LCRO 196/2010

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 2
BETWEEN	**MS CA** Applicant
AND	**MR XU** Respondent

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

DECISION

Background

[1] In January 2009 the Applicant was finding it difficult to meet the mortgage payments on her property in North Island. After discussing the matter with her ex-husband, it was agreed that his company, ABB Ltd, would purchase the property.

[2] A valuation was commissioned and the price was agreed at $240,000. Mr CB prepared an Agreement for the Sale and Purchase of the property, which was unconditional, and provided for settlement on 1 February 2010 (I assume that this was an error and should have been 1 February 2009).

[3] After approaching his bank for funding, Mr CB was advised that the bank would only advance $150,000 towards the purchase.

[4] Discussions took place between the Applicant and Mr CB in which it was agreed that the Applicant would leave the sum of $90,000 owing to be paid four years after the settlement date. The bank subsequently required this to be amended to five years.

[5] The Applicant was not experienced in property dealing and gave no thought as to what provisions should be made to secure the outstanding balance, or what other terms should be provided for.

[6] Either on, or shortly before, 12 January 2009, Mr CB telephoned the Respondent to instruct him to act on the transaction, and advised him that he was to act for both parties to minimise costs.

[7] The Respondent advised Mr CB of the difficulties he faced acting for both parties, and that he would need to speak to the Applicant to ascertain what her feelings on the matter were.

[8] He subsequently contacted the Applicant by telephone and was advised by the Applicant that it was intended that he act for both parties as she did not want to incur any legal costs.

[9] He prepared a document entitled "Deed of Indemnity" which included an acknowledgement by both parties that they had been given an opportunity to seek independent legal advice, but had chosen voluntarily not to do so.

[10] The document recorded that both parties agreed to fully indemnify the Respondent's firm from any costs or damages incurred by the firm as a consequence of the Respondent acting in accordance with his instructions, i.e., for both parties.

[11] Although the Applicant did not recall it, it would seem that she called at the Respondent's office on 12 January 2009 for the purpose of signing this document, and also to sign a letter which the Respondent had prepared addressed to Mr CB's bank. That letter contained an acknowledgement by her that following settlement of the sale, she would still be owed $90,000 by ABB Rentals Ltd. She further undertook to the Bank that she would not seek repayment of this money for a period of five years following settlement, and in addition, agreed not to seek any interest payments for that period.

[12] At that time also, the Respondent handed to the Applicant a letter which recorded the proposed terms of the sale in the following way:

> We understand that you are proposing to sell the above property to ABB Ltd. We note that the proposal is that you accept $150,000 as a cash payment (the majority of which is required to repay the outstanding loan balance) and retain a $90,000 interest in the property.
>
> It is further proposed that the $90,000 be left in the property for a period of five years without attracting interest. We understand that Mr CB is to attempt to pay

> you back within the four year period originally agreed upon, but that the X Bank are insisting upon a five year period in order to provide finance. We hope that these terms are acceptable to you.

[13] The letter then went on to say:

> We have been instructed that we are to act for all parties in this transaction and as such ABC [the Respondent's firm] is seeking to have a Deed of Indemnity signed by the respective parties. This acknowledges that we are to act for you all, that you are all aware that this is the case and that should there be a falling out along the line, we will be indemnified for any costs claimed because we acted on instruction from yourselves. It is important that you note that you are informed that you have the right to consult an independent practitioner and in signing the indemnity you acknowledge that you waive this right.

[14] After obtaining a copy of the Agreement prepared by Mr CB which was held by the bank, the Respondent prepared a variation to the agreement which included the following provisions:

> Price
>
> 1. There is to be no deposit payable. The purchase price is to be paid by a cash payment of $150,000 on the date of settlement. The vendor is leaving the balance at [sic] $90,000 in the property.
>
> 2. Balance of the purchase price in the property to be paid with no interest being paid on the $90,000 to be paid on (30/01/14) or such earlier date as may be agreed between the parties.

[15] On 22 January 2009, Mr CB called the Applicant and asked her to attend at the Respondent's office for the purpose of signing documents. This was at the end of the day, and she attended at the Respondent's office around 5 p.m. Her recall is that she was asked to sign both the Deed of Indemnity and the variation of the Agreement at that stage. The actual date on which this was done is of little relevance, as there does not seem to be much disagreement between the parties as to the nature of the advice provided to her, whether on two separate occasions or on that one occasion on 22 January.

[16] Both the Applicant and the Respondent agree, that the Respondent read the documents through to her, following which she signed them. The meeting on 22 January was between 15 to 20 minutes long.

[17] The transaction proceeded and title to the property was transferred to ABB Ltd.

[18] In or around March 2010, it was suggested to the Applicant that, contrary to her belief, she had no interest in the property. This prompted the Applicant to seek advice

from a solicitor in [North Island], who attempted unsuccessfully to register a caveat against the title to the property.

[19] The Applicant then instructed ABD (Mr CC) to investigate.

The Complaint and the Standards Committee Decision.

[20] On 18 May 2010, Mr CC lodged a complaint with the Complaints Service of the New Zealand Law Society on behalf of the Applicant. In the letter of complaint, he alleged breaches of Rules 3.4 (failure to provide client information), Rule 6.1 (acting for more than one client where there is more than a negligible risk that the lawyer will be unable to discharge the obligations owed to all clients) and, Rule 3 (lawyer to act competently and to take reasonable care). The Rules referred to are the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules).

[21] The Complaints Service acknowledged the complaint and requested that Mr CC "clarify whether [his] client has suffered any losses as a result of the alleged conflict of interest and, if so, can that be quantified?"

[22] Mr CC responded in the following way:

> The only loss that is easily quantifiable for our client at this stage is the $90,000 that has been "left in" the property at X Road, [North Island]. Of course, that loss will not crystallise until such time as the agreed repayment date is reached. From what our client has told us, it seems extremely unlikely that those funds will be received. We have not yet sought tax advice for our client as to whether she will have any tax liability in relation to an interest free loan to an arms' length company. If she does have tax liability in that regard, we would need to quantify that loss.

[23] He then goes on to state:-

> The purpose of the complaint is primarily a disciplinary one. Our client feels very strongly that she was taken advantage of and that had Mr XU complied with the rules, she would not be in the position she finds herself in now.
>
> Ultimately, our client will be calling on ABC to reimburse her any and all loss she incurs as a result of the negligent advice. If the Law Society had the power, our client would very much prefer that ABC pay her the $90,000 loan amount now and she will assign the debt owed to her by ABC's client to ABC. I am unsure if the Law Society's powers extend that far.

[24] After considering the complaint, the Standards Committee determined that no further action would be taken by reason of section 138(1)(f) of the Lawyers and Conveyancers Act 2006. This section provides that:

> A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee

> (f) there is in all the circumstances an adequate remedy … that it would be reasonable for the person aggrieved to exercise.

[25] The Standards Committee noted that:

> The complainant believes that the practitioner should pay the complainant the outstanding $90,000 and take whatever steps are necessary to recover that amount from the purchaser. Not only is the money sought greatly in excess of the jurisdiction of the Standards Committee but the Complaints Service is clearly not the appropriate forum for adjudicating on the moneys and obtaining an order for repayment.

[26] In response to a subsequent inquiry from Mr CC as to whether the Standards Committee decision was "limited to the reparation side of the complaint" or whether "the disciplinary side of the complaint has also been dismissed" the Committee confirmed that the "Standards Committee decision was to dismiss complaints in respect of conduct and reparation."

[27] The Applicant has applied for a review of that decision.

Review

[28] In conducting this review, the following issues fall to be considered:

1. The failure to provide Client Information (Rules 3.4.and 3.5)
2. The conflict of interest (Rule 6.1)
3. The advice provided (Rule 3)

[29] In his responses to the Complaints Service, the Respondent made much of the fact that the Applicant had already signed the Agreement for Sale and Purchase before he was instructed and that his role and obligations were limited by that fact. However, at the time he was instructed by Mr CB, the Agreement was to be varied. Consequently, the Respondent had every opportunity (and an obligation) to advise the Applicant fully on the terms of the proposed variation before she committed to them.

Client Information

[30] Rule 3.4 of the Client Care Rules requires a lawyer to "in advance, provide a client with information in writing on the principle aspects of client service …". Rule 3.5 provides that a lawyer must, prior to undertaking significant work under a retainer, provide his or her client with certain information in writing, which includes the client care and service information set out in the preface to the Rules.

[31] The information referred to in paragraph [30] is commonly provided with a letter of engagement. The Respondent provided a letter of engagement to Mr CB with which was enclosed the information required to be provided the Rules.

[32] The Respondent has acknowledged that he did not provide the Applicant with the client information as required by Rules 3.4 and 3.5..

[33] A breach of the Client Care Rules constitutes unsatisfactory conduct by reason of 12(c) of the Lawyers and Conveyancers Act 2006.

The conflict of interest

[34] On receiving instructions from Mr CB that he was to act for both parties, the Respondent readily recognised that there was a conflict of interest. He advised Mr CB that he would need to discuss the matter with the Applicant. In his letter to the Law Society dated 10 June 2010, he advises that

> I made contact with Mrs CA via telephone and discussed the matter and whether she was happy for us to act for her in her capacity as vendor. She stated that this is what she intended as she did not want to incur any costs. I explained that this meant we could be acting in a situation in which there could be a conflict of interests.

[35] The Respondent also advised the Applicant that he would require to have a Deed of Indemnity executed by both her and Mr CB which was to record that "I had offered them the advice that they should seek independent legal advice because of the possible conflict of interest but that they voluntarily refused to obtain such advice."

[36] The Respondent advised that at the time the Deed of Indemnity was signed by the Applicant, he had read it over to her in full prior to her doing so. The Applicant acknowledges that this was the case, but states that she did not fully understand what the document meant.

[37] The question is, whether this was a situation where Rule 6.1 of the Client Care Rules applied. That Rule provides that: "A lawyer must not act for more than one client on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients." If that were the case, the Respondent should have declined to act.

[38] A leading case which considered this issue is that of *Clark Boyce v Mouat*, [1993] 3 NZLR 641(PC). This case is discussed by Duncan Webb in his text, *Ethics, Professional Responsibility and the Lawyer* (second edition). At page 243, Dr Webb

notes that in that case, Mrs Mouat had given her consent to the lawyer acting for both herself and her son. He then goes on to say:

> This was evidenced by a letter of instruction that was prepared by the lawyers and signed by Mouat. Moreover, Mouat was advised on three further occasions that independent advice was recommended. The Court of Appeal found that this consent was not adequate to relieve the lawyers of their duty of loyalty.[1] The basis for the decision was that the conflict was so great it was impossible to act adequately for both clients. This view had been suggested by Richardson J in an earlier case when he stated:[2]
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> "There will be some circumstances in which it is impossible notwithstanding such disclosure, for any solicitor to act fairly and adequately for both parties."
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> While the Privy Council accepted that there will be cases where it is not possible to act for both clients, it seemed to limit those cases to situations where the retainer could not be carried out without disclosing information to one party which was detrimental to the interests of the other.[3]

[39] On the basis of the Privy Council decision, it would be difficult to say that the Respondent was prevented from acting for the Applicant.

[40] However, it must be remembered that the Client Care Rules post-date the Privy Council decision, and therefore that decision is modified to the extent provided in the Client Care Rules. Rule 1.04 of the Rules of Professional Conflict in force at the time, provided that *"A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties."* Rule 6.1 of the Client Care Rules is expressed differently , and provides that *"A lawyer must not act for more than 1 client on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."* Those "obligations" must be the obligations provided in the Rules and elsewhere and in this case would include an obligation to advise the Applicant to seek security for the funds to be advanced to the purchaser, and/or to require that the advance be supported by a personal guarantee from Mr CB.

[41] Rule 6.1 therefore establishes a stricter test than the previous Rule 1.04 and as established by *Clark Boyce v Mouat* (ibid). Rule 6.1 now provides that if the advice is to be compromised, then the lawyer should not act for more than one party.

[42] In this case, if the Applicant had been advised of the risks that she was exposed to with this transaction, then she may very well have decided not to proceed. Whether that would have disadvantaged Mr CB or not is a matter on which one can only

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[30] *Mouat v Clark Boyce* (1991) 1 NZ ConvC 190,917 (CA).
[31] *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90.
[32] *Clark Boyce v Mouat* [1993] 3 NZLR 641, 647 per Lord Jauncey of Tullichettle (PC).

speculate. There was certainly an advantage to the Applicant in that Mr CB was helping her out of a difficult financial position. However, the revised sale terms were definitely advantageous to Mr CB and the purchase price was some $16,000 below the value of the property as assessed by the December 2008 valuation.

[43] On balance, I have come to the view, that this was a situation where Rule 6.1 did apply and that the Respondent was unable to discharge his obligations to both parties.

[44] The problem is, that the Respondent did not recognise that the Applicant's position was compromised by the varied terms of the Agreement and consequently he could not have recognised the need for him to decline to act.

Informed Consent

[45] The next question to consider is, whether, having formed the view that it was possible to discharge his obligations to both parties, the Respondent obtained the "informed consent" of both parties, and particularly of the Applicant. Rule 6.1.1 of the Client Care Rules provides that "subject to the above, a lawyer may act for more than one party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained."

[46] The Respondent has advised that when he obtained the Applicant's signature to the Deed of Indemnity, he would have read it over to her before she signed it. The Applicant has acknowledged this.

[47] The question is whether reading over the document to the Applicant was adequate to satisfy the requirement that her consent constituted an "informed consent".

[48] The Respondent had not previously acted for the Applicant. He did not know therefore what level of comprehension she had in respect of the proposed transaction. Before one can consider that consent is truly an "informed consent" the person being asked to consent must have an appreciation of the issues, and what protections he or she is being deprived of.

[49] The document that she was asked to sign is headed "Deed of Indemnity" although it does include an acknowledgement by the parties that they "have been given the opportunity to instruct another law practitioner and seek independent legal advice on the matter". However, the focus of the document is on the indemnity provided to the Respondent's firm. Consequently, the importance of the waiver of independent advice is minimised.

[50] The issue of "informed consent" is dealt with by Dr Webb in Chapter 7.4 of his text previously referred to, and a number of comments are noted in some detail.

> "…It bears emphasising that a formulaic consent procedure will not suffice to show that the client understood the existence, nature and possible consequences of the conflict of duties the lawyer faced.[4]
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> …
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> In ensuring the consent to the concurrent retainer is real, the lawyer must be alert to the possibility that some improper pressure has been brought to bear on one client to consent to the conflict of duty existing. It is incumbent on the lawyer to take all reasonable steps to ensure any consent is given free of compromising influences. … It has been noted that in some cases where a solicitor is acting for more than one party "the involvement of a solicitor has too often been a formality or merely served to reinforce [one party's] wishes and undermine any scope for the [other party] to exercise an independent judgment whether to comply".[5] ….
>
> …
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> Any consent to a lawyer continuing to act in the face of a conflict of interest must be given freely and the client must be made fully aware of the consequences of such consent. It must be more than a mere giving of an opportunity to seek independent advice. It will be necessary to positively advise the parties to seek independent advice.[6] The person giving the consent must be of full capacity and capable of understanding the problems of a conflict of interest. In particular, it is important that the client understand that this may mean the lawyer will not be able to fully disclose all information relevant to the matter in hand to the client or be unable to advise effectively on matters which affect the other client's interests. It was held in the Privy Council that Mouat met this test and was fully informed and had firmly declined the offer of independent advice.

[51] In the present circumstances, it follows that unless the Applicant was given some indication of the way in which she was being disadvantaged by the deal she had agreed to, it is questionable whether her consent could be considered to be "informed".

[52] In this regard, the comment by Dr Webb that "…a mere formulaic consent procedure will not suffice" is particularly relevant. Reading the document through to the Applicant would not have been enough to ensure that she appreciated the consequences of consenting to the Respondent acting for both parties.

[53] At page 240, Dr Webb also refers to the case of *Taylor v Schofield Peterson* [1999] 3 NZLR 434. That case concerned a situation where a lawyer was held to be in breach of her fiduciary duties in acting for both parties in the dissolution of a partnership. Dr Webb notes that "while the dissolution agreement itself contained a clause that "the parties were advised to and given the opportunity to seek advice as to the terms of the agreement and the dissolution of the partnership" it was held to be inadequate. In particular, the solicitor had failed in her obligations to fully inform the

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[23] *Taylor v Schofield Peterson* [1999] 3 NZLR 434.

[26] *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, 1060; [2001] 4 All ER 449, 487.

clients of the nature and implications of the conflict". Hammond J set out the requirements which must be met for a solicitor to be entitled to continue to act in a conflict of interest situation [at page 434] as being to:

- recognise a conflict of interest, or a real possibility of one;
- explain to the client what that conflict is;
- further explain to the client the ramifications of that conflict (for instance, it may be that she could not give advice which ordinarily she would have given);
- ensure that the client has a proper appreciation of the conflict and its implications; and
- obtain the informed consent of that client.

[54] The approach taken by the Respondent is very similar to the approach taken by the solicitor in the case referred to above. He advises that he read through the Deed of Indemnity to the Respondent, but it would not seem that he provided any of the additional information or took any of the additional steps outlined by Hammond J. Indeed, given the beliefs held by the Respondent as to the Applicant's position, he would have been unable to provide the degree of information required by that decision as he did not himself have a correct understanding of the Applicant's position.

[55] I therefore have come to the view that the steps taken by the Respondent were insufficient for him to be able to say that he had obtained the Applicant's "informed consent" as required by Rule 6.1.1.

The Respondent's advice

[56] Having determined to act for both parties, and obtained their consent to do so, the Respondent then had a duty to provide full and adequate advice to both parties. This was not a situation where the Respondent was prevented from disclosing information to the Applicant by reason of the fact that it would have been detrimental to the interests of Mr CB, unless of course, it meant that she then declined to continue with the sale. If that was the case, then this surely must have been a situation where Rule 6.1 would apply.

[57] Section 12(a) of the Lawyers and Conveyancers Act provides a definition of unsatisfactory conduct as being conduct of the lawyer that falls short of the standard of

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[34] *Taylor v Schofield Peterson* [1999] 3 NZLR 434.

competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Rule 3 also provides that "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."

[58] At the review hearing, the Applicant stated that she left the Respondent's office on 22 January 2009, believing that she retained an interest in the property. She believed that she had rights to the property should Mr CB fail to pay. It is also clear that she did not differentiate between Mr CB and his company, ABB Ltd.

[59] At the hearing, the Respondent continued to assert that the Applicant retained an interest in the property. He noted that he used the words "interest in the property" in their ordinary sense, and not in any legal sense, but he did not contend that used in this way, the words had a different meaning from that understood by the Applicant. He stated that in his view she retained an equitable interest in the property. Consequently, whether he advised the Applicant that this was the case or not, the Applicant's understanding does not differ from that which the Respondent put forward at the hearing.

[60] The Applicant does not retain any interest, legal or equitable, in the property. This is borne out by the fact that solicitors other than Mr CC, have endeavoured to lodge a caveat against the title to the property on behalf of the Applicant, either as unpaid vendor, or pursuant to an equitable interest. In both cases, the caveat has been rejected from registration by the Registrar of Lands.

[61] All that the Applicant has is a debt due to her by ABB Ltd.

[62] When asked what he considered the Applicant's remedies were should ABB Ltd default in payment, the Respondent replied that she could sue the company or its Director on the basis that Mr CB had signed a resolution authorising the company to enter into the variation of the agreement, and that therefore as Director and shareholder, he was personally liable for the company debt.

[63] Unless a director has provided a personal guarantee in support of a company debt, there is no personal liability merely because the Director has signed a resolution authorising the company to enter into the debt.

[64] It is common practice, that where a lender advances money to a company, its directors are required to provide a personal guarantee in respect of such loans. The

time at which this should have been provided for, was when the agreement was varied to provide for the vendor finance. This document was prepared by the Respondent.

[65] This was also the time for the Respondent to explore with the parties the provision of security for the funds to be advanced to ABB Ltd whether by way of a second mortgage or an agreement to mortgage. Even if the bank may not have been prepared to allow a second mortgage to be registered against the property, the Respondent had a duty to explore options for security over other properties owned by the purchaser. Instead, it seems that he took instructions from Mr CB that there was to be no security, and treated this as an instruction from the Applicant, without satisfying himself that she fully comprehended the consequences of what she was agreeing to.

[66] However, given his understanding as expressed at the hearing, the Respondent would not have recognised that the Applicant was assuming any particular degree of risk in that in his view, she retained both an interest in the property as well as rights against Mr CB personally.

[67] The Respondent advised that he practices in conveyancing. On the basis of his views expressed at the hearing and the advice provided to the Applicant, there would seem to be some gaps in the state of the Respondent's knowledge that he should take steps to rectify.

Subsequent events

[68] It was revealed at the hearing that Mr CB was not amenable to providing any form of security or guarantee to the Applicant in support of the debt owed by ABB Ltd. This is no reflection on him. He has no obligation to do so. However, it was also indicated at the hearing that he may be using the somewhat weakened position that the Applicant finds herself in as some form of leverage in a custody dispute between him and the Applicant. If that is the case, it demonstrates how such matters can come to have unexpected consequences.

Summary

[69] In undertaking this review, I have come to the view that the Standards Committee focused its attention on the suggestion by Mr CC that the best outcome for the Applicant would be for the Standards Committee to order that ABC pay her the $90,000 loan amount now in return for the debt owed to her being assigned to ABC. It therefore determined to take no further action pursuant to section 138(1)(f) of the Lawyers and Conveyancers Act.

[70] In so doing, the Committee has overlooked the fact that the conduct of the Respondent is such as to reveal some serious shortcomings of a professional nature which must be addressed.

[71] The Applicant does not have "an interest" in the property such that she has remedies against the property in the event of default. She is an unsecured creditor of ABB Ltd and has no personal guarantee from Mr CB. If ABB Ltd is placed into liquidation, then she will stand in line with unsecured creditors and the equity that she previously had in the property will in all likelihood be lost.

[72] For the reasons set out above, I have come to the view that the Respondent has breached Rules 3, 3.4, 3.5, 6.1 and 6.1.1 of the Client Care Rules. These breaches automatically result in a finding of unsatisfactory conduct by reason of section 12 (c) of the Lawyers and Conveyancers Act.

[73] The Respondent's conduct is also such as to constitute unsatisfactory conduct by reason of section 12(a) of the Act, which provides that conduct constitutes unsatisfactory conduct if it falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Penalty

[74] I am aware of previous decisions by the Standards Committees and this Office relating to the failure to provide client care information, where no penalties have been imposed, or the practitioner has been censured. Each of the instances that I have considered have contained circumstances which mitigate against any further penalty, such as the fact that the Rules had only been recently implemented, or that there was confusion over who the lawyer was acting for. There are no mitigating factors in this case. Having taken the decision to act for the Applicant, the Respondent did not provide her with the required client care information in breach of Rules 3.4 and 3.5. The appropriate penalty is for a fine to be imposed.

[75] The question of what penalties should be imposed in respect of the other conduct, presents something of a problem. In the first instance, there is no power in the Standards Committee or the LCRO to make an order such as suggested by Mr CC. In addition, no loss has yet been suffered, and in any event, the amount of compensation which can be ordered is limited to $25,000. Consequently, no penalty that is imposed can remedy the position for the Applicant. That is something which the Applicant will need to pursue through the Courts at the relevant time.

[76] Secondly, the professional shortcomings, (apart from the beach of Rules 3.4 and 3.5) arise from what would appear to be gaps in the Respondent's knowledge. Section 156(1)(m) of the Lawyers and Conveyancers Act does allow for the imposition of an order that a practitioner undergo practical training or education. This is somewhat difficult to impose, as in the first instance, it is difficult (particularly in this case) to identify appropriate seminars or courses that the Respondent could attend, but more importantly, education is something which must be sought out and undertaken voluntarily to be properly effective. I have therefore come to the view that it is to be hoped that this complaint is sufficient to prompt the Respondent to acknowledge the apparent gaps in his knowledge and to attend appropriate seminars or courses voluntarily to rectify those gaps.

[77] It is therefore appropriate that the imposition of a fine should be considered. The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573, as to punish the practitioner, as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

[78] Deterrence in the present circumstances has little part if any to play. There does, however, need to be some recognition that the Applicant has been poorly served by the Respondent, and to reflect a measure of disapproval that she should be placed in this situation through the Respondent's shortcomings. In the circumstances, I consider that a fine is the only appropriate penalty.

Decision

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

2. The conduct of the Respondent is found to constitute unsatisfactory conduct in terms of sections 12(a) and (c) of the Lawyers and Conveyancers Act 2006.

Orders

1. With regard to the breach of Rule 3.4 of the Client Care Rules, the Respondent is censured and fined the sum of $400.

2. With regard to the other instances of unsatisfactory conduct referred to in this decision, the Respondent is fined the sum of $5,000.

3. The sums ordered to be paid, are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

Costs

The Standards Committee decision has been reversed by this review. In accordance therefore with the LCRO Costs Guidelines, the Respondent is ordered to pay the sum of $1,200 towards the costs of this review, such sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

Publication

The question arises as to whether there should be publication of the details of this decision, both as to the facts thereof and the name of the Respondent. In this regard I seek submissions from the parties to be provided no later than 3 June 2011. The parties are referred to the previous LCRO decision *Austell v Somerset* (2009) LCRO 76/2009 for a discussion of the factors to be considered. In addition, the parties should refer to the LCRO Publication Guidelines. Both the Guidelines and the decision referred to above can be viewed on the LCRO website

http://www.justice.govt.nz/tribunals/legal-complaints-review-officer/.

DATED this 18th day of May 2011

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Owen Vaughan
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 CA as the Applicant
Mr CC as Counsel for the Applicant
Mr XU as the Respondent
The Waikato Bay of Plenty Standards Committee 2
The New Zealand Law Society