NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 6

LCDT 007/15

BETWEEN	**AUCKLAND STANDARDS COMMITTEE 3**
	Applicant
AND	**PL**
	Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms F Freeman

Mr W Smith

Mr B Stanaway

Mr I Williams

HEARING at Specialist Courts and Tribunal Centre, Auckland

DATE 14, 15, 16 December 2015 and 25, 26 February 2016

DATE OF DECISION 18 March 2016. Order for non-publication made on 5 May 2016

COUNSEL

Ms C Paterson for the Applicant

Mr G Illingworth QC for the Respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGES

[1] The respondent pleaded not guilty to the following charges:

(a) Misconduct in that he wilfully or recklessly contravened rule 3 and/or 13.9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules); or alternatively

(b) Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute (s 241(c) of the Act); or alternatively

(c) Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct.

[2] The respondent is a partner of his law firm, and was at the relevant time the head of the litigation department. In early 2008 the respondent received instructions from I to act in respect of a claim brought before the Weathertight Homes Tribunal (WH Tribunal) by a Body Corporate of which he was the elected representative (Body Corporate). The claim related to units in a marina development in WH (CC).

[3] The essence of the charges is that the respondent failed to ensure that his client Body Corporate complied with its discovery obligations in that litigation.

[4] The documents that were not discovered related to a joint venture between WHH (a company controlled by I and the owner of seven of the CC Units) and WIL to redevelop CC (Joint Venture).

[5] The respondent defended the charges. A hearing took place in Auckland on 14, 15, and 16 December 2015 and on 25 and 26 February 2016.

[6] It is common ground that there had been no disclosure of material records relating to the joint venture so that the essential factual question is whether the respondent complied with his discovery obligations in the litigation.

[7] The respondent presented his defence to the charges on the following bases:

(a) He had a limited role in the discovery and delegated responsibility for those tasks to other counsel in the litigation department of his firm; and

(b) He had no knowledge of the Joint Venture, and is therefore not responsible for discoverable documents in relation to the Joint Venture not being disclosed.

[8] The case of the Body Corporate before the WH Tribunal proceeded on the basis that CC was to be remediated whereas the Joint Venture agreement provided for its redevelopment as a hotel complex or similar. That material difference between remediation and redevelopment might require the WH Tribunal to adopt a different approach to the assessment of damages. Its attention would move from considering the cost of repairing the defects to the existing building to considering the reduction in value (if any) of the existing building having regard to the defects in it.

[9] The Body Corporate lost its claim before the WH Tribunal. The Tribunal's primary finding was that the claimant had purchased CC at a gross undervalue (essentially land value only) and with knowledge of the buildings defects. It was the subject of a very heavy award of costs against it which was in excess of $1 million. I was the primary witness before the WH Tribunal. He was heavily criticised by the WH Tribunal in its decision on costs relating to his credibility and particularly because of his failure to make discovery of the Joint Venture of which it only became aware after its determination of the claim.

[10] I was the main viva voce witness for the Committee in respect of these charges. He asserted that:

(a) It was the fault of the respondent and his litigation team that disclosure of the Joint Venture was not made;

(b) That the respondent knew about the Joint Venture;

(c) He did not receive sufficient advice about discovery of documents;

(d) That he was at all times in the hands of the respondent and his litigation team relating to the conduct of the case before the WH Tribunal.

[11] I was cross-examined at length by Mr Illingworth. The following emerged from his answers to the questions put to him:

(a) The respondent did advise him in writing about the risks of completing the Joint Venture while the claim before the WH Tribunal was in existence and not finally determined;

(b) He did not accept the findings of the WH Tribunal that he bought CC with knowledge of the leaks and at a serious undervalue;

(c) He knew and accepted that the Joint Venture documentation should have been disclosed;

(d) He did not make disclosure of the Joint Venture and relevant documentation under advice, but could not point to any document or occasion telling him that he did not have to make discovery of this arrangement;

(e) He did take some responsibility for the nondisclosure of the discoverable Joint Venture documentation, but sought to minimise that by saying that it was effectively the fault of the respondent's law firm.

[12] The Tribunal finds that I is not a credible witness. His answers to questions were generally rambling and evasive while endeavouring to maintain his position that the failures in respect of discovery were the fault of the respondent and his team.

[13] This Tribunal heard from the respondent at length. On material aspects, his evidence was in direct conflict with that of I.

[14] The Tribunal therefore also considered whether there is evidence from records and from other witnesses that substantiate the charges brought by the Committee. It has accordingly addressed the following events and or records.

I's initial instructions to the respondent

[15] The respondent had a two-hour meeting with I on 26 February 2008 at which the Joint Venture was discussed. By that time the WH Tribunal litigation had been commenced by I personally and without instructing the respondent's law firm. The meeting followed a phone call from I to the respondent on 19 February 2008 in which he indicated that he wished "to redevelop". (File note BoD p 956).

[16] At the meeting of 26 February 2008 the respondent emphasised that in the event that the Joint Venture arrangement went ahead and the proposed sale to the Joint Venture company proceeded to settlement before final determination of the litigation, then, in terms of s 55 of the Weathertight Homes Resolution Service Act 2006, the claim before the WH Tribunal would terminate. The respondent confirmed his advice in writing by letter of 3 March 2008. (See PL Bundle p 8).

[17] Thereafter, on 7 March 2008, the respondent said that he met with R (an associate at the time in the law firm property team) and I at which he said that he explained the relevance of the sale of any of the CC apartments, subject to the WH Tribunal proceeding, because of the effect of s 55 of the Weathertight Homes Resolution Service Act 2006 (Refer his file note BoD p 972). The respondent then left R to engage directly with I to settle terms which were to be subject to deferral of settlement until the final determination of the Claim before the WH Tribunal.

[18] The evidence establishes that R drafted a joint venture agreement. The Tribunal accepts that the respondent was not involved personally in the drafting of that agreement though he did meet with R on 23 April 2008 when he was presented with the draft agreement for comment. He said that R asked him if the heads of

agreement as drafted would defeat the Weathertight Homes Resolution Service claim. He made handwritten notes on the draft advising that the proposed words '*immediately purchasing' at D* of the draft and *'without delay……complete the purchase'* would defeat the claim. (BoD p 964, 965).

[19] The Tribunal is satisfied that the respondent was subsequently not kept informed of the progress of the arrangement or of its finalisation which occurred on 5 September 2008. He said that he did not become aware of the completed documents including heads of agreement, a shareholders agreement and a sale and development agreement, until the time of I's complaint to the Auckland Law Society.

[20] The Tribunal, however, is satisfied that the respondent was well aware of the essential terms of the proposed Joint Venture. He did acknowledge in evidence that if the arrangement had been concluded, it was material and should have been disclosed. In context that disclosure would result in a different approach to the quantification of damages. If the claimants were not going to remediate then the claim would likely be considered under the topic of loss of value and be subject to betterment.

Discovery

[21] The Tribunal has been obliged to turn its attention to the discovery required in the WH Tribunal proceedings. There were many procedural orders issued by the WH Tribunal regarding failures on the part of the claimant and requests for supplementary disclosure. All of these were reported by the law firm to I. This Tribunal finds that I was aware of his obligation to disclose the Joint Venture. In the event he did not instruct any partner or member of staff that the documents should be revealed. Indeed, he failed to acknowledge their existence when he gave evidence before the WH Tribunal. (Refer to BoD at p 229).

[22] The requests for relevant disclosure had become the subject of a thorough search by the staff of the law firm focussing on historic and current conveyancing files. H was the Litigation Administrator in the law firm and became the lead person who co-ordinated the enquiries. She led the initial stage of discovery which occurred

from June/July 2008 until mid-2009. She described the process as being extremely onerous. She was assisted by staff members and also made enquiries outside of the firm with I, other unit owners and other law firms.

[23] Her enquiries did not reveal documents relating to the Joint Venture. She made an enquiry of R at the direction of the respondent who she said told her to search for any conveyancing files relating to units in the CC apartments (para 9 of her affidavit of 22 October 2015). That was on 17 July 2008. She and her team were under great pressure because the time for complying with the procedural order about discovery was about to expire. Following direction from the respondent she had asked of and been told by R that the potential sale of the CC apartments had not gone ahead from which she understood that the sales "had not gone through". She reported this back to the respondent.

[24] The respondent acknowledges that thereafter he did not make any further enquiry about the proposed Joint Venture. He did not enquire further of R. He did not address the matter with I and he did not apprise O of the matter. O was an associate of the respondent's firm and was delegated as the person responsible for the conduct of CC claim from June 2009.

[25] When questioned by counsel for the Committee H said that the respondent, when asking her to follow up with R, gave her a vague instruction in the sense that it was generally directed at sale transactions, there being no specific mention by him of a company or a Joint Venture. At no stage did the words '*Newco or joint venture'* mean anything to her in relation to the claim. (Transcript of evidence p 235).

[26] H was recalled to give evidence on 25 February 2016. In answer to a question from counsel for the Committee she repeated that the direction given to her by the respondent was to find out about the potential sale files. She did not know about a proposed Joint Venture; was not aware of the concept; and learned only about the Joint Venture after I's complaint to the Law Society in 2014.

[27] R's evidence on the point was that at the time of H's enquiry of her, the Joint Venture agreement had not been finalised and therefore had not been signed. It was not signed by all parties until 5 September 2008.

[28] The second stage of discovery took place from late 2009 through to 26 November 2010 at which time I swore an affidavit in which he stated that all documents relevant to the claim had been discovered. He made no reference to the Joint Venture.

[29] O was the counsel responsible for managing the claim which he assumed in late 2009 having rejoined the respondent's firm at that time. He was a solicitor with 12 years experience in civil litigation including leaky building matters. He had experience of being in sole charge of client matters and had been appointed an associate of the law firm.

[30] He gave evidence about his advice to I on his discovery obligations. He said that at no time during his involvement as counsel in the WH Tribunal claim did he have knowledge of *'any joint venture or any sale and redevelopment agreement concerning the CC Apartments between the I entities or any other party (whether associated with the WT or otherwise)'.* (Para 8 of his affidavit of 23 October 2015).

[31] His evidence was that he worked directly with I and met with him on many occasions. He said that he would approach the respondent (his immediate superior) whenever he considered that he required more serious input. O deposed that he had made it clear to I on more than one occasion that *'any document which included an agreement by the Body Corporate to remediate and/or demolish and rebuild the CC Apartments would be relevant and needed to be discovered'.* His advice and queries about discoverable documents continued from 11 October 2010 until 25 November 2010.

[32] O said that he did not at any time advise I not to disclose the Joint Venture and associated documents because he did not know they existed and nothing arising from his discussions with I caused him to be concerned about the adequacy of discovery. From his point of view, he was involved in this discovery matter as a

normal event in the litigation which did not signal to him the need to speak to the respondent about it.

[33] I was cross-examined by Mr Illingworth about there being throughout the discovery process no mention of the Joint Venture, I said that it was not his position to tell O what he needed to know and he presumed that O would know. This is in contradiction to the specific requests made by O for I to provide him with full information. Although there was no express reference by O to a Joint Venture type arrangement, the clear reference to rebuilding and redevelopment meant that I must have been aware of its materiality and of his duty to disclose.

[34] I did acknowledge, when pressed, that he accepted what O had to say and that he considered O to be an honest straightforward practitioner.

Caveats against CC and the correspondence from Simpson Grierson

[35] On 1 September 2010 K, a commercial partner at the law firm, registered caveats in favour of WIL against 11 of the units owned by the Body Corporate. He recorded that he did so *"in recognition of its interest in such lands, and which has not yet materialized in accordance with the Joint Venture".* (BoD p 851).

[36] The respondent was not made aware of the caveats.

[37] The caveats became the subject of a query from Simpson Grierson by email to O commencing on 23 February 2011. In that email counsel noted that there was a mortgage or caveat to WIL registered against the titles. There was a request for valuations and other documents that would explain the reason for the borrowing. The request was not responded to immediately and a follow up email was sent which was addressed to O and to the respondent as well. The respondent sent an email to I as follows:

> "This is the email from Simpson Grierson that I refered (sic) to in our discussions earlier today.
>
> Were there any valuations?

I understand from you there were no mortgages registered." (PL Bundle p 557)

[38] The respondent's answer to questions about that email was that I was in the office with O at the time of the discussion. The respondent said that he was focussed on putting in place security for the law firm's costs and did not make a broader enquiry. He left O to respond to Simpson Grierson's queries saying that O was dealing with it because of his intense involvement with preparation for the hearing and that he, the respondent, was trying to tidy up the fees owing to the firm. There was nothing that alerted him to query the situation regarding the Joint Venture.

Outstanding fees

[39] The respondent was approached by the credit controller of the law firm early in 2009. The controller had become concerned about outstanding fees in respect of the litigation. The respondent wrote to I about those fees on 13 February 2009. Included in his message he drew attention to additional fees outstanding and owing by WHH which he noted had been outstanding since 31 July 2008. There was further correspondence leading to a stop credit being placed in April 2009 when outstanding fees had grown to $39,000.00. This resulted in the litigation team being unable to carry out any more work on the claim. That stop credit was lifted on 12 May 2009 on the instruction of K who was described by the respondent as 'the debtor partner'. It was put to the respondent that he should have made enquiries about the fee components that did not directly relate to the litigation. His response was that his focus was on getting the stop credit lifted, getting paid and getting the litigation moving again. By then I had paid $17,000 towards the outstanding fees.

[40] Outstanding fees were a continuing problem which never went away. There was a meeting between the respondent and I in early February 2010 following which the respondent wrote to T on 25 February 2010. He was forwarding invoices reissued in the name of MR. He said that was done at the request of I.

[41] H gave evidence that she was the primary person following up the payment of outstanding fees and dealt with I directly. The respondent was also involved. She said that I gave an instruction in February 2010 to redirect overdue invoices to MR and send them to T. She said that I told her that he was going into a property

development with T relating to land around CC and that T was going to pay some outstanding invoices to the law firm. She did not at that time know about the Joint Venture but had knowledge of the WH Tribunal litigation. She went on to say that when she was told about MR and development of land she enquired of I whether that had anything to do with the C apartments. The reply she received was that it related to the land around CC. She said that she was not mistaken about what it was that I had told her because she had later walked around CC and came upon the land in question. She reported herself thinking "*I wonder if he's going to be developing this bit of land right here*". She said that it made sense to her because he, I, owned the land on the left and CC to the right. She said that she relayed the information to the respondent.

[42] Having been told of this, the respondent wrote to T on 25 February 2010 enclosing invoices readdressed to MR.

[43] On 11 October 2010 the respondent wrote to I in which he asked him to talk to his "joint venture partner to discuss further funding to pay the law firm's outstanding fees" which by then were outstanding in the sum of $112,281.02.

[44] The respondent explained that the reference to joint venture in that letter was in relation to costs and the development of land. The respondent's explanation for failing to be put on notice by the references to MR and 'joint venture' and therefore to enquire about the Joint Venture was that he had knowledge from H of the land development; that of his own knowledge there was a long standing friendship between I and T. Money had passed from one to the other in the past and there had been the venture between them in relation to land outside of CC which I had acknowledged.

Kiwibank refinancing

[45] On 9 December 2010 Kiwibank requested information from I about the leaky building litigation and also the Joint Venture. He passed that query to R for her attention. The respondent's evidence was that he was asked to provide updated information in respect of the litigation. He did so and gave the information to his

secretary/administrator, H, who then passed it to R who then included it in her email reply.

[46] He said there was no discussion between himself and R about the Joint Venture at that time. He said that he dealt with the matter in the context that I was seeking finance to pay outstanding legal fees and experts' fees.

[47] The respondent maintained under cross-examination that the queries from Kiwibank did not alert him to the existence of the Joint Venture and that from a litigation perspective the only thing of interest to him was the payment of fees.

[48] He went on to say that there was nothing in the correspondence from Kiwibank or R that referred to any properties in particular. His perspective was that there was a possibility that fees could likely be paid through the raising of finance.

Repudiation of the Joint Venture and funding for fees

[49] There was a meeting between I and the respondent on Friday 25 February 2011 which occurred just prior to I meeting with O to prepare for the hearing due to commence on the following Monday 28 February 2011. At that meeting I showed the respondent on his iPad an electronic record of a letter he had received from T in which T gave notice that he had withdrawn from the funding of fees and from the Joint Venture. It was a meeting fraught for both men for obvious reasons.

[50] The respondent emphasised that this was on the eve of the hearing of the litigation. The respondent said that he was upset and considered that T and I had conspired to 'shaft' the law firm of its fees. He said he glanced at the iPad message only and did not consider it carefully. He did not turn his mind to the possibility that the reference to the joint venture related to the initial discussions that had occurred three years earlier. (See his letter of 25 February 2011 – PL Bundle p 551).

Submissions

[51] The Committee's primary submission was that the respondent was in breach of Rule 13.9 in that he failed to the best of his ability to ensure that I's discovery

obligations were fully complied with. He was the partner responsible for the WH Tribunal litigation. All he had to do to locate and discover the documents relating to the Joint Venture was to make an enquiry of his client or of R the member of his staff to whom he had referred the relevant instruction in March 2008. In context it was not enough for him to say that he had delegated responsibility to his staff or that a report from a member of his staff (H) was sufficient to discharge his obligation.

[52] The Committee further submitted that there were sufficient indicators to alert the respondent to make more detailed enquiries about the Joint Venture and thus satisfy compliance with Rule 13.9, it having been accepted by the respondent through his counsel that failure to discover the Joint Venture was a serious matter.

[53] The Committee submitted that, despite having accepted H's information that no sales of the CC apartments had gone ahead, a number of matters/signals should have subsequently put the respondent on enquiry about the existence of the Joint Venture and its relevance to discovery. Pertinently these included:

(a) The respondent's file note of 30 July 2008 in which he noted that I was waiting to obtain funds from Westpac Bank or in respect of a contract he was entering into in respect of "*the development which will lead to a drawdown"*;

(b) The fact of outstanding invoices for WHH which was the owner of apartments in the CC along with the redirection of invoices to MR which was the name of the Joint Venture company;

(c) The reference by the respondent to "*your joint venture partner"* in paragraphs 4 and 11 of his letter to I on 11 October 2010;

(d) The query from Simpson Grierson relating to caveats registered against the CC apartments;

(e) The email from T to I and shown to the respondent on 25 February 2011 in which T advised he had terminated the MR joint venture.

[54] Counsel for the respondent in his opening submissions accepted that the failure to disclose the Joint Venture documents was a very serious failure of its kind and was something that should never have happened.

[55] He submitted that it was permissible for delegation to occur and normal for discovery to be carried out by a team of lawyers. In that context it was acceptable that he had directed H to make the enquiry of R about the Joint Venture. The answer he received was misleading.

[56] He further submitted that, if there was fault on that point, the fault was cured by ongoing enquires that were made and in particular by the evidence of O.

[57] He answered the submissions for the Committee as follows:

(a) The respondent's file note of 30 July 2008 was made in the context of discussions between the practitioner and I seeking urgent instructions relating to outstanding matters during which the client advised that he had a prospect of obtaining funding to pay fees. It was not such that it would reasonably trigger further enquiry.

(b) The outstanding invoices in respect of WHH were issued by R while the respondent focussed on those invoices relating to the litigation. He challenged how it was that the respondent was to deduce from the name MR that a joint venture had gone ahead when that name did not appear on the draft heads of agreement that he discussed with R on 23 April 2008.

(c) The reference in the respondent's letter of 11 October 2010 to "*your joint venture partner*" was a reference to the joint venture complex relating to the land that was separate from CC. He said that there was no evidence of anything new or unusual that should trigger further enquiry by the respondent.

(d) In respect of the query from Simpson Grierson, it was O who communicated and met with the client regarding the enquires made. His evidence was that I misled him by informing him that the mortgages related to refinance and it was therefore not reasonable to expect the respondent to make enquiries in addition to O. He suggested that had the respondent made enquiry himself of I at that time he would have been told the same lie.

(e) As to the notice from T to I whereby the Joint Venture was terminated, it was counsel's submission that it was reasonable for the respondent to relate the reference to joint venture to an apparent second and more recent joint venture which he was told of by H and which related to land separate from the CC apartments which were the subject of the proceedings.

[58] Mr Illingworth submitted strongly that the role played by O was such that he was the alter ego of the respondent in relation to discovery. He saw the discovery process in the litigation to be normal in the management of the file such that there was nothing that arose which prompted him to refer back to the respondent for supervisory advice or direction. He further submitted that O was thorough in his advice to the client concerning discovery.

[59] Mr Illingworth submitted that the thoroughness with which O went about the task of discovery led to the conclusion that the respondent had complied with his obligation in respect of discovery as required by Rule 13.9.

Discussion

[60] We have carefully considered all the evidence that has been presented together with the documents in support.

[61] The first Charge has a focus on actual knowledge of the Joint Venture at the time of disclosure during the discovery process. We find the respondent did not have this degree of knowledge. Nor do we find that he was reckless. We have

therefore proceeded to consider Charges two and three which involve negligence/incompetence and unsatisfactory conduct.

[62] We are satisfied that the respondent is an honest and diligent practitioner. He and his firm had created a well organised office and employed professional and competent staff. Mr Illingworth made the strong submission that in a legal practice generally, and in his client's practice particularly, the burden of making discovery is a task that could properly be delegated. We accept that. But this case illustrates that delegation is always subject to the need for supervision the competence of which is a matter of degree determined by context including the complexity of the subject matter; the number of records; and the knowledge of the participants in that process as to the content of those records and the issues arising in the proceeding.

[63] He did not have any reason not to discover the Joint Venture documents. He was distracted from it when, as we find, R did not keep him informed of the progress and finalisation of the transaction. It would have been reasonable for him to expect to be advised of its completion and to be given a copy. Nevertheless he should have made his own enquiry given the importance of the documents to the claim before the WH Tribunal. It was an enquiry he could have easily carried out in that the discoverable documents were in the offices of his firm.

[64] There are three aspects of the evidence which we find might lead to the conclusion that the respondent failed in his obligation under Rule 13.9.

[65] First. It was common ground throughout the hearing that the Joint Venture (we use this expression as shorthand for the proposed development of the CC apartments recognising that it required a number of sequential arrangements) would require the creation of records which were relevant to the discovery obligation. The issue is whether the Joint Venture proceeded and if so, the practitioner's knowledge of this.

[66] The respondent's litigation team was actively seeking out historical and current conveyancing files as part of this process when he returned to practice from leave in July 2008. The instruction to R must have been to the forefront of his mind.

He did not communicate directly with R to enquire as to progress. His assistant H reported that she had enquired of R seeking all documents relevant to the CC WH Tribunal apartments including any conveyancing files. H said she was told that the potential sale she was advising on had not gone ahead and that R would look for any other related files. R was called to give evidence and a number of differences became evident, as to their recollections of that conversation. For the purposes of our judgment we do not need to resolve these.

[67] H then reported to the respondent in response to his question whether she had checked with R "*in relation to the recent instruction from I of a potential sale of the units".* H replied that she had been told "*that no sale had gone ahead."* The respondent deposed "*I took from this response that R and I had heeded my advice and that I need not be concerned about the proposed transaction any further".*

[68] In fact:

(a) The Joint Venture was continuing under the aegis of R.

(b) R did not report on this to the respondent.

(c) The Joint Venture documents were eventually executed on 5 September 2008 (although backdated to suit the parties). At this point (at the latest) the records ought to have been discovered even if they were characterised as confidential.

[69] Our conclusions in that context are:

(a) H had no knowledge of the Joint Venture instruction. In consequence her questions were not focussed and were general in nature. In the result there was miscommunication between her and R.

(b) Given the state of his knowledge, it was incumbent upon the respondent to either ensure there was clear focus on the specific request of R and adequate direction to his staff or make enquiry himself.

(c) The answer from R which was relayed to him was ambiguous and not enlightening. For example, following his heightened concern as to the effect of s 55, he would not have expected sales to have proceeded at this point in time. Furthermore the Joint Venture arrangement required documentation on a range of matters with sales being the end result. The response he received could not reasonably be construed as a clear indication that the proposed partners had abandoned their discussion.

[70] A reasonable practitioner in the respondent's shoes would have pursued further enquiries.

[71] Second. The Committee says the respondent ought to have been alerted to the existence of the Joint Venture when there was a later request to change cost invoices to be directed to MR (the Joint Venture vehicle) and subsequently when he was told and then shown a letter terminating the Joint Venture in question.

[72] We have given the respondent the benefit of the doubt in respect of his explanation about the meeting with his client on 25 February 2011 at which he was told of the termination of the Joint Venture. He said that he assumed that the reference was to the development of the land around CC. He did not turn his mind back to the original discussions of March 2008.

[73] In this respect the evidence of H is relevant. We found her to be an honest and straightforward witness. She did not know of the Joint Venture, which we have been discussing, until 2014 when she became aware of it as a result of I's complaint. In her discussions with I about outstanding costs, his reference to a joint venture led her to believe that the reference was to development of the land separate to the CC apartments. She was expressly assured this was the case. In that context her evidence is to be preferred to that of I who denied making that assurance. She had reported that to the respondent. The respondent added in his evidence that he was not surprised by the arrangement as there was both a friendship and business association between I and T which had included advances of money.

[74] When apprised of the termination, the respondent was faced with the problem that on the eve of the hearing he was unlikely to receive payment of outstanding fees which were in excess of $100,000.00. It was reasonable therefore to conclude that his attention was directed to the problem of fees rather than to the reference to Joint Venture in the heading of the email from T. The letter reasonably referred to the 'other' joint venture described by I to H.

[75] We accept that, given the above explanation, the respondent reasonably did not look behind the invoice and termination records. Neither event necessarily indicated to him that the Joint Venture was proceeding.

[76] Third. The management of the litigation passed to O who was well qualified to undertake the task of completing discovery. His evidence was also honest and straightforward. There was no contest to his statement that he had no knowledge of the Joint Venture at the relevant times and did not become aware of it until after the completion of the litigation. It follows that the respondent did not inform him of the Joint Venture (or even the possibility of a Joint Venture) or of its relevance.

[77] The submission from counsel for the respondent has been that any earlier failing on the part of the respondent was remedied by O's involvement in the discovery process, by the thoroughness with which he went about that and in particular his enquires and advice to the client. Particular reference was made to O's letter to the client of 11 October 2010 in which he gave advice about the impact of any plan to demolish and rebuild.

[78] We have found that a reasonable practitioner would have made further enquires about the Joint Venture and that the respondent failed to do so. Had he done so he would then have briefed his associate at the outset about the Joint Venture (or even the possibility of a Joint Venture). O would then have been more precise in the enquiries he made about discoverable documents. He would have asked for the documents within the office and also made a direct request of I about the Joint Venture. In so doing I would have had less opportunity to conceal or lie about the venture. In that context it cannot be said that O's involvement in the discovery process remedied the respondent's initial failure.

[79] The respondent had an ongoing responsibility in the litigation, despite the delegation to O as he resumed the role of lead counsel during the latter part of the hearing. The knowledge he had ought to have alerted him to the insufficiency of the extent of discovery made by O.

Decision

[80] For the reasons discussed we find that the respondent failed to discharge his obligation in respect of discovery.

[81] We have found that his failure did not amount to misconduct or recklessness. His conduct was not negligent or incompetent to the degree required to reflect on his fitness to practise or bring his profession into disrepute.

[82] He was negligent however. This stemmed from his initial failure in July 2008 to enquire further into the existence or otherwise of the Joint Venture and its documentation. We hold it was of a low level which leads to a finding of unsatisfactory conduct which was not so gross, wilful, or reckless as to amount to misconduct.

[83] We accordingly find that Charges 1 and 2 are not proved, and by a majority record a finding of unsatisfactory conduct pursuant to Charge 3.

[84] I cannot take any satisfaction or benefit from this result. He knew what was required to be discovered. He chose not to make discovery of the Joint Venture and other documents. He lied to H. He did not disclose documents to O. He subsequently lied to the WH Tribunal. The truth did not reveal itself until it was discovered after the claim before the WH Tribunal had been determined.

[85] We adopt the remarks of Katz J in her decision on I's appeal from the costs decision of the WH Tribunal which she made at para 57 and which we summarise:

(a) Discovery of the documents would likely have seriously undermined the claim before the WH Tribunal;

(b) The apartments had been sold to MR at full market value with no reduction in value for weathertightness defects;

(c) The development plans would have affected the extent to which repairs were necessary;

(d) The documents would likely undermine the claimants' lack of knowledge of the defects;

(e) The documents suggested that the primary purpose of the WH Tribunal claim was to obtain funds for the Joint Venture's capital development plans and not for repair;

(f) The documents were highly relevant to the issue of whether any loss had been suffered by the claimants.

[86] The focus of this Tribunal's decision has been on the professional obligation, in the particular context and circumstances found, that the respondent had to the Tribunal before which the litigation in question was being pursued.

[87] Counsel are to make submissions in writing addressing penalty. Counsel for the Committee is to do so within 10 working days of receiving this judgment. Counsel for the respondent is to reply within 5 working days thereafter. Counsel for the Committee may then respond within a further 3 working days. The Tribunal will then determine Penalty on the papers. We reserve leave to either of counsel to request a hearing on Penalty.

DATED at AUCKLAND this 18th day of March 2016

BJ Kendall
Chairperson