LCRO 219/2010

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 1
BETWEEN	**MR DH** Of [North Island] Applicant
AND	**MS WU** Of [North Island] Respondent

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

DECISION

Background

[1] In January 2009 the parents of the Applicant became aware that a unit adjacent to their property in [North Island] was about to come on to the market for sale. The Applicant's father contacted the owner who referred all enquiries to the Public Trust.

[2] The Applicant was interested in purchasing the unit and consulted ABJ about this. The exact sequence of events surrounding the preparation and signing of the Agreement is unclear, but it is nonetheless clear that the Applicant consulted ABJ prior to the Agreement for Sale and Purchase being signed by him, and that there was adequate opportunity for him to be advised as to the nature of the title to the property prior to his doing so.

[3] The title to the property is an older form of cross lease title which did not provide for exclusive use areas. This is certainly not what could be called an uncommon form of the cross lease title, and is readily identified by the fact that the plan attached to the

title does not record, or have noted on it, exclusive use areas. It does tend, however, to be older cross lease titles which are in this form, as the concept of exclusive use areas developed as cross lease titles became more widely used.

[4] The unit which the Applicant wished to purchase was one of two and the layout of the units were such as to give the impression that there may have been exclusive use areas attaching to each unit. The road crossing for the front unit was on the southern boundary of the property and this gave access to the driveway which led to the garage belonging to that unit.

[5] The garage for the rear unit which the Applicant wished to purchase was located at the rear of the property, and access to that was gained by way of a road crossing and driveway along the northern boundary of the property.

[6] There was a piece of land at the rear of the property which was large enough to accommodate further development.

[7] The Applicant is adamant that he asked the Respondent and Ms E, (who initially dealt with the matter) who were both employed by ABJ, whether the driveway which served his unit was for his exclusive use, and that they confirmed that it was. Both the Respondent and Ms E dispute this. They advise that their recollection was that the Applicant was more interested in developing the basement of his unit to convert it into a self-contained flat.

[8] It became apparent to the Applicant following completion of his purchase, that the title to his property did not in fact entitle him to exclusive use of any of the land surrounding the two units, including the driveways, and that all of the land and driveways were common property.

[9] Upon becoming acquainted with the problem, the principal of ABJ, Mr DI, made strenuous efforts to resolve the matter, travelling on at least two occasions to [North Island] to discuss the matter with the Applicant and the owner of the front unit (Ms C). Mr DI's proposals were to reach agreement with both parties and their mortgagees, and to convert the titles to the units to cross lease titles with exclusive use areas. This however is not a simple process and involves the preparation of a new survey plan which must then be approved by Council, the cancellation of existing leases, and the preparation and lodging of new cross leases. Any mortgage registered against either title needs to be discharged and re-documented.

[10] This would all come at a considerable cost, and Mr DI proposed that his firm would meet all the legal costs, but that the parties would need to fund the survey costs and disbursements. The Applicant and Ms C indicated that they did not have funds to meet those costs, and Mr DI then offered to pay these costs, provided he was reimbursed when the respective properties were sold.

[11] It seems that at one stage agreement had been reached along these lines, but the Applicant subsequently advised Mr DI that he would not agree to what was being proposed because Ms C wished to retain access over the front portion of his driveway. The proposed resolution therefore foundered.

The Complaints/Standards Committee decision

[12] The Applicant subsequently lodged a complaint with the Complaints Service of the New Zealand Law Society.

[13] He states that he would not have bought the property if he had known that there were no exclusive use areas. The complaint was phrased in the form of a request to the Law Society to advise him of his legal rights.

[14] The Complaints Service responded by advising him that it could not provide legal advice. The Complaints and Standards Officer noted the efforts made by Mr DI to try and resolve the matter and recorded the fact that the Complaints Service (or the Standards Committee) could not force Ms C to take any particular course of action.

[15] The Applicant responded by requesting that orders be made requiring the Respondent pay all of the costs associated with rectifying the matter and to refund his legal costs. Rectifying the matter, in his mind, meant the creation of new cross lease titles with exclusive use areas. Inherent in this is an understanding that there was agreement between the Applicant and Ms C to co-operate to achieve this.

[16] The Standards Committee noted that there was no evidence provided to it, other than the advice from the Applicant, that he was never told about the lack of exclusive use areas, but that there was probably an insufficient explanation provided.

[17] It also noted that "rectification of the matter would essentially give the complainant [the Applicant] something better than he purchased initially".

[18] The Committee considered that the complaint was justified as there appeared to be some failure to fully explain the effects and implications of the lack of exclusive use areas, but this was not of sufficient gravity to justify a finding of unsatisfactory conduct.

[19] The complaint was therefore dismissed pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 and no further action was to be taken.

[20] The Committee however resolved to impose an order for costs against the Respondent in the sum of $500 pursuant to section 157 of the Lawyers and Conveyancers Act which provides that even though the Committee makes a determination to take no further action, costs may be awarded against the practitioner complained of.

Review

[21] A review hearing took place in [North Island] on 12 May 2011 attended by the Applicant, the Respondent, Mr DI, and Ms E.

[22] The Applicant's position was simple – he wished to have the Respondent provide him with a title with exclusive use areas at no cost to him.

[23] I explained both at the hearing and in prior correspondence, that neither the Standards Committee nor the LCRO has the power to make such an order, as the co-operation of Ms C was required to effect the outcome sought by him. The outcome sought by him also pre-supposed that there was agreement between him and Ms C on all matters, including the areas to be designated exclusive use areas.

[24] The Applicant was uncertain what Ms C's current view of the matter was.

[25] I sought advice from Mr DI as to whether or not he was still prepared to pursue the proposal that he had put to the Applicant. Somewhat reluctantly he agreed.

[26] This position was reached at the end of the hearing and the review was subsequently postponed to enable the Applicant to ascertain what Ms C's attitude was to continuing with the process of endeavouring to obtain replacement titles.

[27] It has to be recorded at this stage that in my view, Mr DI had made a considerable effort to effect a resolution of the problem. He has readily acknowledged that he takes responsibility for bearing the cost of any orders made against the Respondent, and prior to the complaint, went to some lengths to endeavour to effect a result that would provide the Applicant with a cross lease title with exclusive use areas. His proposals, however, required an acknowledgement by the Applicant that a new title with exclusive use areas would add value to his property, and that he should not expect to have this windfall at Mr DI's expense. Mr DI offered to meet the costs of survey and disbursements provided he was repaid when the respective units were sold. He was

prepared to attend to the not inconsiderable legal work required at no cost to either the Applicant or Ms C.

[28] However, the proposals foundered, because the Applicant would not accept that Ms C should retain access over the front part of his driveway, and neither the Applicant nor Ms C would acknowledge that Mr DI should be refunded the survey costs and disbursements in due course.

[29] By adopting this position, the Applicant in particular, has failed to recognise the generous nature of the proposal, or acknowledge the spirit in which it has been offered. Instead, he has adopted a somewhat unrealistic position, and failed to acknowledge the fact that the price he paid for the property reflected the value of the property as it stands. He considers that he could have negotiated on the price, but it is by no means certain that he would have succeeded in purchasing the property for a price less than what was paid. The Public Trust would have been well aware of the value of the property, and would also have been aware that the value assessed and paid, represented the value of the property based on the title as it stood.

[30] Subsequent to the hearing, further approaches to Ms C produced the same response as previously, namely, that she did not wish to incur any cost at all. In addition, I had reservations in any event as to whether any agreement between the Applicant and Ms C would be sufficiently robust to ensure that the process finally came to fruition, as a degree of co-operation would be required to achieve the end result, which has not been evident in dealings between the two parties to date.

[31] The question therefore to be considered, is whether the Standards Committee decision should be confirmed, modified or reversed as a result of this review.

Unsatisfactory conduct

[32] As noted above, whilst the Standards Committee considered the complaint was justified, it did not consider that the failure by the Respondent to fully explain the effects and implications of the lack of exclusive use areas was of sufficient gravity to justify a finding of unsatisfactory conduct.

[33] The Respondent, through Mr DI, readily acknowledged at the hearing that advice provided to the Applicant as to the terms of the lease and the title was deficient. In addition, in a letter of 19 March 2010 to the Complaints Service, he acknowledged “that in all probability [the Applicant] did not have the situation with the cross lease properly explained to him.”

[34] There is a dispute between the Applicant, and the Respondent and Ms E, that the Applicant specifically asked the question as to whether the unit he was purchasing had the sole use of the driveway which served his property. To some extent, whether he specifically asked the question or not, is of limited relevance.

[35] Texts provided for conveyancing practitioners, such as the Legal Practice Manual produced by ADLS Inc., and CCH, include checklists as to the matters that should be considered when advising a client purchasing a cross lease title. Some firms have produced a summary of the features of this type of title to be provided to clients. In all cases, a consideration of exclusive use areas, whether they are provided or not, is considered to be one of the matters to be addressed.

[36] Ideally, these matters should be addressed prior to the client entering into the Agreement for Sale and Purchase as there are limited options available to a purchaser to cancel an Agreement due to a lack of understanding of the nature and restrictions of a cross lease title.

[37] The Respondent had time to conduct the necessary searches, and obtain copies of the plans and lease necessary to enable her to advise the purchaser on the detail of the title prior to the Agreement being concluded. This was not a situation where the Respondent was presented with an Agreement already signed.

[38] There was clearly some discussion about the Applicant's intentions to develop the property and it seems that Mr DI readily acknowledged some shortcomings both in the Respondent's state of knowledge about this type of title, and his assumptions in that regard. However, there are sufficient manuals and basic conveyancing texts available to alert a practitioner as to the matters that should be considered when advising a purchaser on any sort of title.

[39] If the Respondent was unfamiliar with cross lease titles then she should have consulted these texts, or if they were not available in her office, then consulted Mr DI. It seems that she may have been somewhat confused by the plan annexed to the title as it shows only Flat 2. However, it is apparent from this plan that there were no exclusive use areas. In addition, the title refers to two plan numbers – one for the fee simple estate and one for the flats plan. A proper search would involve obtaining copies of both these plans if they were not provided with the title.

[40] In my view, the Respondent failed to undertake what is a very basic task in conveyancing, and that is to obtain all of the relevant searches related to the property in question and to advise the client on the issues raised by these.

[41] The Standards Committee came to a decision that the conduct of the Respondent was not such as to constitute unsatisfactory conduct. Section 12(a) of the Lawyers and Conveyancers Act 2006 describes unsatisfactory conduct as conduct of a lawyer that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[42] The Standards Committee comprises practitioners experienced in property matters, and also includes lay persons. Their view is not to be disregarded. However, in the present instance, I cannot agree with the Committee that the Respondent's conduct did not constitute unsatisfactory conduct as that phrase is described in section 12(a).

[43] The difference between a cross lease property with exclusive use areas, and one without, is significant. Although the nature of the particular layout of a cross lease property often means that the lack of an exclusive use area has limited impact on an owner's enjoyment of it, in the present instance, this is not necessarily the case.

[44] Ms C has exercised her right to use the front portion of the driveway which serves the Applicant's unit, and, in the circumstances which have arisen, the potential exists for his privacy to be compromised both in terms of the possibility of vehicles passing his unit, and also his being unable to fence off the "boundary" between the two units.

[45] Property rights and privacy are important, and the Applicant was concerned to find out that these had been compromised. The use of exclusive use areas are one of the fundamental matters to ascertain for a client purchasing a cross lease property and the Respondent had the opportunity to ascertain what those rights were. The fact that the Applicant was focusing on his ability to develop the property does not derogate from the Respondent's obligations to provide full and proper advice as to the nature of a cross lease title, and what rights the particular title provided.

[46] It seems to me that a member of the public who consults a lawyer about the purchase of a property is entitled to expect that he or she will be advised as to the nature of a title and any defects inherent in same. I acknowledge that the title to this property was not "defective" per se, but in the eyes of the Applicant, it does not provide him with the property rights that he expected, and is sufficiently different from what could be expected of more recent cross lease titles, as to deserve comment.

[47] The Committee's reference to the Respondent's conduct as not being "of sufficient gravity to justify a finding of unsatisfactory conduct", could lead to the conclusion that the Standards Committee considers that conduct must be "gravely"

deficient before it can be considered to be unsatisfactory in terms of the Act. I do not consider this to be the case. In an article by Professor Webb in *LawTalk* (2008) 217 (9-13), he suggests that "*the choice of the only faintly damming description of 'unsatisfactory' indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the practitioner in question 'must try harder'.* "

[48] He goes on to say that "*any failure by a lawyer whether of competence or professionalism is less than satisfactory. Where the failure is an isolated oversight, slip or negligence the regulatory response is likely to be similarly modest with the focus being on redress or compensation for the client in the event that loss has been caused. A disciplinary response of any magnitude is unlikely*."

[49] Consequently, the Committee seems to have misdirected itself in considering that conduct must be "sufficiently grave" before a finding of unsatisfactory conduct should be made. Without a finding of "unsatisfactory conduct" no orders (other than a costs order as occurred in this case) can be made.

[50] The Applicant in the present instance not unnaturally feels somewhat aggrieved that all that has resulted from his complaint is a payment of costs to the Law Society. It is after all the Applicant who has been disadvantaged by the acknowledged failure of the Respondent to properly advise him on the nature of the title.

[51] In the circumstances, I have come to the conclusion that the conduct of the Respondent in this instance, constitutes unsatisfactory conduct

Penalty

[52] The question to be determined is what is an appropriate remedy to provide. I have already noted the inability of the Committee or the LCRO to provide the remedies sought by the Applicant. Neither the Standards Committee or the LCRO has any jurisdiction over Ms C.

[53] The Committee has also rightly noted in any event, that rectification of the matter as sought by the Applicant would essentially give him something better than he purchased initially.

[54] The only effective remedy is to provide the Applicant with compensation pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006.

[55] In the first instance, the Applicant seeks a refund of his legal costs. By this I assume he refers to the legal costs of ABJ. That firm carried out the attendances necessary to establish the contract, to complete the purchase, and register the Applicant as owner. It also did all of the work necessary to comply with the mortgagee's instructions, and to register the mortgage. The fee charged by the firm was $675, which is an extremely modest fee for the work undertaken. In the circumstances, there is no merit in the Applicant's suggestion that ABJ should be required to refund the fees charged.

[56] However, the Applicant has consulted a firm of solicitors in [North Island] with regard to the matter, for which he has been charged, he says, the sum of $800. This cost has been directly incurred as a result of the issues raised in this complaint, and it is my view that he should be compensated for that. He has not produced any account as evidence that he has incurred the cost, but when GST and search fees are taken into account, it does not seem that this would be an unreasonable amount for researching the matter and advising the Applicant. There will therefore be an order that the Respondent pay the sum of $800 to the Applicant by way of compensation for these costs pursuant to section 156(1)(d) of the Act.

[57] The other head of compensation to which some consideration should be given is anxiety and stress, reflected in the fact that the conflict between the Applicant and Ms C has been at least partially as a result of the Applicant being unable to assert sole use rights over the driveway which serves his property and the land to the rear of the units.

[58] I acknowledge that the Applicant may have contributed to his stress by the manner in which he has interacted with Ms C, but accept that his being unable to construct a fence between the units or assert sole use rights over the driveway outside his property has created a situation where the Applicant has been disadvantaged in his relationship with Ms C.

[59] Previous LCRO decisions have established that compensation for loss of peace of mind, and consequent anxiety and distress, falls within the compensation which may be awarded pursuant to section 156(1)d). See for example *Sandy v Kent* [2010] LCRO 181/09.

[60] Notwithstanding the fact that the Applicant seems to have increased the aggravation, anxiety and stress levels by the manner in which he has approached his relationship with Ms C, the situation in which he finds himself is nonetheless deserving of some recognition.

[61] In *Sandy v Kent*, referred to above, the LCRO noted at para [29] that "there is of course no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory: *Air New Zealand v Johnson* [1992] 1 ERNZ 700; [1992] 1 NZLR159 (CA) It is accepted that such orders should also be modest (though not grudging) in nature".

[62] As also noted, there is limited guidance to be obtained from a consideration of the various decisions in other areas. For example, in employment cases substantial awards are frequently made and this would be entirely inappropriate in this context.

[63] In *Sandy v Kent* the LCRO awarded the sum of $2,500 by way of compensation. In this case, a practitioner acted for both parties in connection with a proposed sale and purchase of a travel agency business in circumstances where the interests of both parties did not coincide, and became even more divergent when difficulties were encountered with the transaction. In *Wandsworth v Ddinbych & Keith* LCRO 149 and 150/2009, the sum of $1,200 was awarded for wrongful termination of a retainer by the lawyer, placing the Applicant in a difficult position in the course of litigation.

[64] Previous decisions of the LCRO are however of limited assistance, as it can be seen that the facts and circumstances of each case differ widely. In the circumstances, a judgment has to be made as to what would be a reasonable amount to acknowledge the situation in which the Applicant has found himself, yet must take into account the fact that Mr DI has made strenuous efforts to resolve the matter. The award must also take note of the principle that awards under this head should be modest.

[65] In all of the circumstances I consider that the sum of $1,000 is a sum which is appropriate in the circumstances. As both amounts ordered to be paid fall within section 156(1)(d) there will be an order for the total amount of $1,800.

Decision

1. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed and the conduct of the Respondent is found to constitute unsatisfactory conduct in terms of section 12(a) of the Act.

2. The order pursuant to section 157 of the Lawyers and Conveyancers Act as to payment of the costs in the sum of $500 is confirmed.

3. This decision is made for the reasons set out in the review above.

Order

The Respondent is ordered to pay the sum of $1,800 by way of compensation to the Applicant within 30 days of the date of this decision pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006.

Costs

1. Pursuant to LCRO guidelines, in general where an adverse finding is made against a practitioner, that practitioner will be expected to bear approximately half the costs of the review. In this case the review is relatively straightforward and one half of the costs would amount to $1,200. However, I acknowledge that the Respondent has already been the subject of a costs order by the Standards Committee in the sum of $500 and although the application for review has been upheld, the finding in this review was a finding which was open to the Standards Committee to reach, in which case no additional costs would have been incurred.

2. In the circumstances, I have made an allowance for the costs already made and therefore order, pursuant to section 210 of the Lawyers and Conveyancers Act 2006 that the Respondent pay the sum of $700 by way of costs to the New Zealand Law Society, such sum to be paid within 30 days of the date of this decision.

DATED this 29th day of June 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:

Mr DH as the Applicant
Ms WU as the Respondent
Mr DI as an interested party
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society