LCRO 24/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 2
BETWEEN	**AL** of Auckland Applicant
AND	**ZO on behalf of** **ZN** of Auckland Respondent

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

DECISION

[1] By a decision dated 21 December 2009, Auckland Standards Committee Number 2 upheld a complaint against Mr AL, finding him guilty of conduct unbecoming which amounted to unsatisfactory conduct as defined in Section 12 (c) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee imposed a number of orders pursuant to Section 156 (1) of the Act. These included payment of a fine in the sum of $1,500.00, and costs of an amount of $750.00. The Applicant was also ordered to rectify the error identified by the Standards Committee.

[2] Mr AL sought a review of that decision because he disagreed with the Standards Committee's interpretation of the events. Accordingly he also challenged the orders made against him. I shall refer to him as the Practitioner throughout.

Background

[3] At the time that the conduct occurred the Practitioner was employed as a staff solicitor in a law practice that specialises in conveyancing work. The Practitioner had received on his desk a Sale and Purchase Agreement which showed the law firm as acting for both vendor and purchaser. He had had no prior contact with either of the clients. At no time did the Practitioner meet the vendor, ZN, who was at that time residing in Europe. ZN's house was vacant and arrangements were made for the purchasers to rent the house as tenants until settlement, a period of about a month. The Practitioner said (and I accept) that he had no involvement in the rental arrangements which were made by the real estate agent and the parties. The rent was, however, paid into the trust account of the law firm where he was employed.

[4] About ten days before settlement was due to take place the purchasers discovered that there was no legal access to the property they had contracted to purchase. This was discovered when the purchasers' surveyor undertook some survey work on the property. They informed the Practitioner about this problem and the Practitioner emailed this information to ZN on 19 ZOune 2008 (all communications between the Practitioner and ZN occurred by telephone or email). I note at this point that this defect was not discoverable by a normal search of the Certificate of Title, and it also appears that the property had been bought and sold a number of times since its sub-division by the neighbours, and at no prior time had this problem been uncovered.

[5] ZN responded the following day (also 19 ZOune 2008 in Europe- the day before settlement in NZ) and informed the Applicant he knew nothing of the matter and it had not been mentioned by solicitors when he purchased the property. The email ended with "*Keep me informed and let me know what I should do, I have a good relationship with the* (next door neighbours)*"*.

[6] The email appears to have been received by the Applicant on 20 ZOune (NZ time), being settlement day. The Practitioner replied by email to ZN, suggesting two possible ways of resolving the problem; either the purchaser was to put in a new access in the front of the property, or the next door neighbours were to grant a right of easement over part of their land being approached upon. He added that *"both of these options will involve some expense and obviously need to be discussed between myself and* (the purchaser)*. ... In order that we can complete settlement today and repay your mortgage to the bank we have suggested to* (the purchaser) *that we will settle on the basis that we will retain the sum of $20,000.00 in our Trust account on an interest bearing deposit until the matter is resolved....* " (The purchaser) *is obtaining more information about the cost of a new access and will be in touch over the weekend. In the meantime we believe it is in everyone's best interest to*

settle today and work on a resolution. We have advised (the purchaser) *not to approach* (the neighbours) *direct until he has discussed things with you.*" There was no further communication between the Practitioner and ZN before settlement took place. The sum of $20,000.00 was retained from the purchase price, and placed in the Trust account of the law firm on an interest bearing deposit. There were some telephone exchanges between the Practitioner and ZN in the following days, but it seems that no mention was made of the retention monies. There were also a few emails were exchanged later in ZOune 2008 between the Practitioner and ZN concerning the access.

[7] ZOust over four months passed during which time it seems that there was no progress on sorting out the access issue. At the end of October 2008 the Practitioner was copied into an email sent by ZN's step-daughter, ZO, to the local Council enquiring into the matter. On 13 February 2009 the Practitioner received a letter from another law firm acting for ZN, seeking information about the terms upon which the $20,000.00 was held in Trust, and what progress the purchasers had made with regards to resolving the access, and any other relevant information.

Complaints

[8] Complaints about the Practitioner were eventually filed by ZO on behalf of ZN. It appears that it was ZO's dissatisfaction with the Practitioner's response (or lack of response) to those enquiries that led to her lodging a complaint with the New Zealand Law Society. The main complaints involved allegations of unauthorised withholding of $20,000, and a conflict of interest. The outcome sought was payment of the $20,000 to ZN, and compensation for the legal fees paid to the law firm engaged to recover the money.

Standards Committee decision

[9] The Standards Committee undertook an investigation which particularly focused on the question of authorisation for the retention. The Committee found that due to the specific timing of the emails and the international clock, that the email (concerning the proposed retention) had been sent by the Practitioner at a time where the vendor would likely have been asleep in Europe, and concluded that the vendor would not have read the email until the morning, some hours after settlement was in fact completed in New Zealand. On that basis, the Standards Committee concluded that the Practitioner had retained the $20,000.00 without instructions and had no authority to have done so. The Committee noted that this had occurred at a time when the Law Practitioners Act 1982 was still in force and that the conduct contravened section 89 of that Act. The Committee further noted that the unauthorised retention constituted ongoing conduct and thereafter breached section

110(1)(b) of the Act. The Committee was satisfied that the breach constituted unsatisfactory conduct as defined by section 12 of the Act. I have referred to the orders made by the Committee pursuant to section 156(1) of the Act which included a fine and a penalty.

[10] The Standards Committee also ordered the P to *'rectify his error by paying the amount of $20,000.00 plus all interest earned on it to* (the vendor) *forthwith.*' The order was made pursuant to subsection 156(1)(h), by which a practitioner can be ordered to rectify, at his or her own expense, any error or omission.

Review

[11] A review hearing was held on 5 August 2010. The Practitioner was present with his Counsel. Although the review hearing date had been agreed by both parties, ZO, who opposed the review application, did not appear. However, her legal representative helpfully made an appearance on her behalf.

[12] A material difficulty in this review is that I have not had the benefit of any direct contact with ZN who, ZO advised, suffers from Alzheimers and would find communication difficult. The complaint, as noted, was made by, ZO, who is the step-daughter of ZN. There are necessarily limitations in undertaking an investigation where the direct evidence of an affected party is not available.

[13] At the start of the review hearing I was informed that the $20,000 retention money had been paid to ZN on 4 March 2010. As this post-dated the Standards Committee decision, the payment appears to have been made pursuant to the Standards Committee's order. There appears to have been some confusion on the part of the Applicant who may have understood the order as a compensatory one, and this led to some discussion. I noted that the order had been made pursuant to section 156(1) (h) and was remedial in nature, and that the order appeared to have been satisfied by virtue of fact that payment had been made. Counsel for the Respondent agreed with this interpretation. In the circumstances it seemed unnecessary to give any further consideration to this particular aspect of the review application.

[14] However, further comment about this order is made under the heading of "Further discussion" at the end of this decision.

[15] The main issue for the review was whether the Standards Committee was correct to have found the Practitioner was guilty of unsatisfactory conduct based on its conclusion that he had retained monies without the authority of the vendor, ZN. The Practitioner disagreed with the way the Committee had interpreted the events. In his view ZN had agreed to the

retention, if not before, then subsequent to the settlement. The following is an explanation of the events as he saw them.

[16] The Practitioner said that the vendor was most anxious to complete the purchase and particularly to ensure that the mortgage was repaid so as to stop interest running. When the access problem was discovered ZN had asked him about the options available in circumstances of the access problem. He said that ZN's determination to settle the transaction was a dominant factor in his mind in proposing a solution that would allow settlement to proceed in the circumstances. He said that after emailing the proposal to ZN, he received no further comment about the matter. A few days after settlement (on 25 June 2008) the Practitioner sent to ZN full details of the settlement, which would have shown the retention. The Practitioner also relies on the several telephone calls he had with ZN after the settlement in which, he says, no mention was made by ZN about the retained monies. The Practitioner took that as ZN's agreement with the action he had taken, if not in advance then confirmed subsequently. The Practitioner saw his proposal as benefitting ZN who was able to achieve settlement of the sale, and repay the mortgage despite the access objection. The Practitioner's Counsel submitted that the access issue was a defect going to the title, and would, despite the late notification, have entitled the purchaser to defer settlement, or cancel the contract if the defect could not be cured. In any event I note that the Practitioner considered the arrangement benefitted ZN. He thought he had done ZN a favour.

[17] The Practitioner also explained that he had understood that ZN would personally progress the resolution of the access issue and liaise with the next door neighbours (who had originally done the subdivision) with whom ZN had an established relationship. He understood that ZN had instructed him not to contact the neighbour. He added that he had not in any event received any instructions to sort out the access issue and that if such an instruction had been given, this matter would have had to be referred elsewhere. However, there is also evidence suggesting that the vendor had understood or may have assumed that the matter was being progressed by the Practitioner. Ultimately the matter came to a head primarily because no progress had been made towards resolving the access problem and a final accounting of the retention money.

[18] I noted earlier that the Standards Committee's enquiry appears to have mainly focused on the question of whether Practitioner had authority for retaining the money. The Committee concluded (rightly in my view) that no prior consent had been given. However, there are other factors that are relevant to the enquiry. I accept the Practitioner's evidence that no objection to the retention was raised by ZN in their several subsequent telephone discussions, ZN then being clearly aware that the money had been retained. The

circumstances suggest that ZN was keen to have the sale settled. He had been informed about the access problem prior to the settlement. It was arguably open to ZN to have telephoned the Practitioner to discuss the issue, and equally arguable that his response indicated that he was willing to leave the solution in the hands of his lawyer, the Practitioner. The action taken by the Practitioner was not later questioned or challenged by ZN, appearing to the Practitioner to have been indicative of ZN's agreement with the action taken, albeit after the fact. From a practical point of view it is not unreasonable to take into account the reality of the circumstances confronted by a lawyer when any subsequent enquiry is undertaken. The circumstances surrounding this matter suggest that it was unlikely that settlement would have taken place without some arrangements which would likely have included retention of some part of the purchase money.

[19] I have also considered that no steps were taken by ZN following settlement (or on his behalf by ZO) concerning the retention having been made. The Practitioner submitted that queries about the access were not raised until just before Christmas 2008. ZO disputed this, stating that 'numerous requests had been made' to the Practitioner to which he did not respond. The evidence on the file shows that there were a few exchanges between the Practitioner and ZN in late June 2008. On the file is a copy of an email sent by ZN on 26 June 2008 asking the Practitioner how ownership of the land in question could be established, the Practitioner stating that this led to his telephone call to ZN. There is no file note of that call. Significantly, no progress was made on the access issue.

[20] The next communication on file is a 29 October 2008 email sent by ZN's partner to the real estate agent. This mentioned the $20,000 retention (although notably not with any criticism) asking him to contact the Practitioner concerning progress on the access matter. This was forwarded to the Practitioner the next day. Also on the file is a copy of an email sent by ZO directly to the local Council, a copy having been forwarded to the Practitioner. The email is dated 31 October 2008 and requesting information from the Council about access. I particularly noted that up to that time there is no complaint concerning the retained monies, and that these communications involved enquiries concerning the access matter.

[21] The formulation of a complaint alleging unauthorised retention appears to have arisen somewhat later, and after another law firm was instructed and requested information from the Practitioner, which included an enquiry about his authority for having retained the money. The information and the circumstances surrounding the matter indicated that the specific complaint against the Practitioner concerning unauthorised retention become formulated in that context.

[22] I noted earlier that the focus of the Standards Committee's enquiry into the complaint was on the authority for the retention. However, the evidence suggests that the fundamental problem was the Practitioner's failure to have properly addressed a conflict of interest that had arisen and that the enquiry ought to have focussed on the question of how the conflict was managed. A conflict clearly arose between the interests of the vendor and the purchaser as soon as it was discovered that there was a problem with the access. The evidence shows that the conflict 'event' (discovery of the access problem) arose about 10 days prior to the scheduled settlement. The Practitioner ought then to have recognised that a conflict existed, and taken steps to ensure that the interests of both parties were protected. There was sufficient time to have arranged for the parties to have obtained independent legal advice as to their positions, and to have reached a basis for settlement.

[23] There is no evidence to indicate that the Practitioner took any steps to manage the conflict of interest as required under the applicable rules. Rule 1.07 of the Rules of Professional Conduct for Barristers and Solicitors (under the Law Practitioners Act 1982) sets out the action that a lawyer must take in the event of a conflict, or a likely conflict of interest among clients. (Equivalent provisions are found in Chapter 6 of the Conduct and Client Care Rules 2008). The conflict rule requires a lawyer to advise each of the clients that a conflict exists, advise each client to take independent legal advice, and to arrange such advice if necessary, and to decline to act for any party where so acting would, or would be likely to disadvantage any of the clients involved. The Practitioner took none of these steps.

[24] Of some concern was that it was not apparent at the review that the Practitioner perceived the existence of a conflict, or accepted this was the case. This was somewhat surprising given that the Practitioner appears to be a reasonably experienced lawyer. He explained that he was a staff solicitor and it was not uncommon for the law firm to act for both vendor and purchaser, and there was no policy in the firm concerning this. I have no information about the firm policy concerning management of conflict. The Practitioner stated that he was unaware of any such policy in the firm. However, the rules of professional conduct apply to every lawyer independently of a firm's policy and a breach of the rules governing professional conduct is not answered by the existence or absence of any policy or instructions of an employer. That is to say, every lawyer is responsible, personally, for his own professional conduct, and for complying with the relevant rules of professional conduct.

[25] Counsel for the Respondent, referring to the conflict issue, submitted that ZN had had no opportunity to have received independent advice as to his interests in relation to settlement options. It was submitted that had such an opportunity arisen, any agreement concerning settlement arrangements would very likely have set out a clear provisions for

how the issue should be resolved. I agree. While there may have been no different outcome as regards retaining part of the purchase money, it is likely that independent legal advice prior to settlement would have led to the inclusion of terms and conditions for a retention, and would very likely have included a clear pathway for resolving the access issue (and finalising the payments). ZN was entitled to have received independent legal advice on this matter. Moreover, the evidence suggests that the uncertainty surrounding the resolution of the access issue (and consequently finalising the money issue) was essentially the cause of ZN's dissatisfaction. This directly resulted from the Practitioner's failure to have managed the conflict of interest, and ultimately led to the complaints against the Practitioner involving the authority for the retained monies.

[26] I appreciate that I have taken a somewhat different approach to that taken by the Standards Committee. Yet even allowing for an argument that ZN had retrospectively approved the retention, this does not overcome the problem that arose from the Practitioner's failure to have managed the conflict in accordance with the rules of professional conduct. None of the confusion about how the access should be finally resolved would have arisen if the conflict had been properly managed, and this responsibility fell squarely on the Practitioner. This case is instructive as demonstrating the reasons for the conflict rules.

[27] While I have concluded that the Practitioner's omissions are based on grounds different from that found by the Standards Committee, the Practitioner's failure to have properly dealt with the conflict issue was serious and in the circumstances there is no reason to disturb the Standards Committee's finding of unsatisfactory conduct, or the orders concerning the fine the costs.

Costs

[28] The Practitioner has been unsuccessful in overturning the Standards Committee decision, and in accordance with the Costs Guideline of this office, it is appropriate that he contributes to the costs of the review. This was a hearing in person and relatively straight forward. I also take into account that the reasons for the Practitioner's challenge to the basis of the Committee's decision were to some extent successful. In the circumstances I consider a costs order of $400.00 is appropriate. Accordingly, the Practitioner is ordered to pay the sum of $400 to the New Zealand Law Society within 30 days of the date of this decision.

Further discussion

[29] As earlier noted the Standards Committee made an order requiring the Practitioner to rectify the error by paying the $20,000 plus accrued interest into ZN's account. Two observations need to be made in relation to this order. The first is that no consideration appears to have been given to whether it was within the Practitioner's power to carry out the order. It was disclosed at the review hearing that the Practitioner had been a staff solicitor. It also appears that his employment was terminated as a result of the complaint. Given the money was retained in the firm's Trust Account it is not obvious how it could have been carried out by the Practitioner in the circumstances. The question is academic in this case since the firm carried out the Committee's order. However, it does raise the important issue of implementation in relation to orders that may be imposed by a Standards Committee on a lawyer.

[30] The further observation is that no consideration appears to have been given to any third party who may have claimed an interest in that fund. I have in mind the purchasers in this case, who agreed to settle on the basis that the money would be retained to cover any costs for remedying the access problem. Without the retention (or some other arrangement) it may reasonably be supposed that they would not have agreed to settle the purchase. The result of the Committee's order is that a fund that was withheld for the benefit of the purchaser to cover the vendor's potential liability, has now been returned to the vendor, leaving the purchaser without any security for the rectification of the access issue. When a Standards Committee is considering imposing a remedial order, it needs to give consideration to how that order may affect the legitimate interest of any other party. There is nothing in this case to indicate that the Committee took into account, or sought the views of, any third party who might be affected by that order.

Decision

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

DATED this 27th day of August 2010

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr AL as the Applicant
XX as the Applicant's Representative
ZO as the Respondent
XX as an interested party
The Auckland Standards Committee 2
The New Zealand Law Society