

**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**

**EO AND EP**

of Auckland

Applicants

**AND**

**VO**

of Auckland

Respondent

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

**DECISION**

[1] EO and EP (the Applicants) sought a review of a Standards Committee decision declining to uphold their complaint against their lawyer, VO (the Practitioner).

[2] The Applicants considered that the Practitioner was responsible for them having lost a pre-auction offer made on their property, and they sought to recover from him the difference between that offer and the price they in fact got at the auction for their property.

**Background**

[3] The Practitioner was the solicitor and co-trustee of the Applicants' Family Trust which had put the Trust property on the market to be sold by way of auction. The sale by auction was being handled by ABR.

*The pre-auction offer*

[4] On 10 December 2010 the estate agent, T, received a pre-auction purchase offer. She faxed it to the Applicants. They faxed it on to the Practitioner, and this was followed by a telephone conversation between them during which the Applicants contend that they told the Practitioner that they had hoped to get more money for the property but they did not want to lose this sale. They explained to the Practitioner why they thought a higher offer might be obtained. I note at this point that the Practitioner denied recalling that his clients said that they did not want to lose the sale, he having understood their instruction was to try and increase the offer.

[5] ABR's procedure for pre-auction offers requires all such offers to be in a specific form that intending purchasers are required to sign when making a pre-auction offer. Clauses 5 and 6 provide that if an offer is received which is acceptable to the vendor, all other registered buyers will then be contacted and informed that an offer acceptable to the purchasers has been received and in the event that other registered buyers wish to make an offer, the auction will be brought forward.

[6] The Sale and Purchase Agreement contained the following Clauses:

21.0 This offer

- (a) shall remain open for acceptance by the vendor: and
- (b) may not be withdrawn by the purchaser until 4.00 p.m. on the second working day after the offer has been presented to the vendor.

22.0 In the event the vendor accepts the offer herein but there is also disclosed interest by proposed purchasers, then the vendor undertakes to bring the auction date forward.

*Discussions between Practitioner and ABR personnel*

[7] After the telephone discussion with his client the Practitioner telephoned T to discuss the possibility of the purchaser increasing her offer. What transpired between them in the course of that telephone conversation is a matter of dispute. T's report to the Standards Committee stated that the Practitioner was "*extremely angry, rude and offensive and to my complete surprise told me that the offer was rejected and he would rather see the property put to auction.*" She reported having advised the Practitioner that as far as she was aware there were no other active bidders and this was possibly the best buyer; she was concerned about the Practitioner having considered her to be

negative and not working for his clients and unprofessional. It is understood that the agent was reduced to tears, and had telephoned her superior, described her conversation with the Practitioner, adding that she had tried to inform the Practitioner about the protocol on pre-auction offers.

[8] The Practitioner also called the agent's superior (K) whose report to the Committee indicated that his exchange with the Practitioner was of a similar nature. The Practitioner also contacted the Auctioneer, and there is evidence that their exchange was also of a similar kind.

[9] The three parties with whom the Practitioner spoke on the phone all reported similar conduct on the Practitioner's part. They also all reported that the Practitioner rejected the offer on behalf of his clients, the Applicants. In these circumstances, the pre-auction provisions were not triggered.

[10] The Practitioner denied that his conduct was as had been described by the ABR personnel, although he acknowledged having taken a firm approach. Materially, he denied that he had rejected the purchaser's offer, stating that his efforts had been directed to getting a higher price. He considered that the estate agents approach was inconsistent with their obligation to work for the vendors' interest.

*Communications between Practitioner and purchaser's solicitor*

[11] Also on 10 December the Practitioner communicated by telephone with the solicitor acting for the purchaser who had made the pre-auction offer. The file contained copies of the following communications faxed between the lawyers:

[12] A 11 December 2009 letter from the purchasers' solicitor to the Practitioner recorded:

*"We note your telephone advice of yesterday that our client's offer to purchase the above property was not accepted by your client which means that your client will now proceed to auction.*

*Since then our elderly client's family has been involved and our client now realises she does not have the funding for the future. You may care to telephone the writer in this regard."*

[13] The Practitioner's reply of the same day:

*"We refer to your most recent fax. Your client's offer remains open until 4.00 pm on Monday and as advised we will be obtaining our clients' instructions as to whether or not it is to be accepted."*

[14] The purchaser's solicitor response by return:

*"We have your letter of this morning.*

*We confirm our position, the offer was rejected on behalf of your clients by you yesterday and you invited our client to increase her offer.*

*The process is at an end as far as our client is concerned."*

[15] Later that same day the Practitioner wrote again to the purchaser's solicitor. This was a longer letter recording that his interpretation of the offer was that it could not be withdrawn, referring to the contract clause stating, *"the offer shall remain open for acceptance by the vendor, and may not be withdrawn until 4pm on the second working day after the offer has been presented to the Vendor."* The Practitioner went on to record his understanding of their telephone exchange of the day before which referred to the possibility of a variation (to the ABR Agreement) if an acceptable offer were to be made by the purchaser, and added that the estate agents had advised that their protocol could not be amended. The Practitioner concluded with informing the solicitor he was seeking his clients' advice about whether or not in the circumstances the offer was acceptable.

[16] The Practitioner immediately contacted the Applicant and obtained their agreement to confirming the offer was at an acceptable level. This was returned to the purchaser's solicitor prior to the expiry of the time stated in the Agreement.

#### *Further communications*

[17] On 14 December (after the weekend) the real estate agency sent an email to the Practitioner informing him:

*"I have spoken with the Purchasers solicitor who confirms that the offer made by her client was rejected. The buyer will however attend the Auction on Wednesday"*.

[18] The Practitioner faxed the agent, outlining his contact with the Purchaser's solicitor, and his view that the offer could not be withdrawn until the time stated in the offer. He wrote, *"We are at a loss to understand how the Purchaser can withdraw the*

*offer when the Agreement you prepared fairly states that it can't be.*" The Practitioner asked the estate agents to collect a deposit.

[19] In reply the estate agent advised,

*"We understand from the Purchaser's solicitors that no agreement is in existence therefore no deposit is available to be collected."*

[20] The same day the Practitioner informed the Applicants of his view of the situation. However, it appears that the Applicants accepted that the offer had been rejected. They decided to await the outcome of the auction which occurred soon afterwards. At the auction the original purchasers bought the property but at a price that was \$16,000 less than their pre-auction offer.

### *Complaints*

[21] The Applicants consider that the Practitioner rejected the pre-auction offer and for that reasons they hold him responsible for having lost the pre-auction offer, causing them to lose some \$16,000. They complained to the New Zealand Law Society. Their complaints included a claim for compensation. Their additional complaint concerned the Practitioner having deducted his fees without their prior agreement.

[22] Information they enclosed further alleged that the Practitioner had failed to respond to letters sent to him by their new lawyer.

[23] The Standards Committee concluded that there *had* been unsatisfactory conduct on the part of the Practitioner. In setting out its reasons the Committee referred to the Practitioner's conduct in relation to his communications, and also noted that the Practitioner had not answered letters sent to him by another lawyer they had engaged in relation to this matter. On the matter of the Practitioner having taken fees, the Committee did not agree that this amounted to wrongful conduct. The Committee perceived the main substantive complaint as involving an allegation that the Practitioner had been negligent and did not consider that this could be resolved through the disciplinary process, but should be resolved in the court.

### *Review*

[24] A review hearing was held on 28 June 2010. The Applicants attended, as did the Practitioner who was accompanied by his partner in the law practice.

[25] At the review hearing the Applicants outlined their complaint which was essentially a reiteration of the information on the file. Their main concern was the financial loss arising from having lost the pre-auction offer.

[26] The Practitioner enlarged on his earlier response to the Standards Committee. He disputed that he had rejected the pre-auction purchase offer. He accepted that he had conveyed the message that the offer was not at a level acceptable to the vendors but did not accept that this amounted to a rejection of the offer. He considered that the (prospective) purchaser could not in any event have withdrawn the offer prior to the time frame set out in the Agreement since the offer was stated to be irrevocable for that duration. He added that even if it was the case that he had 'rejected' the offer- which he denied – this could not as a matter of contract law, have had the affect of withdrawing an offer before time that was to remain open.

[27] The Practitioner considered that the cancellation of the contract by the purchaser was wrong as a matter of law and could not be done. He submitted the purchaser's response indicated that the pre-auction offer had been erroneously treated as a straight-out purchase offer (which can lapse on notice of non-acceptance) rather than having been perceived in the context of a pre-auction offer. He suggested that the confusion may have arisen particularly due to the way clause 22 had been drafted, which may have indicated that an offer could be "accepted" (and by inference also 'rejected'), whereas the 'acceptance' of a pre-auction offer meant that the offer was at an acceptable level to the vendor, but not contractually binding the vendor if a higher bid was forthcoming. He submitted that an offer could not be 'accepted' and *at the same time* leave open an opportunity for the vendor the right to sell the same property to another buyer.

[28] The Practitioner's view was that his initial advice that the price was not at an acceptable level was immaterial, and that his subsequent advice, given within the timeframe of the offer, that the Applicants approved the pre-auction offer, should have triggered the pre-auction processes, and that the real estate agents ought to have then collected a deposit.

[29] The Practitioner took the view was that any loss to the Applicants arose as a result of the real estate agents accepting the interpretation of the legal position as had been stated by the Purchaser's solicitor that the contractual process was at an end. He considered this to have been incorrect as a matter of law. The Practitioner denied any responsibility for the loss suffered by the Applicants.

*Considerations*

[30] At first glance there appears to be a direct link between the Practitioner's conduct and the loss of the pre-auction offer. However, closer examination questions whether this is the proper approach.

[31] However, I will first address preliminary matters. The parties disagreed on the instructions given to the Practitioner but agree that they had wanted to explore the opportunity of getting the offer increased. The Practitioner could not recall that the Applicants had stated that the sale should not be lost, and it may be that their explanation about why they believed a higher offer might be obtained may have overshadowed other advice to the Practitioner. There is evidence that the Practitioner did try and obtain an increase to the offer, and this is not inconsistent with the Applicant's evidence. However, this review does not depend on these disagreements.

[32] There is also disagreement about whether the Practitioner had "rejected" the offer. The individuals with whom the Practitioner conversed at that time all interpreted the discussion as the Practitioner having rejected the offer. The Practitioner rejected this, but agreed that he had (initially) informed parties that the offer was not at an acceptable level. Regardless of the words used, I accept that the Practitioner conveyed a message to those with whom he communicated at that time that the offer that had been made was at an unacceptable level to his clients, and that this was interpreted as a rejection of the offer.

[33] A central issue is the relationship between the Practitioner's conduct and the loss suffered by the Applicants. An enquiry conducted in a disciplinary context must consider whether the Practitioner's actions led to the Applicants' loss. I have therefore considered the approach taken by the Practitioner in the overall circumstance.

[34] The status of an offer made in a pre-auction context is discernable from the ABR Terms and Conditions for Pre-Auction Offers, which explains that an 'acceptance' signals that the offer is at an acceptable level, and triggers steps for bringing forward the auction. In this context, a contractual offer was made and which would remain 'open' and 'not be withdrawn' during a defined time frame. Within that time frame the Practitioner first advised the purchaser that the offer was not at an acceptable level, and then advised the purchaser that it was acceptable.

[35] The Practitioner's view was that the offer was not able to be withdrawn prior to the stated time frame, and that regardless of any earlier advice, his confirmation within

the agreed time frame that the price was acceptable resulted in the offer having been “accepted” in the pre-auction context, and as such triggered the pre-auction provisions.

[36] There was evidence that the Practitioner had informed the purchaser’s solicitor of his interpretation of the Agreement, that there had been discussion about the problem caused by the way that clause 22 had been drafted; that there had been discussion about whether the offer could be increased and if so whether this could lead to a firm contract, and change the documentation so as to avoid the auction. It appears that the Practitioner made enquiry but ABR were opposed to any change to the auction arrangements. This led to the Practitioner obtaining the Applicant’s confirmation that the pre-auction offer was at an acceptable level and conveying this to the purchaser’s solicitor.

[37] The evidence of the above emails shows the Practitioner’s efforts to convey to the purchaser’s solicitor his view of the legal position after having advised that the offer was ‘acceptable, and disputing the position taken by the other lawyer.

[38] There was also evidence of the Practitioner’s efforts to present his view of the legal position to the estate agent, stating that he was ‘*at a loss*’ to understand how the purchaser could withdraw an offer which the contract had fairly stated could not be withdrawn. The Practitioner advised the agent and also his clients of his view of the legal position that the pre-auction offer was still ‘live’ when the offer was confirmed as being at an acceptable level.

[39] The purchaser’s solicitors considered the contract at an end, a view that was conveyed to the ABR agent. The evidence suggests that this view was accepted by the estate agent who took no further steps. There is nothing to show what if any consideration was given by the estate agents to the Practitioner’s interpretation.

[40] The readiness of the agency to accept the legal position as advanced by the Purchaser’s solicitor is confirmed by the following emails sent by VN on 14 December to the Practitioner, informing the Practitioner, “*I have spoken to the purchaser who confirms that the offer made by her client was rejected. The buyer will however attend the Auction on Wednesday.*” And, “*We understand from the Purchaser’s solicitors that no agreement is in existence therefore no deposit is available to be collected.*” This suggests that the estate agents accepted that there was no valid pre-auction offer, a position with which the Practitioner disagreed. This was so despite the Practitioner’s contrary assertion that the offer remained open to be ‘accepted’ until the expiry of the stated time frame.



[41] I have referred to the ABR terms and conditions for a pre-auction offer which appear to be clear in providing that 'acceptance' of an offer in this context signals that the offer is at an acceptable level and intends to trigger certain processes. In this context a pre-auction offer was made and stated to remain open and not be withdrawn for a defined period. The legal implications of the Practitioner's advice in the above circumstances raises a legal question that cannot be resolved through the disciplinary machinery of the New Zealand Law Society, nor by this review process. However, this question is pivotal to any claim by the Applicants.

[42] However, for the purpose of considering the Practitioner's conduct in a disciplinary context, it is not necessary to go further than to acknowledge that the legal opinion he expressed and acted upon was one that was tenable.

[43] The Applicants were aware of the legal position as asserted by the Practitioner but appear to have accepted the view taken by the ABR personnel, and they informed the Practitioner that they would await the outcome of the auction.

[44] At the review hearing the Applicant's stated, "*What choice did we have?*" Clearly this was not a matter that could have been readily resolved to anyone's satisfaction within the time frame of the scheduled auction. However, this is an insufficient basis for concluding that the Practitioner's position was wrong such as to establish a proper basis for concluding that the Applicant's loss was directly the result of any act or omission on the part of the Practitioner such that there was a proper basis for a compensatory order.

[45] While it may be argued that the manner of the Practitioner's engagement with the ABR personnel impacted on the opportunity for effective dialogue between them concerning the matters that had arisen, the 'conduct issue' for the purposes of a compensatory order revolves around the question of whether the Practitioner was wrong in the view that he took. The evidence shows that he went to some effort to protect his clients' interests as he saw the legal position. This view was not untenable on the evidence, and could not therefore be considered unreasonable in the circumstances.

[46] Under s. 156 of the Lawyers and Conveyancers Act compensatory orders can be made against a lawyer where it is shown that a loss suffered by the Applicants has been caused directly by the act or omission of the Practitioner. For reasons I have set out above, the Applicants have not established a clear link between the Practitioner's conduct and their loss. This is a matter that needs to be tested in the Court.

[47] I agree with the observations of the Committee that the Applicants had an alternative remedy and that it was appropriate for the Committee to exercise its discretion pursuant to Section 138(1)(f) as read with Section 152(3) of the Act. I accept as correct the Standards Committee's decision declining to take any further action in relation to this complaint.

*Other matters*

[48] I previously noted that the Standards Committee made an adverse finding against the Practitioner. I have assumed that this included the complaints concerning manner in which the Practitioner engaged with the ABR personnel. I accept that the Practitioner's conduct in that matter amounted to a breach of Rule 12 of the Lawyers: Rules of Conduct and Client Care states:

A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

[49] I have also assumed that the Standards Committee's adverse decision covered the Practitioner's failure to have responded to letters sent to him by another lawyer engaged by the Applicants. On the evidence this was a proper finding.

*Taking of fees*

[50] The Standards Committee took the view that the Practitioner was entitled to take his fees once he had issued a valid invoice for his services. The Committee considered that this complied with Regulation 9(1)(a) and 9(2) of the Trust Account Regulations and as such did not consider that this aspect of the complaint raised any professional standards issues.

[51] In my view the Standards Committee was in error in this matter. The Committee appears to have overlooked a previous decision of this Office, namely *A v Z*, LCRO 40/2009. There the LCRO concluded that a lawyer may only deal with trust funds in two ways pursuant to s 89 of the Law Practitioners Act 1982 (or s 110 of the Lawyers and Conveyancers Act 2006). That is by paying those funds to the client, or paying them at the direction of the client. This decision may be accessed on the LCRO website. It is understood that this decision was widely promulgated at the time.

[52] Accordingly if a lawyer wishes to deduct his or her fees from the funds of a client held in trust he or she must obtain the specific authority of the client.

[53] However, as a finding of unsatisfactory conduct has already been made against the Practitioner it is unnecessary to make a further similar finding.

**Decision**

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

**DATED** this 3<sup>rd</sup> day of August 2011

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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:

EO and EP as the Applicants  
VO as the Respondent  
The Auckland Standards Committee 2  
The New Zealand Law Society