LCRO 255/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Otago Standards Committee
BETWEEN	**TC and TD** Applicant
AND	**NV** Respondent

Introduction

[1] TC and TD have applied for a review of the Standards Committee determination in which the Committee determined that NV's conduct constituted unsatisfactory conduct in respect of one of their complaints, but determined to impose no penalty in respect thereof, and took no further action in respect of the remainder of their complaints.

[2] It is unfortunate that NV was not more pragmatic in accepting TC's settlement offer at the outset and/or engaging with TC prior to the complaint being made. Instead, much time has been expended throughout the process of the complaint and this review and the relationship between NV and his former clients has now been terminated.

Background

[3] NV had acted for TC and TD since 1992.

[4] In March 2008 he was instructed by them to institute a rent review of a commercial building owned by TC and TD's property owning company, CBW.

[5] In the course of that process, the tenant of the building sent NV a letter in which it was stated that his business had been on a very steady decline in the previous few months and that the printing industry in which the tenant was engaged was not in a good position overall. The tenant further advised that he had been unable to pay his bills, had made staff redundant and was facing further redundancies, and both owners

and staff had been obliged to accept reduced wages. In summary, the tenant advised that any rent increase would "be the last nail in the coffin" for his business.

[6] As a result, TC and TD waived the rent review on the basis that the rent would be reviewed the following year.

[7] In August 2008, CBW entered into an agreement to sell the property to CBX. NV was away at the time the agreement was entered into and during the due diligence period. Various matters were raised by the purchaser's solicitor in the course of conducting due diligence, and in response to a query from them, the solicitor handling the matter for TC and TD provided a copy of the letter from NV to the tenant in which the rent review was waived. He did not however provide the purchaser's solicitor with a copy of the letter from the tenant referred to above.

[8] The agreement was declared unconditional and settlement proceeded on 29 August 2008. NV had returned by that time and resumed control of the file. He was responsible for signing and sending the settlement statement sent to the purchaser's solicitor although it was prepared by a member of his staff.

[9] Following settlement, NV accounted to TC and TD. In his statement he included accounts for work which had been done over six years previously totalling $2,812.50 and deducted those fees from the balance paid to TC and TD.

[10] TC and TD were disappointed and angry with NV and TC wrote to him to object to these fees being deducted. There followed some correspondence between NV and TC during which time TC reviewed his files to try and ascertain whether the work which had been billed had been included in previous accounts. He was unable to verify exactly whether he had been billed for those matters but offered to pay $1,000 plus GST in settlement of the account.

[11] NV responded; -

> I am surprised that you do not have access to your accounting records from 2002 as you are required to retain these. You should be well aware that there was work done and not charged for. The invoice for the work involved represents excellent value. I have offered to show you the file so that you can see the time records involved and review the matters undertaken. I am not prepared to accept $1,000.00 plus GST in full settlement. I would accept $2,000.00 plus GST.

[12] Following some further correspondence NV wrote again to TC on 24 February: -

> Thank you for your email dated 16 January 2009 and letter dated 17 February 2009. The correspondence between us seems to have reached a stalemate. We now propose that:
>
> - We write off the outstanding bill of costs

- That you accept that you have no claims against us either personally through your company or your family trust
- That you will be entitled to pursue a claim against [CBX] for the apportionment of ground rent amounting to $1,537.50 through the Disputes Tribunal if you wish
- That you arrange to uplift your files

NV had earlier refunded the fees deducted following TC's objections.

[13] In addition to TC's complaint about deduction of fees, he had also realised that the purchaser's share of ground rental payable by the registered proprietor of the property they had sold had not been apportioned and recovered on settlement from the purchaser. In an email of 15 September 2008 NV had acknowledged his mistake in not attending to this and sought details of the amount paid by TC and TD.

[14] TC provided this information on the following day but heard nothing further from NV. He followed the matter up in late October at which time NV responded. He advised that he had not noted TC's email of 16 September and then requested further information as to the date to which ground rental was paid. Finally, on 31 October, he sent a letter to the purchaser's solicitor requesting payment of the amount due by the purchaser being $1,537.50.

[15] The purchaser's solicitor responded advising that the tenant of the property was in financial difficulties and had not paid rental and outgoings for the month of November. The solicitor advised that if TC and TD pursued recovery of the ground rent then their client intended to investigate what TC and TD knew about the financial state of the tenant at the time of sale. In this regard, the solicitor questioned whether TC and TD had failed to disclose information in terms of the warranties in the agreement for sale and purchase. Subsequently the tenant went into liquidation and the purchaser incurred losses through non payment of rental and other payments due in terms of the lease.

[16] On instructions from TC, NV advised the purchaser's solicitor that TC and TD intended to pursue recovery of the ground rental. That ultimately resulted in the purchaser of the property instituting proceedings in the Disputes Tribunal against CBW for breach of the terms of the agreement for sale and purchase. That claim was based on the fact that the company had not disclosed the letter from the tenant referred to in [5] above and that this constituted a breach of clause 6.1 of the agreement.

[17] That clause reads as follows:

> The vendor warrants and undertakes that at the date of this agreement the vendor has not
>
> (1) received any notice or demand and has no knowledge of any requisition or outstanding requirement:
>
> ...
>
> (c) from any tenant of the property:
>
> (2) given any consent or waiver which directly or indirectly affects the property and which has not been disclosed in writing to the purchaser.

[18] TC and TD counterclaimed for the outstanding ground rental.

[19] On 9 December 2009 the Disputes Tribunal issued its decision in which it found that CBW was in breach of clause 6.1 of the agreement by not disclosing the letter from the tenant on the basis that the letter constituted a "notice" in terms of that clause. The Tribunal ordered the company to pay the sum of $15,000 to the purchaser, being the maximum amount that the Tribunal could order. It also ordered that the claim by the company for $1,537.50 for the unpaid ground rental be off set against that payment, thereby effectively upholding the counterclaim by CBW.

[20] TC lodged an appeal against the decision of the Disputes Tribunal in the District Court in September 2010 which was beyond the statutory period for appeal. He then compiled his complaint against NV and forwarded this to the firm with a request that the firm engage in discussions to resolve his complaints, failing which the complaint would be lodged. No response was received from NV and the complaint was lodged with the New Zealand Law Society Complaints Service on 15 November 2010.

The complaints and the Standards Committee determination

[21] TC and TD's complaints related to the following matters: -

- The deduction of the fees for the "historical unbilled work;
- The error in not apportioning the ground rent;
- Failing to advise that the tenant's letter needed to be disclosed to the purchaser; and
- NV's "intimidating and bullish" attitude towards TC and TD and failing to engage in meaningful discussions to endeavour to resolve the complaints.

[22] Having investigated the complaints the Standards Committee issued its determination:

1. With regard to the deduction of fees, the Committee considered that the letter of engagement issued by the firm was only in respect of the sale process and that it did not give NV the authority to deduct fees in relation to other matters from the sale proceeds without specific authority. The Committee therefore determined that NV's conduct in this regard constituted unsatisfactory conduct. Taking into account the fact that NV had refunded the fee and had also indicated he did not intend to take any action to recover them, the Committee determined not to impose any penalty for the unsatisfactory conduct.

2. The Committee noted that NV accepted his mistake with regard to the failure to apportion the ground rental and also noted that he then made an attempt to recover that amount from the purchaser. The Committee did not consider the mistake amounted to unsatisfactory conduct under section 12 of the Lawyers and Conveyancers Act. It therefore determined to take no further action with regard to that aspect of the complaint.

3. The Committee discussed the finding of the Disputes Tribunal with regard to the failure to disclose the tenant's letter to the purchaser's solicitor. The Committee was of the view that that letter did not amount to a "notice" under clause 6.1(1) of the agreement for sale and purchase and accordingly there was no failure on NV's part. The Committee further noted that even if the letter did constitute a "notice" no loss to TC and TD had flowed from the non disclosure. The Committee's reasoning was that the purchaser of the property indicated at the Disputes Tribunal hearing that if the letter had been disclosed he would have sought a reduction of the price by at least $85,000. Given that the jurisdiction of the Disputes Tribunal was limited to $15,000 the Committee reasoned that TC and TD therefore suffered no loss through non disclosure of the letter.

4. The Committee did not consider that there was any evidence to support the complaint about NV's attitude towards TC and TD

Review

[23] NV initially objected to this review being conducted on the grounds that the firm's client was CBW. He advised that company was in liquidation and noted that the complaint had been processed in the name of TC and TD. His submission was that

they were unable to take any action on behalf of the company in liquidation by virtue of the provisions of the Companies Act.

[24] Section 132 of the Lawyers and Conveyancers Act 2006 provides that "any person" may complain about the conduct of a practitioner and that it is not necessarily the client that must be the complainant. On this basis the review proceeded.

[25] A review hearing was held in Dunedin on 14 November 2012 attended by TC and TD and NV. TC and TD consider that the Committee's determination appeared to trivialise NV's mistakes and the subsequent consequences. The impression they have is that the Committee appeared to advocate for NV and showed "little regard for objective resolution and natural justice or for the professional standards expected of legal professionals by the general public".

[26] A review is "much broader than an appeal. It gives the review officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the review officer reaching his or her own view on the evidence before her"[1].

[27] It is intended to address each of the issues raised by TC and TD in their complaints.

The deduction of fees

[28] TC and TD take issue with the fact that although the Committee found that NV's conduct in deducting fees without authority constituted unsatisfactory conduct, it did not impose any penalty. They contend that the Committee has thereby sanctioned a lowering of a fundamental professional standard. They argue that NV only agreed to repay the fees following their objection and that this should not in any event affect the imposition of a penalty as it does not alter the fact that NV had deducted the fees without their authority in the first instance.

[29] Following receipt of the instructions to act on the sale of the property CBY sent a letter of engagement to TC and TD on 7 August 2008. This was headed: "[CBW]: Sale [number] [Street name] Street Dunedin".

[30] Under the heading "billing arrangements" was included the following: -

> We may deduct from funds held on your behalf any fees, disbursements or expenses for which we have provided an invoice.

[1] *Deliu v Hong* [2012] NZHC158 at [41].

[31] In discussing the penalty to be imposed the Committee took into account the fact that NV had refunded the fee and had also indicated that he did not intend to take any action to recover the fee. Taking these factors into account, the Committee determined not to impose any penalty for the unsatisfactory conduct. I agree that these were relevant factors to take into account in considering what penalty to impose, but not to the extent that no penalty at all should result.

[32] What the Committee did not refer to, and I am unsure whether it specifically discussed, is the fact that, other than for the reasons specified by the Committee, NV's actions conformed with the requirements of the Trust Account Regulations as they were understood at the time. This reasoning is reflected in the submissions dated 4 April 2011 provided by NU on behalf of NV. At point 1 of his submissions NU stated that:

> He [NV] was entitled to deduct payment from monies held for the client provided that full particulars were supplied to the client. Full particulars were supplied to the client as per the statement and invoice attached to the complaint. The fees charged were entirely proper having regard to the work completed. [NV] prepared the invoice providing a description of the work and forwarded the same to [TC and TD] at the time the deduction was made. Although the work related back to previous years [NV] was fully entitled to charge and be paid for the same.

[33] In May 2009 this Office issued a decision[2] which altered the long held understanding that providing an invoice was rendered in accordance with Regulation 8 (now repeated in Regulation 9 of the Trust Account Regulations 2008) then fees could be deducted from funds held for general purposes. In *A v Z* the LCRO held that if a lawyer wishes to deduct fees from funds held for a client for general purposes he or she must obtain the direction of the client to do so.

[34] Criticism of that decision is founded upon the basis that it does not take note of the right of set off expressly preserved in section 113(2) of the Lawyers and Conveyancers Act 2006. However, the Law Society issued a memorandum to its members on 13 August 2009 that for so long as the issue remained in doubt it recommended that the prudent course for lawyers would be to:

- Advise the client in terms of Rule 3.4(a) of the Conduct and Client Care Rules that fees may be deducted from funds held for the client and ensure that the client accepts in writing the terms of engagement; and
- Comply with Regulation 9 of the Trust Account Regulations at the time a fee is deducted.

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[2] *A v Z* LCRO 40/2009.

[35] The LCRO decision and the Society's memorandum of course came some time after this matter arose. When NV deducted the fees from the funds held for TC and TD, the prevailing accepted conduct was that so long as an invoice was rendered a lawyer could deduct fees from funds held. In the circumstances it would be somewhat unfair to retrospectively apply the LCRO decision to NV's conduct. However, his conduct in deducting his fees without TC's consent was in breach of the Regulations as interpreted in *A v Z.*

[36] The Standards Committee did not determine the matter on that basis. Instead, it held that because the letter of engagement referred only to the sale of [number] [Street name] Street, that TC was unable to deduct fees in respect of other matters.

[37] TC has not objected to the fees in respect of the sale being deducted. Whilst therefore NV's deduction of any fees did not conform with the decision in *A v Z*, nevertheless, TC has implicitly accepted that position. However, deduction of fees for other matters was not permitted for the reason held by the Standards Committee and by virtue of the subsequent LCRO decision.

[38] Consequently, the finding of unsatisfactory conduct in this regard is confirmed.

[39] TC has objected to the fact that no penalty has been imposed. I have speculated on the reasons why the Standards Committee adopted this position, but whatever they were, I concur that the imposition of a penalty would be inappropriate given that NV had complied with the widely accepted interpretation of the provisions at that time.

[40] In the circumstances, I confirm the determination of the Standards Committee with regard to penalty.

The failure to apportion ground rent

[41] The property sold was a leasehold property. Ground rent was payable to the head lessor. Clause 46.2.1 of the lease between CBW and the tenant provided that CBW as landlord was obliged to pay the ground rent to the head lessor. The lease did not provide for recovery from the tenant.

[42] Consequently, when the property was sold, any advance payment of the ground rental should have been apportioned between CBW and CBX.

[43] In preparing the settlement statement for the purchaser's solicitor, CBY did not apportion ground rental. In his email of 15 September 2008, NV acknowledged that mistake with the added comment that "we note that the lease provides for the tenant to

pay rates to the Council but that would not include the ground rent to CBZ. That is our mistake. Could you please advise the amounts paid for ground rent and we will arrange for an apportionment".

[44] TC supplied the amount paid for ground rent on the following day. However, NV did not note his reply email and it was not until TC made further enquiries later in October that NV then asked for the period covered by that payment. That detail would have been included in the head lease itself if NV had retained a copy.

[45] TC provided the information requested and NV then wrote on 31 October 2008 to the purchaser's solicitor in an attempt to recover the amount due by it. Given that NV had acknowledged his error in not apportioning the ground rent, it might have been expected that he would have been more diligent in pursuing recovery. In addition, once it became clear that the purchaser was not going to readily pay its share, it might have been expected that NV would have offered to reimburse CBW directly and then pursue recovery from the purchaser. NV did not however take this step. Instead the matter escalated and the purchaser issued proceedings in the Disputes Tribunal for breach of the warranties contained in the Agreement for Sale and Purchase by CBW.

[46] The preparation of a settlement statement is a fundamental function of a conveyancing lawyer. When a leased property is sold, reference must be made to the lease to establish what should be apportioned between vendor and purchaser. In this case, the tenant paid outgoings such as rates, so there was no need to apportion those. The requirement for the landlord to pay the ground rental was a specific term of the lease between CBW and the tenant which should have been noted when the settlement statement was prepared.

[47] Section 12(a) of the Lawyers and Conveyancers Act provides that unsatisfactory conduct constitutes "conduct of the lawyer … that occurs at a time when he or she or it is providing regulated services and is conduct 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.

[48] It is difficult to accept that a failure by a conveyancing lawyer to correctly prepare a settlement statement does not constitute unsatisfactory conduct. Errors in calculations are understandable, but a failure to identify what should be included in a settlement statement is not. Preparation of a settlement statement is a fundamental requirement in any conveyancing transaction and a client is entitled to expect that

function will be competently and diligently completed. In the circumstances, I consider that NV's conduct in this regard constitutes unsatisfactory conduct.

[49] The question then to consider is what penalty should be imposed. TC seeks at the very least recovery of the amount that should have been paid by the purchaser. The difficulty in this regard is that the Disputes Tribunal referee set this amount off against the amount payable by CBW to the purchaser. Effectively therefore, the amount has been paid.

[50] TC's argument is that he has not received it. I cannot see the logic in that. The company has been given credit for the amount payable by it to the purchaser. Even though CBW is in liquidation the matter is of some relevance as TC advised that the liquidator is seeking to recover distributions or payments by the company to TC and TD prior to the liquidation. Any monies paid to the company as a result of this decision, will reduce the amount that ultimately will need to be paid back by TC and TD.

[51] TC states that if the ground rent had been apportioned, he would not have had to pursue recovery and therefore may not have been exposed to proceedings in the Disputes Tribunal by the purchaser. In this regard he refers to the letter from the purchaser's solicitor dated 24 November 2008 in which the solicitor stated "…if your client proceeds to make a claim for this minor outgoing he [the purchaser] will vigorously defend it in the Disputes Tribunal on the basis of a counter-claim of $7,500 against your client for the loss of rent he has now suffered."

[52] Section 156(1)(d) of the Lawyers and Conveyancers Act provides that an order of compensation may be made where it appears that a person has suffered loss by reason of any act or omission of a lawyer. TC's claim in this regard is that the purchaser would not have pursued a claim through the Disputes Tribunal if the claim to recover the ground rent had not been pursued and if NV had reimbursed the company for the ground rent it would not have been necessary for the TC and TD to pursue the tenant.

[53] The applicable standard of proof in disciplinary proceedings is that of the balance of probabilities – in other words, that something would have been more likely to occur than not. A claim for compensation based on an assumption that the purchaser would not have brought its claim if the TC and TD had not pursued recovery of the ground rent is too uncertain to satisfy that test and in the circumstances there can be no compensatory order made on this basis.

[54] In previous decisions of this Office[3] it has been established that compensation for anxiety and stress may be awarded pursuant to section 156(1)(d) of the Act. In this situation, NV did not take any steps to rectify his error other than to somewhat less than proactively seek recovery from the purchaser. Conversely, he continued to seek payment of his accounts and left TC to pursue his counter-claim for the ground rent in the Disputes Tribunal proceedings. I do acknowledge of course that by that stage TC had instructed alternative lawyers. However, it seems to me that NV did not take any active steps to rectify his error but rather left TC to deal with the matter himself.

[55] I acknowledge that NV's client was a limited liability company. By their very nature, corporations cannot suffer anxiety and stress. However, section 156(1)(b) of the Act refers to loss suffered by "any person" and this does not necessarily mean that person must be the lawyer's client. In this case it was TC and TD who suffered anxiety and stress and in these circumstances I consider that some compensation is due to them for the anxiety and stress suffered by them.

[56] In *Sandy v Khan*, the LCRO noted at [29] that an award for anxiety and stress should be modest, though not grudging. In that case he made a compensation award of $2,500. In another decision *Wandsworth v Ddinbych and Keith* [4] the LCRO awarded the sum of $1,200 to the applicant.

[57] The circumstances in which compensation on this basis has been awarded vary widely, but in general terms there must be something more than the stress associated with the complaint itself. Thus in *Sandy v Khan* the lawyer's firm had acted for both parties in the sale and purchase of a business in circumstances where the complainant's interests had become compromised. In *Wandsworth,* the lawyer had wrongfully terminated a retainer, and the compensation ordered under this head was to compensate the complainant for the stress of having to arrange new representation for the litigation in which he was involved, and the general disruption to his business and personal affairs.

[58] In the present circumstances, TC and TD did not receive any measure of support from NV to take whatever steps he could to avoid the purchaser issuing proceedings. Instead NV tended to focus on obtaining payment of the bills rendered by him and he rebuffed the overtures from TC aimed at resolving matters. His solution

[3] See for example *Sandy v Khan* (also referred to on NZLII as *Sandy v Kent*) LCRO 181/2009.
[4] LCRO 149 & 150/2009.

was to ultimately write off what he referred to as the 'outstanding accounts" and to leave TC and TD to deal with the Disputes Tribunal proceedings without his support.

[59] Although the resultant anxiety and stress that this has caused TC and TD needs to be acknowledged, the amount assessed as compensation for this should only be minimal. Without dismissing the anguish, distress and disruption to their lives as recorded by TC, the proceedings were issued in the Disputes Tribunal, and as a consequence the maximum liability faced was limited to $15,000. This is not the same as facing proceedings issued out of the Court where the cost and the potential orders would have been greater. Weighing up all of the circumstances I consider that an appropriate award of compensation to TC and TD is $500.

[60] NV rendered a fee for his services in respect of the sale. Part of those services was not performed competently. In the circumstances, NV's fees should be reduced to acknowledge this. NV's fee for the sale was $1,000. Any amount fixed for preparation of the settlement statement is somewhat arbitrary, but a figure of $150-$200 is not out of the way. In the circumstances, I consider that NV's fees should be reduced by $175 plus GST.

[61] Finally, I note that TC and TD have incurred costs in defending the Disputes Tribunal proceedings. Part of those costs related to their counter-claim for the ground rental. TC has supplied details of costs incurred by them, but the bulk of these appear to relate to events after the Disputes Tribunal proceedings. For this reason I have not considered these when coming to my decision and they have not been sent to NV for comment.

[62] The solicitor engaged by TC and TD to assist with regard to the Disputes Tribunal proceedings was a personal friend who declined to render accounts. However, TC advises that they made an *ex gratia* payment of $1,200 to the lawyer on account of his fees. I am prepared to accept this advice as being correct.

[63] In all of the circumstances NV is ordered to make the following payments:-

1. The sum of $500 to TC and TD pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act by way of compensation.
2. The sum of $175 plus GST to CBW pursuant to section 156(1)(e) in reduction of the firm's fees.

3. The sum of $300 to CBW in reimbursement of fees incurred in bringing the counter-claim in the Disputes Tribunal proceedings. I have intentionally not included GST in this Order as it was not paid pursuant to any invoice.

Failing to disclose the "Notice" from the tenant

[64] The Disputes Tribunal referee determined that the failure to disclose the letter dated 10 March 2008 from the tenant to NV amounted to a breach of the warranty contained in clause 6.1 of the Agreement for Sale & Purchase. The relevant parts of that clause are set out in [17] above.

[65] The Standards Committee disagreed with the finding of the Disputes Tribunal and therefore did not consider that the failure to disclose the letter from the tenant amounted to unsatisfactory conduct.

[66] As noted in [47] above, section 12(a) of the Lawyers and Conveyancers Act defines unsatisfactory conduct as being conduct 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. Given the finding of the Disputes Tribunal, it is logical that TC and TD should consider that the failure to disclose the letter from the tenant should amount to unsatisfactory conduct.

[67] The provisions of the Disputes Tribunals Act 1988 which dictate the principles to be followed in determining matters before the Tribunal include the following:-

> The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to stricter legal rights or obligations or the legal forms or technicalities.[5]

[68] It is impossible to determine what facts are relevant to a future claim based on the merits and justice of a case, and a vendor of a property (and their lawyers) can only proceed on the basis of what they understand the law to be. A Disputes Tribunal decision based on the merits and justice of a case does not always result in an outcome based on the law.

[69] The purchaser's claim before the Tribunal followed the default by the tenant of the property. The Tribunal came to the view that the letter from the tenant to NV constituted a "Notice" in terms of clause 6.1 of the Agreement.

[70] Clause 6.1.1 refers to "notices", "demands", "requisitions" or "outstanding requirements". All of these denote an element of formality indicating that the notices,

[5] Section 18(6).

demands, requisitions or requirements are pursuant to some statute or document. The letter from the tenant was sent opposing a proposed rent increase. It was not a formal notice in respect of anything and most conveyancing lawyers would not consider that the letter from the tenant fell into the category of a "Notice" in terms of clause 6.1.

[71] Although I do not know the specific composition of the Standards Committee which determined this matter, it is the practice of the Complaints Service to ensure that Standards Committees include lawyers who practice in the area of law under consideration. Those members, and the lay members, reflect what could be expected of the standard of competence and diligence required of a reasonably competent lawyer. The Standards Committee did not consider that the conduct of CBY in connection with this matter constituted unsatisfactory conduct, and I agree with that view.

[72] The Disputes Tribunal referee also concluded that there had been a breach of clause 6.1 (2) in that CBW had waived its right to a review. However, under cover of their letter dated 18 August 2008, CBY had provided the purchaser's solicitors with a copy of the letter dated 13 March 2008 in which CBW had waived the rent review. In the circumstances it seems to me that the Referee was not correct in his or her decision.

[73] There is also of course the fact that it was not NV who did not forward the letter as he was away at the time that due diligence was under way and another member of the firm was handling the file.

[74] Regardless of that fact however, I do not consider that the conduct of any of the lawyers who were handling the file at that time constituted unsatisfactory conduct with regard to this aspect of the complaint.

NV's attitude

[75] I have commented in the introduction to this decision on the approach that NV took towards TC when he objected to the deduction of fees for matters other than the sale. I have also commented on his approach to resolving the matter which I consider could have been better handled.

[76] However, these responses could better be categorised as client relationship issues, rather than matters which would attract the attention of the disciplinary process. Overall, I do not consider that there is any reason to come to a different conclusion from that of the Standards Committee in this regard.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed in respect of all matters other than the complaint in respect of the failure to apportion ground rental. In that regard, the determination of the Committee is modified in the following way:-

1. In failing to apportion the ground rental in the settlement statement to the purchaser's solicitor NV's conduct constitutes unsatisfactory conduct.
2. In respect of that finding the following Orders are made:
    (a) pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006, NV is to pay the sum of $500 to TC and TD by way of compensation;
    (b) pursuant to section 156(1)(e) of the Lawyers and Conveyancers Act 2006, NV is to pay the sum of $175 plus GST to CBW (in liquidation) in reduction of NV's fees.
3. Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006 NV is to pay the sum of $300 to CBW (in liquidation) in reimbursement of fees incurred in bringing the counter-claim in the Disputes Tribunal proceedings.
4. The above payments are to be made by no later than 14 February 2013.

Costs

In accordance with the Costs Orders Guidelines issued by this Office, where there has been a finding of unsatisfactory conduct against a practitioner, costs orders will be made against the practitioner in favour of the New Zealand Law Society. In this regard, there has been a modification of the Standards Committee finding. Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 NV is ordered to pay the sum of $400 to the New Zealand Law Society by way of costs, such payment to be made no later than 14 February 2013.

DATED this 14th day of January 2013

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O W J 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:

TC and TD as the Applicants
NV as the Respondent
NU as Partner of CBY
Otago Standards Committee
The New Zealand Law Society