LCRO 33/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 2
BETWEEN	**HH**
	Applicant
AND	**AUCKLAND STANDARDS COMMITTEE 2**
	Respondent

DECISION

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

Background

[1] The facts giving rise to this matter have been recorded in the decision of the Standards Committee which is the subject of this review. However, it is necessary that I record the facts briefly to provide context for this decision.

[2] Mr and Mrs SY live (or did so at the time when this matter arose) [overseas].

[3] In December 2006 Mr and Mrs SY signed an agreement to purchase an apartment in Auckland off the plans.

[4] Subsequent to their signing the Agreement, the estate agent had the Agreement signed on behalf of the developer, and inserted the firm name of HH as the solicitors for the purchaser. The purchaser's copy of the agreement was then forwarded to HH's firm under cover of a letter dated 12 December 2006.

[5] Ms SX of that firm was appointed to act on behalf of Mr and Mrs SY.

[6] Ms SX was employed by HH as a legal assistant. He advises that she has a law degree from overseas that would have enabled her to be admitted in New Zealand but she had not taken that step. At that time, Ms SX had worked for HH for at least eighteen months.

[7] HI Law acted for the developers.

[8] Prior to signing the agreement, Mr and Mrs SY had inserted two conditions. These were as follows:

> This agreement is subject to the purchaser selling a business in [overseas] before the 20th January 2007 or earlier by mutual agreement.
>
> Subject to finance from New Zealand bank within 30 days of signing this agreement.

[9] The agreement was also conditional on:

a) the Vendor achieving a sufficient number of pre-committed sales in the development on terms and conditions and to a level entirely satisfactory to the Vendor by 20 June 2007;

b) the Vendor obtaining the consent on terms and conditions entirely satisfactory to the Vendor by 30 June 2007; and

c) the property achieving practical completion and stratum estate Certificate of Title issuing for the Property by 30 November 2009.

[10] Despite the fact that the conditions inserted by Mr and Mrs SY were due to be satisfied in January 2007, no contact was made by Ms SX with Mr and Mrs SY. She did not write to confirm that the firm was acting on their behalf or provide a summary of the terms of the Agreement. In particular, she did not seek any instructions with regard to the two conditions inserted by the SYs, or offer any advice as to what was required to ensure proper notification of satisfaction of the conditions was provided.

[11] The first activity on Ms SX's file was on 17 May 2007 when Ms HJ of HI Law wrote to Ms SX seeking payment of the deposit and noting the conditions of the Agreement. Pursuant to the terms of the Agreement, the deposit was to have been paid by Mr and Mrs SY to HI Law within 10 working days of the date of the Agreement to be held by that firm as stakeholder. Ms HJ also noted that the two conditions inserted for the protection of the purchaser were due to have been satisfied by 20 January 2007.

[12] There is no indication on the file that Ms SX communicated with her clients at that stage and no further correspondence appears until 27 June 2007, when Ms HJ wrote to Ms SX advising that the conditions inserted for the benefit of the Vendor had been satisfied. Ms SX sent a copy of that letter to Mr and Mrs SY at their postal address in [overseas]. She did not however make any comment, provide any advice as to the terms of the Agreement, or seek instructions with regard to satisfaction of the purchaser's conditions.

[13] On 19 October 2007, Mr and Mrs SY sent an email to Ms SX, advising that they were going to be in Auckland the following week. They sought an appointment with Ms SX to discuss the purchase and also to seek advice on immigration matters. An appointment was scheduled for 25 October.

[14] Subsequently however, Mr and Mrs SY sent an email cancelling that appointment, advising that the estate agent had made an appointment for them with "another firm". Ms SX was not advised who that appointment was with.

[15] In fact, the agent had arranged for them to instruct Ms HJ of HI Law to act for them in connection with the purchase.

[16] On 29 October 2007, Mr and Mrs SY met with Ms HJ and paid the balance of the deposit. They also executed a general power of attorney in favour of Ms HJ but it is clear from their subsequent correspondence that they did not know what this document was or why it had been signed. There is some conjecture that Ms HJ had obtained the power of attorney so that she could subsequently execute loan documentation on their behalf. However, it is noted that the power of attorney has not been acted upon.

[17] In June 2008, Ms HK of HI Law, sent an email to Mr and Mrs SY enclosing a letter from the developer. This letter advised that the building was 73% complete, and that completion was expected towards the end of October 2008.

[18] On 20 October 2008 the estate agent contacted Mr and Mrs SY, to request that they make contact with a mortgage broker to assist them with obtaining finance. At that time they had made an application to Westpac Bank for finance but the agent was anticipating difficulties in that regard.

[19] This was borne out when on 3 November 2008, Westpac advised that it had declined their loan application.

[20] It is evident from email correspondence between the agent, the broker, HI Law and Mr and Mrs SY, that they were having trouble raising the necessary finance. Mr

HL of HI Law at that time emailed Mr and Mrs SY and offered to assist them with their finance applications. This was at the beginning of November.

[21] Prior to this, the agent had sent an email update on 16 October 2008 as to progress with regard to the building. This email had been copied to Ms SX from which it would appear that there had been some communication between her and the agent which indicated that she was to resume acting for Mr and Mrs SY.

[22] This was confirmed when Ms SW, a solicitor also employed by HH, sent an email to Mr HL at HI Law on 22 October 2008, advising that the firm of HH was acting for Mr and Mrs SY. Thereafter, HI Law corresponded with Ms SX acting on behalf of Mr and Mrs SY as settlement approached.

[23] On 6 November 2008, Ms SW sent an email to Mr and Mrs SY to advise that titles had issued and that settlement was imminent. She also included the firm's terms of engagement.

[24] On 10 November, the agent sent an email to Mr and Mrs SY advising them that HI Law were in a conflict situation and that it was necessary for them to instruct another solicitor. He noted that all other clients to whom he had sold apartments in the building had instructed Ms SX to act on their behalf. By this time of course, Ms SX had already resumed acting for them.

[25] HI Law then sent the settlement statement to Ms SX advising that settlement was scheduled for 20 November. Apparently without instruction, Ms SX sought an extension of the settlement date due to the fact that finance had not been arranged.

[26] No extension was agreed, and on 3 December, HI Law sent a settlement notice in terms of the agreement to Ms SX requiring that Mr and Mrs SY settle within 12 working days of the notice.

[27] At that time, the matter was brought to the attention of HH.

[28] HH advises that on the same day as the settlement notice was received, he telephoned Mr HL of HI Law and left a message for him to call back. Mr HL did not return the call. Nothing was sent in writing to HI Law, in contrast to the email which had been sent on 22 October, confirming that the firm was acting.

[29] HH advises that he then tried for the next three days to make contact with Mr HL. He advises that he finally left a message that the firm of HH did not act for Mr and Mrs SY and that the settlement notice was ineffective. Mr HL did not return his calls.

[30] HH further advises that he finally spoke to Mr HM, the principal of HI Law "some two weeks later", complaining that he had not received a return call from Mr HL. This would have coincided with the expiry of the settlement notice.

[31] In his letter of 1 September 2010 to the Complaints Service, HH states that he "was concerned that HI Law was trying to "stitch up" [his] firm in order for the purchasers to forfeit their deposit". It is accepted that in that telephone conversation, HH confirmed to Mr HM that his firm was not acting for Mr and Mrs SY.

[32] As noted in HH's letter of 1 September 2010, that was his last involvement with the matter.

[33] On 23 December 2010 the deposit was forfeited and sent by HI Law to the developer's mortgagee. There is no evidence that any notice of cancellation was sent to HH's firm.

[34] By March 2009, no further progress had been made on behalf of Mr and Mrs SY to enable them to arrange finance, and they sought a refund of their deposit.

[35] Mr HL responded noting that the firm of HH acted for them, and advised that they should correspond through that firm.

[36] Mr and Mrs SY were confused. They asserted that as far as they were concerned, Ms HJ was their lawyer and they had no knowledge of HH. This is either an overstatement on their behalf, or the correspondence which Ms SX had sent to them had not been received by them. They had of course made an initial appointment with Ms SX in October 2007, and it cannot therefore be correct that they had no knowledge of HH, or at least the firm of HH.

[37] However, they then corresponded with Mr HM, and ultimately lodged a complaint with the Complaints Service of the New Zealand Law Society, naming HI Law as the party about which they were complaining. This was treated by the Complaints Service as a complaint against Mr HM.

[38] In the course of the investigation, the Standards Committee commenced an own motion investigation into the conduct of both Mr HL and HH.

The Standards Committee Investigation and Decision

[39] The issues which the Standards Committee determined to investigate concerning HH's conduct were set out in a Notice of Hearing dated 22 October 2010.

Those issues are recorded in paragraph 40 of the Standards Committee decision in the following manner:

> (a) Whether [HH] had instructions to act for [Mr and Mrs SY] in relation to an Agreement for Sale and Purchase sent to him in December 2006
>
> (b) Whether [HH] acted negligently and/or incompetently on receipt of that agreement in that it does not appear as if any steps were taken, *inter alia:*
>
> i. To make contact with [Mr and Mrs SY] on receipt of the agreement in December 2006.
>
> ii. To provide any advice in relation to the terms and conditions of the agreement.
>
> iii. To provide any advice in relation to the purchaser's conditions contained in the agreement.
>
> iv. To ascertain whether the conditions had or could be satisfied.
>
> v. To provide any advice to [Mr and Mrs SY] of their rights in the event that the conditions could not be satisfied
>
> (c) Whether [HH] was negligent and/or incompetent in representing to [HI Law] (in October and November 2008) that the firm was acting for [Mr and Mrs SY], when the firm had been advised on 22 October 2007 that [Mr and Mrs SY] were using another lawyer.
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> (d) Whether [HH], in the belief that the firm was acting for [Mr and Mrs SY], was negligent and incompetent in:
>
> i. Not taking any steps to advise [Mr and Mrs SY] in relation to settlement and the consequence of failure to settle.
>
> ii. Not taking any steps to advise [Mr and Mrs SY] that a settlement notice had been served on the firm in December 2008.
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> (e) Whether [HH] misled [HI Law] on 18 November 2008 by advising that [Mr and Mrs SY] were seeking an extension of settlement date to 4 December 2008 (as they were facing problems in finalising the finance for their purchase), when no such instructions had been received.
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> (f) Whether the representations made by [HH] to [HI Law] were relied on by [HI Law] and caused or contributed to the loss suffered by [Mr and Mrs SY], being the loss of the deposit paid under the agreement for sale and purchase.
>
> (g) Whether [HH] ensured that the conduct of the practice and his employees in relation to this transaction was competently supervised and managed.

[40] The Committee considered the submissions made by HH by letter dated 1 September 2010 and the further submissions dated 26 November 2010. HN also made submissions to the Committee on behalf of HH.

[41] The Standards Committee decision contains a helpful summary of the submissions made by and on behalf of HH with regard to each matter and these are recorded as follows:

(a) *Instructions to act*

It was confirmed that [HH]'s firm had received instructions to act in December 2006. On receipt of the instructions [HH] assigned [Ms SX] to manage the matter.

(b) *Negligence or incompetence on [HH]'s behalf*

[HN] submitted that failure to take any of the steps listed in (b) of the Notice of Hearing could not be personalised to [HH] as this conduct was attributable to staff members, not [HH].

He further submitted, that by November 2007, there was another firm involved as the solicitors for the [SY]'s, namely, [HI Law].

Any failure was attributable to the staff members who had been given the transaction to manage and not [HH] personally. [HH] had a general duty to ensure that staff members were competently supervised.

(c) *Negligence in representations that the firm was acting*

The submission made by [HN] in this regard proceeded on an incorrect assumption that the representation to [HI Law] was sent on the same day as they were notified by [Mr & Mrs SY] that they were instructing another firm. In fact, that occurred on 22 October 2007, whereas the representation in question was made on 22 October 2008 when the firm assumed instructions for the second time.

(d) *Negligence/Incompetence in conduct of conveyancing file*

It was again submitted that [HH] could not be criticized personally for any negligence or incompetence in the conduct of the conveyancing file.

The negligence and/or incompetence to be considered was::

a) Not taking any steps to advise the [SY]s in relation to the settlement and the consequence of failure to settle.

b) Not taking any steps to advise the [SY]s that a settlement notice had been served on the firm in December 2008.

c) Not providing any legal advice to the [SY]s in relation to the settlement notice and the deposit paid under the agreement.

It was submitted that [HH] could not be criticized personally in this regard and that by December 2008, another firm was acting for and on behalf of the [SY]s. It would seem that this submission was also based on the mistake as to the dates in question, as by December 2008 [HI Law] had declared a conflict of interest, and [SX] had confirmed that [HH]'s firm was acting.

(e) *Misleading email dated 18 November 2008*

[HN] submitted that [HH] did not issue this notice and it was written by one of the staff members without his knowledge.

(f) *Reliance by [HI Law] - causation*

> It was submitted that [HH] had not been personally responsible for the representations made to [HI Law]. In addition [HN] submitted that the true cause of the loss of the deposit, was [HI Law] wrongly paying the deposit to the vendor's mortgagee, not [HH]'s conduct.
>
> (g) *Supervision of staff*
>
> [HH] provided details of the supervision of his staff which included the provision of firm manuals as well as in house instruction by a Law Society seminar presenter.

[42] Having considered all the material before it, the Committee accepted that, for the most part, the errors from HH's office resulted from actions of his staff rather than him personally. However, the Committee determined that HH's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect and would further be regarded by lawyers of good standing as unacceptable.

[43] The Committee considered that if HH had taken appropriate steps on receipt of the settlement notice, the SYs would have been in a position to take advice and may have been able to avoid the forfeiture of their deposit. It determined that this was sufficiently serious to warrant a finding of unsatisfactory conduct.

[44] The Committee made the following orders against HH;

a) That he pay $5,000.00 compensation to the SYs pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006; and

b) That he pay costs of $750.00 pursuant to section 156(1)(n) of the Act.

The application for review

[45] The first ground for review put forward by Mr HN is that the Committee's decision is unreasonable and fails to consider whether HH's conduct had reached the appropriate threshold required before an adverse finding can be made.

[46] The second ground put forward for the review is that the orders for compensation and costs were unreasonable and excessive.

[47] The outcome sought by HH is that the adverse finding and/or the orders of compensation and costs be set aside.

The review

[48] The review hearing took place in Auckland on 10 November 2011 and was attended by HH and his counsel, Mr HN.

[49] At paragraph 4 of his submissions Mr HN noted that HH did not seek to review those parts of the decision of the Committee where it rejected the grounds or issues as set out in the Notice of Hearing. Section 203 of the Lawyers and Conveyancers Act 2006 sets out the scope of a review undertaken by this Office from which it will be noted that the LCRO may review all the aspects, or any of the aspects of an inquiry carried out by or on behalf of a Standards Committee and of any investigation conducted by or on behalf of a Standards Committee to which the final determination relates. Consequently, the review is not limited to specific aspects raised by the Applicant.

Unsatisfactory conduct

[50] In his submissions to the Standards Committee, Mr HN argued that even if HH could be criticised personally, it is still necessary for the Standards Committee to establish quite separately, that HH's conduct was not only in error, but that it had fallen below the appropriate standards to warrant an adverse disciplinary finding.

[51] Mr HN refers to a number of decisions in both the legal and medical arenas which reinforce the principle that a breach of the required standards will not automatically result in an adverse disciplinary finding. These decisions establish that there is a threshold of seriousness that has to be crossed before an adverse finding can be made.

[52] Care must be exercised in applying these cases to the "new concept" of unsatisfactory conduct, which was introduced into the "legal firmament" by the Lawyers and Conveyancers Act 2006 (the phrases inserted "are drawn from an article by Professor Duncan Webb reproduced on the LCRO website").

[53] Section 12(a) of the Act defines unsatisfactory conduct as being "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."

[54] Section 12(b) also defines unsatisfactory conduct as being "conduct of a lawyer ... that occurs at a time when he or she is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including –

(i) conduct unbecoming a lawyer ...; or

(iii) unprofessional conduct.

[55] Section 3(1)(b) of the Act provides that one of the purposes of the Act is to protect consumers of legal services. It is also useful to refer to the article by Professor Duncan Webb which, as noted above, is reproduced on the LCRO website. In that article he makes the following comments:

> - In general, unsatisfactory conduct will be conduct which is not so egregious as to amount to misconduct but is still deserving of being marked out as falling below the standard of conduct that clients and the public are entitled to expect. It is a professional lapse.
>
> - It is of note that the Act looks to the standards expected of a *member of the public* and what they are entitled to expect from *a reasonably competent lawyer*. This is an articulation of the well established "reasonable consumer test" which focuses not on the views of professional people(i.e. a peer based standard) as to proper standards, but the reasonable expectations of ordinary people. While in practice the two will frequently converge, the shift in focus is an important signal.
>
> - The upshot of this is that orders may be made by the professional body for wrongs which were not previously considered professional breaches. Oversights slips and other errors which fall foul of the "reasonably competent lawyer" test will amount to unsatisfactory conduct.

[56] Applying these concepts, it follows therefore that the threshold to which Mr HN refers is much reduced when considering a finding of unsatisfactory conduct compared to the threshold that is referred to in the cases noted by Mr HN.

[57] The factual data referred to by Mr HN when comparing the legal profession to the medical profession is not an appropriate comparison in its raw state. The comparison that should be made is the comparison of matters which come before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal and the equivalent Medical Tribunals (depending on the jurisdiction).

The role of the real estate agent

[58] One of the features of the facts giving rise to this matter is the role played by the real estate agent. As is often the case, the legal status of the agent as the vendor's agent has tended to become somewhat blurred. Mr and Mrs SY met the agent when he visited [overseas] for the purpose of promoting apartments in the building. Being unfamiliar with New Zealand and having no contact with any solicitor, they did not express any instructions in this regard. They were certainly surprised to subsequently note that HH's firm had been inserted on the agreement as their solicitors.

[59] The lack of communication from HH's firm about the Agreement or the conditions would not have done anything to alert them to the fact that HH's firm was purportedly acting for them. They did however make contact with Ms SX to make an

appointment to discuss the agreement, so they must have been aware that HH's firm considered that they were acting for the SY's.

[60] However, again, at the behest of the agent, Mr and Mrs SY cancelled a proposed appointment with Ms SX, and instead went with the agent to HI Law where they met Ms HJ. From that time on they considered that Ms HJ was their lawyer.

[61] The agent continued to communicate with Mr and Mrs SY with regard to their finance, and arranged contact with a broker. Sometime in October 2008, it would appear that the agent was again instrumental in directing Mr and Mrs SY back to HH's firm. He wrote to Mr and Mrs SY on 10 November 2008 advising that HI Law had a conflict, and it was therefore necessary for Mr and Mrs SY to instruct different solicitors. He recommended HH's firm again and proceeded as if they had been instructed. HH's staff also acted as if they had been reinstructed without contacting Mr and Mrs SY for confirmation. Indeed, this is the same manner in which the firm had been initially instructed.

[62] Overall, it seems to me that HH's staff placed too much reliance on the agent without independently confirming for themselves the instructions and advice being offered. This in itself could be considered to be a criticism of HH as Ms SX's employer. Mr HN himself makes the observation that the agent was the Vendor's agent, and HH's staff should have had clear instructions to seek confirmation by the client at all times of any instructions issued by the agent.

What HH knew

[63] Mr HN submitted that matters should be considered from HH's perspective. Whilst the test established by section 12(a) of the Lawyers and Conveyancers Act is that conduct is to be measured against the expectations of a member of the public, the notional member of the public must take in to account the known facts. To that extent, it is useful to examine what HH knew (or could have been expected to have known);

- The agreement was sent to his office by the real estate agent on 12 December 2006 with HH's firm recorded as the solicitor for the purchaser.
- His firm had proceeded until 22 October 2007 on the basis that it was acting for the purchaser.

- During that time, no advice had been provided to Mr and Mrs SY as to the terms of the Agreement particularly the terms with regard to the conditions inserted by them.
- On 22 October 2007 the firm was advised by Mr and Mrs SY that they were consulting another solicitor.
- It was not known which firm then continued to act for Mr and Mrs SY.
- From at least 16 October 2008, the agent included Ms SX in correspondence that he was having with Mr and Mrs SY. This would indicate that there had been some communication with Ms SX by the agent to advise that she was to be reinstructed.
- On 22 October 2008, his firm had notified HI Law by email that it was acting for Mr and Mrs SY (on direction from the agent).
- HI Law had acted on this advice in the settlement process by sending the settlement statement and other communications relating to settlement to Ms SX.
- Ms SX had sought an extension of the settlement date. It is clear that Ms SX considered that the firm was acting for Mr and Mrs SY.
- On 3 December 2008, HH's firm received a settlement notice served on them as the purchaser's solicitor in accordance with the terms of the agreement.
- HH telephoned Mr HL. In one of the telephone calls he left a message that his firm was not acting for Mr and Mrs SY.
- He subsequently spoke to Mr HM and advised him directly that his firm was not acting. The date of this telephone conversation is unknown but HH says it was "a couple of weeks later".

[64] The above represents HH's state of knowledge at the time. It has only been subsequently that the state of knowledge of Mr and Mrs SY has become known as set out in their letter to the Complaints Service dated 29 August 2010.

[65] What steps HI Law took subsequently and whether the deposit was forfeited correctly or not is not the focus of this review. The question is, whether a member of

the public would consider that HH had acted diligently and competently when possessed of the facts as recorded above.

[66] The firm operated on the basis that it accepted instructions on the advice of the agent. This occurred when Mr and Mrs SY signed the Agreement in the first instance and the agent inserted HH's firm as acting for them. HH's staff proceeded on the strength of this notification without seeking independent verification or communicating with Mr and Mrs SY. When the agent advised them subsequently in October 2008 that they were to be reinstructed, they proceeded similarly.

[67] If it was conceivable that HI Law considered it was acting correctly, then it also follows that Mr and Mrs SY's deposit was at risk. They deserved the opportunity to take whatever steps were available to them to protect their money. The question is, whether HH acted in a manner that fell short of the standard of competence and diligence that a member of the public is entitled to expect of him as a reasonably competent lawyer.

The finding of unsatisfactory conduct

[68] The Committee was critical of HH's conduct in dealing with the settlement notice. He says that he was concerned that HI Law was trying to "stitch his firm up" to enable the vendor to forfeit Mr and Mrs SY's deposit. He was therefore clearly alert to the possibility that this would occur.

[69] However, he took no steps to communicate with Mr and Mrs SY. Regardless of the reasons why his staff had sent the emails confirming that his firm was acting, they had nevertheless been sent. The emails provided written confirmation to HI Law of this, and these could be produced by that firm to confirm that the settlement notice had been validly served. Mr HM could have considered that HH's advice that his firm was not acting was just a ploy by Mr and Mrs SY to avoid service of the settlement notice.

[70] Mr HM advised HH (rightly or wrongly) that he considered the conditions had been satisfied.

[71] There has been nothing provided to indicate why HH considered his firm was not acting for Mr and Mrs SY. His firm accepted that it was acting for them on the basis of notification by the agent when the Agreement was entered into, and there is no apparent reason why his staff should not have accepted that they were to recommence acting for Mr and Mrs SY when advised of this by the agent.

[72] Being aware of the views held by HI Law, it is not unreasonable to expect that HH should have recognised that if he did not make contact with Mr and Mrs SY, it was likely that their deposit would be forfeited. He could not rely on the agent to advise them and he did not in any event make any inquiries as to what had been communicated by the agent to Mr and Mrs SY. Instead, the only action he took was to make phone calls to Mr HL which went unanswered, and to leave a message, which he could not be sure had been received. Some two weeks later he spoke to Mr HM, in the main to complain that Mr HL had not returned his calls. This is set against the written confirmation by HH's staff that the firm was indeed acting.

[73] Mr HN considers that the Committee has overreached itself in coming to the view that HH had a duty to do everything in his power to rectify the situation. Whilst it may not have been necessary for him to go to this extent, the least that he could have done was to contact Mr and Mrs SY and advise them of developments and ascertain whether in fact they considered that HH's firm was acting for them. Had that conversation or communication taken place, he would presumably have been advised by Mr and Mrs SY that they considered Ms HJ was their lawyer. This in turn would have made HH aware of the conflict and why it was that the agent had referred them back to his firm.

[74] Having become involved at that stage, it would have been clear to HH that Mr and Mrs SY had not received any advice from his firm with regard to the conditions, or that his firm had not notified HI Law that they had been satisfied. Non satisfaction of the conditions presented definitive grounds for the Agreement to be cancelled by the SYs, and HH had the opportunity to enable them to exercise this remedy.

[75] If nothing else, Mr and Mrs SY were deprived of the opportunity to take steps to protect their deposit. Speculation as to what may have developed is not necessarily helpful. The issue is that HH did not take any steps to advise or assist Mr and Mrs SY, or communicate directly with them. The vendor forfeited the deposit, and it was not until Mr and Mrs SY sought repayment in March 2009 that it became known that the deposit had been forfeited and paid to the vendor's mortgagee.

[76] HH's conduct falls short of what a member of the public is entitled to expect of a reasonably competent lawyer, and this constitutes unsatisfactory conduct in terms of section 12(a) of the Lawyers and Conveyancers Act 2006.

Unreasonable and excessive penalty

[77] Notwithstanding the finding of unsatisfactory conduct, Mr HN submits that the penalty imposed by the Standards Committee is unreasonable and excessive.

[78] The Committee ordered HH to pay the sum of $5,000.00 to Mr and Mrs SY by way of compensation pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act. That section provides that "where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner, the Standards Committee may order the practitioner to pay a sum not exceeding [$25,000.00] to the person who has suffered the loss."

[79] HH's omission was to fail to contact Mr and Mrs SY to advise them of developments and/or to advise them of the options available to them pursuant to the terms of the Agreement. He also took no steps to remedy the fact that his staff had not provided any advice to Mr and Mrs SY with regard to the conditions. If he had made contact with Mr and Mrs SY, for whom his firm had acted for some 10 months, and for whom his firm had mistakenly or otherwise confirmed they were then acting, he would have been able to discuss whether the conditions had been satisfied or not, and if not, either he, or the SYs, would have had the opportunity to give notice of cancellation at that stage. If the deposit had not then been refunded before the purported settlement notice expired, they would have then had the opportunity to take more proactive steps to make sure that the deposit was not forfeited.

[80] The Standards Committee came to the view that "had the SYs received good legal advice in relation to the settlement notice, they may have been able to avert the forfeiture of their deposit." In this regard, the Committee has focused on HH's conduct relating to receipt of the settlement notice. However, I consider that note needs to be taken of the fact that no advice was provided to Mr and Mrs SY by HH's firm when they first received the Agreement and when it is accepted that the firm was acting. It is accepted that HH was not the person involved at that stage, but he cannot deny that he was the person who had control of the file at the time the settlement notice was issued. A review of the file at that time would have revealed that no notification had been provided by HH's firm that the purchaser's conditions had been satisfied, nor had any advice been provided to Mr and Mrs SY as to what was required to ensure the conditions were satisfied in terms of the Agreement.

[81] HH would be aware that notice of satisfaction of the conditions was required to be provided in writing. Even though his firm had not been acting for the SYs for some 12 months, it had been acting in January 2007 when the conditions were due to be satisfied, and had continued acting for some months subsequently. In the

circumstances, a discussion with Mr and Mrs SY would have revealed whether they had provided written notice of satisfaction of the conditions independently, and if not, it was highly likely that the Agreement could have been readily cancelled. Even if the SYs then advised HH that they did not consider his firm was acting for them, they would then have had the opportunity to instruct whoever was acting for them to take this step. If that was not followed by an acknowledgement by HI Law that the Agreement had been cancelled, followed by repayment of the deposit, then they would have been alerted to the need to take active steps to prevent their deposit from being forfeited.

[82] Mr HN submits that the Committee's determination that HH's conduct was causative of the loss of the deposit is wrong, and harsh. He submits that the true cause of the loss was the fact that HI Law released the deposit when it should not have because the Agreement had not been made unconditional. In *Wolverhampton v Shaftesbury* LCRO 145/2009 at [62] the LCRO expressed the view that it is appropriate to interpret the words of section 156(1)(d) consistently with the principles of causation that the Court would apply in such a case. Consequently, it must be shown that the losses arose from the breach by the lawyer of his obligations and would not have arisen but for that breach. Applying this test to the conduct of HH alone, it is possible to argue that his conduct was not causative of the loss. However, his lack of activity in the circumstances which arose, certainly contributed to enable HI Law to take the action it did. Mr HM had advised HH that the purchaser had waived the conditions, and having served a settlement notice, he considered that the deposit could be forfeited. Without checking with the SYs, HH was in no position to know whether they had waived the conditions or not. It was therefore reasonable for the Committee to reach the view that the SYs would not have incurred the loss which they had, but for the actions of all three lawyers, to a greater or lesser extent.

[83] In addition to the "but for" approach, the Courts have also considered the loss of chance when considering issues such as this. In this case, the loss of chance, was that Mr and Mrs SY were deprived of the opportunity to take steps to protect their deposit. In Stephen Todd's text "The Law of Torts" 5th edition, he notes at paragraph 20.2.04 that the question becomes one of whether the chance was "real" or "substantial', as opposed to the loss of a mere speculative possibility. The author describes the approach taken by the Courts as to assess the probability of the chance of avoiding an adverse event, with an assessment of high probability resulting in complete recovery.

[84] If Mr and Mrs SY had received good legal advice in the circumstances, I consider that it is highly probable that steps would have been taken to prevent HI Law paying their deposit over to the mortgagee.

[85] For these reasons therefore, I consider that the Standards Committee was correct in coming to the view that the SYs have suffered loss by reason of HH's omissions, and that it is proper that he be ordered to bear part of their losses.

[86] Mr HN considers that Mr and Mrs SY have grounds to recover their money from the Bank. However, if HH had taken the steps which the Committee described as the "minimum basic steps one would expect a prudent solicitor to take in such a situation" they would have been afforded the opportunity to take active steps to prevent the payment of their deposit to the bank.

[87] The Committee has apportioned the loss between the three solicitors involved, although did not provide for a full recovery. It has not provided any explanation of the principles that it has applied in this regard, but it is fair to assume that it has done so on its perception of the degree of culpability of each party. HH has been ordered to pay the sum of $5,000 out of a total of $50,000. I consider that this represents a fair assessment of the degree of HH's culpability in this matter and in the circumstances intend to confirm the Committee's determination.

[88] Following the review hearing, this Office contacted Mr and Mrs SY to advise them that HH had applied for a review of the Standards Committee determination, and to invite them to comment on the application if they so wished. Subsequently, Mr HN wrote to this Office to confirm his view expressed at the hearing, that Mr and Mrs SY had a remedy against the bank to which payment had been made and to offer assistance from HH in recovering that money. A copy of that letter was sent to Mr and Mrs SY.

[89] Mr and Mrs SY responded through their friend to express a wish to communicate directly with Mr HN but that otherwise they had no further comment to make in respect of the matter. HH's concerns and willingness to assist the SYs is to be commended, but cannot of course have any bearing on the outcome of this review.

Supervision

[90] One of the main factors put forward in defence of HH was that he had not personally been responsible for the various aspects of the conduct being investigated by the Committee.

[91] Rule 11.3 of the Conduct and Client Care Rules provides that "a lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practice on his or her own account".

[92] One aspect of the Standards Committee decision with which I do not necessarily agree, is the finding that there were no conduct issues arising in this regard.

[93] HH advised the Committee of the steps that he had taken in producing manuals for his staff, and arranging for a Law Society presenter to provide a series of seminars to them.

[94] However, merely providing the manuals or information is not enough. It is important to ensure that staff are properly supervised and are adhering to the requirements set out in the manuals or to the advice provided in the seminars.

[95] HH advises that his firm was processing a large volume of transactions at the time in question. Ms SX, who was primarily responsible for this file, had a law degree from overseas and at that stage had been employed by HH for some eighteen months. There is no information relating to her previous experience, particularly in New Zealand where conveyancing practices and procedures are different from overseas. Nevertheless, it does appear that Ms SX had, in that eighteen month period, acted for a large number of clients in similar transactions.

[96] However, it does seem to me that it is unacceptable that an Agreement should be received into a law office, without communication being made with the client to outline the terms of the Agreement, and particularly, as in this case, to seek instructions whether the conditions inserted for the benefit of the purchaser have been satisfied. Mr and Mrs SY would have had no idea of what was required to ensure that satisfaction of the conditions was communicated in terms of the Agreement, and that the Vendor could have cancelled the Agreement after the date for satisfaction of the conditions had passed. If that had occurred, Mr and Mrs SY would justifiably have been very aggrieved.

[97] In addition, it does seem to me, that HH's staff were accustomed to acting on the directions of the real estate agent, rather than independently verifying instructions and providing advice directly to the client. This too is unacceptable, and there should

have been a standing direction that clients were to be separately contacted and advised. The concept of "independent advice" is otherwise somewhat eroded.

[98] HH advised that he had weekly meetings with his staff, and his door was always open for staff to approach him with problems. In addition, Mr HN noted that proper supervision does not necessarily involve personally reviewing all files periodically.

[99] I accept that the experience of the staff is necessarily an element to be taken into account when considering what level of supervision is required. However, if there was a similar lack of communication with all clients, then I would not consider that this is a matter which could be laid at the feet of individual staff members, but more likely reflected shortcomings in the practices and procedures for which HH was responsible.

[100] In considering this issue, the Committee was satisfied that HH had fulfilled his supervisory obligations. Without further investigation and inquiry, it cannot be said that he has not. Given the outcome of this review, I will similarly confirm the Standards Committee decision in this regard. However, I am concerned at the lack of advice provided to Mr and Mrs SY, and perceive that the approach adopted by HH's firm was one of "processing" the transaction in a mechanical way, rather than providing a level of service and advice that is expected of a lawyer. In particular, the lack of communication on receipt of the Agreement, even to confirm instructions, is something which I consider constitutes extremely poor service. This is something to be borne in mind by any firm which receives referrals from a real estate agent and for this reason, I intend to order that this decision be published, but with all identifying details removed.

Decision

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

Costs

The determination of the Standards Committee has been upheld. In accordance with the Costs Guidelines issued by this Office, a costs order will follow where a finding against a practitioner is upheld. Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 HH is therefore ordered to pay the sum of $1,600 to the New Zealand Law Society towards the cost of this review, such sum to be paid within 1 month of the date of this decision.

Publication

The Standards Committee ordered publication of its determination, excluding any details that might lead to identification of any of the parties involved. Having confirmed the Committee's determination, it follows that the publication order is also confirmed. In addition, because my decision adds further comment to the Committee's determination it is therefore appropriate that a summary of this decision be also published. Pursuant to section 206(4) of the Lawyers and Conveyancers Act 2006, I direct that a summary of this decision be published in conjunction with the publication of the Committee's determination, but with all identifying details removed, particularly any details which might identify the parties or the property involved in this transaction.

DATED this 21st day of December 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:

HH as the Applicant
HN as Counsel for the Applicant
Auckland Standards Committee 2
Mr and Mrs SY as an interested party
The New Zealand Law Society