LCRO 371/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**SW** Applicant
AND	**STANDARDS COMMITTEE** Respondent

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

DECISION

Introduction

[1] Mr SW seeks a review of the decision of the Standards Committee which made findings of unsatisfactory conduct against Mr SW, arising from an own motion inquiry proceeded by the Committee which had been commenced following referral of a judgment of the District Court to the New Zealand Law Society (NZLS).

Background

[2] Mr SW acted for Mr TX over a number of years.

[3] Around 1991 Mr TX befriended a young man, Mr UY.

[4] In March 2004 Mr UY and his partner Ms VZ purchased a property in [Suburb], [City], for $383,000. That purchase was funded by a deposit of $50,000 which was paid by Mr TX and an advance from the [X] Bank. Mr SW acted for Mr UY and Ms VZ on the purchase and for the bank, who as security for the loan advanced, required a mortgage to be registered over the property.

[5] In early 2009 Mr TX instructed Mr SW to register a caveat over the [suburb] property to protect what Mr TX contended was the unpaid $50,000 loan. Mr TX died in February 2010. Mr SW was named as one of the executors in Mr TX's will and was bequeathed a five per cent share in Mr TX's residuary estate.

[6] Mr UY and Ms VZ were aware of the caveat but assumed that it would lapse after Mr TX's death.

[7] Mr UY and Ms VZ contracted to sell the [suburb] property in April 2010. Mr SW refused to release the caveat unless the loan was repaid. An agreement was reached whereby the caveat was released on the basis that the contested $50,000 was held in Mr SW's trust account pending resolution of the dispute. The house was sold in May 2011.

[8] Mr UY and Ms VZ issued proceedings in the [City] District Court against Mr SW and two co-executors seeking to recover the $50,000. The executors defended the proceedings which were tried on [X Date] before Judge [AB]. In a reserved judgment issued on [X Date] Judge [AB] dismissed Mr UY and Ms VZ's claim and awarded costs against them.

[9] The judgment issued was critical of aspects of Mr SW's conduct.

[10] Mr SW wrote to the NZLS on 20 February 2013 forwarding a copy of the judgment and providing submissions in response to the Judge's criticism.

[11] Judge [AB] sent a copy of the judgment to NZLS on 19 April 2013.

The own motion inquiry

[12] On 30 April 2013, the Standards Committee resolved to investigate on its own motion, matters raised in Mr SW's correspondence, and issues identified in the judgment of Judge [AB].

The Standards Committee determination

[13] The Committee determined that the matter should be set down for hearing, advised Mr SW accordingly, and invited him to make submissions.

[14] The issues identified by the Committee to be addressed were:

- Whether Mr SW may have had a conflict of interest in respect of the services provided.

- A consideration of Mr SW's decision not to advise the [X] Bank of the advance by Mr TX to Mr UY and Ms VZ.
- Mr SW's failure to keep adequate file notes.
- Concerns raised by Judge [AB] in his judgment of 12 February 2013, concerning Mr SW's professional conduct.

[15] Mr SW, in a response to NZLS on 18 August 2013, advised that:

- He had no reasonable grounds to decline instructions from Mr TX to attend to registering the caveat.
- He had not made a conscious decision to decide not to advise [X] Bank of the nature of the funds credited to his account.
- At the time Mr TX lodged funds to his trust account, he had no express knowledge as to the nature of the payment.
- The Judge's allegation that he had failed to keep adequate file notes could not be sustained on any objective analysis.
- A failure to keep adequate notes had not been established.
- He had not been conflicted.
- The Judge's comments concerning his professional conduct were gratuitous and unsubstantiated.

[16] The Committee delivered its decision on 9 December 2013. Matters addressed by the Committee in its decision were narrowed to two issues:

- Was there any conflict of interest in relation to the services Mr SW provided regarding the purchase of the property and his actions in relation to the caveat?
- Did the lack of file notes in the matter amount to a breach by Mr SW of his professional obligations?

[17] The Committee concluded that:

- There was insufficient evidence to establish that Mr SW had acted in breach of his obligations in relation to Mr UY and Ms VZ and [X Bank] in respect of the mortgage.

- Mr SW was conflicted in the transaction by virtue of the interests he was representing, and that conflict once established, was sufficient to ground a finding of unsatisfactory conduct.

- Mr SW's standard of record-keeping was inadequate and he had not maintained proper professional standards in this regard, such as to meet the threshold for a finding of unsatisfactory conduct.

[18] Following on from its findings of unsatisfactory conduct, the Committee:

- Censured Mr SW.

- Imposed a fine of $1,500.

- Ordered him to pay costs of $1,000.

- Directed Mr SW to take advice from another practitioner.

- Directed that Mr SW make his practice available for inspection.

- Directed that the facts of the matter be published.

Application for review

[19] Mr SW filed an application for review on 18 December 2013.

[20] Mr SW submits that:

(a) Well before Mr TX had paid $50,000 into his trust account the parties had told Mr SW that Mr TX was going to provide funds to assist Mr UY and this was common knowledge to Mr TX and Mr UY.

(b) Mr UY did not clarify the nature of the funds provided by Mr TX and after the funds were received he asked Mr UY and Mr TX to sort the nature of the funding out between themselves.

(c) Consequently he did not have information that was confidential to Mr UY and as a result rule 8.7.1(a) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 does not apply and the entire rule is irrelevant.

(d) When he received and receipted the $50,000 from Mr TX there was no record of whether it was a gift or a loan and apart from receipting those

funds into his trust account in accordance with Mr TX' instructions he had no obligation to either party.

(e) There is no evidence to support the Committee's observation that Court proceedings would have been unlikely to have occurred if file notes had been kept, and its finding that contemporaneous records would have assisted the Court in the proceedings is conjecture.

(f) There were no consequences flowing from any lack of file notes and his record-keeping cannot be said to be inadequate.

(g) The purchase of the [suburb] property in 2004 was a one-off conveyancing transaction and five years later, when he received instructions from Mr TX to lodge a caveat against the [suburb] property, he no longer had obligations to Mr UY or Ms VZ. The requirement in rule 13.5.1 to maintain independence in litigation did not apply because he was not involved in litigation when he lodged the caveat and the process of preparing and filing a caveat does not constitute litigation.

Role of the LCRO on review

[21] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

[22] In *Deliu v Hong* it was noted that a review is:[1]

> … 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.

The hearing

[23] At hearing Mr SW traversed the matters raised in his written submissions. He submitted that:

- NZLS had failed to carry out its inquiry in an objective manner.
- Criticism of his failure to keep file notes was unfair.

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

- Criticism that his failure to keep file notes was of sufficient gravity to merit the imposition of a disciplinary sanction, failed to explain why the purported failure was of significance.

- The requirement to complete a file note must be referenced to objective reasons.

- Counsel for the plaintiff in the civil proceedings had deliberately endeavoured to discredit him.

- He had "got offside" with the presiding Judge and as a consequence had been subjected to gratuitous comments from the Judge.

- No evidence was adduced to support conclusion that he had used confidential information in an improper way.

- The Committee had incorrectly concluded that a breach of rule 8.7.1 had been established.

- The Committee had found a breach of rule 13.5.1, when there was no jurisdiction for it to do so.

Analysis

Issue 1- Failure to keep file notes

[24] Mr SW's failure to keep file notes was the subject of adverse comment from the Judge who presided over the trial in the District Court. The Judge noted that he was "astounded by his [Mr SW's] evidence on this point and his self justification for his practice".[2] The Judge identified six events which were not recorded in file notes, and records his view that "any competent solicitor would have recorded such matters at the time and such records would have provided a useful aide memoire".[3]

[25] Mr SW is critical of the comment in the Committee's decision which records him reporting to the Committee that he "did not believe in file notes"[4] and says that he made no such comment. He advised that it was his practice to make file notes if he thought it appropriate to do so, but that it was his preference when wishing to record matters of significance, to record matters of relevance in an email to himself. He considered that method provided a more accurate record, as an email trail was less susceptible to manipulation after the event.

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[2] *UY v SW* DC Wellington, CIV-2011-085-461, 12 February 2013 at [178].
[3] At [180].
[4] Standards Committee determination dated 9 December 2013 at [24].

[26] A careful reading of the transcript of the trial hearing, and in particular those portions of the transcript which traversed the issue of Mr SW's approach to the taking of file notes, gives a clear indication that he advanced argument to the Court, that he considered there was no point in recording details of the transactions between Mr TX and Mr UY and Ms VZ, and that he had limited confidence in the practice of recording matters in file notes. Mr SW tells the Court, that "I don't have much belief in file notes, I mean, they can [be] concocted at any time".[5]

[27] Mr SW conceded that he gave his evidence to the Court in a "defensive" manner, and that he may have got on the wrong side of the Judge.

[28] That concession did not divert Mr SW from holding firm to his view that there was no need to document any aspects of the TX-UY-VZ transaction, and that the Judge's comments on his purported failings were, in his view, gratuitous and lacking in foundation.

[29] At first step, it is so obvious as to approach the trite to record the importance on occasions of practitioners recording matters in appropriate file notes. Previous decisions from this Office have emphasised the significance of making file notes.

[30] In LCRO 119/2010, the Review Officer noted that "The importance of written confirmation of matters discussed cannot be over-stated".[6]

[31] In LCRO 17/2012, the Review Officer in considering submission from a practitioner that it was the practitioner's policy not to keep file notes, noted that a comment of that nature was:[7]

> … an extraordinary statement for any lawyer to make. File notes are crucial records of events and telephone conversations which it is necessary for a number of reasons that a lawyer should make and retain.

[32] Mr SW submits that the Committee made findings that his failure to keep file notes constituted unsatisfactory conduct, without providing any objective analysis as to why it was necessary to do so. He can only be fairly criticised for failing to make file notes, says Mr SW, if on any objective analysis it can be established that it was necessary for him do so, and that his failure to do so had unsatisfactory consequences.

[33] Closely allied to this argument, and an underpinning theme advanced by Mr SW both at the District Court and review hearings, is his view that file notes are of limited

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[5] Transcript of hearing at 45.
[6] *CH v XO* LCRO 119/2010 at [33].
[7] *UY v Bunbury* LCRO 17/2012, 4 March 2013 at [51].

efficacy, that they can be easily manufactured "after the event" and are capable of concoction.

[34] Addressing firstly submission that file notes are capable of being concocted and manufactured after the event, of course that is the case, but the validity and importance of such an established and important component of legal practice, cannot, and should not, be compromised or diminished by argument that the practice is capable of being abused.

[35] Practitioners who regularly record matters they consider material in appropriate file notes, do so in order to ensure that there is clarity and certainty around instructions received, and that their clients' positions, and on occasions their own positions, are protected by removing or diminishing future prospect of uncertainty or argument over matters recorded in the file note.

[36] Argument that a file note can be constructed after the event does not satisfactorily negate argument that a file note should have been made at a particular time. Nor can argument that a file note can be concocted (which is clear suggestion of dishonest construction) negate or minimise the obligation on practitioners to properly file note matters in circumstances where, on the exercise of objective judgement, there is demand for a written record to be made. To argue otherwise is to diminish a legitimate and essential tool of legal practice by argument that the practice is diminished by its vulnerability to unscrupulous abuse.

[37] I do not agree with Mr SW that the Committee failed to consider the context in which the transactions occurred, and in particular, the requirement or otherwise to take file notes by reference to the particular nature of the transactions.

[38] I take it to be that Mr SW is arguing that his failure to make file notes can only be the subject of fair criticism, if it was necessary for him to record matters. He maintains that he had an accurate recall of all the significant events, and that there was no necessity for him to record the details of the transactions. He goes further. He suggests that his lack of knowledge as to whether Mr TX and Mr UY intended that Mr TX's $50,000 advance was a loan or gift obviously prevented him from making a file note which recorded the nature of the advance. He could not make a file note recording the nature of the transaction if he did not himself know what arrangement the parties had come to.

[39] The commencing point is the advance from Mr TX of $50,000 to assist Mr UY and Ms VZ with the purchase of their home. Mr SW submits that he made it clear to

both Mr TX and Mr UY, that he did not want to know the basis on which the funds were being advanced (loan or gift) and that his specific advice to both parties was to work out between themselves what the status of the advance was.

[40] In adopting that position, Mr SW argues that he was assisting both Mr TX who wished to advance the funds, and Mr UY, who needed the funds to complete the purchase. There was, says Mr SW, no need to record the nature of the transaction and indeed he says he had no knowledge as to whether the funds advanced were intended to be a gift or loan. He deliberately ensured that he was kept in the dark. I could not make a file note recording the nature of the arrangements says Mr SW, because I did not know what those arrangements were. He described the position to the Court as follows:[8]

> Ah, the advice I gave, well a conversation I had with both parties at the time was that if, um, if it was going to be advance, it was going to be loan, then I didn't want to know about it because I didn't want to have to have any responsibilities with the [X] Bank, to tell them about what was, ah, what the arrangement was. I had nothing to do with the application to [X] bank but nonetheless in those circumstances, I have obligations to the bank because I'm acting for the bank as well, I have obligations to the bank to alert them to anything that I think might be untoward or might impact on their lending. If I don't know then I can't tell them. I told them to go away and sort it out for themselves.

[41] The Standards Committee gave consideration to the issue as to whether that approach could be seen to have potentially compromised Mr SW's position with another of his clients (the bank) but determined it had insufficient information to form a view on that matter. That aspect of the Committee's decision is not challenged by Mr SW on review.

[42] Argument that Mr SW was unaware of the nature of the advance, and took deliberate steps to ensure that he remained uninformed, must be directly addressed.

[43] If Mr SW's argument is accepted that at the time the funds were advanced he deliberately avoided any discussions with the parties which would have drawn to his attention the basis on which Mr TX was advancing the funds, he is correct to argue that he could not record what he did not know.

[44] However, I do not accept Mr SW's argument that this was a transaction that did not require any formal record-keeping. This was exactly the type of transaction that would have benefited from clarification of the parties' obligations and responsibilities for the simple reason that the transaction evoked the possibility of future dispute, no better evidenced than by the fact that the circumstances surrounding the advance subsequently became the subject of proceedings before the District Court.

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[8] Above n 5, at 45-46.

[45] If Mr SW was unaware what the nature of the advance was, it would have nevertheless been helpful to record that position in an appropriate file note. I reject Mr SW's argument that his lack of knowledge precluded him from making any written record of the transaction, "I cannot record what I don't know". Advice that he had left it to the parties to sort out, should have been recorded.

[46] That omission in itself would not in my view be sufficient to warrant the imposition of a disciplinary sanction.

[47] Whilst Mr SW says that he was not aware of the nature of the advance, it was not the case that he was oblivious to the need for Mr UY and Ms VZ to give some consideration to issues that could potentially arise.

[48] When he met with Ms VZ to execute the mortgage documents it is clear that he was turning his mind to making sure that Ms VZ understood her potential obligations. When giving evidence to the District Court, Mr SW was questioned as to whether he had discussed the nature of the loan with Ms VZ when she attended at his office. He advised the Court as follows:[9]

> As to whether I discussed the $50,000, it's inconceivable that I didn't discuss that in the context, in the whole context of what the, ah, where the funds were coming from and what the arrangement was between Mr TX and Mr UY and what the obligation might be to Ms VZ and Mr UY.

[49] This was, in my view, a difficult road for the practitioner to travel. On the one hand Mr SW is saying that he is uncertain as to whether the money advanced was intended to be a gift or a loan, on the other he is advising the parties who are his clients in the transaction, of what their obligations "might be".

[50] Whilst Mr SW argues that he did not record the status of the advance as he had no need to do so, and in any event did not know whether the funds were intended to be gift or loan, he nevertheless felt it appropriate to advise Mr UY and Ms VZ that they should ensure certainty of their financial arrangements by executing a relationship property deed:[10]

> … I thought it prudent to draft a relationship property agreement. It wasn't at the instigation of Mr TX or anybody else. It was at my instigation because I had these obligations as the solicitor acting for these parties in those circumstances to discuss those things with them and to have them recorded. I also would like to cover my own back so that there is no question six months or a year down the track that I didn't address these issues. So I prepare these things as much for my own safety as for an obligation to the parties.

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[9] Above n 5, at 41.
[10] Above n 5, at 40-41.

[51] A property agreement was drafted, but not finalised. The agreement addressed the status of the funds advanced by Mr TX, as between Mr UY and Ms VZ, and recorded that Ms VZ was to have no claim on those funds.

[52] Mr SW emphasises that the need for a relationship property agreement was advanced at his instigation, and he had obligations to his clients to have the matters recorded. He further emphasises the importance for his own safety, of having a written record.

[53] Yet he remains firm in his view that he was not required or obliged to record the nature of the advance from Mr TX to Mr UY, or his understanding that the parties had reached their own agreement.

[54] If there was uncertainty as to the nature of the advance in the early stages, there was abundant opportunity subsequent for Mr SW to have made record of significant matters.

[55] In providing an overview of the opportunities offered to Mr SW to record his understanding of the transaction, the District Court Judge noted that Mr SW had no written record vouching for his understanding of the following:

- The nature of the advance from Mr TX on 3 March 2004 when received into his trust account for the credit of the plaintiffs.
- His discussion(s) with Mr UY, Ms VZ and Mr TX as to the nature of the advance from Mr TX on 3 March 2004.
- His discussion with the plaintiffs as to the relationship property agreement.
- His discussion with Mr TX which formed the basis for lodging the caveat.
- His telephone discussion with Mr UY about the caveat in 2009; and
- His telephone discussion with Ms VZ about the caveat in 2009.

[56] It is Mr SW's failure to clarify, and record in appropriate file notes, events which transpired after the purchase, which elevates the conduct in my view to a level which merits imposition of a disciplinary sanction.

[57] Instructions from Mr TX to make demand on Mr UY and Ms VZ were not documented. Mr SW argues that the issuing of the demand speaks for itself.

[58] Request made by Mr UY of Mr SW following receipt of the notice of demand, to clarify the basis upon which the fees were advanced, was not recorded.

[59] Mr SW made no record of his telephone discussion with Ms VZ.

[60] Mr SW, as noted, submits that criticism can only be made of a practitioner for failing to make a record of a particular event, if it can be established, on any objective analysis, that there was a need to do so, and that there was possibility of adverse consequences arising from a failure to do so.

[61] Argument as to whether funds advanced by Mr TX were intended to be a gift or a loan ended up in the District Court.

[62] Whilst Mr SW did not act for Mr TX in respect to the initial advance, except to the extent that he allowed his trust account to be used to facilitate the transfer of funds, he had a previous history of acting for Mr TX, and a continuing history of acting for him after the purchase.

[63] A prudent practitioner would have been acutely aware of the potential for disputes arising in circumstances where funds are advanced by one party to another, and the nature of the advance is not clarified or documented.

[64] Whilst Mr SW advances argument that his obligations to Mr UY and Ms VZ, subsequent to completing the purchase, were narrowly confined to that of an obligation to engage with them in a courteous manner, it must have been compellingly clear to him when he received instructions to make demand on Mr UY and Ms VZ, that there was possibility of serious dispute between his client and former clients and that his engagement in the transaction, and his understandings of the instructions received, may assume considerable significance. In those circumstances, on any objective analysis, the desirability of making careful file notes recording his understandings of the parties' positions would have been obvious.

[65] Mr SW submits that there were no adverse consequences arising from his failure to make file notes, and rejects the Committee's view that had he kept notes, court proceedings may have been unlikely to have proceeded.

[66] I agree with Mr SW, that suggestion that court proceedings may not have been initiated if he had kept records is speculative. The proceedings, when initially filed, were for recovery of $50,000 based on claims for an interest in a shareholders account. That claim, described by the Judge as not sitting easily with the facts, was subsequently amended.

[67] Whilst I do not agree that Mr SW's failure to provide file notes was of such significance as to have been a determining factor in whether the litigation proceeded or

not, the provision of appropriate file notes which recorded Mr SW's understandings, and in particular the instructions he received from Mr TX, would have greatly assisted the Court in clarifying the pivotal argument as to whether the funds advanced by Mr TX were intended by him to be a loan or a gift. It is reasonable to conclude that the Court, and perhaps the parties, would have likely been in the position of being able to determine the dispute more expeditiously, if they had the benefit of Mr SW having recorded appropriate file notes at the stages in the transaction identified at [179] of the District Court judgment.

[68] The District Court Judge, in considering Mr SW's role, observed that a competent solicitor would have recorded details of the transactions and concluded that his conduct was unprofessional.[11] The Committee considered that Mr SW's standard of record-keeping was inadequate and that he had not maintained proper professional standards in this regard. On looking carefully at the conduct afresh, as I am required to do, that analysis having particular regard to the thresholds established for conduct findings under ss 9 and 12 of the Lawyers and Conveyancers Act 2006 (the Act), I am satisfied that Mr SW's failure to keep file notes was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent lawyer.

Conflict of interest

[69] The Committee concluded that Mr SW had been materially conflicted, and that his conduct in that regard, met the threshold for a finding of unsatisfactory conduct to be made.

[70] In arriving at that view, the Committee concluded that Mr SW had breached rules 8.7.1 and 13.5.1.

[71] Rule 8.7.1 provides that:

> A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's practice where-
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> (a) the practice or a lawyer in the practice holds information confidential to the client; and
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> (b) disclosure of the confidential information would be likely to affect the interests of the former client and adversely; and
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> (c) there is more than negligible risk of disclosure of the confidential information; and
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> (d) the fiduciary obligation owed to the former client would be undermined.

[11] Above n 2, at 180,183(k).

[72] Rule 13.5.1 provides that:

> A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.

Rule 13.5.1 - breach

[73] At paragraph [20] of its decision, the Committee concludes that there was a significant risk that Mr SW may have been:

> … required to give evidence in relation to the circumstances in which the $50,000 payment was made, in relation to the caveat in any proceedings that may have arisen in relation to it.

[74] In my view, rule 13.5.1 has no application to the complaint.

[75] Rule 13.5.1 is engaged by those elements of the conduct rules which address a lawyer's obligation to preserve his or her independence in the course of the conducting of proceedings.

[76] The possibility of rule 13.5 being engaged arises in circumstances, where a lawyer is acting in proceedings. Mr SW was not, at any stage, acting in proceedings for either of the parties.

[77] A proceeding has been defined as:[12]

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of judgment.
> 2. Any procedural means for seeking redress from a tribunal or agency.
> 3. An act or step that is part of a larger action.
> 4. The business conducted by a court or other official body; a hearing.
> 5. *Bankruptcy*. A particular dispute or matter arising within a pending case – as opposed to the case as a whole.

[78] I do not consider that a breach of rule 13.5 is established.

Rule 8.7.1

[79] The second ground for the Committee's finding that Mr SW had a conflict of interest, was based on conclusion that he had breached rule 8.7.1, specifically that he held confidential information the nature of which was likely to affect Mr UY and Ms VZ's interests in relation to the caveat, such that there was more than a negligible risk that the information could be disclosed in relation to the caveat in a way which could undermine the fiduciary duties Mr SW owed to Mr UY and Ms VZ.

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[12] Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, West Group, United States, 2014) at 1398.

[80] Mr SW submits that the Committee erred in concluding that he had breached rule 8.7.1, and argues that the rule is only engaged in those circumstances where at first step it is established that the lawyer holds information confidential to a former client.

[81] I do not think it helpful to approach concerns regarding Mr SW's decision to act on instructions to register the caveat, from the perspective of addressing a potential breach of rule 8.7.1.

[82] It is necessary to carefully consider all aspects of Mr SW's engagement in the transaction.

[83] When considering conduct complaints, a Standards Committee may arrive at a view that the conduct complained of constitutes unsatisfactory conduct. If such conclusion is reached, a Standards Committee has access to a broad range of orders that may be made.[13]

[84] Unsatisfactory conduct is defined in s 12 of the Lawyers and Conveyancers Act 2006 (the Act) as:

> (a) Conduct … that occurs at a time when [the lawyer] 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; or
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> (b) conduct of a lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including-
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> (i) conduct unbecoming a lawyer or an incorporated law firm; or
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> (ii) unprofessional conduct; or
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> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
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> (d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

[85] Mr SW submits that he had no residual obligation to Mr UY and Ms VZ following completion of the purchase. He notes that considerable time had elapsed from when the property was purchased (2004) to the time he received instructions from Mr TX to make demand for repayment of the loan (November 2006).

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[13] Lawyers and Conveyancers Act 2006, s 156.

[86] In February 2009, Mr SW registered a caveat against the title. Mr UY contacted Mr SW at that time to discuss the caveat.

[87] Mr TX died in February 2010. Mr UY and Ms VZ mistakenly believed the caveat would automatically lapse on Mr TX's death.

[88] Mr SW submits that his obligations to Mr UY and Ms VZ ended at the time the conveyancing transaction was concluded. He sees no problem with acting for Mr TX and making demand for repayment of the funds advanced. He does not consider that he compromised any obligations to his former clients when he registered the caveat against the property.

[89] I do not agree. Mr SW placed considerable emphasis on the fact that he remained aloof from the initial transaction, to the extent that he deliberately avoided being made aware of the nature of the transaction.

[90] In the absence of that knowledge at the time the transaction was completed, Mr SW was placed in a potentially compromising position when he was subsequently instructed by Mr TX to make demand, and to lodge a caveat, particularly in the face of enquiry from Mr UY seeking clarification as to the nature of the $50,000 advance.

[91] The very real possibility of Mr TX (as it transpired in the guise of his estate) and Mr UY and Ms VZ becoming embroiled, as they did, in a litigious dispute would have been readily apparent at this juncture.

[92] In circumstances where there was no document recording the nature of the advance, no loan documentation, no gift documentation, no file notes recording the intention of the parties, and there was very real potential for Mr SW to become ensnared in the dispute (as he was) and the possibility arising of him needing to give evidence in Court in the capacity of a witness (as he was), there was manifest need for Mr SW to ensure that he remained independent.

[93] The situation became increasingly engaging for Mr SW following the death of Mr TX, when he took on the role of executor of Mr TX's estate, an estate in which he was a minor beneficiary.

[94] It is from this background that the Judge is prompted to conclusion that Mr SW had obvious conflicts of interest, and that his position was compromised by the various interests he was serving.

[95] I consider that the conduct, viewed in its totality, amounted to a breach of s 12 (a) of the Act.

[96] It has frequently been emphasised that a pivotal element of the disciplinary regime established under the Act, is its focus on consumer protection.

[97] Importantly, an assessment as to whether a practitioner's conduct is deemed to be unsatisfactory under s 12(a) of the Act, is to be measured by reference to whether the conduct falls short the standard of competence and diligence that a member of the public (not a practitioner) is entitled to expect of a reasonably competent lawyer.

[98] For a finding of unsatisfactory conduct to be established under s 12(a) it must be established that the practitioner's conduct fell short in respect to both competence and diligence.

[99] It is unnecessary to embark on exhaustive definition of those terms, but both must be appraised by reference to the offending conduct, and an evaluation as to whether that conduct falls short of what members of the public would expect of a reasonably competent lawyer.

[100] Competency involves the notion of the practitioner conducting his professional affairs in a capable and able manner. Diligence has been defined as, "care; caution; the attention and care required from a person in a given situation".[14]

[101] In giving careful consideration to the conduct in its totality, I arrive at the view that Mr SW's failure to keep accurate records at significant points in the transaction, and his preparedness to act against his former clients in circumstances where there was such potential for him to be exposed to real risk of conflict, fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent lawyer.

Costs

[102] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[103] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of $1,200 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision. I note that whilst the review proceeded by way of a formal hearing, I have set the level of costs at a level equivalent to a cost orders imposed where a review of average complexity is

[14] Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, West Group, United States, 2014) at 522.

determined “on the papers” rather than imposing costs by reference to the guideline figures for a hearing in person.

[104] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006.

Decision

[1] The decision of the Standards Committee is confirmed as to the finding that there has been unsatisfactory conduct on the part of the practitioner pursuant to s 12 of the Act.

[2] The finding of unsatisfactory conduct is established pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006.

[3] The findings that the Practitioner breached Rules 8.7.1 and 13.5.1 are reversed.

[4] Orders (i) to (vi) at [28] of the Standards Committee decision of 9 December 2013 are confirmed.

DATED this 14th day of September 2015

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R Maidment
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:

SW as the Applicant
Standards Committee
New Zealand Law Society