LCRO 39/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 1
BETWEEN	**MR and MRS DL** of [North Island] Applicants
AND	**MR WR** **and** **MR WQ** Respondents

Background

[1] Mr and Mrs DL were the tenants of premises in [North Island].

[2] The lease provided for the tenant to pay outgoings. Rather than providing invoices for the outgoings, the landlord adopted an arrangement whereby the tenant was to make regular payments on account of outgoings at the same time as rental payments. This process is provided for in paragraph 3.5 of the lease. Paragraph 3.6 of the lease provides that details of the actual outgoings are to be provided as at 31 March in each year of the tenancy.

[3] The DL sublet part of the premises and the subtenants paid rent at various times directly to the landlord.

[4] The monthly payments made by the DL were irregular, and they state that neither the landlord or themselves kept adequate records to enable the amounts due to be readily identified from time to time.

[5] Mr and Mrs DL also claimed that certain amounts should be set off against the payments due to the landlord.

[6] The end result was that there was a considerable degree of uncertainty over the amount that was actually due to the landlord.

[7] In June 2009 the landlord applied for summary judgement against the DL in the sum of $164,175.88 plus interest and costs.

[8] Mr and Mrs DL instructed ABL Legal to represent them. Their first meeting was with Mr WR. He reviewed the proceedings and subsequently reported to Mr and Mrs DL. With their agreement, Mr WR enlisted the aid of Mr WQ, who was a staff solicitor in his office with some four years experience.

[9] Mr and Mrs DL disputed the amount claimed by the landlord and provided their own spreadsheets. These spreadsheets showed that the landlord owed Mr and Mrs DL $82,395.88 which was a result in part of taking into account amounts that Mr and Mrs DL alleged the landlord owed them for “contra” deals. In addition, Mr and Mrs DL considered that they were entitled to counterclaim for damages.

[10] The areas in contention were identified by the landlord’s solicitors as being (i) the correct amount of rental due from October 2006 (ii) the outgoings due in terms of the lease(iii) the claims for set off (iv) the sum of the payments made (v) how interest was to be calculated.

[11] By December 2009 it became clear that there were legal and factual disputes necessitating representation by a solicitor with greater experience than Mr WQ. Mr WR was unavailable to assist and consequently Mr WO was instructed.

[12] Submissions were prepared and sent to Mr WO. The matter was set down for a defended summary judgement hearing on 22 January 2010.

[13] On the day of the hearing Mr WQ attended the Court together with Mr DL and Mr WO. Prior to the hearing, Mr WO and Mr WQ met with the landlord’s counsel to discuss the issues.

[14] Liability was not an issue. Mr and Mrs DL were clearly liable under the lease. The question was one of quantum.

[15] Prior to the hearing Mr WO had prepared his own calculations, and had come to the view that the minimum liability for Mr and Mrs DL was $80,000.00.

[16] The landlord's counsel had also carried out a similar exercise and come to the view that the minimum amount that was due to the landlord was $75,000. He had prepared a spreadsheet which recorded how this figure was arrived at. This spreadsheet was tabled at the negotiations.

[17] Discussions took place, some of them in the presence of Mr DL, and some not.

[18] After clarification that the premises had been re let from an earlier date than had been claimed by the plaintiff, the sum of $50,000.00 was agreed as an amount at which the claim could be settled.

[19] Leaving aside what Mr and Mrs DL understood to be their options, the facts are that they agreed to settle at the sum of $50,000.00 and judgement was entered for that amount by consent. There was no provision for the judgement debt to be paid by monthly instalments.

[20] On the Tuesday following the hearing (which was on a Friday) Mr DL emailed Mr WR and commenced his email with the words "I thanked [Mr] [WQ] for his work on Friday. I thought his representation to be very good".

[21] He then went on to say that "I have to say though that I consider it did not go well".

[22] He then raised several matters where he considered Mr WO had not been provided with sufficient "tools to work with".

[23] One of these related to the commencement date of the new lease which the landlord had deposed was 1 August 2008, whereas the lease had commenced on 1 June 2008.

[24] Another matter raised by Mr DL related to the sum of $15,000.00 which Mr and Mrs DL claimed was due to them as an incentive payment by the landlord.

[25] Mr DL also noted that he and his wife would be in a difficult situation because he did not expect the landlord to agree to the judgement debt being paid off at the rate of $500.00 per month.

[26] Correspondence ensued between Mr DL and Mr WR culminating in a complaint being lodged with the Complaints Service of the New Zealand Law Society on 16 June 2010 by Mr and Mrs DL.

The Complaint and the Standards Committee Decision

[27] Mr and Mrs DL complain that they had received inadequate representation and poor advice leading to an unjust award. The matters complained of involved:

1) Lack of preparedness.

2) Lack of advice.

3) Lack of diligence in spreadsheet analysis.

4) Not taking cognisance of their statements that the landlords were lying.

5) Not detailing the options sufficiently. Telling Mrs DL that she had no option whatsoever.

6) Engaging a barrister who wasn't comprehensively briefed and who appeared to have a mindset that the landlord's position was correct and that his role was solely that of a damage control negotiator.

7) Being unable to go to the Court for a decision, due to the fact that Mr WO had the fixed opinion that they owed the plaintiff a minimum of $80,000.00.

[28] Subsequent to the complaint being lodged, the landlord filed bankruptcy proceedings against Mr and Mrs DL. In the course of those proceedings, an affidavit was filed on behalf of the landlord in which it was deposed as follows:

> Prior to the hearing [the landlord's] lawyer prepared a schedule adopting the "best case scenario" for Mr and Mrs [DL]. It calculates the rent, outgoings and interest due on the basis that, unless there was clear evidence to the contrary, the sum due and the rent paid accorded with Mr [DL] own spreadsheet. A copy of the schedule is annexed and marked "C". Even adopting the best case scenario for them, the [DL] owed [the landlord] approximately $75,000.00.

[29] This spreadsheet was sent by Mr and Mrs DL to the Complaints Service under cover of a letter in which Mr DL stated he had never seen the revised spreadsheet and that it had been withheld from him by Mr WO and Mr WQ at the District Court.

[30] Having decided to inquire into the complaints and holding a hearing on the papers which included all submissions received from the parties, the Standards Committee determined to take no further action on either of the complaints against Mr WR or Mr WQ. The Standards Committee provided the following reasons:

1) Mr WR gave proper advice, drafted and filed appropriate pleadings, obtained an adjournment and, in conjunction with Mr WQ, properly briefed Mr WO. He was not present at the hearing.

2) Mr WQ also properly represented the complainants. There was no untoward pressure to accept any settlement offer. There was a negotiation before the hearing which is not unusual and both complainants were consulted on the settlement offer and agreed to it. The quantum represented a significant discount on the claim being pursued by the creditor. If it was agreed, the repayment of $500 per month should have been in the written agreement but it is doubtful this was the case as the creditor disputes it and Mr DL signed the agreement without reference to it.

3) The complainants appear to have later regretted entering into the settlement agreement and blame their legal advisors for that position but that is not a well founded complaint. This was a commercial dispute and was properly dealt with in that context.

[31] Mr and Mrs DL have applied for a review of that decision.

Review

[32] A review hearing was held in Wellington on 8 September 2011. In attendance, were Mr and Mrs DL, Messrs WR and WQ and their counsel Mr WP, and Mr WO.

[33] The substance of the complaint by Mr and Mrs DL was that they had received inadequate representation and poor advice from Messrs WR and WQ which led to an unjust award against them. In their review application, and at the hearing, Mr and Mrs DL emphasised that they did not consider the Standards Committee had given due consideration to the fact that the landlord had produced a revised spreadsheet at the Court which they are adamant had not been shown to them. They say that they only became aware of the existence of this revised spreadsheet during the course of the High Court bankruptcy proceedings in September 2010 after they had filed their complaint with the Complaints Service. They had provided the revised spreadsheet to the Complaints Service and allege that this is evidence of collusion between the landlord's solicitor and Mr WO. A separate complaint has been made against Mr WO.

[34] They allege that Messrs WR and WQ have been untruthful in the statutory declarations provided by them to the Complaints Service, and in addition, that various

"contra" payments had not been taken into account in establishing the figure agreed to be paid to the landlord.

The Law

[35] It is important to note that there must be a finding that the conduct of Messrs WR and/or WQ constituted unsatisfactory conduct before any Orders can be made against them. Unsatisfactory conduct is defined in section 12 (a) of the Lawyers and Conveyancers Act 2006 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.

[36] The advice and representation provided must therefore fall below that of a reasonably competent lawyer. This is an objective assessment and is one to be made by what a member of the public might expect.

[37] It is relevant in this regard that membership of the Standards Committee includes lay persons who are able to bring their perspective to an examination of the complaint. The conclusions of the Standards Committee are not to be lightly disregarded.

[38] In this instance, having inquired into the matter and conducted a hearing on the papers, the Standards Committee determined that no further action was appropriate.

The spreadsheet

[39] As noted above, Mr and Mrs DL consider that the Standards Committee had not taken note of the revised spreadsheet presented during the course of the bankruptcy proceedings. They allege that this had been withheld by Messrs WO and WQ at the settlement negotiations and that Mr DL had therefore been misled into thinking that the settlement figure had been negotiated down from the amount of $164,000.00 claimed by the landlord, whereas in fact, the landlord had reduced its claim to $75,000.00. Mr and Mrs DL therefore consider the negotiated settlement was a poor outcome.

[40] At the review hearing, Mr and Mrs DL stated that the spreadsheet was presented to the High Court in the bankruptcy proceedings as representing the amount claimed by the landlord. Whether that is correct or not can only be verified by reference to a transcript of those proceedings. However, in this regard, it is relevant to refer to the affidavit provided on behalf of the landlord dated 3 September 2010 sworn in support of those proceedings. At paragraph 16 of that affidavit the deponent stated:-

> Prior to the hearing, [the landlord's] lawyer prepared a schedule adopting the 'best-case scenario' for Mr and Mrs [DL]. It calculates the rent, outgoings and interest due on the basis that, unless there was clear evidence to the contrary, the sum due and the rent paid accorded with Mr [DL]' own spreadsheet. A copy of the schedule is annexed and marked "C". Even adopting the best-case scenario for them, the [DL] owed [the landlord] approximately $75,000.

[41] That is not a statement that the amount claimed was reduced to that figure - it is a statement that the figure of $75,000.00 represented the best-case scenario for Mr and Mrs DL. The statement of claim had not been amended and the claim before the Court was the original claim of $164,175.88 plus interest and costs.

[42] It is unlikely that the landlord's counsel would have presented the matter to the Court otherwise than the manner in which it is expressed in the affidavit.

[43] Viewed in this way, the spreadsheet showing a balance of $75,000.00 assumes less relevance than is attributed to it by Mr and Mrs DL.

[44] Mr DL states that he was unaware of the existence of the spreadsheet until the bankruptcy proceedings, and that its existence had not been revealed to him by either Mr WO or Mr WQ during the settlement negotiations. Both of them advised at the review hearing that they had not been provided with a copy of the spreadsheet by the landlord's counsel, and it is unlikely that they would have been. The spreadsheet had been prepared by the landlord's lawyer for his own purposes in establishing what the bottom line figure would be in any settlement negotiations. If the matter did not settle, then he would not want opposing counsel to be in possession of the detail of what his client was prepared to concede, as this would alert the defence to the areas of the claim where the landlord's counsel considered their position was weak.

[45] Similarly, Messrs WO and WQ would not have presented this to Mr DL as being the amount that the landlord had reduced its claim to, as that was not the case. The most that could have been said was that the landlord was prepared to settle at that figure, and that is what occurred.

[46] Consequently, there is no reason to consider that the Standards Committee failed to appreciate the significance of that spreadsheet - its significance was less than what has been attributed to it by Mr and Mrs DL.

Mr WR

[47] Mr DL initial contact with ABL Legal was with Mr WR whose role after handing the file to Mr WQ was one of overview. He was not present at the Court.

[48] Mr DL however points out that he included Mr WR in various emails, and inasmuch as he was responsible for supervising Mr WQ, he is equally as culpable as Mr WQ.

[49] That does not correctly express the position in professional disciplinary matters. There is no vicarious liability for another's actions. The complaint that could be levelled against Mr WR if Mr WQ is found to be lacking, is one of failing to properly supervise Mr WQ as was his responsibility both as a partner of the firm, and in terms of the express obligations to Mr and Mrs DL.

[50] Whichever way one approaches the issue however, it follows that Mr WR will only ever assume any culpability if a finding is made against Mr WQ.

[51] It is appropriate therefore that this review addresses primarily the conduct of Mr WQ.

[52] Mr and Mrs DL refer to a letter sent by Mr WR to the Legal Services Agency in June 2010 with regard to the terms of settlement, in which he stated that the agreed settlement figure (which he recorded as being $55,000.00) was to be paid by monthly instalments of $500.00. Mr WQ however correctly stated in his declaration to the Standards Committee that he reported to his clients that the settlement did not include an agreement to accept monthly instalments.

[53] It is not clear to me what weight Mr and Mrs DL are putting on the incorrect information included in the letter to the Legal Services Agency. It was explained by Mr WP on behalf of Mr WR, that it was an error on Mr WR's behalf, and that Mr and Mrs DL were well aware of the incorrect information contained within the statement, as they had been advised by Mr WR in July 2010 that he was aware that he had made a mistake in his letter. In addition, Mr and Mrs DL themselves were well aware that the landlord had not agreed to this, as they had expressed doubt that the landlord would agree to this, immediately after the hearing in January 2010.

[54] There is no evidence of deceit or collusion provided by this evidence.

Mr WQ

[55] As noted, Mr WQ was the solicitor primarily responsible to represent Mr and Mrs DL. He was the solicitor who prepared the Notice of Opposition, the defendants' affidavits, and submissions. He briefed Mr WO, attended the District Court and participated in the settlement negotiations, although I understand these were primarily conducted by Mr WO.

[56] Any shortcomings in his performance would therefore necessarily involve the preparation of the documents, the advice provided prior to the date of hearing, and the instructions provided to Mr WO.

[57] The area of the review application which I consider deserves closest attention is the claim made in respect of the counter claimed amounts which Mr & Mrs DL are currently pursuing. This is because they allege that these amounts were not taken into account when negotiating the settlement figure.

[58] Of the amount claimed ($54,957.78) the claim for $15,000.00 was specifically referred to in the complaint, but other than the general allegation of a lack of analysis of the spreadsheets, the complaint in respect of the claims for the remaining amounts were not apparent in the material before the Standards Committee. To the extent that this review is a review of matters before the Committee, the other claims should be disregarded. I will however address those so that no issues remain outstanding.

[59] The claim for $15,000.00 was part of the counter claim and defence put forward by Mr and Mrs DL. There was disputed evidence in connection with the claim, and the landlord rejected the claim on the basis that it was statue barred. It was therefore a matter which was brought into the settlement negotiations in a general way and as part of the tradeoffs that necessarily take place in these circumstances. In that the settlement negotiations were primarily conducted by Mr WO, there is nothing further that needs to be said in connection with this, expect to observe that the claim for this amount had been included in Mr and Mrs DL opposition to the landlord's claim.

[60] A significant difference between the DL' spreadsheet and that of the landlord, was whether the subtenants' payments had been accounted for. A cursory examination of the spreadsheet produced by the landlord would indicate that the credits for the tenants' payments had been increased in several instances which presumably took into account the sub tenants' payments.

[61] In addition, settlement discussions such as those which took place, in the end, come down to what each of the parties will accept to settle the matter. To that extent therefore the detail of the figures, although they must have some foundation, will not necessarily be precise.

[62] Mr WO had formed the view that after making provision for the earlier commencement of the new lease, the sum of $50,000 represented the best that could be achieved in negotiation. It was certainly a long way from the original sum claimed by the landlord, and insofar as Mr WQ is concerned, it cannot be suggested that he

lacked the necessary degree of competence or diligence in allowing to settlement to proceed on this basis.

[63] It must not be forgotten that Mr DL agreed to the settlement figure. He was not included in all of the settlement discussions, but clearly his instructions to settle at that figure were required. He had a very detailed knowledge of the figures and it was not unreasonable that Mr WQ should adopt the view that if Mr DL agreed to the figure then it was in order.

[64] Mr DL claims however that he was not given any option but to accept the figure. The options presented were to proceed with the hearing or to accept the agreed figured. Mr DL is under the impression that because the landlord had produced a revised spreadsheet showing the amount due as being $75,000.00 then that was the amount claimed by the landlord. In support of this contention, he states that this is how the spreadsheet was presented in the bankruptcy proceedings.

[65] Mr WO exercised his professional judgement in recommending that the figure be accepted. A barrister or solicitor has a duty to promote settlement where it is a realistic outcome, and that is what Mr WO did. There is considerable judicial comment as to the duty of a solicitor in these circumstances.

[66] Mr WO was the lead counsel in these negotiations, and it was reasonable for Mr WQ to defer to his recommendations.

Other Matters

[67] Having reached this position in my deliberations, I have returned to the detail of the complaint lodged by Mr and Mrs DL. There is no evidence that Mr WQ was unprepared for the hearing or had not adequately advised Mr and Mrs DL up to that point. The only aspect of the complaint that has not been addressed is the advice to Mrs DL. She states that when Mr WQ telephoned her she formed the view that there was no option but to agree to the settlement.

[68] Mr DL states this differently when he says to the Complaints Service in his reply dated 6 July 2010 to Mr WR's comments: "No other options were given, we had to accept at the $50,000.00 or go to Court at the "[Mr] [WO] given figure" of $134,000.00 and have our barrister argue from a point that we owed the plaintiffs at least $80,000.00". This is not a single option. The situation as stated by Mr DL was correct. The settlement could either be accepted or the matter would proceed to be argued on

the landlord's claim which had not been amended, and I am unsure as to the relevance of the figure of $134,000.00.

[69] However to present this situation as exposing Mrs DL to "undue duress" is unfair. Mrs DL had not been involved to any great extent in the proceedings, and it would have been difficult for Mr WQ to explain to her in a short telephone conversation all of the ground that had been covered during the day. As often happens in these circumstances, one person takes the lead in dealing with all of the detail of the proceedings, and in this instance that was Mr DL. Mr DL had agreed to the settlement and presented with the news that he had agreed, it is not surprising that Mrs DL would have felt obliged to agree. The pressure to agree was not necessarily imposed by Mr WQ.

[70] In the review application, Mr and Mrs DL also refer to a statement made by Mr WQ in his declaration provided to the Standards Committee that if the matter proceeded they would be liable for removing improvements to the premises. This was not correct as the plan attached to the lease shows the mezzanine floor, although it is only when explained by Mr DL that one is able to identify that.

[1] Mr WQ has explained that this comment was made following a statement by the landlord's lawyer that his clients reserved the right to claim these amounts if the matter did not settle. He too was wrong and any claim for this would have been readily defended once Mr DL pointed out the error.

[71] As with the comments made about Mr WR, it is unclear to me what weight is placed on this error. It is an understandable mistake and indeed was only a repeat of a mistake made by the landlord's counsel and nothing resulted from it. It is certainly not a matter on which a finding of unsatisfactory conduct could be founded.

Decision

[72] In all of these circumstances I do not consider that there is any reason to depart from the conclusions of the Standards Committee. Pursuant to Section 211 (1)(a) of the Layers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 29th day of September 2011

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:

Mr and Mrs DL as the Applicants
Mr WR as a Respondent
Mr WQ as a Respondent
Mr WP as the Respondents Counsel
The Wellington Standards Committee 1
The New Zealand Law Society
The Secretary for Justice (with Applicants' details anonymised)