LCRO 49/09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Auckland Standards Committee No 1
BETWEEN	**CLIENT C** of Auckland
	Applicant
AND	**LAWYER H** of Auckland
	Respondent

DECISION

Background

[1] Client C complained to the New Zealand Law Society regarding the conduct of Lawyer H. The matter was referred to the Auckland Standards Committee 1 for consideration. Client C has an interest in a property owning company XXXX. Lawyer H acted for XXXX in respect of a disputed rental review with a tenant. Client C complained that Lawyer H failed to identify that XXXX had failed to properly commence the rental review process. He complained further that a statutory demand was issued and an opposition to it being set aside was pursued on the assumption that the rental review process were properly commenced and that costs were needlessly incurred by those proceedings. Client C also made allegations relating to the nature of certain advice given to him by Lawyer H and suggested that Lawyer H "smelt of alcohol" on two occasions.

[2] On 26 February 2009 the Auckland Standards Committee 1 resolved to take no action on the complaint. That decision was notified to Client C on 4 March 2009. Client C sought a review of the decision of the Standards Committee by an application received by this office on 6 April 2009. The parties have consented to this matter being considered without a formal hearing and

therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and by the Standards Committee.

Applicable standards

[3] The core aspect of this review concerns the manner in which Lawyer H reviewed the XXXX file concerning the rent review. That is conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. I observe that some subsequent aspects of the complaint relate to the manner in which the opposition to set aside a statutory demand was conducted in October 2008. However, Client C complains that those subsequent actions were founded on an alleged breach in respect of the manner in which Lawyer H conducted a review of the file of Client C's solicitor.

[4] On 1 August 2008 the Lawyers and Conveyancers Act 2006 and related regulations came into force. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service since that date may be the basis for a regulatory response by the professional body.

[5] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct, conduct unbecoming or serious negligence. Misconduct was generally considered to be conduct:

> "*of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise."*

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners"

(*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). In respect of the core complaint that Lawyer H provided an opinion which was erroneous, there can be no suggestion that the thresholds of misconduct or conduct unbecoming were reached.

[6] The complaint of Client C is that Lawyer H was negligent in the way the file was reviewed. For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standards is that:

> the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

I now turn to consider whether this standard was breached.

Alleged failure to detect error

[7] Client C states that Lawyer H was retained as counsel to review the rent review file as a whole with a view to securing the rent review that XXXX thought that it was entitled to from its tenant. He argues that Lawyer H failed to detect that the rent review process had not been properly commenced. It is accepted that the rent review process was in fact flawed because the notice of the revised rental did not meet the formalities required by the terms of the lease. In the opinion provided on 1 February 2008 Lawyer H did not identify this flaw. The focus of the opinion was on whether or not the tenant had objected to the revised rental in a timely way. Lawyer H considered that this had not occurred and on this basis concluded that XXXX was in a strong position to claim the revised rental.

[8] Lawyer H, in his response to the complaint to the Law Society, states that he was instructed to provide an opinion on whether the tenant could dispute and/or arbitrate the new rental sought. He states that he was not asked for an opinion as to whether the rent review had been properly commenced. This is obviously a dispute about the scope of the instructions given to Lawyer H. It appears that the instructions were not given in writing.

[9] For the purposes of this review I am prepared to assume that the instructions to Lawyer H were to provide an opinion on the general merits of the landlord's position rather than a narrow opinion of whether or not the new rental could be objected to.

[10] If it is accepted that Lawyer H was required to provide a general opinion the question becomes whether Lawyer H was negligent in failing to identify the fact that the notice of the rent review did not meet the formalities required by the lease. The flaw in particular was that the document presented was simply a notification by a valuer of the appropriate rental for the premises addressed to Client C. The Court later ruled that the notice needed to be "under the hand" of a person authorised by the landlord and this was not the case.

[11] It is well established that the bare fact that a court reaches a conclusion that differs from an opinion provided by a lawyer does not show negligence. The question is whether the opinion provided was one which a reasonable practitioner could have arrived at after competent and diligent research. Client C observes that he paid some $8 000 for the opinion which related to around 16 hours of Lawyer H's time. The invoice (dated 3 March 2008) however records that some of the time relates to other attendances such as meetings and perusing correspondence from other solicitors. However, it would seem that a substantial period of time was properly spent perusing the relevant documents and presumably on ascertaining the legal position. On the assumption that a general retainer existed, it would be reasonable to expect a competent barrister to consider whether the formalities of the rent review were properly commenced.

[12] Lawyer H did in fact consider this matter in his opinion (of 1 February 2008) in which he stated that "it appears that you gave the tenant your valuer's certificate on 13th September 2007…". He did not however identify the fact that the certificate was not given "under the hand" of a person authorised by the landlord. It should also be noted that at the outset Lawyer H was of the view (and Client C later deposed) that the notice had been given by Client C's former solicitor. Had the notice been delivered with a covering letter from XXXX's solicitors it is possible that the Court would have found that the notice was given "under the hand" of a person authorised by the landlord. However, representatives of the tenant stated in affidavits filed in the statutory demand proceedings that the notice had been given by Client C showing the valuer's letter to a representative of the tenant. Client C later filed a further affidavit stating that he had handed the valuer's letter to the representative of the tenant. It is therefore not at all clear that the facts of how the notice was actually provided to the tenant were apparent from the file that Lawyer H was required to review.

[13] The “under the hand” point was raised for the first time in the proceedings in the High Court to set aside a statutory demand of the landlord against the tenant in respect of legal expenses that the landlord considered the tenant liable for under the terms of the lease. It appears that this objection to the notice of the revised rental was not raised until very late in the day and was in fact not raised at all in the rent review process itself (which appears to have been finally resolved by agreement). It is fair to say that the point is a highly technical one.

[14] The Court of Appeal has stated that a lawyer is not liable "for mistake in a nice and difficult point of law but he must measure up to the degree of professional competence which would be exercised by the reasonably competent and careful solicitor in the particular circumstances”: *Bannerman Brydone Folster & Company v Murray and Another* [1972] NZLR 411 per Woodhouse J at page 429. Applying this standard I consider that a reasonably competent and diligent barrister could give an opinion on the overall merits of the rent review process which did not identify this particular flaw. This is what Lawyer H in fact did. In this regard I no not consider him to have been negligent.

[15] In any event, if I were wrong in concluding that the failure of Lawyer H to identify this defect was not negligent it is clear that the negligence complained of did not approach the standard of being of “such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute”.

Other allegations

[16] In his application for review Client C also states that the Standards Committee did not consider his allegations that Lawyer H had lied and that he smelled of alcohol. In respect of the differing version of events presented by the respective parties I do not consider that there is any need to make findings of credibility. On most matters of substance the parties are in general agreement. On other matters (such as the meeting after the hearing and the advice given on receipt of the affidavits and submission of the tenant) the difference is not substantial and the error by one party or the other does not appear invidious and is easily explicable by simply mistaken recollection.

[17] Client C has suggested that Lawyer H dismissed the affidavits and submissions filed on behalf of the tenants in the statutory demand proceedings as irrelevant. I do not consider these matters to be at the heart of the complaint; however, I deal with them for completeness. The suggestion that Lawyer H advised Client C that the affidavits of the tenant were irrelevant is at odds with the fact that Lawyer H arranged for Client C to file a further affidavit in the matter. While I do not consider it material, I also consider it unlikely that Lawyer H would have suggested that the submissions filed on behalf of the tenant were "irrelevant" as Client C alleged. Lawyer H states that he advised Client C that the nature of the objection had changed to focus on the technical non-compliance with the terms of the lease upon which the tenant finally prevailed. There is no written evidence of this advice, but I consider it likely that a discussion as to the nature of the arguments in the tenant's submissions occurred. If Lawyer H expressed an opinion that the submissions lacked merit, this is likely to have been his genuine opinion on the matter. Client C may have construed this to mean that the submissions were "irrelevant". As such I do not consider that the allegation of Client C in this regard raises any matters of professional conduct.

[18] The allegation that Lawyer H smelled of alcohol could be considered a serious one, particularly if the implication is that he was drunk in court on 10 October 2008. The allegation is strongly denied by Lawyer H. Other than the allegation of Client C and the denial of Lawyer H there is no other evidence on this matter. I note that the hearing of 10 October was conducted in the morning. It is inherently unlikely that counsel would have consumed alcohol prior to appearing in court at any time, let alone in the morning. The allegation of Client C in this regard is not proved.

[19] I do not consider that there is anything of concern in Client C's bare allegation that Lawyer H's office smelled of alcohol at a meeting on 29 September 2008.

Decision

[20] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee 1 is confirmed.

DATED this 27th day of May 2009

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Duncan Webb
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:

Client C as applicant
Lawyer H as respondent
The Auckland Standards Committee 1
The New Zealand Law Society