LCRO 68/2011

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	**Mr and Mrs NA** Of [South Island] Applicant
AND	**AL** of [South island] Respondent

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

DECISION

[1] Mr and Mrs NA (the Applicants) sought a review of a decision by the Standards Committee declining to uphold their complaints against Mr AL (the Practitioner).

[2] The background giving rise to the complaints was set out in some detail in the Standards Committee decision, and it is not necessary to repeat the details here except insofar as they directly concern the grounds for the review.

[3] In brief, the Applicants operated a cafe in premises that had been purchased by R Limited (the developer) who wished to redevelop the buildings. Although I shall refer to the Applicants throughout, it is in fact their company which was the lessee of the premises. The Applicants entered into an arrangement with the developer, in the nature of a heads of agreement, under which the Applicants agreed to vacate the premises to allow the development to take proceed, compensation was payable to the Applicants, and which provided for the Applicants re-entry to the premises under a new leasing agreement with the developer.

[4] The Applicants had not sought legal advice before signing that agreement. It subsequently turned out to be inadequate in many significant ways. When a dispute later arose about whether the premises were in a sufficiently completed state for the Applicants to re-enter and fit out the premises, they turned to the Practitioner for legal assistance.

[5] The Practitioner's initial focus was on achieving agreement as to the terms of re-entry and also the terms of new lease between the parties; disagreements between the parties delayed resolving these matters. The developer eventually cancelled the agreement with the Applicants and signed up a new tenant for the premises, leaving the Applicants without any business to return to. Although the Applicants later won a substantial damages award in the Court, they were unable to realise the judgment because the developer had become bankrupt.

[6] Out of these events the Applicants lodged complaints with the New Zealand Law Society, alleging that the Practitioner had failed in his professional duties towards them. The three main complaints were:

a) The Practitioner had delayed in filing proceedings for interim relief by way of an injunction, a delay that they claimed was pivotal to the ultimate outcome of losing their business;

b) Overcharging; and

c) Failure to inform them of alternative financing streams (legal aid) when their funds ran out.

[7] The complaints were investigated by the Standards Committee who noted that these events had occurred prior to the commencement of the Lawyers and Conveyancers Act 2006 (the Act), and were therefore to be considered under the rules applicable under the Law Practitioners Act 1982. The Standards Committee concluded its investigation, stating that it was satisfied that no further action was necessary or appropriate pursuant to Section 145(2)(c) of the 2006 Act.

[8] The Committee noted that the Applicants had been adequately advised in respect of decisions made at critical times, which were identified by the Committee as:

a) the attempts made in September 2006 to negotiate terms on which the Applicants could re-enter the premises rather than issuing proceedings for urgent interim relief; and

b) In relation to cancelling the agreement and suing for damages.

The Committee was satisfied that the risks had been made clear to the Applicants from a relatively early stage, and they elected to continue with the proceedings.

[9] The Standards Committee perceived the Practitioner to be alive to the matter of eligibility for legal aid and the ability to apply for hardship relief for Court fees, and it was satisfied that the Applicants' position in respect of these matters had been properly considered.

[10] In relation to the alleged overcharging, the Committee noted that the Practitioner accepted he could have done more to keep the Applicants aware of the costs situation, but also noted that substantial concessions had been made to the bills and that some of the debt had been written off. The Committee acknowledged that communications could have been better but it considered that any failure was insufficient for a finding of unsatisfactory conduct against the Practitioner.

Review Application

[11] The Applicants sought a review because they felt that inadequate weight had been given to the delays by the Practitioner in applying for interim relief.

[12] They also considered that there had been a lack of consideration by the Committee to the complaint of excessive overcharging by the Practitioner. They added that no importance had been placed on the advice given by the Practitioner not to appeal the initial injunction and overall they felt that their responses to the Practitioner's submissions had been "virtually overlooked" by the Committee particularly with regard to their financial situation.

[13] This review has been conducted "on the papers" in accordance with Section 206 of the Act, with the consent of the parties.

Considerations

Applicable Standard

[14] The conduct complained of occurred prior to the commencement of the Lawyers and Conveyancers Act 2006 (commencement date 1 August 2008). It is significant to

note this because the complaints therefore fall under the transitional provisions of section 351 of this Act. Section 351 provides that a Standards Committee shall have no jurisdiction to consider a complaint about conduct that occurred prior to the commencement of the Act unless the conduct could have led to proceedings of a disciplinary nature under the Law Practitioners Act 1982.

[15] The Standards Committee's decision was less than clear about what professional standard was applicable to the conduct being complained about. In clause 4.1 of the decision, the Committee referred to section 351, but its relevance to the complaint appears to have mainly focused on the available penalties rather than explaining that the applicable professional standard was that which applied under the former Law Practitioners Act (now repealed).

[16] This is relevant because the disciplinary standard by which the complaints are to be measured is higher under the former Act. A more serious degree of wrongdoing needs to be shown before a Standards Committee has jurisdiction to impose an adverse finding (and any penalty) under the Law Practitioners Act, than conduct which could lead to an adverse finding under the Lawyers and Conveyancers Act. The concept of "unsatisfactory conduct" (a lesser degree of wrongdoing) was introduced by the later Act, and has no application to conduct that predates 1 August 2008.

[17] Under the Law Practitioners Act findings could be made of "misconduct", or "conduct unbecoming a barrister or solicitor". A finding of misconduct may follow in respect of the conduct considered to be "reprehensible, inexcusable, disgraceful, deplorable, or dishonourable." (*Auckland District Law Society v Ford* [2001] NZAR 598).

[18] "Conduct unbecoming" was generally perceived to be at a lower threshold, but required evidence of negligence or incompetence by the Practitioner in his professional capacity, of such degree or so frequent as to reflect on the lawyer's fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute. Conduct which amounts to mere negligence, or an error of judgment, will not be misconduct, since these do not reflect on the Practitioner integrity or ability to continue to practice law.

[19] By virtue of section 351 of the Act, with regard to complaints made after 1 August 2008, about conduct that arose prior to that date, the jurisdiction of the Standards Committee arises only if the conduct reaches a threshold that could have

led to disciplinary proceedings against the Practitioner. If it does not, a Standards Committee is obliged to decline jurisdiction.

[20] In summary, the conduct complained of arose prior to the pivotal date of 1 August 2008. The Standards Committee made no adverse finding against the Practitioner in relation to the complaints. The Applicant have sought a review and I am obliged have considered their complaints against the professional standards that applied under the Law Practitioners Act.

Complaint of delay (by the Practitioner) in issuing proceedings for Injunctive Relief

[21] The evidence was that the Practitioner filed proceedings (seeking an interim injunction) on 5 October 2006. The next day the developer entered into a new agreement to lease with a third party. The Court declined to grant the interim injunction, observing that the Applicants had had a period of six weeks to file the application which would have been dealt with swiftly, and could have maintained the position without the involvement of any third party obtaining the benefit of the lease. Accepting that the delay in making the application had a direct bearing on the lease having been entered into, the Judge considered that specific performance (of the original agreement relied on by the Applicants) would risk substantial injustice to the new tenant.

[22] The Applicants have relied significantly on the words of the Judge in supporting their complaint of delay against the Practitioner. They noted it was more likely than not that they would have been successful in the application, referring to the Judge's comment that:

> But this is not a case where I think that the Court should exercise its discretion to grant interim relief especially because of the question of delay. This is pivotal in my discretion to refuse the interim remedy.

[23] The Applicants' complaint was that they had specifically instructed the Practitioner, by email of 5 September, to file litigation on 8 September 2006, but the proceeding was not filed until 5 October. They conclude that had the proceeding been filed on 8 September there would have been no third party, and no impediment to their application being granted.

[24] The Practitioner denied having received specific instructions as claimed by the Applicants. His evidence was that the Applicants were aware that throughout

September he continued to negotiate terms on which they might re-enter the premises.

[25] The Practitioner's view was that the Judge had dealt with this aspect rather too harshly in the circumstances where the proceedings were actually filed before the second lease was signed. He said that the parties' original dispute was more about the terms of the entry rather than whether the developer would attempt to find a replacement tenant and rely upon a purported cancellation.

[26] The Applicants have relied on their email of 5 September 2006 as being the "specific instructions" to file litigation on 8 September. I have read this email and I assume that what the Applicants refer to is that part of the email in which they write:

> *please give* [the developer] *notice that we will give him until Friday to answer all our queries, and begin negotiations to reach an agreement with regards to the heads of agreement to achieve some conclusion to all of this or we will press ahead with litigation next week*.

[27] A letter sent by the Practitioner to the developer's lawyer, also dated 5 September 2006, advised that he had instructions to file proceedings to enforce the Applicants' rights under the heads of agreement if the developer was not prepared to take certain steps by Friday.

[28] I have considered the Applicants' email, and cannot agree that this amounts to a "specific instruction" to file litigation. The email refers to litigation being contemplated if the developer refused to begin negotiations to reach an agreement. The evidence showed that thereafter there were ongoing communications between the developer and the Practitioner towards resolving the differences between the parties.

[29] It is clear from the evidence that the Applicants were aware throughout September that no proceedings had been filed, and that there were communications between them and the Practitioner as to steps he was taking on their behalf in his correspondence with the developer which continued in the following weeks. That this is so is shown by a letter sent by the developer to the Practitioner on 15 September 2006 setting out terms on which the developer would resolve the matter. An undated memorandum on the Practitioner's file set out the Applicant's list of "Things to be finalised", and there was also the Practitioner's further letter to the developer's solicitor on 18 September, rejecting the solicitor's offer and proposing a meeting for

the following day. This would only have been done on the instructions of the Applicants.

[30] It was not until 28 September that it became known that the developer was entertaining proposals for an alternative tenant, the Practitioner then writing to the developer's lawyer in terms, *"It has come to our attention that your client appears to be entertaining proposals for alternative purchasers or tenants....."*, and seeking assurance that this was not the case. This letter was cc'd to the Applicants.

[31] Thus, by the end of September 2006 the relationship between the Applicants and the developer had deteriorated to the point that the developer indicated he would be looking for another tenant, at which point in time the Practitioner immediately filed an application for an interim injunction, seeking restraining orders against the developer, sent these to the Applicants for checking their affidavits, and the proceedings were then filed the following week on 5 October (mistakenly recorded by the Judge as having been filed on 11 October). All up these took no more than a week to prepare for filing. There were no concerns expressed by the Applicants at this stage, whose email of 2 October enquired whether there had been a response, and if not whether the papers would be filed the next day. The Practitioner informed the Standards Committee that this was when the developers rejected an offer to meet with the Applicant and signalled its intention to seek another tenant.

[32] With reference to the evidence I have referred to, I do not accept that the Practitioner was specifically instructed to file proceedings on 8 September. Nor is it the case that the Applicants were unaware of the ongoing negotiations during September, and that no proceeding had been filed.

[33] I have also read the judgment of Williams J (later awarding substantial compensation to the Applicants against the developer) who concluded that the developer's purported cancellation of the heads of agreement was unjustified at law, a conclusion reached after canvassing the whole of the events that had led to the litigation.

[34] This outcome showed that the Applicants' belief that the developer was acting outside of the agreement was well founded, a view shared by the Practitioner who appears to have pressed on with trying to resolve the matter by way of negotiation in accordance with the legal merits of the positions of the two parties. There was nothing to have suggested to the Practitioner (or the Applicants) that the developer was in fact entertaining another tenant at an earlier time, and I note that negotiations,

or efforts to achieve a resolution, were still continuing well into the second half of September 2006. When it did become apparent that another tenant was in the wings, the Practitioner took prompt steps to prepare and file proceedings in the Court.

[35] These circumstances show that judgment calls were being made along the way, and that litigation was seen as a last attempt to resolve the matter if no agreement could be reached. This cannot amount to an error of judgment. Even taking into account that the Practitioner might have considered the possibility of another tenant coming into the picture, I do not accept that the Practitioner's failure (if there was one) could possibly reach the threshold that could have led to disciplinary proceedings against the Practitioner under the Law Practitioners Act. If it was an act of negligence (which is doubtful in my view), it was an isolated act and not repeated acts of negligence that would have questioned the Practitioners fitness to practice. Nor was it conduct that would bring the law profession into disrepute. No disciplinary issues arise in relation to this complaint.

Complaint of overcharging

[36] The Applicants alleged that the legal fees exceeded, by a large margin, a quote that had been given by the Practitioner. The Practitioner considered that the complaint ignored the fact that requests were made for further or additional work, and that the hearing itself went on longer than anticipated.

[37] The Applicants took the matter to the Disputes Tribunal, who considered both the issue of quantum of legal fees that had been charged, and whether a quote had been given. A copy of the Disputes Tribunal decision was on the Standards Committee file, showing that the Adjudicator rejected that there had been a quote. The Adjudicator noted that an estimate could be expected to come within 10% to 15% of a final bill, but in this case also rejected that the Practitioner should be held to the estimate which, it was noted, had been given well in advance of the full scale of services being known. On the matter of quantum, the Adjudicator considered that the fees were within the acceptable range.

[38] I find no evidence that a quote was given to the Applicants, and accept that given the complexity of the matter it is unlikely that the Practitioner would have given a quote. The evidence indicates that the Applicants were given an estimate in July 2007 in relation to pursuing the litigation. This was well ahead of the events that occurred in September 2008 and subsequently. An estimate applies when the work

that has been identified, but generally would not apply to unforeseen factors which emerge during the course of the work. It is clear from the evidence that a number of matters had to be considered in respect for the way forward, and that there was some complexity in putting together the Applicants' case for the Court. I can find no basis for an adverse finding in relation to this complaint.

[39] Although the Applicants' complaint appears to rest essentially on an estimate "having been exceeded", rather than the quantum of fee, for the sake of completion I will add that a complaint (made after 1 August 2008) about fees that are invoiced prior to that date, is now required to be considered as "conduct" issue under section 351 of the Lawyers and Conveyancers Act. (Prior to the date a fees-related complaint would be dealt with by way of a review of costs). Under the transitional section 351 an adverse finding could be made against a Practitioner only if the legal fees were found to be excessive to a degree that would have led to disciplinary proceedings against the Practitioner.

[40] There was no costs assessment undertaken, but the work done by the Practitioner was substantial. It has not been suggested that the hours were not put in. Other than note that the Practitioner could have done more to keep the Applicants informed of costs, the Standards Committee did not find it necessary to comment further, noting that "substantial concessions" had been made in respect of the bills against time recorded, and amounts were also written off. There is nothing to indicate that the level of charging would have reached the threshold at which disciplinary proceedings could have been taken against the Practitioner.

Failure to advise Applicants of alternative funding

[41] The Applicants contended that the Practitioner knew that they were not in a good financial position and yet no attempt was made by him to advise them to apply for legal aid at the time. Their view is that if the Practitioner had advised them of the legal aid option at around August 2006, or at the latest after the injunction in December 2006, they would at that time most probably have been eligible for legal aid in pursuing the substantive case. They referred to the Practitioner's awareness that they were struggling to pay the legal bills, yet still no suggestion was made by the Practitioner with regards to applying for legal aid.

[42] In this regard they considered that his actions contravened Sections 7 to 9 and 12 to 14 of the Lawyers and Conveyancers Act, particularly with regard to the

services falling short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, and misconduct charging grossly excessive costs for the work. I have previously noted that the provisions of that Act do not apply in this case. The question is whether any failing or omission by the Practitioner was such that could have led to disciplinary proceedings against him under the Law Practitioners Act.

[43] The Practitioner responded that at the time of the injunction his clients' position was relatively good, and he provided details of his understanding of their financial position. He said that the Applicants had stated they would pay the legal fees and had agreed, in January 2007, to an instalment programme. He said that based on this commitment, and the affidavit evidence, he understood they had the means to pay his fees. He added that work on the file continued although the commitment (presumably to pay) was not followed.

[44] Further communications occurred with the Applicants into August 2007, but the Practitioner stated that for his part, he was under the impression that they were able to pay the fees and that the delay in doing so was because they intended to raise cash from selling the plant and equipment which was taking longer than expected. The Practitioner said he raised the matter of fees again in his reporting letter of September 2007, and that the Applicants replied in that same month with advice on progress of the sale of the plant.

[45] The Practitioner continued that the next significant event in November 2007 was that the developer's financial position was such that it was no longer economical to proceed, and he reported accordingly to his clients in December. He further said that the fact of the developers insolvency would have needed to have been disclosed to legal services agency, and in that light any application would be certain to have been unsuccessful.

[46] He said that the Applicants continued to hold the view that the legal fees would be paid from the proceeds of the sale of the plant, and had kept him informed of progress. He also referred to the Applicants' expectation of getting something from the Court proceedings, and proposed a settlement offer be made to the developer.

[47] The evidence shows that by the time that the expectation of any payout by the developer was shown to be unrealistic, the Applicants would then have not qualified for legal aid. Having considered all these matters I find that no part of the Practitioner's conduct should be the subject of criticism in a disciplinary forum. Any

omission, if there was an omission, would not have reached the threshold that would have or could have led to disciplinary proceedings against the Practitioner.

[48] I have not included mention of every detail of the complaints or the review application, but I have carefully considered all of the evidence and information provided in relation to the Applicants' complaints. In summary, the complaints have been considered against the professional standards applying at that time. For reasons given in this decision, I conclude that the jurisdictional threshold was not met in this case, and that the Standards Committee was correct to have decided that no further action should be taken. The application is declined.

Decision

Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 10th day of April 2012

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Hanneke Bouchier
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 NA as the Applicants
AL as the Respondent
The [...] Standards Committee
The New Zealand Law Society