LCRO 83/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury-Westland Standards Committee 2
BETWEEN	**AC** of X Applicants
AND	**AAA** of X (Mr B and Mr R) Respondents

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

DECISION

Background

[1] On 3 April 2007, the Applicants and SH purchased a motel business in X.

[2] The business was under-performing but the purchasers formed the view that there was considerable potential to grow the business and paid a sum in excess of $400,000 for the goodwill of the business based on valuation advice received at the time.

[3] Difficulties with the vendor and the state of the buildings at the time of possession meant that the purchasers commenced operations in difficult circumstances, and anticipated occupancy rates were not achieved. This naturally resulted in the purchasers' financial circumstances coming under pressure.

[4] Subsequently, the purchasers became aware of what they considered to be significant defects within the complex including leaking buildings. A report commissioned by them as to the condition of the motel raised a number of matters of concern and the purchasers required legal assistance to determine the respective obligations of themselves and their landlord, in terms of the lease.

[5] In addition, a rent review was scheduled for 11 October 2007, and became part of the matters on which advice was sought and provided by the Respondents.

[6] In late August 2007, the purchasers approached the firm of AAA on the recommendation of the X Motel Association for advice and assistance. They were initially referred to Mr S within that firm. Mr S was a commercial lawyer and the purchasers were happy with the advice and service provided by him.

[7] Mr S, however, soon involved Mr R (Mr R) in the conduct of the file and shortly thereafter the file was referred to Mr B (Mr B) a litigator in the firm.

[8] Despite their desire to avoid litigation, this referral was accepted by the purchasers, but they became increasingly dissatisfied with the advice being received, resulting ultimately in their approaching other law firms in X to represent them. In March 2008 they instructed an alternative firm, although this was not apparently communicated to Mr B who continued to provide advice to the purchasers during April 2008.

[9] The business was sold in July 2008, although AAA did not learn of this until steps were taken by AAA to recover outstanding costs.

Complaint

[10] The complaint was lodged on 21 December 2008 by Mr AC (AC) against Messrs B and R of the firm AAA. This was treated by the Complaints Service as two complaints, but dealt with together. The complainants were recorded by the Complaints Service as AC and Mrs AC (AC) (collectively referred to as "the Applicants"). SH has not participated in the complaint.

[11] In a letter to AAA dated 22 September 2009, the Applicants outlined their core concerns. These were:

- The fees and associated costs;
- The costs associated with the involvement of three lawyers;
- The advice and representation received.

[12] At the time the complaint was lodged, the sum of $6,631.43 remained outstanding to AAA, the sum of $6,000 having been paid.

[13] The compensation sought by the Applicants was to have the accounts rendered by AAA reduced by the balance outstanding. The Applicants considered that Messrs B and R (collectively referred to as "the Respondents") had failed to recognise that there were watertightness issues with the buildings, and to satisfactorily support the Applicants in their challenge to the landlord. As a result of this failure the Applicants contend that they have been obliged to paint the exterior of the building at a cost of $12,000 plus GST, and to pay an increased rental of $7,072.16 plus GST.

Standards Committee Decision

[14] Having carried out its investigation, the Standards Committee decided pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) not to take any further action with regard to the complaint because it concluded that in all the circumstances it was unnecessary for it to do so.

[15] The Committee provided its reasons for the decision in respect of each of the aspects of the complaint raised by the Applicants.

Application for review

[16] The Applicants have applied for a review of the Standards Committee decision and cite the following reasons why the decision should be overturned in their favour:-

1. The Applicants consider that where there were different accounts of events, the Committee chose to believe the Respondents' version in every instance.
2. They consider that where there was a lack of documentary evidence, the Respondents' statements were consistently given preference over theirs.
3. They consider that documentary evidence supporting their statements had been ignored.

[17] They then referred to the specific issues raised in their complaint and examined the Committee's decision in respect of each of these. The issues are:-

- Costs
- Loss of enjoyment
- External painting
- Review of market rental

[18] In respect of each of these matters, the Applicants give examples where they consider the Committee has taken an approach consistent with points 1-3 in paragraph [16] above. This involved a detailed consideration of the Committee's decision.

[19] The outcome sought by the Applicants is that the Committee's decision be overturned in their favour. I take this to mean that they desire that an order be made whereby they are relieved of payment of the balance of the accounts due to AAA.

[20] Before any orders such as they seek may be made, the Committee or the LCRO must first make a finding of unsatisfactory conduct in the nature of conduct unbecoming (refer paragraphs 37-43).

[21] Without first making such a finding there can be no outcome such as that sought by the Applicants. It is important for the Applicants to bear this in mind, so that they can understand both the Committee's decision and the outcome of this review.

Review

Overview

[22] Before dealing with the detail of the complaint, the Standards Committee decision, and the application for review, it is appropriate to make some general observations with regard to this matter.

[23] In the complaint to the Complaints Service, the Applicants set out two main reasons for dissatisfaction with the conduct of the Respondents.

[24] In summary, these related to a perceived failure on the Respondent's behalf to successfully promote the Applicant's position with regard to the water-tightness/external painting issues, and secondly, a failure to resist an increase in rental pursuant to a rent review.

[25] The obligation to paint the premises was a term of the lease. Non-compliance with the provisions of the lease constitutes a ground for cancellation of the lease. The landlord took the step of issuing a Notice of Intention to cancel the lease on 15 February 2008 pursuant to section 246 of the Property Law Act 2007.

[26] Reference is made in a letter from the Applicants to Mr B dated 22 September 2008, to this notice not being issued by "the bailiff" and that therefore the Applicants mistakenly believed that the notice was a "genuine" notice.

[27] A Notice of Intention to cancel is issued by the landlord of the premises. It is not either filed with, or served by, the Court. The notice in question was signed by P, as solicitor and duly authorised agent of the lessors, and is a valid notice in terms of the Act. Consequently, it is unsurprising that Mr B did not make any mention of the validity of the notices when forwarding copies under cover of his letter dated 18 February 2008.

[28] The Applicants complied with the notice by painting the premises with a conventional 100% acrylic paint. It is difficult to see how the Applicants' costs in complying with their obligations in terms of the lease translates into shortcomings by the Respondents.

[29] A review of the correspondence from the landlord and their solicitors reveals that the landlord did not accept that there were water-tightness problems with the buildings. It is likely that the only way that the landlord was going to accept the Applicants' contentions, would be for proceedings were to be issued against the landlord and Orders made requiring them to comply with their obligations in terms of the lease. The Respondents cannot be held responsible for the landlord's lack of acceptance of the state of the building as outlined in the Richardson report.

[30] A second point raised by the Applicants relates to the rent review. The issue in this regard, is that the first valuer engaged by the landlord indicated to the Applicants that no rent increase was justified.

[31] A second valuer was engaged by the landlord, and on the basis of this valuation, the landlord sought an increase in rental.

[32] The Applicants consider that the Respondents should have prevented, or not agreed to, the landlord using this second valuation to support the increase.

[33] The rent review provisions of the lease are contained in Clause 2 and are prescriptive in nature.

[34] Clause 2 sets out the process to object to any proposed rent increase. If that process is not followed, the rental sought by the landlord becomes the rental payable. The ultimate recourse for the Applicants was to resort to arbitration which, of course, carried with it significant costs. Ultimately, it was the landlord who exercised the right contained within Clause 2 to have the matter determined by arbitration.

[35] Mr B set out the rent review process in a letter to the Applicants dated 2 April 2008. If the matter had proceeded to arbitration, all of the matters raised by the

Applicants in opposition to any increase would have been aired. Unfortunately, the Applicants were unable to contemplate proceeding to arbitration, and therefore the increased rental sought by the landlord became the rental payable in terms of the lease.

[36] Mr B could not, however, be expected to provide a solution other than what was provided in the lease itself, the terms of which no doubt the Applicants reviewed at the time of purchase.

Applicable law

[37] It is appropriate to consider at this stage, the applicable law with regard to this complaint.

[38] The conduct complained of took place between late August 2007 and March 2008.

[39] In paragraphs 20 and 21 of its decision, the Standards Committee sets out the relevant provisions of the Act insofar as it relates to this complaint.

[40] As noted there, section 351 of the Act provides that before a complaint about conduct which occurred prior to the commencement of the Act on 1 August 2008 can be accepted, it must be conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

[41] The Committee accepted the complaint and proceeded with its investigation. It follows therefore, that the Committee had formed the initial view that the conduct was such that proceedings of a disciplinary nature could have been commenced under the 1982 Act.

[42] The Committee correctly notes at para 20 of its decision, that section 352 of the Act restricts any penalty in respect of pre 1 August 2008 conduct, to those penalties which could have been imposed in respect of that conduct under the 1982 Act. Consequently, the conduct would necessarily have to have been conduct which was either misconduct or unsatisfactory conduct in the nature of conduct unbecoming. A finding of misconduct may only be made by the Disciplinary Tribunal. Consequently, it is only if the Committee or the LCRO makes a finding of unsatisfactory conduct in the nature of conduct unbecoming, that there can be an order made which would provide the outcome sought by the applicants. Conduct unbecoming in the professional disciplinary arena was discussed in *B v Medical Council [2005] 3 NZLR 810.* In that case, Elias J (as she then was) stated:- "*...it needs to be recognised that conduct which*

attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public.....I accept the submission of Mr [W] that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which it is unfair to impose."

[43] It is important that these comments be borne in mind when considering the matters raised in this review. The Applicants have pointed to a number of incorrect statements made by the Committee in its decision. The question, however, to be considered in this review, is whether those errors are sufficient to alter the outcome of the decision by the Committee.

The review application

[44] As noted in paragraph [17] above, there are four issues arising out of the Committee's decision which require to be addressed. These are:

(i) Costs;
(ii) Loss of enjoyment;
(iii) External painting;
(iv) Review of market rental.

Costs

[45] The Applicants have identified various matters with which they were unhappy with regards to costs charged by the Respondents. These are:

- The unauthorised involvement of Mr R.
- Charging for in-house conferences.
- Doubling up when file passed between authors.
- Unnecessary inspection of premises.
- Referral of the file to Mr B.

[46] It is appropriate to make some comment in respect of each of these matters:

The unauthorised involvement of Mr R.

[47] The Applicants first met with Mr S of AAA. Shortly thereafter, however, the file was referred by Mr S to Mr R. The Applicants contend that this referral was unauthorised by them. At any point in time, the solicitor who has the carriage of a file within a law firm must be able to utilise other personnel within the firm. This is done for

a variety of reasons, e.g. potential absences, work done at an appropriate level, etc. It would not be expected that in each case, referral of the file to other members within the firm would need to be authorised by the client, unless the client specifically instructed that one person within the firm was to act on their behalf. Mr S involved Mr R at a time when it was clear that the Applicants' file would need to be progressed during a forthcoming absence by Mr S. It would have been remiss of Mr S not to brief another member of the firm with regard to the file in these circumstances. This may have meant the potential double-up for both Messrs S and R inspecting the premises, but this was unavoidable if proper carriage of the file was to continue during his absence. If there is any criticism to be made in this regard, it is that both authors should not have charged their time for this inspection given that it was necessary for the purpose of allowing Mr S to be absent from the office. Other than this instance, all work carried out by Mr R would have otherwise been carried out by Mr S and charged for accordingly.

Charging for in-house conferences

[48] The full extent of any charging for in-house conferences would only be revealed by a detailed audit of the firm's time records. It is important to observe here, that the complaints process under the Act does not incorporate a costs revision, as was previously the case under the 1982 Act. Under that Act, a client could apply for any account to be formally revised, and in those cases the file would be scrutinised by a costs reviser who then made a decision as to whether or not the fee should be adjusted. Any such adjustment was binding on the law firm.

[49] Under the present Act, the only question to be decided is whether or not the Respondents have adopted practices which result in over-charging to the extent that they could be considered to be guilty of unsatisfactory in the nature of conduct unbecoming.

[50] The matters raised by the Applicants focus on the detail in the Standards Committee's decision where they consider the Committee was incorrect (e.g. a charge of $162 for Mr R to read the file and discuss with Mr S). In that regard, they may very well be correct. However, I note that I do not necessarily consider that it is inappropriate to charge for all "in house" conferences. It is not uncommon for a lawyer to consult another lawyer in a firm about a file, where the other lawyer has greater experience or expertise in respect of the matter being discussed. In those circumstances, it may very well be appropriate for both lawyers to record their time. Each case must be considered separately. I would also note that, although it is not the

case here, lawyers do not necessarily bill a client strictly on the basis of the time recorded – that is only one factor to be taken into account when establishing the fee to be charged, so that although the time may be recorded, that may not necessarily determine the fee to be charged..

[51] The question to be decided for the purpose of this review, is whether in the overall context, the extent of what could be considered to be inappropriate billing based on the time recorded, would be sufficient to support a finding of unsatisfactory conduct in the nature of conduct unbecoming. As noted in paragraph [21] no orders can be made without such a finding. Having noted the instances referred to by the Applicants, I do not consider that there are sufficient instances where there has been inappropriate charging to support the making of such a finding.

Doubling up when file passes between authors

[52] The same comments as are made in paragraphs [49] and [50] above apply here.

Unnecessary inspections of premises

[53] The Applicants referred to there being "an undisclosed cost" with respect to the inspection. Mr S had determined that it was appropriate for him to view the premises to enable him to better understand the situation. The Applicants contend that this was unnecessary, and that they were unaware that there would be a cost for this. It is inconceivable that the Applicants could have considered that there would be no cost associated with the inspection. It is not possible to make any judgment as to the necessity for the inspection as each practitioner will adopt differing practices in this regard. It is therefore immaterial that Mr B subsequently did not see the need to inspect the premises. It is not appropriate that either the Committee or I should make any decision in this regard. Mr S considered that he needed to inspect the premises and an arrangement was made to do this with the Applicants. It follows therefore, that any charge made for the time expended in this inspection, was time expended on this matter, and it was appropriate for a charge to be made.

Referral to Mr B

[54] The Applicants contend that the referral to Mr B, a litigation lawyer within the practice, "upped the ante". They contend that this increased their costs. They have described their agreement to the matter being referred to Mr B as being on the basis that they were presented with a fait accompli. Nevertheless, they continued to deal

with Mr B rather than requesting that the file be returned to Mr S when he returned to the office. Consequently, the Respondents were unaware of any dissatisfaction with this step and proceeded accordingly.

Summary

[55] Having considered the matters raised by the Applicants, it is then necessary to stand back and ask the question as to whether or not the conduct complained of was conduct of such a degree as would warrant a disciplinary charge being brought against the Respondents. In all of the circumstances, I have formed the view that the matters raised by the Applicants, either taken separately or collectively, fail to reach this threshold.

Loss of enjoyment

[56] The Applicants complain that Mr B did not pursue a claim against the landlord for breach of the right to quiet enjoyment. The Committee had considerable difficulty in understanding the basis of the complaint under that head.

[57] Reference however by the Committee to paragraphs 15 to 18, 28, and 39 to 43 of Mr B's letter of 24 March 2009 (see paragraphs 48 and 49 of the Committee decision) is somewhat puzzling in this regard.

[58] The issue regarding the breach of quiet enjoyment is addressed in paragraphs 36 to 38 of Mr B's letter, from which it is clear that Mr B and Mr S have different views as to the basis for a claim against the landlord for breach of quiet enjoyment.

[59] Mr S, in his letter of 19 September 2007 to the landlords, referred to the failure of the landlord to keep the building water-tight, as constituting a breach of the right to quiet enjoyment.

[60] However, Mr B, in paragraphs 36 to 38 of his letter dated 24 March 2009 to the Complaints Service, refers to the reparation work by the landlord as the basis for a claim of a breach of that provision. He states that he formed the view that interruption by the landlord's workmen did not constitute a breach of the right.

[61] Breach of the tenants' right to quiet enjoyment renders a landlord liable to damages. However, a landlord is not exposed to a claim for double damages if more than one covenant in the lease is breached by the same activity (or lack thereof). Consequently, it is hard to see why any claim against the landlord would allege that failure to keep the premises water-tight constituted a breach of the right to quiet

enjoyment, when there would be a more direct breach of the obligation to keep the premises water-tight.

[62] It is also difficult to see how a successful claim could be made against the landlord for breach of this clause by reason of the disruption to the tenant by the landlord's workmen in endeavouring to comply with the landlord's obligations in terms of the lease.

[63] It seems that Mr B may not have satisfactorily explained his views to the Applicants, or alternatively, the Applicants did not understand or accept his views.

[64] Whatever the situation, I can see no evidence of any shortcomings on Mr B's behalf in this regard and I concur with the decision of the Standards Committee in respect of that matter.

External painting

[65] The Applicant as lessee was obliged by paragraph 46 of the lease to paint the outside of the premises at intervals of 5 years.

[66] The quotation for painting the exterior and interior of the premises was provided by "0800 Wepaint" on 28 May 2007. I have not been able to ascertain definitively who requested the quotation from that firm, but my assumption is that it was requested by the Applicant.

[67] The quotation recommended that a membrane coating known as Wattyl Granoskin be applied to the exterior to remedy and prevent noticeable cracking, and to protect against the ingress of water.

[68] Clause 13(1) of the lease provides that "the landlord shall keep and maintain the building and all building services in good order and repair, including maintaining the exterior and the roof and keeping the premises watertight …".

[69] The cost of the application and ongoing maintenance of the Wattyl system was considerably more than the cost of conventional painting and the Applicants objected to paying the full costs associated with this as they would be partly paying for the costs of keeping the premises watertight. They were also concerned that by doing this work they would expose themselves to liability in respect of the water tightness of the building. This was reflected in the letter from Mr S to the landlords on 19 September 2007, where it was proposed that the landlord make the building weathertight and

"should the building need further painting after you have made the building watertight, then our clients will attend to this".

[70] The Applicants believed that the ongoing responsibility for external painting should be removed from the lease (refer letter 5 September 2007).

[71] The Applicants allege that Mr B (in general terms) failed to advance this position. Their complaint is that Mr B –

(a) Failed to follow the Applicants' informed initial instructions;
(b) Failed to enforce the lease requirements;
(c) Exposed the Applicants to considerable additional costs;
(d) Exposed the Applicants to possible future liability;
(e) Exposed the Applicants to ongoing additional maintenance expenditure without consideration to any offsetting;
(f) Failed to acknowledge and follow expert opinion;
(g) Failed to follow instructions;
(h) Thereby added to their legal expenses and stress.

[72] These aspects of the complaint were dealt with by the Committee in paragraphs 50 to 54 of its decision. In paragraph 53, the Committee came to the conclusion that "the Committee sees no evidence that Mr B did not, in fact, diligently prosecute his clients' position in correspondence and negotiations with the landlord's solicitors over a considerable period of time – in terms of that analysis, between 21 January and at least 19 March 2008."

[73] If the Applicants consider that Mr B should have continued to promote their expectations that they be released from their obligation to paint the exterior of the premises, then their contention is correct. He did not promote that.

[74] However, that does not seem to be reflected in the instructions given to Mr B. For example, on 30 January 2008, Mr B sent a draft letter intended for the landlords' solicitors, to the Applicants for their approval. In that draft it is clearly recorded that the Applicants remained prepared to meet their obligations to paint the premises but were not obliged to use the Wattyl system as required by the landlord.

[75] That letter quite forcefully states "it is not our clients' responsibility to paint the units with a Wattyl Granoskin system or engage tradesmen to carry out the work."

[76] However, in the last sentence of the first paragraph on the second page of that letter, the draft letter includes the following:

> "As previously advised, our client will contribute what it would have cost to paint the premises itself with a conventional paint in a workmanlike manner using the existing colour."

[77] The Applicants commented in detail on that draft in their email of 7 February 2008. They did not request this statement to be removed, and it is not apparent from any of the other correspondence on the file that these were the instructions.

[78] In the letter dated 25 May 2010, accompanying the application for review, the Applicants cite a failure to comply with their instructions to remove paragraph 7 of the draft letter as an example of Mr B's failure to promote their instructions. I have some difficulty in understanding this. Paragraph 7 of the draft letter is as follows:

> "We suggest your client contact Mr H directly in order to discuss a suitable time for your clients' contractors to apply the Wattyl Granoskin system and the contribution of our client to the cost."

[79] In the letter as finally sent to the landlord's solicitor on 12 February 2008, this paragraph was removed and replaced with the wording requested by the Applicants.

[80] Consequently, I concur with the Committee's decision. If it is the Applicants' contention that Mr B acted contrary to instructions by continuing to promote the idea that they contribute the cost of painting the premises conventionally, then I can see no correspondence or evidence of clear instructions to Mr B to support that contention.

Review of market rental

[81] This matter has been addressed already in paragraphs [30] to [36]. It follows from those comments that I concur with the Committee's decision in this regard.

Conclusion and Decision

[82] In each instance I have concurred with the decision of the Standards Committee. Consequently, pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006, I confirm the decision of the Canterbury-Westland Standards Committee.

DATED this 26th day of January 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:

AC as the Applicants
Mr B as the Respondent
Mr R as the Respondent
The Canterbury-Westland Standards Committee 2
The New Zealand Law Society