

LCRO 93/2011

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Waikato Bay of Plenty Standards Committee 2

BETWEEN

MR and MRS IH

Applicant

AND

MR QU

Respondent

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

DECISION

[1] Mr and Mrs IH have applied for a review of the determination by Waikato Bay of Plenty Standards Committee 2 to take no further action in respect of their complaint about Mr QU who they instructed to act for them as mortgagees. The outcome of the review is that the Committee's decision is confirmed.

Background

[2] In April 2008 Mr and Mrs IH sold a property in [North Island] to Mr JW and Ms JX (the mortgagors). To enable the mortgagors to complete the purchase Mr and Mrs IH advanced the sum of \$323,000 to them secured by way of a first registered mortgage against the property.

[3] The mortgage was for a term of two years and payments of interest at 6.9% per annum were to be made bi-weekly.

[4] The mortgagors fell into arrears with their payments. Mr and Mrs IH sought judgement in the District Court against them for the arrears and also issued a notice pursuant to section 119 of the Property Law Act 2007. Expiry of the notice enabled the IHs to exercise their rights as mortgagees to either sell the property or to enter into possession.

[5] On 3 September 2009 the solicitors who were acting for Mr and Mrs IH at the time advised that agreement had been reached to “transfer the property back into [their] name and that rent will be direct credited into [their] bank account”.

[6] The property was not transferred into their names and instead the next communication with Mr and Mrs IH from their solicitor was to seek instructions in respect of alternative proposals from the mortgagors’ solicitors, which involved a sale of the property by the mortgagors.

[7] It was at that stage that Mr and Mrs IH instructed Mr QU to act for them. After meeting with him they agreed with his suggestion that he try to negotiate a beneficial outcome with the mortgagors through their solicitors.

[8] On 16 October 2009 they sent an email to Mr QU as follows: -

Dear Sir

It has been a week since you took over our legal proceedings against [JW] & [JX]. Despite your efforts there has been no progress in our attempts to ‘negotiate’ a deal with the mortgagors. To date no payments have been received after 6 October.

We not have no option but **force** our rights - as spelt out in the Property Law Act notice as was served to [JW & JX] - and **enter into possession**. This will enable us to receive rental income from the property.

Our understanding is that we need your letter with instructions etcetera which we can take to the occupiers of the house at [North Island address]. Please advise when we can uplift the letter from your office.

Thanks for your cooperation.

[IH]

[9] Mr & Mrs IH’s complaints relate to Mr QU’s conduct in acting for them up until they terminated his instructions on 4 November 2009.

The complaint and the Standards Committee determination

[10] Mr and Mrs IH complained to the Law Society on 28 October 2009 although it

was either not received or actioned by the Complaints Service until 2 December 2009.

[11] Their complaints were that: -

- a) They believed they were not getting the right support from Mr QU. They had instructed Mr QU that they wanted to enter into possession of the property without delay as prior negotiations and legal action had stalled. They did not consider that Mr QU was supporting them in this objective.
- b) They complained that Mr QU had repeatedly ignored instructions without providing adequate or valid explanations. This related to the issuing and publication of notices pursuant to section 156 of the Property Law Act 2007.
- c) That Mr QU continued to negotiate with the mortgagors' solicitors notwithstanding that they had indicated they did not wish to him to continue to do so. They felt that Mr QU had some compassion towards the mortgagors and suggested that he had a conflict of interest in that he or his firm acted for a construction company by which Mr JW was employed.
- d) They also considered that Mr QU had subjected them to undue pressure by warning them that lawyers gave up defending people who let them or others down.

[12] Following a consideration of all of the material and information provided by the parties the Standards Committee determined pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of the complaint. That section provides the Committee with a discretion to take no further action if it considers that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[13] The reasons provided by the Committee are set out in full as some comment on these is necessary: -

The complainants sold their property and the purchaser took an interest only mortgage back from the vendors but got into arrears. The practitioner was asked to advise on the possibility of the complainant getting the property back as mortgagee in possession. The practitioner advised them of the procedures they would need to follow before they could take steps as mortgagee in possession.

The complainants ignored that advice and took matters into their own hands

delivering their own notices to the owners and the tenant. At that stage the practitioner told them that in his view that they had exhausted all legal remedies and offered his resignation. The complainants also alleged conflict of interest. There is no evidence of that. The practitioner had no contact with the mortgagors (borrowers) and did not know them other than through contact with their lawyers. The full response from the practitioner was forwarded to the complainants and no comment was received by the Committee.

The Application for review

[14] Mr and Mrs IH have applied for a review of that determination. They summarise the issues in the following way: -

- a) Mr QU had drafted PLA notices that were not in the standard ADLS format.
- b) Mr QU had failed to arrange public notification of the same notice in the Gazette within the timeframe required.
- c) They consider that the lack of service from Mr QU meant that they were deprived of appropriate legal support resulting in them losing in excess of \$10,000 without the right to sue the mortgagors for that debt.

They referred to their request to the Committee to provide evidence of publication of the Property Law Act notices and considered that the complaints process had been neither thorough nor fair. They therefore sought a full review of the Standards Committee investigation and determination.

Review

[15] A review by this Office is broad and is not the equivalent of an appeal. The LCRO has a discretion as to the approach to be taken on any particular review with regard to the extent of the investigations necessary to conduct that review. In addition, the LCRO must come to an independent view based on the evidence before him or her.¹ It is a full review as requested by Mr and Mrs IH. To this end I have obtained and reviewed Mr QU's file as well as the file of the Standards Committee.

[16] An Applicant only hearing was initially scheduled for 8 December 2011 as it was considered that a dialogue with Mr and Mrs IH would have been helpful to both ensure that I was fully apprised of all issues with which they were concerned as well as to

¹ Deliu v Hong and the LCRO [2012] NZHC 158. at [39] to [41]

ascertain the extent of their understanding of some issues.

[17] Unfortunately Mr IH advised that he was detained indefinitely in Holland and this Office was unable to participate in a skype or video link. In the circumstances it was decided that the review would be completed on the material before me and both parties provided their consent pursuant to section 206(2)(b) of the Lawyers and Conveyancers Act.

The Standards Committee determination

[18] As noted above some aspects of the Standards Committee require comment.

[19] In their initial complaint to the New Zealand Law Society the IHs stated that whichever of them spoke to Mr QU on the telephone, had inquired whether he had experience in advising mortgagees who wished to enter into possession. In addition the email sent by them on 16 October confirmed that they wished to enter into possession of the property pursuant to their rights as mortgagees. From these comments and other material on the files there is no indication that they sought advice in general from Mr QU as to what remedies were available to them following default by the mortgagors. They focused on their right to enter into possession.

[20] It is important that I should correct any misunderstanding that they would thereby be “getting the property back” (as referred to in the Standards Committee determination) in the sense of “ownership”. This may have been an impression that Mr and Mrs IH had formed from the advice provided by their previous solicitor and is a point noted in the letter from Mr AY sent to the Law Society on Mr QU’s behalf.

[21] The Committee also records that the complainants ignored advice relating to the procedures required to enter into possession and took matters into their own hands, delivering the notices to the owners and the tenants. From my review of the file the IHs requested Mr QU to provide the form of the notices which they intended to serve themselves. This does not amount to “taking the matter into their own hands”. There was no reason why they could not serve the notices themselves and they did not take any steps outside of what Mr QU was advising.

[22] The Committee also records that “at that stage the Practitioner told them that in his view they had exhausted all legal remedies and offered his resignation”. I have searched all of the material before me for this statement and cannot locate any

correspondence to this effect. Mr and Mrs IH terminated Mr QU's instructions on 4 November. In his response on the following day he states "I am disappointed that you have become unhappy with the service provided but would have thought you might have advised me earlier particularly as you wrote to the Law Society on 28 October – seven days ago". There is no indication that Mr QU offered to resign or suggested that all legal remedies had been exhausted. There were certainly other remedies available to Mr and Mrs IH. It is quite clear that the IHs terminated Mr QU's instructions themselves.

[23] Although the outcome of this review does not depend on what was recorded in the Standards Committee determination it is important that these inaccuracies are corrected so that they are not perpetuated.

Preliminary comments

[24] It is pertinent at this stage that I should make some preliminary comments about the advice received by Mr and Mrs IH prior to instructing Mr QU.

[25] Mr and Mrs IH were initially advised by another solicitor with regard to the default by the mortgagors. He had prepared the requisite notices pursuant to section 119 of the Property Law Act and service had been effected. It is to be presumed that he had also provided some initial advice to them as to their options. I am unable to decipher Mr QU's file notes of the initial meeting with the IH's, but the email sent by them on 16 October 2009 to Mr QU contains specific instructions to him and did not seek any advice as to the best option.

[26] The primary remedy available to a mortgagee is to exercise the power of sale of the property. Mr and Mrs IH were however quite definite and clear in their instructions that they wanted to take possession. The reason for this was to enable them to receive the rents that were being paid by the tenants of the property, but as Mr QU pointed out, there are certain disadvantages in taking this step. Taking possession does not result in a finite solution as the property remains in the ownership of the mortgagors unless further steps are taken to sell the property.

[27] In this regard the email dated 3 September 2009 from their previous solicitor is somewhat puzzling. If agreement had been reached as was stated in that email, the property would have been able to be transferred to Mr and Mrs IH, by their executing a transfer to themselves pursuant to the power of sale. Nothing further was required

from the mortgagors unless it was anticipated that some sort of agreement between the parties was to be entered into.

[28] For some reason the transfer to Mr and Mrs IH did not take place. Nevertheless, it is clear that Mr and Mrs IH had a definite view of what it was they wanted Mr QU to do and instructed him accordingly. A lack of advice or understanding on their part at this stage has contributed to the events that followed.

[29] The other preliminary comment required relates to the review application. A review by this Office can only be a review of the issues raised in the initial complaints and the Standards Committee determination. In that regard the complaint that Mr QU had drafted Property Law Act notices that were not in the standard ADLS format is not part of this review as it was not an issue raised in the complaint considered by the Standards Committee. In addition the Standards Committee did not consider events that occurred subsequently to the termination of Mr QU's instructions. In their review application, Mr and Mrs IH state Mr QU's actions resulted in their losing in excess of \$10,000 without the right to sue the mortgagors for that debt. If there is a suggestion that Mr QU has been negligent in the drafting of the Property Law Act notices or did not take the necessary steps required by the Property Law Act then that is a matter for the Courts.

[30] I turn now to consider each of the matters raised by Mr and Mrs IH in their complaint to the Complaints Service.

Not getting the right support

[31] This complaint is directed at the very focused objective of Mr and Mrs IH to enter into possession of the property. They have interpreted Mr QU's attempts to negotiate with the mortgagors as not providing support to them in their objective.

[32] The broader objective would have involved either payment of the arrears (the IHs had issued proceedings to try to achieve this) or repayment of the whole loan following either the sale of the property or the mortgage being refinanced. No doubt, that is what Mr QU hoped to achieve and there can be no criticism of him for endeavouring to achieve that outcome.

[33] As noted by Mr QU, the Courts do not support precipitous action by mortgagees and if Mr and Mrs IH had entered into possession without exploring other options they may very well have been exposed to action by the mortgagors. These steps have

been interpreted by the IHs as showing “compassion” to the mortgagors rather than “coming down hard” on them as they wanted. Rather than being a personal reaction by Mr QU it reflects the approach that the Courts have taken and provided the IHs with appropriate responses should any of the steps taken by them to exercise their powers as mortgagee be challenged.

[34] Mr QU was instructed on 8 October 2009. On Friday 16 October Mr and Mrs IH issued their specific instructions to proceed to provide whatever was needed to enable them to take possession. The Property Law Act contains detailed requirements to be followed by a mortgagee exercising powers under a mortgage in default. Although not requested, on Wednesday 21 October Mr QU provided advice in some detail as to what steps were required to be taken to ensure the actions by the IHs could not be challenged. He also provided the form of the notice to be provided to the owner and the tenant. Rather than not supporting the IHs, this advice was given to enable them to achieve their objective lawfully.

Mr QU ignored instructions

[35] In an email dated 22 October Mr and Mrs IH had advised Mr QU that the required notices had been served on the owners and the tenants. It was then necessary to advertise that the mortgagee had taken possession. Contrary to what is expressed by Mr and Mrs IH in the review application that publication needed to occur “within the minimum 10 days required”, the Act requires that publication should occur at the same time as possession is taken. In this instance possession would be deemed to have been taken on receipt of rental income.

[36] On the same day as Mr and Mrs IH advised that they had served the notices, correspondence had been received that the property was to be auctioned by the mortgagors on 19 November. In addition a repayment figure had been requested as at 28 October. As the IHs had specifically instructed Mr QU that he should not communicate with the mortgagors’ solicitor without confirmation from them, Mr QU sought authority to do so to ascertain the purpose of the request. He also suggested deferring advertising until this information could be obtained. It seems that Mr and Mrs IH may have interpreted this suggestion as failing to follow their instructions.

[37] In the circumstances as they presented, Mr QU’s suggestion was a reasonable suggestion. Indeed as it turned out it seems that the mortgagors had arranged to

refinance the loan but approval was withdrawn when the advertising was noted by the proposed lender. I acknowledge that this is advice from the mortgagors only and has not been verified.

[38] Mr QU sent a letter to Mr and Mrs IH on 30 October 2009 enclosing copies of the notices sent for publication. He also included a copy of the letter sent to the “New Zealand Gazette” from which it should have been possible for the IHs to realise that any subsequent reference to the “Mercantile” Gazette was an error.

[39] In correspondence with the Complaints Service Mr and Mrs IH requested that the Committee provide evidence of publication of the notices required by the Property Law Act after a mortgagee has taken possession of the mortgaged property. From Mr QU’s file I can confirm that the notices were published in the Bay of Plenty Times on [October 2009] and in the New Zealand Gazette on [November 2009]. That evidence is provided by a telephone message taken by another member of Mr QU’s firm from the Bay of Plenty Times which reads:-

Classified ad Public Notice [JW] and [JX] has gone in paper today – run again tomorrow? How long.

That message is dated [October 2009]. Confirmation of the publication in the New Zealand Gazette is provided by an invoice dated [November 2009] which reads as follows:

*Placement of Notice
Name of Gazette: New Zealand Gazette
Notice No: []
Category: General Notices
Description: Receipt of income from mortgaged property –
[IH]
Published: [November 2009]*

[40] In the circumstances I do not consider that Mr QU can be accused of failing to follow instructions without good reason.

[41] I note that in the review application, Mr and Mrs IH referred to failing to advertise “within the minimum 10 days required”. The Property Law Act provides that public notification must be given “immediately” on entering into possession of the property. The date of possession in this instance would have been the date on which rent was received. I am therefore uncertain as to what the reference to “10 days” derives from. This was another matter I intended to discuss with Mr and Mrs IH at the proposed hearing as it seems that there is a possibility that they have been

misinformed on this matter.

[42] They have a certain view of things that may not be correct and this may have contributed to their view of Mr QU's conduct which led to their complaints.

Miscellaneous

[43] The IHs also complained that Mr QU was intent on continuing to talk to the mortgagors' lawyer. This aspect of their complaint has largely been dealt with in the preceding paragraphs. They seemed to have a view that by advising the mortgagors' solicitors that his clients intended to take possession as mortgagees, that this disadvantaged them. The mortgagors' solicitor would have been aware that this was an option for the mortgagee to take whether or not it had been specifically mentioned. There is no reason why Mr QU should not have mentioned the proposed action as it may have made the mortgagors aware that his clients intended to pursue their rights. The section 119 Property Law Act notice had been served and had expired, and this was an option open to them. In addition there was no apparent way that the mortgagors could have prevented the proposed action and in turn no apparent reason why this information should not have been so communicated.

[44] In the complaint to the Complaints Service Mr and Mrs IH refer to a comment made by Mr QU that "from experience, lawyers soon give [up] defending people who let them or others down". They perceived this as a warning by Mr QU which constituted undue pressure.

[45] The statement was made in the context of discussing what actions the mortgagors may take to delay the process. In my view, the statement made by Mr QU referred to lawyers acting for the mortgagors, and indicated that those lawyers may not be willing to represent the mortgagors should they make promises which they did not fulfil. It was not a statement directed at the IHs.

[46] There is also a suggestion that Mr QU had a conflict of interest because he or his firm also acted for Mr JW's employer. This has been refuted by Mr QU and there is no evidence to the contrary.

[47] Finally Mr and Mrs IH refer to the fact that Mr QU made no reference to the "Guidelines" as set out on the Law Society website. I am not sure whether or not they are referring to the client information letter which is required to be provided by a lawyer to his or her clients by the Lawyers and Conveyancers Act. I cannot locate any such

client information letter on Mr QU's file. However in the circumstances this matter has not been pursued by Mr and Mrs IH nor has it been commented on by either Mr QU and/or the Standards Committee. To pursue that particular issue in isolation at this stage would only serve to unnecessarily prolong this investigation and in the circumstances I decline to make any further enquiry or investigation into this particular matter pursuant to section 205 of the Lawyers and Conveyancers Act 2006.

Summary

[48] In summary I do not consider that Mr QU's conduct constituted unsatisfactory conduct as that term is defined in the Lawyers and Conveyancers Act and therefore the determination of the Standards Committee is confirmed.

Decision

Pursuant to section 11(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

DATED this 22nd day of June 2012

O W J 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 IH as the Applicants
Mr QU as the Respondent
The Waikato Bay of Plenty Standards Committee 2
The New Zealand Law Society