LCRO 105/2018

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**SW** Applicant
AND	**NL** Respondent

DECISION

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

Introduction

[1] Ms SW has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning the conduct of Mr NL, a lawyer and director of The NL Law Firm Limited (the firm). Mr NL acted on the sale of a property owned by Ms SW and her husband, Mr RA, from whom she was separated.

[2] On 16 August 2014 Ms SW and Mr RA entered into a relationship property agreement. They were married on [date] 2014. Mr NL acted for Mr RA in respect of the relationship property agreement.

[3] Ms SW and Mr RA separated just over two years later on [Date] 2016.

[4] At that time they owned two properties. The first, [Property 2] (the property) was held in their joint names; the second, [Property 1] (the company's property),

previously owned by Ms SW unencumbered, was held by their company in which they were equal shareholders, and the only directors.

[5] They obtained a bank loan to assist with the purchase of the property following which both properties were subject to mortgages in favour of the bank. Mr RA, however disputes that the loan was made to them personally.

[6] Mr NL again acted for Mr RA in respect of the couple's relationship property differences. Ms SW was independently represented by her own lawyers.

[7] On or about 17 February 2017, Ms SW and Mr RA decided to sell the property. Ms SW wanted her lawyer to act on the sale but Mr RA would not agree.

[8] On 15 March 2017 Ms SW's lawyer informed Mr NL that Ms SW proposed "a payment of $91,818.28 + 50% of the proceeds" from the sale of the property calculated following repayment of the bank loan, and deduction of sale costs. Mr NL responded on 24 March 2017 with Mr RA's counter offer of $130,000 on the basis that following the sale of the property the bank loan would remain secured over the company's property.

[9] The property was sold at auction on [Date] 2017. The agreement for sale and purchase (the sale agreement) recorded Mr NL as the vendors' lawyer, namely, acting for Mr RA and Ms SW.

[10] Ms SW met with a bank representative on [date] 2017 "to discuss the up-coming mortgage repayment" from the sale, and a new loan she wanted so she could "settle" her relationship property differences with Mr RA.

[11] Further settlement offers were exchanged on [date] 2017. Ms SW's lawyer proposed a payment of $120,000 on the basis the bank loan was "discharged" on the sale of the property. Mr NL proposed a payment of $140,000 without mentioning the bank loan.

[12] On [date] 2017 Mr NL informed the bank that Mr RA, for whom he acted, had sold the property. Mr NL requested a release of the bank's mortgage over the property. He stated that until resolution of the relationship property differences the mortgage over the company's property would "remain".

[13] On [date] 2017 Ms SW's lawyer rejected Mr RA's offer of $140,000 and made a counteroffer of $125,000.

[14] On [date] 2017, the day before settlement, Mr NL withdrew Mr RA's offer to accept $140,000, and requested mediation. That day Ms SW's lawyer undertook to Mr

NL to release Ms SW's part of the e-dealing upon receipt of Mr NL's undertaking "to hold the sale proceeds undisbursed (excepting rates, water and mortgage liabilities)".

[15] Mr NL attended to settlement of the sale on [date] 2017. He says at 10:13 am he received the balance of the sale proceeds from the purchaser's lawyer which he lodged on term deposit for both Mr RA and Ms SW. Later that day he provided his undertaking to Ms SW's lawyer that he would "hold the settlement funds … undisbursed pending settlement of the relationship property agreement being signed by the parties". He requested Ms SW's lawyer to release the e-dealing so he could complete settlement.

[16] On [date] 2017 Ms SW's lawyer objected to Mr NL retaining the sale proceeds in the firm's trust account. Mr NL ceased acting for Mr RA the following day.

Complaint

[17] Ms SW lodged a complaint with the Lawyers Complaints Service on 1 September 2017. She alleged that when acting for her and Mr RA on the sale of the property Mr NL (a) did so notwithstanding that Mr RA's and her respective interests were in conflict, (b) unfairly and unethically handled her money in his trust account, and (c) provided poor service.

[18] She said on settlement of the sale Mr NL, without her knowledge and consent, did not repay the bank mortgage from the sale proceeds. At that time she sought reimbursement of $12,146.10 representing her share of the interest she had been required to pay to the bank.

(1) Acting for both parties

[19] Ms SW complained that Mr NL, following her separation from Mr RA, was already acting for Mr RA concerning relationship property matters. She said when Mr NL commenced acting for her and Mr RA on the sale of the property, it would have been obvious to him that her interests, and Mr RA's interests were in conflict.

[20] She complained that by not repaying the bank mortgage from the sale proceeds, Mr NL "ignor[ed] [her] instructions in favour of" Mr RA's instructions.

[21] She said "[w]hen it is obvious that two parties are separating and are displaying contrasting outcomes, it is not wise for a lawyer to act for both parties". She referred to r 6.1.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) commenting that a lawyer who considers that the clients' respective

interests do not conflict can act for more than 1 client but must first obtain their informed consent to do so.

[22] She also referred to the requirement in r 6.1.2, namely, where it becomes apparent to the lawyer concerned that he or she will no longer be able to discharge the obligations owed to all of the clients, then the lawyer must inform each of the clients and cease acting for them.

(2) Information for clients, letter of engagement

[23] Ms SW stated that Mr NL had neither provided her with terms of engagement, nor informed her of the likelihood of a conflict. She said he had not recommended to her that another lawyer "act with him or for [her] separately on the sale".

(3) Keep informed, obtain instructions

[24] She said Mr NL approved "the auction documents without telling" her lawyer.

(4) Act competently and in a timely manner

[25] She complained that Mr NL neither attended to the final payment of water rates, nor notified the local authority of the change of ownership which resulted in receipt of an overdue rates notice.

Response

[26] I include references to Mr NL's response to Ms SW's complaint in my later analysis.[1]

Standards Committee decision

[27] The Committee delivered its decision on 5 May 2018 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[28] The Committee identified six issues for consideration.

(1) Acting for more than 1 client – r 6.1

[1] Filed with the Lawyers Complaints Service on 22 November 2017.

[29] The Committee stated that because Mr NL was already acting for Mr RA, r 6.1 prevented Mr NL from acting for both Mr RA and Ms SW. This was because Ms SW and Mr RA all were "in the midst of an acrimonious relationship property dispute [and] had clearly competing interests" in respect of the sale of the property.

[30] Insofar as Mr NL "carried out slightly more work" than Ms SW's lawyer on the sale of the property, the Committee stated that this did "[not] change the fact that Mr NL was acting at all times for Mr RA", and Ms SW's lawyer was "acting at all times for Ms SW".

[31] Although of the view that Mr RA and Ms SW ought "to have instructed a completely independent law firm to act on the conveyancing", the Committee said there "was no evidence …that either Mr RA or Ms SW had any objection" to their respective lawyers "acting jointly on the conveyancing".

[32] For these reasons the Committee "could not accept that there was any basis" for concluding that Mr NL "had acted in a conflict of interest situation".

(2) Information for clients, terms of engagement – rr 3.4, 3.5

[33] The Committee concluded that because Mr NL did not act for Ms SW, who was separately represented, he was under no obligation "to provide Ms SW with terms of engagement and client care information".

(3) Keep informed, obtain instructions – rr 7, 7.1

[34] Similarly, because Mr NL acted for Mr RA, the Committee found that Mr NL's "duties to disclose information and keep his client informed" were "owed to Mr RA and not to Ms SW".

[35] The Committee noted "there was no evidence to suggest that Mr NL failed to ensure" that Ms SW's lawyer was "kept informed of material developments" concerning the sale.

[36] For these reasons, the Committee concluded "it would have been inappropriate for Mr NL to contact Ms SW directly to provide her with an update about the conveyancing" of the property. By "directing all correspondence about progress" on the sale to Ms SW's lawyer, the Committee said Mr NL had "acted entirely appropriately".

(4) Competence – rates issue – r 3

[37] While accepting "it was Mr NL's responsibility to notify the council of the change of ownership", the Committee noted that "for some reason or other" the council was "unaware of the change of ownership" which "led to the issuing of a rates debt".

[38] Having noted Ms SW "had not produced any evidence which would prove definitively that Mr NL was responsible" for that occurring, the Committee observed that the rates notice may have been "wrongly addressed", or "lost in transit", or "overlooked by the Council on receipt".

[39] Because Mr NL had "rectified the situation as soon as he became aware" of these circumstances, the Committee considered it would be "unduly punitive to sanction" him for "at worst, an oversight".

(5) Keep informed, obtain instructions – bank loan – r 7.1

[40] In reaching the conclusion that Mr NL had "acted appropriately in all the circumstances", and had not contravened r 7.1, the Committee repeated that Mr NL acted for Mr RA, not for Ms SW who was separately represented.

[41] The Committee stated that in [date] 2017, before settlement of the sale of the property, Mr NL informed both the bank, and Ms SW's lawyer, "that repayments of the.mortgage were to cease pending resolution of the relationship property dispute".[2]

[42] The Committee observed (a) it "was open" to Ms SW to "raise" any "concerns with Mr NL" through Ms SW's lawyer "before settlement occurred", (b) the bank had requested "as a condition to the discharge of the mortgage" over the property, "an undertaking that the proceeds of sale would be held pending resolution of the relationship property dispute", and (c) on [date] 2017 Mr NL provided that undertaking which prevented him from "releasing any part of the proceeds of sale to Ms SW".

[43] Finally, the Committee noted that no evidence had been produced that Mr NL had "made unauthorised deductions from the funds held on trust" for either Mr NL's "professional fees", or "admin[istration] fees".

[44]

(6) Professional dealings – r 10.1

[2] Letter NL to [EP], Ms SW's lawyer (date 2017).

[45] In the absence of evidence that suggested Mr NL had failed to treat Ms SW's lawyer with respect and courtesy, the Committee stated that Mr NL had been "forthright and cooperative in his dealings" with Ms SW's lawyer.

[46] The Committee repeated that Mr NL's undertaking prevented him from releasing the proceeds of sale until Mr RA and Ms SW had "resolved their relationship property dispute", and "accepted" Mr NL's explanation that he "responded to all correspondence received" from Ms SW's lawyer "in a timely manner".

Application for review

[47] Ms SW filed an application for review on 18 June 2018.

[48] She seeks a written apology from Mr NL including his acknowledgement that (a) he followed Mr RA's instructions not to repay the bank loan secured against the property but to hold that money in his trust account pending resolution of the relationship property dispute, and (b) when acting for Mr RA and Ms SW on the sale of the property did so when their respective interests were in conflict.

[49] She seeks compensation of $21,417 representing interest paid by her to the bank which she says was due to Mr NL's conduct.[3]

(1) Sale of the property - Mr NL acting for Mr RA and Ms SW

[50] Ms SW says Mr NL's name was recorded on the sale agreement as Mr RA's and her lawyer. She says she believed Mr NL was acting for both Mr RA and her on the sale of the property.

(2) Conflict of interests

[51] She says by retaining the sale proceeds of the property in his trust account pending resolution of the relationship property dispute, Mr NL had preferred Mr RA's interests over her interests.

(3) Keep informed, obtain instructions

(a) Bank loan

[52] Ms SW says the sale proceeds of the property were sufficient to repay the loan in full. She claims her lawyer's [date] 2017 instructions to Mr NL to pay the "rates, water

[3] This compensation figure is the updated figure to that in [18], provided by Ms SW at the hearing.

and mortgage liabilities" from the sale proceeds did not authorise Mr NL to obtain a release of the mortgage over the property without repaying the bank loan, whilst leaving the mortgage over the company's property in place.

[53] She says had she known Mr RA intended that the sale proceeds of the property be held in Mr NL's trust account she "would never" have agreed. Otherwise, she says her lawyer's 6 April 2017 letter to Mr NL "would have been quite different".

[54] In support of her contention that the mortgage loan was to be repaid, she refers to Mr NL's [date] 2017 invoice concerning the sale of the property addressed to Mr RA in which Mr NL refers to "[a]rranging release of [bank] mortgage and arranging for discharge of mortgage registration, receiving a statement of the amount to repay the [loan], arranging for repayment …and advising the [bank] of repayment".

(b) Company

[55] She says although Mr NL was not acting for the company, without prior reference to her lawyer, or herself, and therefore without authority, [Mr NL] "initiated major changes to the [company's] mortgage" by obtaining a release of the mortgage over the property whilst the bank retained security over the company's property.

Response

[56] Mr NL, by his counsel, Mr CN, filed his response in this Office on 13 July 2018, and 28 August 2018.

(1) Sale of the property

[57] Mr NL says there is "no evidential basis for Ms SW's assertions" that he acted for her. He says Ms SW was separately represented.

(2) Conflict of interests

[58] He says he "was not in a conflict of interest situation". He says whilst he undertook "the majority of the conveyancing work" Ms SW's lawyer "also carried out a number of activities". For these reasons, he says his professional duties were owed to Mr RA.

[59] He says he neither acted for the company, nor "initiate[d] any changes in the mortgage or otherwise 'changed the makeup' of the mortgage". He says the mortgage over the company's property "remains in place".

[60] He says the mortgage over the property was discharged and the sale proceeds held in his trust account "pending settlement of a relationship property agreement" in accordance with his undertaking to the bank.

(3) Keep informed, obtain instructions

[61] Mr NL repeats that because Ms SW was not his client he had no professional duty "to seek her instructions or otherwise consult her interests".

(a) Bank loan

[62] He refers to the "disputed status" of the bank loan, namely, "whether the debt to [the bank] is a debt of the company …".

[63] He says the Committee, in stating that he "advised both" Ms SW's lawyer and the bank in [date] 2017 that "Mr RA was going to stop mortgage payments", was referring to Ms SW's corresponding statement in her complaint.

[64] He says Ms SW's contrary assertion may refer to "without prejudice correspondence passing between" Mr NL and her lawyer. He says Ms SW and her lawyer were "aware that there was an issue regarding repayment of the loan on settlement" which remained outstanding. This, he says, explains his [date] 2017 letter to the bank in which he requested a release of the bank's mortgage over the property, and informed the bank that the mortgage over the company's property would remain.

[65] Mr NL says having received the bank's [date] 2017 "indicative settlement statement" which noted that the "sale proceeds would be frozen pending a separation agreement being provided to [the bank]", the following day he undertook to the bank "to hold the settlement funds …undisbursed pending settlement of the relationship property".

[66] In response to Ms SW's lawyer's [date] 2017 letter which requested his undertaking "to hold the sale proceeds undisbursed (excepting rates, water and mortgage liabilities)", he says the following day he provided his unqualified undertaking to Ms SW's lawyer to "hold the settlement funds…undisbursed pending settlement of the relationship property agreement being signed …".

[67] He says because the question of repayment of the bank loan was an issue between the parties, Ms SW's lawyer "was not in any position to instruct Mr NL to do this".

[68] Concerning his [date] 2017 invoice in which his sale attendances were summarised, he says that was "a working draft" not "issued" to Mr RA "as the matter is ongoing".

[69] He says in early [month] 2018, the Family Court made an interim order that $400,000 be paid to the bank "in reduction of personal debt" which Mr NL paid on [date] 2018.

(4) Trust account queries

[70] Mr NL says that he received three payments in respect of the sale of the property: (a) the balance of the deposit, $46,964 (being $73,700, less the agent's commission); (b) the settlement balance, $653,267.18 (being $663,267.18 less $10,000 retained for roof repairs); and (c) a final payment, $7,347.75.

[71] He says he "held" all funds received "in his trust account on IBD deposit". He says he had "not taken any fees nor made any other deductions". He says Mr RA's new lawyer sent a "full copy" of that account to Ms SW's lawyer on [date] 2018.

[72] He says he attended to payment of water rates "from his own office account".

Hearing

[73] The review progressed by way of a hearing in Auckland on 15 August 2019 attended by both parties. Mr CN appeared for Mr NL.

Nature and scope of review

[74] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[4]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the

[4] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[75] More recently, the High Court has described a review by this Office in the following way:[5]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[76] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to first, consider all of the available material afresh, including the Committee's decision, and secondly, provide an independent opinion based on those materials.

Issues

[77] Ms SW challenges the Committee's findings in respect of two of the six issues identified by the Committee.

[78] First, whether Mr NL acted for her and Mr RA on the sale of the property. Secondly, Mr NL's conduct in arranging with the bank that the sale proceeds of the property would be held in his trust account undisbursed pending resolution by Mr RA and Ms SW of their relationship property differences.

[79] At the hearing Ms SW raised a number of trust account, and related matters concerning the term deposit for the sale proceeds of the property that were not put before the Committee. For that reason, I do not have jurisdiction to consider those matters on review.

[80] I have identified the following issues for consideration on this review:

(1) Client

(a) When acting on the sale of the property, did Mr NL act for them both on that matter?

(2) Acting for more than 1 client – r 6.1

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[5] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(b) If so, was Mr NL prevented by r 6.1 from acting for both Mr RA, and Ms SW?

(c) In particular, was there a more than negligible risk that Mr NL may have been unable to discharge the obligations he owed to either or both Mr RA and Ms SW when acting on the sale of the property?

(3) Keep informed, obtain instructions – rr 7, 7.1

(d) Before Mr NL arranged with, and provided his undertaking to the bank that he would hold the sale proceeds of the property in his trust account until Mr RA and Ms SW had resolved their relationship property differences, did Mr NL first obtain the authority and consent of Ms SW, or her lawyer, to make that arrangement, and provide that undertaking?

(e) If not, then on what basis did Mr NL provide that undertaking to the bank, and did he owe a duty to Ms SW to account to her for her share of the sale proceeds?

Analysis

(1) Acting on the sale of the property

(a) Retainer, client

[81] Although not defined in the Act or the Rules, the term "client", is included in the definition of retainer in r 1.2 described as:[6]

> … an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[82] As such, a "client" is the recipient of legal services and appears in a number of the Rules. The question whether a lawyer has been retained is to be determined objectively. In *Hartlepool v Basildon,* the fact that the lawyer concerned "had personal reservations as to whether he [or she] was going to take the case are relevant only in so far as they were objectively ascertainable". [7]

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[6] The Australian Solicitors' Conduct Rules, June 2011 similarly provide that client, "with respect to the solicitor or the solicitor's law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter."

[7] *Hartlepool v Basildon* LCRO 79/2009 (September 2009) at [23]*;* see also GE Dal Pont ***Lawyers' Professional Responsibility*** (6th ed, Thomson Reuters, Sydney, 2017) at [3.20].

[83] In particular, "… whether a reasonable person observing the conduct of both [the lawyer] and [the client] would conclude that the parties intended [a] lawyer-client relationship to subsist between them … some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer." [8] For that reason, it is important that the lawyer identifies who his or her client is, particularly when instructed by a number of persons among whom there may be differences or even conflicts.

[84] The "retainer" between lawyer and client has also been described as being: [9]

> … central to various aspects of the lawyer-client relationship. Fundamentally, it identifies the client and prescribes the services expected of the lawyer. In doing so it determines upon whose instructions the lawyer acts, the scope of the lawyer's authority in carrying out those instructions and the scope of the lawyers' duties.

(b) Parties' positions

[85] Ms SW contends that Mr NL acted for her and Mr RA on the sale of the property.

[86] Mr NL disagrees. He says he acted for Mr RA alone. He says Ms SW was separately represented.

(c) Discussion

[87] Ms SW refers to her request in her [date] 2017 email to Mr RA, that because she would need to arrange a loan to purchase a replacement property for herself, it made sense for her lawyer to act on the sale of the property.

[88] She says Mr RA's email response the next day, copied to Mr NL, did not in so many words refuse her request, but stated that Mr NL would forward a copy of the sale agreement to Ms SW's lawyer, and "liaise with them throughout the process".

[89] She says when the property sold at auction on [date] 2017, Mr NL's name was recorded on the sale agreement as Mr RA's and her lawyer. She says when she and Mr RA signed the sale agreement she understood Mr NL "was representing both [their] interests" and would "complete the task". Hence, she says she asked Mr NL on [date] 2017 to arrange a final water meter reading for the property.

[90] For his part, Mr NL explains that he first acted for Mr RA in 2014 concerning a relationship property agreement with Ms SW who was similarly separately represented

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[8] At [23] referring to *Day v Mead* [1987] 2 NZLR 443 (CA) at 458, *Blyth v Fladgate* [1891] 1 Ch 337, and *Giffith v Evans* [1953] 1 WLR 1424 at 1428. See also *T v G* LCRO 29/2009 (April 2009) at [26].
[9] Dal Pont at [3.05] and [5.25].

at that time. He says in early 2017 Mr RA informed him [Mr RA] and Ms SW were separating, and instructed him to act in the negotiation of a relationship property settlement.

[91] Mr NL says when the property, which was jointly owned by Mr RA and Ms SW, was sold he acted for Mr RA on the sale. He says Ms SW had her own lawyer acting for her. At the hearing, Mr CN, referring to Mr NL having been named as the vendors' lawyer on the sale agreement, submitted that only one firm could be nominated to act.

[92] Mr NL says he prepared the settlement statement, and attended to settlement by receiving the sale proceeds "on the basis of undertakings" he had provided to the bank, and to Ms SW's lawyer. That is, by holding the sale proceeds in his trust account and not repaying the bank loan on settlement.

[93] Mr CN submitted that whilst Mr NL acknowledged he carried out the "majority" of the conveyancing, Ms SW's lawyer completed Ms SW's authority and instructions (A & I) for e-dealing purposes. At the hearing Ms SW explained that this avoided the need for her to attend at Mr NL's office to sign an A & I.[10]

[94] Mr NL says he "did not provide Ms SW with terms of engagement and client care information as [he] did not consider that [he] acted for her". He says had he "considered [he] was acting for Ms SW" he would have sent her "a client care letter and terms of engagement".

[95] In that case, he says he would not have needed to provide an undertaking to her lawyer because his "obligations to Ms SW would have been covered by [his] client care letter and terms of engagement". However, he says in those circumstances he would not have agreed to act for Ms SW because of "an impossible conflict situation given the relationship property dispute".

[96] As noted above an agreement which constitutes a "retainer" may be "express or implied, whether recorded in writing or not …". The question whether a lawyer has been retained, which includes a consideration of the lawyer's position on the matter, is to be determined objectively.

[97] Because a person claiming the existence of a contract has the burden of proof, it follows a lawyer claiming the existence of a retainer not reduced to writing is required

[10] For Land Transfer purposes, conveyancing transactions are effected by e-dealing on Landonline. Completion of the e-dealing aspect of the conveyancing on the sale of the property was by way of a multi-party e-dealing in respect of which Ms SW's lawyer attended Ms SW on her signature of her A & I. See New Zealand Law Society *Property Transactions and E-dealing Practice Guidelines* (New Zealand Law Society, Wellington, 2015) [the PLS Guidelines] at part 2.

to produce evidence in either or both words or conduct. In seeking to prove the existence of a retainer not reduced to writing "the lawyer must overcome four main evidential difficulties". Namely, (a) "evidence of conduct is rarely, in and of itself, unequivocal"; (b) inaccurate recollection of past events; (c) the scope of the retainer; and (d) the lawyer's word against that of the client in which case the courts will usually "side with the client".[11]

[98] On the other hand, in circumstances where an alleged client claimed his or her lawyer contravened a professional obligation or duty, then the alleged client bears the burden of proof "of facts and circumstances sufficient to establish a tacit agreement to provide legal services". In those circumstances "objective facts, not merely from the lawyer's belief as to which clients he or she was acting for" will be determinative.

[99] It has been observed that the "reasonable expectations of the alleged client carry significant weight here, as the lawyer may always take steps to dissuade a belief that the lawyer acts for a person". In ascertaining "how" the lawyer "referred to and dealt with" the alleged client, the lawyer's file material will be of assistance.[12]

[100] Adopting that approach, whilst Ms SW had her own lawyer acting for her, that was primarily in respect of the relationship property matter.

[101] In his [date] 2017 email to Ms SW's lawyer, to which he attached a copy of the sale agreement, Mr NL stated he was "happy to attend on the conveyancing aspects of the sale". Mr CN explained that this was on the basis Ms SW was separately represented.

[102] Nevertheless, Mr NL proceeded to act on the sale. In my view, the fact Mr NL also requested Ms SW's lawyer's "e-dealing details" in his [date] 2017 email, and asked that Ms SW communicate with him through them, did not diminish his professional duties to Ms SW when acting on the sale.

[103] Mr NL acknowledges he performed the bulk of the conveyancing work on the sale of the property. In so doing he dealt with the real estate agent, the purchasers' lawyer and the bank. His attendances included collecting the balance of the deposit from the real estate agent; arranging a release of the bank's mortgage; preparing a settlement statement; exchanging settlement undertakings with the purchasers' lawyers; receiving

[11] Dal Pont at [3.50] and [3.55].
[12] Dal Pont at [3.60].

the balance of the purchase price (as adjusted) at settlement from the purchasers' lawyer, and releasing the e-dealing.[13]

[104] As noted earlier, a number of these attendances are described by Mr NL in his "draft" [date] 2017 invoice to Mr RA referred to earlier.

[105] My analysis of the communications exchanged between Mr NL and Ms SW's lawyer, and the nature of the legal work Mr NL undertook when acting on the sale leads me to the conclusion that whilst Mr NL and Ms SW's lawyer each acted for Mr RA, and Ms SW respectively on the relationship property matter, Mr NL acted for them both on the sale of the property.

[106] It also follows, in my view, that before commencing to act on the sale Mr NL was required to provide Ms SW with the information on the principal aspects of client service, and client care and service information specified in rr 3.4, and 3.5.

[107] In this regard, as noted earlier, Mr NL submits that because he acted for Mr RA alone, the requirements of those rules did not apply to Ms SW. Only for the reason Mr NL appears to have proceeded to act on the sale under the mistaken belief that he was not acting for Ms SW I make no adverse finding in respect of his contravention of those particular rules.

(2) Was Mr NL prevented from acting for both Mr RA and Ms SW?

(a) Acting for more than 1 client – r 6.1

[108] Consistent with the consumer protection purposes of the Act and lawyers' fundamental obligation to protect clients' interests, r 6 requires that: [14]

> [i]n acting for a client, a lawyer must, within the bounds of the law and [the rules], protect and promote the interests of the client to the exclusion of the interests of third parties.

[109] The principle that applies to a lawyer who acts, or proposes to act for more than one client on a matter has been described as "… an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients conflict".[15]

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[13] PLS Guidelines at part 1, section 2.
[14] Sections 3(1) and 4 of the Act. But see s 4(d).
[15] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [7.1], referring to *Moody v Cox* [1917] 2 Ch 71 at 81.

(i) Qualified prohibition against acting for more than 1 client

[110] In such circumstances r 6.1 contains a qualified prohibition that:

> [a] lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[111] The threshold, "a more than negligible risk" above which the prohibition in r 6.1 applies, is very low. It has been described in a decision of this Office as circumstances where there is "no meaningful risk that the obligations owed to the parties would not be able to be discharged", and "a real risk of an actual conflict of interest …".[16]

[112] The distinction between contentious and non-contentious matters provides a useful way to assist in determining whether or not a conflict of duty exists for a lawyer, or is likely to arise in a particular situation.[17] In the latter category, where the parties "…are negotiating and significant terms remain to be resolved, it would be more or less impossible for a lawyer to act for both parties … an advantage acquired by one client will often result in a detriment to the other client".[18] The responsibility for making that determination rests with the lawyer concerned.[19]

(ii) If not prohibited from acting – informed consent

[113] In circumstances where a lawyer considers that the prohibition in r 6.1 does not apply, r 6.1.1 contains a qualified permission for a lawyer to:

> … act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

[114] Rule 1.2 defines "informed consent" to mean:

> …. consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

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[16] *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [27] and [36]. In this context, the word "negligible", which is not defined in either the Act or the Rules means, "unworthy of notice or regard; so NL or insignificant as to be ignorable": *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003).

[17] Webb, Dalziel and Cook at [7.2]. See *Sandy v Kahn*, and more recently *ZAA v YBC* LCRO 243/2013 (27 June 2017); generally, Dal Pont at [7.35], [7.95] and [7.115].

[18] At [7.2].

[19] *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (HC) at 440, applying *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 646; see Webb, Dalziel and Cook at [7.3].

[115] The process of obtaining informed consent under r 1.2 requires that the lawyer concerned take positive steps to explain to the parties (a) the material risks to each of them if the lawyer acts for the parties, and (b) the alternatives available, for example, each party instructing an independent lawyer. The lawyer must (c) also believe, on reasonable grounds that the clients understand these issues. Informed consent must be given without influence, and independent from the other clients.[20]

[116] These rules still apply where different lawyers in a firm act for different parties in a matter or a transaction.[21] Moreover, "[a]n information barrier within a practice does not affect the application of, nor the obligation to comply with, rr 6.1 or 6.2".[22]

(iii) No longer able to discharge professional obligations

[117] Under r 6.1.2, even though a lawyer may have obtained the prior informed consent of all parties concerned to act:

> . if …it becomes apparent that the lawyer will no longer be able to discharge the lawyer's professional obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

[118] This rule acknowledges the possibility that the interests of the clients for whom a lawyer is acting may or could diverge to the extent that by continuing to act the lawyer finds himself or herself no longer able to carry out of his or her professional obligations owed to all of the clients.

[119] For example, a lawyer may (a) receive information from one client which the lawyer would be duty bound to disclose to the other client(s) (see r 7), but in doing so may breach the duty of confidence owed to the client who provided the information to the lawyer (see r 8);[23] or (b) act to protect one client's interest at the expense of another client(s) for whom the lawyer is also acting on a matter (in contravention of rr 6 and 6.1).[24]

[120] In such circumstances r 6.1.2 requires that the lawyer concerned "must immediately inform each of the clients of this fact and terminate the retainers with all of the clients." This Office has stated that "it is unacceptable for a single firm to act for two

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[20] *Sandy v Kahn* at [41] and [42]; see also Webb, Dalziel and Cook at [7.4].
[21] Rule 6.2.
[22] Rule 6.3.
[23] See *Black v Taylor* [1993] 3 NZLR 403 (CA) at 419, referred to in *Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [15].
[24] *Sandy v Kahn* at [25] and [32].

parties who are in dispute with each other", and that "[o]ther than when proceedings are actually filed there can be no clearer conflict of interest".[25]

[121] Under r 6.1.3, a lawyer may continue to act for 1 client only if "the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act" for that client, and "no duties to the consenting clients have been or will be breached".

(b) Parties' positions

(i) Ms SW

[122] Ms SW claims Mr NL acted for Mr RA and her on the sale of the property when prohibited from doing so by r 6.1. She says by proceeding to act for them both without first obtaining her prior informed consent Mr NL contravened r 6.1.1.

[123] She also claims that by arranging with the bank to hold the proceeds of sale of the property in his trust account pending resolution of the relationship property differences, Mr NL preferred Mr RA's interests over hers. For that reason, she says Mr NL was required by r 6.1.2 to cease acting for them both and inform them accordingly.

(ii) Mr NL

[124] Consistent with his claim that he did not act for Ms SW, Mr NL denies there was "a conflict of interest situation". He says he acted for Mr RA alone to whom he owed his professional duties. He acknowledges that he carried out most of the conveyancing work on the sale, but points out Ms SW's lawyer also attended to "a number of activities".

[125] He explains that the bank's mortgage over the property "was collateral security for a loan advance" to the company in which Mr RA and Ms SW were equal shareholders, and the only directors. He said he did not act for the company.

[126] He says the bank "did not require repayment" of the company's mortgage, and "[t]he settlement (in terms of [his] undertakings) …protected the interest[s] of both parties".

[127] He says the sale proceeds, from which he had not made any payments and had not deducted his fees, were held in his trust account on term deposit in accordance with his undertakings.

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[25] *Sandy v Kahn* at [34].

(c) Discussion

[128] I have already concluded that Mr NL, when acting on the sale of the property, did so for both Mr RA, and Ms SW. Taking into account that Mr RA and Ms SW were involved in an unresolved relationship property dispute between them, the next question is whether Mr NL was permitted to do so in such circumstances.

[129] As discussed above, the test in r 6.1 whether a lawyer is permitted to act for more than 1 client on a matter or transaction is whether "there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients".

[130] If the answer is yes, in other words "there is a more than negligible risk …", then the lawyer will be prohibited by r 6.1 from acting. It has been observed that while it may be possible to act for more than 1 client on a straightforward transaction where all terms have been agreed, "it is impossible" to do so where the parties are involved in a dispute. That is, where the matter is contentious.[26]

[131] Mr NL says he "would never have agreed to act for Ms SW in those circumstances". His explanation, which the Committee accepted, is that, contrary to my finding, he only acted for Mr RA, and the conveyancing duties were shared with Ms SW's lawyer, albeit weighted towards Mr NL because he was dealing with the purchaser's lawyer.

[132] However, as well as the unresolved nature of their relationship property dispute, at the time of the sale of the property, Mr RA and Ms SW also had opposing unresolved views about repayment of the bank loan which the parties and their respective lawyers appear to have overlooked openly discussing.

[133] That is the position in which Mr NL found himself. Because Mr RA's and Ms SW's respective interests were in unresolved conflict at that time, there was clearly a more than negligible risk Mr NL may be unable to discharge his professional obligations owed to 1 or both of them. Those circumstances alone were sufficient reason for Mr NL to decline, indeed required him to decline, to act on the sale.

[134] From my analysis of the information produced to this Office for this review, the conclusion I have reached is that Mr NL acted for both Mr RA and Ms SW on the sale of the property in contravention of r 6.1.

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[26] Webb, Dalziel and Cook at [7.2].

[135] Seemingly unaware that he was prohibited from acting on the sale in those circumstances, Mr NL proceeded to do so. Ms SW says Mr NL did not first obtain her prior informed consent. At the hearing, Mr CN submitted that because Mr NL considered he was not also acting for Ms SW on the sale, there was no need for him to obtain Ms SW's informed consent.

[136] However, because I have concluded that Mr NL acted for them both on the transaction, albeit in contravention of r 6.1, it follows that in the absence of having obtained Ms SW's informed consent, Mr NL also contravened r 6.1.1.

[137] Moreover, because Mr NL was unaware of his conflicting duties owed to each of Mr RA and Ms SW respectively, it was not until Mr NL received Ms SW's lawyer's 12 April 2017 letter about repayment of the bank loan that the following day he ceased acting for Mr RA.

[138] By then Mr NL had long since provided his undertaking to the bank, and exchanged undertakings with Ms SW's lawyer ahead of settlement of the sale on [date] 2017.

[139] Mr NL ought to have declined to act, or at least ceased acting on the sale as soon as he became aware that Mr RA and Ms SW had opposing views about the application of the bank loan. Namely, retention of the bank loan in Mr NL's trust account as required by Mr RA pending resolution of the relationship property differences, or immediate payment from the sale proceeds as required by Ms SW.

[140] However, again because Mr NL proceeded on the mistaken belief that he was acting for Mr RA alone, and ceased acting as soon as he was alerted to his conflict of duties by Ms SW's lawyer on [date] 2017, I make no finding that Mr NL contravened r 6.1.2 referred to above.

(3) The bank loan

(a) Keep informed, obtain instructions – rr 7, 7.1

[141] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[27] With limited exceptions, a lawyer risks

[27] Rules 7 and 7.1.

a complaint from a client with a prospect of a disciplinary response if the lawyer does carry not out the client's instructions.[28]

[142] If a prospective client's instructions to the lawyer "could require the lawyer to breach any professional obligation" then the lawyer may decline the instructions.[29] If, during the carriage out of the work on a retainer, the client's "instructions … require the lawyer to breach any professional obligations," then the lawyer may terminate the retainer.[30]

[143] It follows from this that a lawyer is required to follow a client's instructions of a client's matter. It has been observed that a lawyer:[31]

> …must not act in contravention of a client's instructions. It may be appropriate for the lawyer to counsel against a particular course of action when it is considered not to be in the client's best interests. But when clients are firm in their instructions, the lawyer may not substitute the lawyer's own judgment for that of the client.

[144] Where the lawyer is unsure about the client's instructions then:[32]

> ….it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action.

[145] Concerning advice provided to a client in compliance with these requirements, r 1.6 requires that information that the Rules requires a lawyer to provide to the lawyer's client must (a) be provided in a clear manner, and (b) not be misleading. In doing so the lawyer is required to take into consideration (c) the identity and capabilities of the client, and (d) the nature of the information being provided.[33]

(b) Parties' positions

(i) Ms SW

[146] Ms SW says she understood and assumed from "correspondence between" her and Mr RA, together with "discussions" between her and her lawyer "prior to the sale", that the bank loan would be repaid from the sale proceeds of the property.

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[28] Webb, Dalziel and Cook at [10.3].
[29] Rule 4.1.
[30] Rule 4.2.1(a).
[31] Webb, Dalziel and Cook at [10.3].
[32] At [10.3], referring to *Ismail bin Ibrahim v Lim Lim & Oon* [1998] 1 AMR 339.
[33] See discussion in *Sandy v Kahn* at [38].

[147] Otherwise, she says she would have informed the bank she did not agree, her lawyer would not have released the e-dealing to enable settlement of the sale, and her dispute with Mr RA on this issue could have been referred to mediation.

(ii) Mr NL

[148] Mr NL focuses on what he describes as the "disputed status" of the bank loan. That is, whether the loan was a debt personal to Mr RA and Ms SW, or whether a loan to the company.

[149] He says Ms SW's lawyer knew what he describes as "an issue regarding repayment of the loan on settlement" which was unresolved at settlement. Hence, he says, his undertaking to the bank to hold the sale proceeds of the property in his trust account because the bank still held a mortgage over the company's property.

(c) Discussion

[150] Ms SW says she "was horrified to learn after settlement" that the loan "had still not been repaid and that a week after that another monthly payment was expected".

[151] She says Mr NL did not write to her lawyer before he sent his [date] 2017 letter to the bank. She says her lawyer remained unaware of that letter until Mr NL produced his file towards the end of [month] 2017.

[152] She refers to her lawyer's [date] 2017 letter to Mr NL requesting his undertaking "to hold the sale proceeds undisbursed (excepting rates, water and mortgage liabilities)". She says she understood that following payment of those items the balance would be "around $20,000" which she agreed to.

[153] She says before receiving that letter Mr NL had already made arrangements with the bank whereby the sale proceeds of the property including the bank loan would be held in Mr NL's trust account pending resolution of the relationship property dispute. She says she viewed his [date] 2017 undertaking to her lawyer as his "agree[ment]" he would pay the "rates, water and mortgage liabilities" referred to in her lawyer's [date] 2017 letter to Mr NL. She says when, following settlement, her lawyer asked him why the bank loan had not been repaid he replied he was "doing what" the bank and her lawyer "instructed him".

[154] As already noted, for his part Mr NL says because the issue of repayment of the bank loan was unresolved, on [date] 2017 Ms SW's lawyer was in no position to instruct Mr NL to repay the loan to the bank.

[155] Ms SW suggests Mr NL, in making this arrangement with the bank, "was acting primarily" as Mr RA's lawyer, and had "used [that] position to influence the outcome" of the sale "in favour" of Mr RA. She says by subsequently referring Mr RA to another lawyer to complete the relationship property negotiations, Mr NL recognised there was a conflict between Mr RA's and her respective interests.

[156] It is evident from the information provided to this Office for this review that Mr NL did not seek Ms SW's consent, before he arranged with the bank, on [date] 2017, to hold the sale proceeds in his firm's trust account until the parties had resolved their relationship property differences.

[157] Because I have found that Mr NL acted for both Mr RA and Ms SW on the sale of the property it follows that Mr NL owed Ms SW the duty to promptly disclose to her all information received by him relevant to the sale.

[158] Also, the duty to keep her informed about progress with the sale, included Mr RA's proposal to withhold repayment of the bank loan until resolution of the relationship property differences. This included consulting with Ms SW's lawyer about steps to implement both Mr RA's and Ms SW's respective instructions on the matter.

[159] Instead, Mr NL acted unilaterally. He has not produced any evidence that he first discussed with Ms SW's lawyer Mr RA's proposal that the bank loan be held in his firm's trust account pending resolution of the relationship property dispute.

[160] In my view it is not an answer, as Mr CN suggests, that because Mr NL had to follow Mr RA's instructions [Mr NL] did not need Ms SW's approval.

[161] I observe that although Mr NL had provided his undertakings to both the bank, and to Ms SW's lawyer, and settled the sale, it was still open to him, after first having obtained Mr RA's authority, and Ms SW's lawyer's agreement, to repay the bank loan as requested by Ms SW's lawyer on [date] 2017.

[162] It is unlikely the bank would have objected. In this regard I observe from Ms SW's account of her meeting with a bank representative on [date] 2017 that initially the bank expected the loan would be repaid. Although, had the loan been repaid at that time interest from [date] 2017 would still have been incurred, the cost to the parties would have been significantly less.[34]

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[34] Instead of running on until on or about [date] 2018, when in accordance with the Family Court order of that date, Mr NL made a partial reduction of the loan. See a similar observation in *Carrol v SW* [2018] NZFC 1830 at [98(d)].

[163] The conclusion I have reached is that by neither informing Ms SW, or her lawyer, of Mr RA's proposal not to repay the bank loan until the relationship property differences were resolved, and not consulting with them about that matter, Mr NL contravened rr 7 and 7.1.

Decision

[164] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) Reversed as to the finding to take no further action concerning Ms SW's allegation that Mr NL acted for both Mr RA and Ms SW on the sale of the property in circumstances when there was a more than negligible risk Mr NL may be unable to discharge the obligations owed to 1 or more of them, and substituted with a finding that by acting for both Mr RA and Ms SW on the sale Mr NL contravened rr 6.1 and 6.1.1 which constitutes unsatisfactory conduct under s 12(c) of the Act.[35]

(b) Confirmed as to the finding to take no further action concerning Ms SW's allegation that Mr NL failed to comply with rr 3.4 and 3.5 by not providing to Ms SW client information on the principal aspects of client service, and client care and service information.

(c) Confirmed as to the finding to take no further action concerning Ms SW's allegation that Mr NL failed to notify the rating authorities of the change of ownership of the property.

(d) Reversed as to the finding to take no further action concerning Ms SW's allegations that Mr NL failed (i) to keep Ms SW informed generally in respect of the sale of the property, and (ii) to seek Ms SW's instructions in relation to the repayment of the bank loan, and substituted with a finding that by neither informing Ms SW, or her lawyer, of Mr RA's proposal not to repay the bank loan until the relationship property differences were resolved, and not consulting with them about that, Mr NL contravened rr 7, and 7.1 which constitutes unsatisfactory conduct under s 12(c) of the Act.[36]

[35] s 12(c) includes "a contravention of [the] Act".
[36] Section 12(c) includes "a contravention of [the] Act".

(e) Confirmed as to the finding to take no further action concerning Ms SW's allegation that Mr NL refused to correspond with Ms SW's lawyer in contravention of his professional obligations to do so.

Orders

[165] Having made a finding of unsatisfactory conduct, s 156 of the Act includes among the orders that a Standards Committee can make, orders in the nature of penalty.

[166] In this regard, the functions of penalty in the disciplinary context have been described by the Court of Appeal as punishing the practitioner, a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct. [37]

[167] The starting points for penalty are the seriousness of the conduct and culpability of the lawyer concerned. Mitigating and aggravating features, as applicable, are also taken into account. Acknowledgement by the lawyer of error, and acceptance of responsibility are matters to be considered in mitigation.

(a) Fine

[168] A fine is one of the orders a Standards Committee, or this Office on review, can make. The maximum fine available is $15,000.[38] Concerning an appropriate fine, this Office has stated that in cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, regulations or the Act) and a fine is appropriate, a fine of $1,000 would be a proper starting place in the absence of other factors.[39]

[169] Taking into account the functions of a penalty referred to above, in my view the imposition of a fine in respect of Mr NL's contraventions is warranted. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 Mr NL is ordered to pay to the New Zealand Law Society the sum of $2,000 by way of a fine to be paid within 30 days of the date of this decision pursuant to s 156(1)(i) of the Act.

(b) Compensation

[170] Section 156(1)(d) provides:[40]

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[37] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].
[38] Section 156(1)(i).
[39] *Workington v Sheffield* LCRO 55/2009 at [68].
[40] The $25,000 maximum compensation amount is prescribed by the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

> Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner … [it may] order the practitioner … to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000].

[171] The section provides that the person who seeks compensation must have "suffered loss by reason of any act or omission of [the lawyer]". There must be a clear "causative link" between Mr NL's conduct, namely, his contraventions of the rules referred to above, and the loss claimed by Ms SW.

[172] Ms SW says Mr RA stopped paying his share of the loan payments "from [date] 2017". She says although the money held in Mr NL's trust account had earned some interest, Mr NL had "not provided an actual bank statement of the trust account", and she did "not believe he [had] invested all the money received".[41]

[173] In my view it is speculative to assume that had an independent law firm acted on the sale, and/or had repayment of the bank loan issue been resolved before settlement of the sale, that the loss claimed by Ms SW would not have been incurred.

[174] In other words, the possibility cannot be discounted that Mr RA and Ms SW may have agreed the basis upon which the bank loan component of the sale proceeds be applied either (a) by being held in Mr NL's trust account as stakeholder for both parties for a specified time whilst the parties negotiated, and repaid to the bank failing agreement being reached within that time, or (b) faced with an impasse on that issue, repayment of the loan on settlement of the sale.

[175] In summary, there is not in my view a clear "causative link" between Mr NL's conduct and the loss claimed by Ms SW.

[176] For these reasons, I do not consider it is appropriate that Ms SW be compensated by an order under s 156(1)(d). In arriving at this view, I make the observation that such matters are best determined by the Courts in respect of any claim in negligence brought by a client against his or her lawyer where witnesses can be tested by cross examination.

(c) Costs

[177] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that pursuant to s 210(1) of the Act, Mr NL is ordered to pay costs in the sum of $1,600 to the New Zealand Law Society

[41] Ms SW refers to a further payment of $7,347.75 from the purchasers, $500 retained for water rates yet only $33.99 required.

within 30 days of the date of this decision. Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[178] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

DATED this 23rd day of August 2019

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B A Galloway
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:

Ms SW as the Applicant
Mr NL as the Respondent
Mr CN, counsel for Mr NL
[Area] Standards Committee [X]
New Zealand Law Society