LCRO 239/2017

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
BETWEEN	**AB** Applicant
AND	**CD** Respondent

DECISION

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

Introduction

[1] Ms AB has applied for a review of a decision by the [Area] Standards Committee (the Committee), which made a finding of unsatisfactory conduct against Mr CD, a barrister. Mr CD acted for Ms AB, her sister Ms EB and their company, [JJ] Holdings Ltd ([JJ]), on a property dispute.

[2] In November 2014, Ms AB sold a residential property (the property) to Mr B and Ms T KL (the vendors). On or about 6 January 2015, the vendors and [JJ] signed an agreement for sale and purchase (the sale agreement) whereby the vendors were to sell the property to [JJ] for a sale price of $455,000. The purchase was subject to [JJ] obtaining bank finance. No settlement date was specified in the sale agreement.

[3] Unable to agree on settlement of the transaction, on 12 June 2015 [JJ] lodged a caveat against the title to the property to protect its interest pursuant to the sale agreement.

[4] In early July 2015, the vendors made applications to the High Court first, to have the caveat removed,[1] and secondly, for an injunction restraining [JJ] from selling the property.[2]

[5] Mr GH of [XB] Legal, who acted for [JJ], instructed Mr CD to assist him. On 10 July 2015, Mr GH filed a Notice of Opposition to the vendors' proceedings in the High Court.

[6] Mr CD sent his letter of engagement to [JJ], Ms AB and Ms EB on 13 July 2015.

[7] On 18 and 28 September 2015, Mr GH unsuccessfully tendered settlement of the proposed purchase for $455,000. The vendors' lawyer responded on 6 October 2015, with the vendors' offer to sell the property to [JJ] for $509,000.

[8] On 8 October 2015, Ms AB informed Mr CD that she and Ms EB wanted to make a counteroffer of $469,000. The following day, 9 October 2015, Mr GH informed the vendors' lawyer that [JJ] rejected the vendors' offer of $509,000. Mr GH stated that [JJ] would pay $455,000 for the property as provided in the sale agreement.

[9] On 28 October 2015, the High Court heard the vendors' application to remove [JJ]'s caveat. In its decision delivered on [date] 2015, the Court sustained [JJ]'s caveat on condition that [JJ] commence proceedings for specific performance within fourteen days and "prosecute[d] [that] claim … promptly".[3]

[10] An approach by Mr CD to the vendors' counsel in early May 2016, to explore settlement options, and his attempt in September 2016, to arrange mediation, were both unsuccessful.

[11] The dispute was ultimately settled, after four days of negotiation, on 15 November 2016, the first day of the scheduled High Court hearing.

Complaint

[12] Ms AB lodged a complaint with the Lawyers Complaints Service on 28 February 2017. She claimed Mr CD "failed to act in [her] best interests". She claimed Mr CD "wanted to drag the case out … to generate as much work as possible" from her. She said she had raised her concerns about Mr CD's conduct with him "on a number of occasions".

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[1] *KL v [JJ] Holdings Ltd* [2015] NZHC [xxxx].
[2] *KL v [JJ] Holdings Ltd* [2015] NZHC [xxxx]
[3] *KL v [JJ] Holdings Ltd*, above n 1, at [28].

[13] She requested "appropriate orders" against Mr CD and a review of the legal fees he charged her.

(1) Instructions to present a counteroffer

[14] Ms AB claimed that, having received the vendors' 6 October 2015 offer to sell the property to [JJ] for $509,000, on 8 October 2015, she asked Mr CD "to present a counteroffer of $469,000" to the vendors, which he failed to do.

(2) Advice — alternatives to litigation

[15] Ms AB claimed Mr CD did not advise her to settle the dispute. She stated that the "effective" amount in dispute, $40,000, warranted "a quick negotiated settlement", which her counteroffer of $469,000 would have assisted to achieve.

(3) Instructions — term of settlement agreement

[16] Ms AB claimed that, contrary to her instructions to Mr CD, he did not include in his amended draft of the settlement agreement received from the vendors' counsel "a clause requiring substantiation of expenses" for renovations to the property.

(4) Legal fees

[17] Ms AB requested a review of Mr CD's legal fees charged to her in the matter.

Response

[18] Mr CD did not provide comments to the Lawyers Complaints Service, or submissions to the Committee before the hearing of Ms AB's complaint, despite his stated intention to do so.[4]

Standards Committee decision

[19] The Committee delivered its decision on 2 November 2017 and determined, pursuant to section 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act), that by failing to follow Ms AB's instructions to present her counteroffer to the vendors' lawyer, Mr CD contravened rr 3 and 13.3 of the Lawyers and Conveyancers Act

[4] Emails from Mr CD to Lawyers Complaints Service (1) before the Committee's hearing, 23 May 2017, 2 June 2017, 13 June 2017, 29 June 2017 and 20 July 2017; (2) after the Committee's hearing, 6, 9 October 2017.

(Lawyers: Conduct and Client Care) Rules 2008 (the Rules), which constituted unsatisfactory conduct under ss 12(a) and 12(c) of the Act.

[20] The Committee made orders that Mr CD pay a fine and costs.

[21] Concerning Ms AB's allegations that Mr CD (a) did not follow her instructions to include a term in the settlement agreement and misled her to believe he had, and (b) failed to advise her of the alternatives to litigation that were reasonably available, the Committee decided, pursuant to s 152(2)(c) of the Act, to take no further action.

[22] The Committee noted that Mr CD had not provided his comments or submissions in response to Ms AB's complaint.

(1) Instructions to present a counteroffer

[23] The conclusion reached by the Committee was that "on the balance of probabilities and on the evidence available", Mr CD failed to follow Ms AB's instructions to present the counteroffer. In doing so Mr CD had contravened rr 3 (act competently) and 13.3 (follow instructions in litigation).

[24] In reaching that decision, the Committee considered that whilst (a) Ms AB's 8 October 2015 email to Mr CD was "not an unequivocal instruction to present a counteroffer", and (b) it was "open to interpretation" that Ms AB was "seeking [Mr CD's] advice on the issue", no evidence had been produced "recording any subsequent discussion or instruction" between them.

[25] The Committee added that although Mr CD had "said to Ms AB that she was aware that he presented multiple settlement offers" to the vendors' lawyer, "all … [were] rejected".

(2) Instructions — term of settlement agreement

[26] From the information available, and in "the absence of evidence to the contrary", the Committee found that on the balance of probabilities Mr CD "failed to follow [Ms AB's] instructions to incorporate" in the proposed settlement agreement a term "requiring the parties to substantiate any expenses being claimed with invoices".

[27] The Committee acknowledged that "common sense and normal commercial practice requires parties claiming expenses to substantiate the amount being claimed". However, because there was no evidence that the absence of such a provision had

"prejudiced" Ms AB, the Committee decided to take no further action on this aspect of Ms AB's complaint.

(3) Advice — alternatives to litigation

[28] The Committee stated that there was "insufficient evidence" for it "to conclude that Mr CD failed to provide to his clients a competent appraisal and … advice of the rewards and risks of the proceedings".

[29] In arriving at that conclusion, the Committee referred to (a) Mr CD's email communications to Ms AB concerning his attempts to settle the matter, (b) Ms AB's admission in response that the vendors "were not interested in negotiating a settlement, and (c) Mr CD's later, 21 February 2017, email to Ms AB, in which he recalled her instructions to proceed with the litigation "notwithstanding … her conviction that she was in the right and that the [vendors] were lying".

[30] The Committee also stated there was no evidence Mr CD failed to advise Ms AB's bank, as she requested, about "the likelihood of litigation success", or had "dragged the case out" to "generate as much work as possible" from Ms AB.

(4) Legal fees

[31] Concerning Ms AB's complaint about Mr CD's legal fees, the Committee stated that it had resolved to appoint an investigator, and a separate decision would be issued.

Application for review

[32] Ms AB filed an application for review on 13 December 2017. She considers that Mr CD's conduct in failing to present her counter offer to the vendors was "wilful or reckless" and sufficiently serious as to constitute misconduct.

[33] She seeks orders of (a) compensation for the profit she would have otherwise made had the sale of the property proceeded and (b) cancellation of Mr CD's fees invoiced to her "after the caveat proceedings".

(1) Instructions to present a counteroffer

[34] Although the Committee found, on the balance of probabilities, that Mr CD did not present Ms AB's counteroffer to the vendors, Ms AB nonetheless maintains that her 8 October 2015 email to Mr CD contained her "unequivocal offer … of $469,000 … to be made" to the vendors' lawyer.

[35] She says the Committee ignored that she was "dependent" on Mr CD "for a successful outcome" of the dispute, considering that her offer had "already been rejected despite [her] clear instructions". She asks why Mr CD had not produced evidence in support of his position that he had presented the counteroffer.

[36] Ms AB explains that her counteroffer of $469,000 meant that "the amount in dispute had fallen to merely $40,000". She says a settlement was "clearly called for", which she contends Mr CD ought to have realised. She says she had asked for Mr CD's advice on how to progress.

(2) Instructions — term of settlement agreement

[37] Ms AB says, in response to having been informed by Mr CD that a settlement had been reached with the vendors, she sent to him by email "a list of changes" she wanted to be included.

[38] Ms AB says she did not provide copies of these emails to the Committee because she had not been requested to do so. She says the emails, which she has produced to this Office, "clearly show [she] instructed" Mr CD "to include a clause for deductions to be substantiated with invoices".

(3) Advice — alternatives to litigation

[39] Ms AB says that the Committee unfairly "accepted" Mr CD's "story" and did not request "any details of [his] attempts", such as file notes, to settle the matter.

[40] As with the previous issue, Ms AB states that Mr CD had not provided evidence in support of his position.

Response

[41] Mr CD filed his response in this Office on 13 August 2018.

(1) Instructions to present a counteroffer

[42] Mr CD submits "there is… no basis upon which the … Committee could have determined that [he] failed to follow" Ms AB's instructions.

[43] He submits that it would have been "necessary" for the Committee to find he "had received an unequivocal instruction to present a counteroffer" in order to make a finding that he "failed to follow those instructions".

(2) Instructions — term of settlement agreement

[44] Although Mr CD supports the Committee's decision not to take any further action concerning this issue, he says he does not accept the Committee's finding that he failed to follow Ms AB's instructions to do so.

[45] Mr CD says, as requested by Ms AB, he "sought to include" in the settlement agreement a provision relating to substantiation of the expenses, but the vendors "would not agree".

(3) Advice — alternatives to litigation

[46] Mr CD says he agrees with the Committee's decision that he did not breach his duty to advise Ms AB on the alternatives to litigation.

[47] He says he explained to Ms AB that it made "no commercial sense … to spend more on the litigation than the difference between the purchase price" of $455,000, and "the market value of the property". He says he does not accept "there is any factual basis" for her allegation.

[48] He says "from the outset of receiving instructions through to the eventual settlement" on the first day of the hearing, he "advised [Ms AB] repeatedly that every attempt ought to be made to reach a commercial settlement".

[49] He says he gave Ms AB "extensive advice as to the alternatives to litigation". He says he "believes" he could not have "given … any more" such advice, or "worked harder" in endeavours to resolve the dispute.

[50] He refers to "[n]umerous settlement proposals advanced throughout the litigation" in correspondence, in person and by telephone, "none of which", he says, the vendors "were prepared to accept", until a settlement was agreed on the first day of the High Court hearing, 15 November 2016. He says he obtained Ms AB's instructions "in every instance".

Review on the papers

[51] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[52] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[53] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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 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.

[54] More recently, the High Court has described a review by this Office in the following way:[6]

> 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.

[55] 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 (a) consider all of the available material afresh, including the Committee's decision, and (b) provide an independent opinion based on those materials.

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[5] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[6] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Issues

[56] The issues I have identified for consideration on this review are:

(1) Instructions to present a counteroffer

(a) Did Ms AB instruct Mr CD to present a counteroffer of $469,000 to the vendors?

(b) If so, did Mr CD present that counteroffer to the vendors, or their lawyer?

(c) If not, what did Ms AB ask Mr CD to do?

(2) Instructions — term of settlement agreement

(d) Did Ms AB instruct Mr CD to include in the settlement agreement a provision relating to the substantiation of expenses?

(e) If so, did Mr CD include that provision in the draft settlement agreement and submit it to the vendors' lawyer?

(3) Advice — alternatives to litigation

(f) Did Mr CD advise Ms AB about the alternatives to litigation as a means to resolve the dispute?

Analysis

(1) Professional standards — misconduct, unsatisfactory conduct

[57] Should a determination be made that a lawyer's conduct warrants a disciplinary response, there are two findings that can be made (a) unsatisfactory conduct pursuant to s 12 of the Act, or (b) misconduct pursuant to s 7. A misconduct finding can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[58] The term "unsatisfactory conduct" is defined in s 12 of the Act. There are three categories which concern the conduct of a lawyer (or incorporated firm) when providing regulated services:[7]

[7] Concerning s 12(a), see also Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3, and s 6 of the Act — definitions of "regulated services", and the inter-related definitions of "legal services", legal work" and "reserved areas of work".

(a) "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer" — s 12(a) of the Act.

(b) "conduct … that would be regarded by lawyers of good standing as being unacceptable including … (i) conduct unbecoming … or (ii) unprofessional conduct" — s 12(b) of the Act.

(c) "conduct consisting of a contravention of [the] Act, or of any regulations or practice rules made under [the] Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)" — s 12(c) of the Act.

[59] It will be noted that the category of unsatisfactory conduct in s 12(c) can also occur when a lawyer is not providing regulated services.[8]

(2) Instructions to present a counteroffer — issues (a), (b) and (c)

(a) Instructions — professional rules

All legal matters

[60] A lawyer must respond to a client's inquiries in a timely manner, 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.[9]

[61] Importantly, lawyers' duties are "governed by the scope of their retainer". However, "[m]atters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer".[10]

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[8] Lawyers and Conveyancers Act 2006, s 12(d) — unsatisfactory conduct also consists of "a failure on the part of a lawyer …, to comply with a condition or restriction to which a practising certificate held by the lawyer … is subject (not being a failure that amounts to misconduct under section 7)".

[9] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, rr 7, 7.1; r 1.2 — a "retainer" is defined as "an agreement under which a lawyer undertakes to provide or does provide legal services to a client".

[10] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.

[62] With limited exceptions, a lawyer risks a complaint from a client, with a prospect of a disciplinary response, if the lawyer does not carry out the client's instructions.[11] However, where the lawyer is unsure about the client's instructions, then "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".[12]

Litigation

[63] A lawyer who acts for a client on a litigation matter is required by r 13.3 to obtain and follow the client's instructions:

> Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

[64] The footnote to r 13.3 cites as an example of the application of the rule:

> … a lawyer should never seek or agree to a consent order without the client's authority, nor should a lawyer for the defence in a criminal trial disclose, without the client's authority, the fact that the client has previous convictions or other charges pending.

[65] It will be noted that the duty in this rule is "subject to the lawyer's overriding duty to the court", and is qualified in that it concerns a client's instructions on significant decisions in respect of the conduct of litigation.[13] The rule requires that the lawyer take those instructions after having informed the client of the nature of the decisions to be made and the consequences of them.[14]

[66] By doing so, the rule refines, in a litigation context, the wider duty in the second part of r 7.1 that a lawyer must "consult the client … about the steps to be taken to implement the client's instructions".[15]

[67] The Court of Appeal has explained that whether or not a decision is "significant" will depend on the "factual context". The Court described "significant decisions" being

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[11] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [10.3].
[12] At [10.3] — see r 1.6 as to the manner in which a lawyer must provide information to a client — see discussion in *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [38].
[13] Lawyers and Conveyancers Act, s 4(d) — lawyers' fundamental obligations. See also the corresponding professional duty in Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, rr 2.1 and 13.
[14] Webb, Dalziel and Cook, above n 11 at [10.3]; Jenny Beck and Duncan Webb booklet *Ethics – confidentiality and disclosure* (New Zealand Law Society webinar, 2013) at 5.
[15] Webb, Dalziel, Cook at [10.3]; GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [5.20].

those where, in the context of a "trial counsel's failure to follow instructions will generally give rise to a miscarriage of justice".[16]

[68] Such decisions can be contrasted with those where "the effective conduct of a client's case would be impossible if [the client] had to be consulted at every turn during preparation and at the trial itself".[17] In other words, decisions of perhaps a routine procedural nature. The Court stated that where a client alleges his or her lawyer has failed to follow instructions on a significant issue, the question will be whether, on the facts, the lawyer failed to do so.[18]

(b) Parties' positions

[69] Ms AB claims Mr CD did not follow her instructions to present her counteroffer of $469,000 to the vendors' lawyer.

[70] Mr CD's position is that there is "no basis" on which the Committee could have arrived at its conclusion, albeit on the balance of probabilities, that he did not do so.

(c) Discussion

[71] As I have identified, the questions to be answered are (a) whether Ms AB's 8 October 2015 email to Mr CD was an instruction to him to submit Ms AB's counteroffer to the vendors' lawyer? (b) If so, whether he did so? (c) If not, what did Ms AB ask Mr CD to do?

Context

[72] On 6 October 2015, the vendors' lawyer informed Mr GH (by fax) that the vendors would complete the sale of the property to [JJ] for a sale price of $509,000. Mr GH forwarded that fax to Mr CD and Ms AB that day.

[73] Also on that day, to assist with a loan application to her bank, Ms AB asked Mr CD (by email) to write and explain to her bank manager the "settlement position", and "chances of winning and court costs being paid".

[74] In his response to Ms AB that day (by email), Mr CD apologised for missing her telephone call. He invited her to discuss the vendors' offer "in the morning", 7 October

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[16] *Hall v R* [2015] NZCA 403, (2015) 28 CRNZ 630 at [65]. Fundamental decisions are those "relating to plea, electing whether to give evidence and to advance a defect based on the accused person's version of events".
[17] *R v Pointon* [1985] 1 NZLR 109 (CA) at 112.
[18] *Hall v R*, above n 16 at [77].

2015. Until then, he asked her "to have a think about … how [the vendors'] offer of $509,000 compare[d] with the current market value".

[75] In her reply, also that day (by email), Ms AB stated that Ms EB wanted to "stick to" the purchase price of $455,000, which represented the amount of an approved loan. She said she would obtain her brother's views.[19] Ten minutes later, Ms AB similarly informed Mr GH (by email) that Ms EB was "not willing" to pay $509,000, but [Ms AB] would discuss the matter with Mr CD who would then appraise Mr GH.

[76] On 8 October 2015, Ms AB informed Mr CD (by email, 4.06 pm) that after "discuss[ing]" and "explain[ing]" to Ms EB and their brother, "what" she and Mr CD "discussed yesterday", 7 October 2015, their "counteroffer" to the vendors is "[$]469[,000]". She referred to Ms EB's requests to the vendors, before the vendors had issued proceedings, to discuss their differences. She said the vendors were not "willing to listen". She referred to legal costs incurred and mortgage payments, which when added to the purchase price of $455,000, was almost equivalent to the vendors' $509,000 offer. She referred to the further costs to "do up" the house and slowing market conditions.

[77] Ms AB explained that to resolve the dispute they had "considered" paying the vendors $14,000 "extra". She said their "counteroffer" of $469,000 was their "final offer" to "put an end to the matter". She asked for Mr CD's "thoughts on this" and "any questions" he may have. She asked him to let her know when he was "free" and she would "call" him.

[78] Mr CD says he then, that day, informed Ms AB's bank manager (by email) of "the $455,[000] agreement".

[79] The following day, 9 October 2015, Mr GH informed (letter) the vendors' lawyer that the vendors' offer of $509,000 was rejected. He stated Ms AB and Ms EB would pay "the purchase price of $455,000" provided for in the sale agreement "in or around June 2015". The letter records a copy was sent to Mr CD who says "a copy … was sent" to Ms AB.

Consideration

[80] In support of his submission that the Committee had "no basis" to make an adverse finding against him, Mr CD says Ms AB did not raise this issue again until five

[19] Ms AB's and Ms EB's brother was a real estate agent.

months later in her email to him on 10 March 2016, when she asked why he had not submitted her counteroffer to the vendors.

[81] Ms AB says despite having sought Mr CD's advice "time and time again" from 10 March 2016 onwards, "not once did he dispute that he did not" present the counteroffer as instructed. She says he later informed her by email that he had not made the offer because she "subsequently called him and with[drew] the offer".

[82] A year later, in his 11 May 2017 email to Ms AB, after she had laid her complaint with the Lawyers Complaints Service, Mr CD recalled that having received Ms AB's 8 October 2015 email, they "talked on the phone about" Ms AB's proposed counteroffer". He said they "agreed that it was a waste of time increasing [her] offer" because it "would never be accepted" by the vendors. He said Ms AB instructed him "to hold the offer" of $455,000.

[83] Mr CD also stated that he "didn't read" Ms AB's 8 October 2015 email "as a firm instruction to make that counteroffer - rather [she] was asking for [his] advice about it". In his response to Ms AB's application for review, he says he "did not receive an unequivocal instruction" from Ms AB to "submit a counteroffer".

[84] Mr CD did not make a file note of his 8 October 2015 telephone conversation with Ms AB, or record the matters discussed in a following email to her and Mr GH. In his submissions to this Office, he accepts it would have been "best practice" to have made a file note of his telephone conversation with Ms AB on 8 October 2015 and regrets not doing so. However, he says he was in regular communication with Ms AB by email and telephone and describes his relationship with her as "collaborative and open dialogue … on an ongoing basis".

[85] Ms AB makes no mention of a conversation with Mr CD on 8 October 2015. As noted above, in her 8 October 2015 email to Mr CD she referred to her "discussion" with Mr CD the day before, 7 October 2015, but provides no details of the matters discussed.

[86] In summary, in her 8 October 2015 email to Mr CD, Ms AB asked him (a) for his "thoughts … and any questions", and (b) for him to let her know when he would be available to talk to her about her proposed counteroffer.

[87] This required Mr CD to consult Ms AB (a) to obtain clarification, as he considered necessary, of her intentions concerning her proposed counteroffer, (b) to ensure she understood the consequences of making a counteroffer, and (c) having done that, obtain her instructions.

[88] As noted above, Mr CD says his "recollection" is that having received Ms AB's 8 October email, he and Ms AB "talked on the phone" about her proposal to make a counteroffer of $469,000, "and agreed" to do so would be "a waste of time" because the vendors would not accept it. He says Ms AB instructed him to "hold to the offer of $455,[000]". He says he would not otherwise have sent his email to Ms AB's bank manager that day "referring to the $455,[000] agreement".

[89] In plain terms, Ms AB says Mr CD did not respond to her 8 October email as she requested. She refers to her discussion with Mr CD the previous day, 7 October 2015, not on 8 October 2015. On the other hand, Mr CD says he "talked" with Ms AB about her email, and Ms AB instructed him not to submit the counteroffer.

[90] It is troubling that Mr CD did not keep a file note of the conversation he says he had with Ms AB on 8 October 2015, or preferably, did not send Ms AB an email, copied to Mr GH, spelling out her instructions. In the absence of that record on a matter of such importance to Ms AB in the context of the dispute with the vendors, Mr CD relies on his "recollection" of events conveyed to Ms AB 19 months later in his 11 May 2017 email.

[91] The result is that I am unable to reconcile the parties' conflicting views as to whether they spoke on 8 October 2015 after Mr CD received Ms AB's email that day. In reaching that position, however, I am not saying that I accept Mr CD's version that he responded to Ms AB as she requested. Rather, Ms AB has not persuaded me on the balance of probabilities that he did not respond to her. [20]

[92] From my analysis of the information produced to this Office, the conclusion I have reached, by the narrowest of margins is that Ms AB has not shown on the balance of probabilities that Mr CD did not talk to her on 8 October 2015 in response to her email that day.

[93] Having reached that conclusion, it follows that it is not necessary for me to decide whether Mr CD passed on Ms AB's counteroffer, either to Mr GH, or the vendors. I do however, make the observation that Mr CD's statement that Mr GH's 9 October 2015 letter to the vendors' lawyer rejecting the vendors $509,000 offer, and stating that [JJ]'s agreement to purchase the property for $455,000 remained unchanged is consistent with the position taken by Mr CD.

[20] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [26].

(2) Instructions — term of settlement agreement — issues (d) and (e)

(a) Parties' positions

[94] Ms AB claims Mr CD did not, as she instructed him, include a "substantiation of expenses" provision in the draft settlement agreement.

[95] Mr CD says in accordance with Ms AB's instructions, he sought to include that provision in the settlement agreement, but the vendors "would not agree".

(b) Discussion

[96] The questions therefore, are (a) whether Ms AB instructed Mr CD that she wanted to include a substantiation of expenses provision in the draft settlement agreement, and (b) whether Mr CD carried out those instructions.

Context

[97] On Friday 11 November 2016, four days before the High Court hearing scheduled for the following Tuesday, 15 November 2016, the vendors' counsel sent "a slightly revised settlement proposal" to Mr CD (by email at 4.42 pm).

[98] At 8.46 pm, Mr CD forwarded that email and the attached draft settlement agreement, to Ms AB. He requested that she "call [him] about this tomorrow".

[99] Ms AB responded (by email at 2.43 am) the following morning, Saturday 12 November 2016. Among the points she raised, she stated the vendors had informed her they were "spending $15,000 on improvements". She stated she wanted the draft settlement agreement amended to provide that the vendors' "allowance for improvements … be capped at $15,000".

[100] Also, and importantly concerning this issue, Ms AB wanted a provision requiring both parties to "produce invoices (or other suitable source documentation) to substantiate all claims under the [settlement] agreement".

[101] On Monday 14 November 2016, Mr CD responded to the vendors' counsel (by email at 8.39 am). Mr CD stated that having obtained Ms AB's instructions "over the weekend", there was "agreement in principle". He stated that this was "subject to clarifications and amendments" he had "marked up" in the draft settlement agreement which he attached.

[102] Clause 1 of Mr CD's amended draft provided that "[t]he renovations underway on the property (the Renovations) will be completed. The cost of the Renovations shall be capped at $15,000 including GST".

[103] Clause 4, prioritised payment of "the proceeds of the [sale] of the Property". The third priority, contained in paragraph c, was "[t]he cost of the Renovations". Clause 5 provided that payment (and the other payments in clause 4) was "contingent upon the party claiming reimbursement providing invoices establishing the costs to be reimbursed".

[104] The settlement agreement, which the parties signed on 15 November 2016, the first day of the scheduled High Court hearing, included clause 1 from the draft, which "capped" the cost of renovations "at $15,000 including GST". Not included, however, was Ms AB's proposed amendment, which would have required "invoices establishing the costs" of the renovations.

Consideration

[105] Mr CD says during negotiations on 15 November 2016, the vendor's counsel told him the vendors would not agree to the "provision of invoices" requirement because "they believed it would potentially lead to further disputes".

[106] These communications, and Mr CD's marked up draft of the settlement agreement, support the conclusion that Ms AB requested Mr CD to include the provision of invoices requirement in the draft settlement agreement. They also show that, in accordance with those instructions, Mr CD inserted that provision, clause 5, in his amended draft which he sent to the vendors' counsel.

[107] As noted, Mr CD says he "went through" the settlement agreement with Ms AB and Ms EB, who "confirmed their agreement" before they signed it on 15 November 2016, albeit "reluctantly". He rejects any suggestion he "misled" them.

[108] I make the observation that this accords with usual practice for a lawyer who acts for a client in the negotiation and drafting of a document, and who at the conclusion of that process, presents a document in final form to his or her client for signing.

[109] Ms AB does not deny he did not do so.

[110] From my analysis of the information produced to this Office concerning this aspect of Ms AB's complaint, I can find no issues of a professional nature adverse for Mr CD.

(3) Advice — alternatives to litigation — issue (f)

(a) Instructions — professional rules

[111] When a lawyer is acting for a client to resolve a dispute, r 13.4 provides that:

> A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute.

[112] So that the client can make informed decisions regarding the resolution of the dispute in which the client is involved, this rule imposes a positive ongoing duty on the lawyer concerned to keep the client advised of alternatives to litigation that are reasonably available. By imposing this duty, the rule aligns with the approach taken in the International Code of Ethics.[21]

[113] With the intention of avoiding the expenditure of resources, cost and uncertainty of outcome with litigation, many commercial contracts typically provide alternative disputes resolution (ADR) clauses, which may include the obligation of the parties to first, negotiate in good faith and, if unsuccessful, submit to mediation. If appropriate in the particular circumstances, for example, lease disputes, the parties may be required to refer the matter to arbitration.[22]

[114] The stated exception to the duty in the rule, is where the lawyer believes on reasonable grounds that the client already has an understanding of the alternative means of dispute resolution. However, the sophistication and business experience of the client may lead to a conclusion that in some circumstances a finding against the lawyer concerned may not be warranted.[23]

(b) Parties' positions

[115] Ms AB claims Mr CD did not advise her and Ms EB of the alternatives to litigation of their dispute with the vendors, namely, a negotiated settlement or mediation.

[116] In response, Mr CD says from July 2015, when Ms AB and Ms EB first instructed him to act for them on the dispute, he "repeatedly" advised them to settle the matter.

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[21] International Bar Association "International Code of Ethics" (1988) <www.ibanet.org>, r 11.
[22] Webb, Dalziel and Cook, above n 11 at [14.5].
[23] *JG v RS* LCRO 245/2010 (15 March 2012) at [57] and [62].

(c) Discussion

Context

[117] Mr CD says that "within a week of being instructed" in July 2015, he advised Ms AB and Ms EB to tender settlement, but they "were not in a position to do so until September 2015".

[118] On 18 September 2015, Mr CD responded to Ms AB's email that she had "signed … documents for settlement tender [that] afternoon". He informed Ms AB (by email) that he had spoken with Mr GH about "steps" Mr GH was "taking [that] day to tender settlement" and serve "a settlement notice" on the vendors.

[119] Eleven days later, on 29 September 2015, because the vendors had changed lawyers, Mr CD advised Mr GH (by email) to serve the settlement notice again.

[120] On 9 October 2015, Mr GH, on behalf of [JJ], rejected the vendors' 6 October 2015 offer to sell the property to [JJ] for $509,000. He stated that [JJ] would complete the purchase for $455,000, the purchase price provided in the sale agreement.

[121] Mr CD refers to his subsequent requests of Mr GH "to make further demands for settlement". He refers to "a series of emails" to Ms AB during March 2016 about settlement of the dispute. On 13 March 2016, he asked Ms AB (by email) whether her "commercial rationale for continuing with the case" remained. He advised Ms AB and Ms EB to have the property valued.

[122] On 10 March 2016, Ms AB questioned (by email) whether she and Ms EB would be "better off negotiating … and putting an end to this matter". She questioned "the whole process of fighting this any further". She asked Mr CD to explain "how profitable this is commercially" for them. She referred to Mr CD not having submitted their 6 October 2015 counter offer to the vendors. She asked Mr CD what his "fees will be".[24]

[123] On 22 March 2016, Mr CD asked Ms AB (by email at 2.42 pm), if she "want[ed] to continue on with the case" and if not, he "may be able to negotiate an end to the proceedings with the [vendors'] lawyer". He asked her on what "basis" she wanted him to "negotiate" for her. Later that day, in response (by email at 5.35 pm) to her question why he hadn't submitted her 8 October 2015 counter offer to the vendors, he stated that

[24] Ms AB raised the counteroffer issue again with Mr CD the following day on 23 March 2016 (by email).

the vendors had "consistently rejected any offer", but he was "more than happy to make a settlement offer" to the vendors.[25]

[124] On 4 and 9 May 2016, Mr CD approached the vendors' counsel (by email) to explore the possibility of a settlement. In accordance with Ms AB's instructions, on 9 May 2016 he submitted [JJ]'s increased offer of $485,000 to the vendors' counsel, which was rejected.

[125] He says despite his efforts during September 2016 to arrange a mediation, the parties could not agree on the choice of a mediator, a venue, or sharing of the mediator's costs.[26]

Consideration

[126] The parties hold opposing views as to whether Mr CD advised Ms AB about the alternatives to litigation.

[127] It is evident however, that between July 2015, when Mr CD was instructed to represent [JJ], Ms AB, and Ms EB on this matter, and November 2016, when a settlement was achieved, Mr CD made several attempts to resolve the dispute.

[128] In summary, the first of these attempts appears to have been Mr GH's tender of settlement and settlement notice in September and October 2015. The vendors' response was their offer to sell the property to [JJ] for $509,000. Seven months later, on 4 and 9 May 2016, Mr CD approached the vendors' counsel to explore settlement options. In September 2016, Mr CD attempted to arrange mediation. Finally, from 11 November 2016 until 15 November 2016, the first day of the scheduled High Court hearing, Mr CD negotiated a settlement of the dispute with the vendors' counsel.

[129] When a lawyer is instructed to act for a client to assist in the resolution of a dispute, it can be expected that the lawyer, having made an initial assessment, will advise the client if the lawyer considers whether, for example, negotiation and mediation are "reasonably available" as alternatives to litigation. Ideally, that preliminary advice would be included in the lawyer's letter of engagement, or in a letter soon afterwards.

[130] As a matter progresses, it can also be expected that a careful and diligent lawyer will, as necessary, reassess any previous decision made how best to resolve the dispute. Appropriate advice could be included in the lawyer's progress reports, preferably written.

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[25] During this time, Mr CD also raised with them their "delays" in "setting" his fees.
[26] These attendances are referred to in Mr CD's 21 September 2016 invoice to [JJ].

In this regard, Mr CD's letter of engagement refers to progress reports "about steps to carry out [[JJ]'s …] instructions".

[131] Despite this advice not having been included in Mr CD's letter of engagement, as the dispute evolved, at the times I have referred to, including on 8 October 2015, when Ms AB expressed her desire to submit a counteroffer, a negotiated settlement was an alternative means of resolving the dispute known to Ms AB.

[132] Ultimately, a negotiated settlement was achieved without a Court hearing on the substantive issues. I make the observation that whilst one party to a dispute may desire a settlement, the other party, such as the vendors in this matter, may not. Where proceedings have been issued, and a Court hearing is scheduled, not infrequently a settlement is reached in the lead up to, just before, or during the Court hearing.

[133] Overall, from my analysis of the information produced to this Office, I have not been persuaded to depart from the Committee's finding that it was more probable than not that Mr CD did explain to Ms AB and Ms EB the alternatives, that were reasonably available, to resolving the dispute by litigation.

Decision

[134] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee is reversed as to the Committee's finding that Mr CD failed to follow Ms AB's instructions to submit Ms AB's counteroffer to Mr GH, or to the vendors' lawyer and thereby contravened rr 3 and 13.3 which constituted unsatisfactory conduct under sections 12 (a) , and (c) of the Act.

[135] Because I have reversed the Committee's finding of unsatisfactory conduct, the orders made by the Committee fall away. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Committee is:

(a) Reversed as to the Committee's order that Mr CD pay a fine to the New Zealand Law Society (s 156(1)(i)).

(b) Reversed as to the Committee's order that Mr CD pay costs to the New Zealand Law Society (s 156(1)(n)).

[136] In conclusion, I make the observation that this decision is yet another illustration of the importance to both client and lawyer like that both are clear as to the client's instructions, and the steps to be taken to implement them.

[137] A failure by the lawyer to adequately, and timely make a written record of that information which is then communicated to the client risks a later dispute about what was said, what happened, and ultimately may, as in this matter, lead to the client making a formal complaint about the lawyer at the cost in unnecessary time, money and anxiety to both.[27]

Anonymised publication

[138] 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 absent of anything as might lead to their identification.

DATED this 3rd day of July 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 AB as the Applicant
Mr CD as the Respondent
[Area] Bay Standards Committee
New Zealand Law Society

[27] See r 1.6 – "All information that a lawyer is required to provide to a client under [the] rules must be provided in a manner that is clear and not misleading given the identity and capabilities of the client and the nature of the information".