

LCRO 151/2012

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X]

BETWEEN

CC

Applicant

AND

BB

Respondent

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

DECISION

Introduction

[1] Ms CC has applied for a review of the determination by [City] Standards Committee [X] to take no further action in respect of her complaint about Ms BB. Ms BB was described by the Committee as an unregistered legal executive employed by [The Firm]. Ms BB acted for Ms CC in relation to the sale of her property in [Town].

Background

[2] Ms CC owned property at [XY] Road, [Town]. The property has variously been described as [Number] [XY Road],¹ [Number] and [Later Number] [XY] Road² and [Number A and Later Number B] [XY] Road.³ However they are described, there were two certificates of title (or unique identifiers).

[3] In [date] building consent [XXX] was issued for the construction of a dwelling and garage/workshop on the property, but the construction of the dwelling did not proceed and

¹ Letter attached to complaint form (26 March 2012).

² Agreement for Sale and Purchase (all versions).

³ Various correspondence from [The Firm].

the consent was amended to permit the conversion of the garage/workshop to an accessory (habitable) building.

[4] In April building consent [XYZ] was issued for a new dwelling.

[5] Code Compliance Certificates were required for the works authorised by these consents.

[6] In [Date] Ms CC agreed to sell the property and she says she instructed [The Firm] to act for her. There are some inconsistencies in Ms CC's correspondence but I have concluded the firm had acted for her for some time⁴ during which time Ms CC may have come in contact with Ms BB. However the instructions were received, it is clear that Ms BB was assigned to act for Ms CC in connection with the sale.

[7] This was a private sale between Ms CC and the purchaser and no real estate agent was involved. Consequently the Agreement for Sale and Purchase of the properties was to be prepared by the lawyers for either the vendor or the purchaser. It would seem that the first draft of the Agreement was prepared by the purchaser's solicitor. Ms EE⁵ has uplifted Ms CC's files from [The Firm] and advises she cannot locate a copy of the first draft of the Agreement on the files.

[8] Ms BB sent an email to Ms CC on [Date] in which she outlined the terms of the draft. It is apparent this draft included a clause (clause 16) under which Ms CC warranted to complete two items of work before settlement, and to obtain "at her costs a code of compliance in respect of the dwellings situated on the property including but not limited to ...". There then follows five specified items of work.⁶

[9] Ms BB sent an email⁷ to Ms CC outlining the terms of the draft, and with reference to this clause she said: "subject to you attending to items under clause 16.0 – is this going to be an issue for you – particularly the issue of a final code of compliance prior to settlement?". It is important to note that clause 16 referred to a code of compliance in respect of the dwellingss on the property (emphasis added). Nevertheless, the Agreement clearly reflected that there were two dwellings involved in the sale as it included details of the tenancy of [number] [XY] Road, and required vacant possession of [number] [XY] Road.

⁴ In the application for review Ms CC says that Ms BB had been her lawyer since [Date] representing her in a relationship property matter at that time.

⁵ Ms EE is counsel for Ms CC.

⁶ There is frequent reference in the documents, correspondence, submissions to the Lawyers Complaints Service, the Standards Committee determination and submissions/correspondence to this Office to "codes of compliance". In incorporating such reference into this decision I have repeated the words as written. However, the Building Act 2004 refers to Code Compliance Certificates which is the correct terminology to use.

⁷ Email BB to CC ([Date]).

[10] On the copy of this email retrieved from Ms BB's file, there is a handwritten note "ok". It is reasonable to assume this was a record of the response from Ms CC to this question as there are two other handwritten notes with apparent responses to other issues on which instructions were required from Ms CC.

[11] An email from Ms [XX] (who was a PA at the firm) to Ms BB dated [Date] advises that Ms CC was "currently arranging the work to be completed to get the code of compliance ..." (emphasis added).

[12] On [later date] at 1.09 pm, the purchaser's solicitor sent a final version of the agreement to Ms BB advising that they had sent the Agreement to their client. This version differed from earlier versions in that clause 16 was amended to include the following provisions:

- c. The vendor obtaining at her cost a code of compliance in respect of the dwellings situated on the property in respect of the works for which the building consents [XXX] and [XYZ] were granted, including but not limited to those matters listed on the notice of inspection, copies of which are attached.
- d. The vendor completing conditions of Resource Consent conditions as set out in the attached inspector's report and warrant that there will be no outstanding conditions in respect of the Resource Consent nor other requisitions in respect of the property as at the date of settlement.

[13] The notice of inspection referred to was a handwritten note of a building inspector dated [date] 2006 in respect of consent [XYZ]. The handwritten notes include the following comment: "Resource Consent conditions to be completed". No details of the conditions were otherwise referred to.

[14] It is accepted by the parties that this version of the Agreement also had attached to it, the extract from the Land Information Memorandum (LIM) relating to the property. In addition, a further page from the LIM referring to the planning conditions, was also attached to the Agreement, which identified that "the land use consent for the main dwelling was approved provided the kitchen was removed from the accessory building to comply with the District Plan Rules".

[15] It would seem that the purchaser signed this version of the Agreement and took it to Ms CC who also then signed. The final and fully signed Agreement was then sent by the purchaser's solicitor to Ms BB by email at 3.47 pm on [later date].

[16] Ms BB then sent a four page letter to Ms CC on the same day, which confirmed receipt of the signed Agreement and recorded its terms. The only reference to clause 16 was a single line on the first page which read (in relation to the conditions of the contract): "you arranging a final code of compliance for the properties by settlement date".

[17] Because no Code Compliance Certificate had issued in respect of consent [XXX] for the accessory building, settlement was delayed (and also settlement of Ms CC's ongoing purchase) and after much negotiation Ms CC was obliged to accept a reduction of the price by \$100,000.

Ms CC's complaints

[18] Ms CC's complaints are best identified by incorporating into this decision sections of her complaint. She says:

the most important clauses in this contract concerned my supplying to the purchaser two separate codes of compliances for each building. The first code of compliance for building one which was a garage/ancillary unit built in [date], I thought I had but for this to be verified before going ahead with the signing. BB was aware that I intended to use the deposit from the sale to complete the code of compliance for building two as I had informed her of this.

I perceived the sale and purchase of my property as going ahead without any problems since my expectation was that both code of compliances had been checked by BB and as I had just completed the task of obtaining the code of compliance for the main dwelling or building two.

It was only after the contract went unconditional and the deposit was received that it came to light that there was in fact no code of compliance for the first building and that this had not been verified before I signed an unconditional contract. BB had failed to carry out my instructions and to protect my interests.

I was astonished to find out that BB had not in fact obtained copies of the code of compliances from Council and forwarded them on to the purchaser's lawyer before advising me to go ahead with signing an unconditional contract.

As a result of poor legal representation I was forced to concede \$100,000 from the agreed price of \$760,000 to the purchaser in order for the sale to go ahead and in order to save the deposit I paid for my onward sale.

The Standards Committee determination

[19] The Standards Committee distilled the following single issue from Ms CC's complaint:

Did Ms BB breach the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules") by providing poor advice to Ms CC and failing to follow Ms CC's instructions?

This reasonably encapsulates the matters complained of.

[20] The Committee noted Ms CC's expressed view once she became aware that the Council records did not include a record of a Code Compliance Certificate being issued for the "little house" i.e. consent [XXX]. Her expressed view was that she had the Code Compliance Certificate for the "little house" and Council records were not correct.

[21] At [18] of its determination the Committee says:

The email communication supports that Ms CC and Ms BB discussed Ms CC's assertion that she held the Code of Compliance Certificate, and that it had been lost but that the Council should have a copy. This is clearly inconsistent with the allegation that Ms BB was instructed to verify the existence of the Code of Compliance Certificate. Such an allegation is not evidenced in the email statements at all.

[22] The Committee then gave its reasons for determining to take no further action in respect of Ms CC's complaint:

Whilst there is now a dispute on the extent of the instructions, the Committee considered that the correspondence provided simply does not support the allegations by Ms CC in any way, and in fact proves that Ms CC believed she possessed the Code of Compliance Certificate and that the Council should have also had that on its records.

The agreement for sale and purchase signed by Ms CC has a LIM report attached to it noting that there is no Code of Compliance Certificate for either building, a matter of which Ms CC and Ms BB are both deemed to be aware. The agreement also required Ms CC to obtain Code of Compliance Certificates by settlement. This confirms Ms CC knew the Code of Compliance Certificates needed to be obtained. Ms BB would therefore not have known at the time that this would prove to be an issue.

Review

[23] This review was conducted by way of a telephone hearing on 26 November 2015 attended by Ms CC and her counsel, Ms EE, and Ms BB and her counsel, Mr DD. Ms BB had previously been represented by Mr FF, who had provided submissions to this Office, and Mr DD relied on these submissions together with his oral submissions.

[24] In her complaint, Ms CC has referred to her loss arising "as a result of poor legal representation". It seemed to me that this included the advice received by Ms CC in the negotiations which followed once it became clear she was not able to provide the Code Compliance Certificate as required by clause 16. In her response to Ms CC dated 12 August 2011, Ms HH addressed this aspect of the complaint in some detail. Ms HH is the principal of [The Firm] by whom Ms BB was employed and who responded to the complaint against her.

[25] However, this aspect was not addressed in any detail by the Standards Committee nor was it addressed by Ms EE in her submissions to this Office. Ms EE acknowledged this omission but did expand on aspects of Ms CC's complaint with regard to the advice received in connection with the negotiations.

[26] Mr DD submitted the focus of the complaint, the Standards Committee investigation and its determination had all been on the assertion by Ms CC that she had

instructed Ms BB to ensure there would be no difficulty in complying with the obligations imposed by clause 16 of the Agreement to provide the Code Compliance Certificates.

The proper respondent

[27] It is appropriate that I should first deal with Ms EE's submission that the proper respondent to this review application should be, or at least include, the firm that Ms BB was working for at the time, [Name] Ltd t/a [The Firm].

[28] Section 2 of the Complaint Form is headed "Lawyer details". The next line then requires a complainant to complete the "Name of lawyer or law firm or employee of lawyer you wish to complain about". Ms CC wrote here – "BB".

[29] The next line of the form then has the heading: "Firm's name (if known)" and Ms CC wrote ["The Firm"] followed by the firm's address.

[30] [The Firm] is the trading name of [Name] Limited and I have ascertained this company was incorporated on [Day Month Year]. The events giving rise to Ms CC's complaints took place towards the end of [Date].

[31] The Lawyers Complaints Service processed this complaint as a complaint about Ms BB and wrote to her to advise of the complaint in a letter addressed to her at [The Firm].⁸ Ms EE argues that the principal of the firm, Ms HH, responded to the complaint on behalf of the firm, not as Ms BB's counsel.

[32] Ms HH clearly contemplated that the firm could be included as a party complained about, and wished to be closely involved at all stages of this review. Ms BB did not formally appoint Ms HH as her counsel for this review and Ms HH attended the hearing as Ms BB's support person.

[33] Ms EE's submission is that "compensation which may be awarded to [Ms CC] as a result of this review ought properly to be indemnified by [Name] Limited".⁹

[34] I record here the view expressed by me at the review hearing, namely, that it would be wrong for me to accede to Ms EE's request, which would in effect be to join [The Firm] as a party complained about at this stage.

[35] The Standards Committee has not addressed the complaint as a complaint against that firm. In *Q v LCRO* the Court held that where the LCRO identifies a mistake by a Standards Committee:¹⁰

⁸ Letter LCS to BB (19 March 2012).

⁹ Submissions EE to LCRO (14 September 2015) at [4].

It is arguable that the proper cause of action was for the Complaints Officer to have referred the matter back to the Standards Committee for reconsideration, or to have at least turned her mind to that possibility, her failure to do so amounting to a failure to take into account a relevant factor.

[36] The role of this Office is to review all aspects, or any of the aspects of an inquiry or investigation by a Standards Committee in coming to its final determination.¹¹ One of the aspects of the inquiry must be to identify the party complained about.

[37] Although Ms HH has been closely involved with the progress of this complaint and review, she has responded on the basis that the complaint is about Ms BB. If the complaint were to be treated as a complaint about the [Name] Limited, the focus of the complaint, and Ms HH's responses, would change to address the inclusion in the complaint that the firm did not properly supervise Ms BB. That necessarily must be a matter which is returned to the Standards Committee to consider from this perspective.

[38] As discussed with counsel in a teleconference on 7 December, I do not consider there is any discretion to introduce a party to a complaint at the review stage, and to continue with the review. Even if Ms HH, on behalf of [Name] Ltd were to agree to this, I do not consider there is any jurisdiction to do so. As noted above, the focus of a complaint against the law firm (as distinct from the focus of the complaint against Ms BB) must be quite different, and the Committee has not considered the matter from that perspective. I intend therefore to return this matter to the Standards Committee to reconsider the complaint as a complaint against [Name] Ltd.

Jurisdiction

[39] Correspondence from Ms BB was signed off in the following manner:

BB
Associate
Qualified Legal Executive (NZ Law Society)
Registered Conveyancer (NZ Society of Conveyancers)

[40] Ms BB left [The Firm] shortly after the events giving rise to Ms CC's complaints occurred to establish her own conveyancing practise. A conveyancing practice may only be operated by a conveyancing practitioner.

[41] Following the review hearing, I enquired of Mr DD as to when Ms BB was issued with a practising certificate.¹² In an email dated 3 December, Mr DD replied:

¹⁰ *Q v LCRO* [2013] NZCA 570, [2014] NZAR 134 at [53].

¹¹ Section 203 Lawyers and Conveyancers Act 2006, s 203.

¹² Ms BB presently operates her own conveyancing practice.

I have taken instructions, and those are that Ms BB became a Registered Conveyancer on [date]. Conveyancing Practitioner status was granted on [date]. I attach a copy of her practising certificate.

The copy of the practising certificate provided expired on [date]. Mr DD continued:

Ms BB advises that through the NZ Society of Conveyancers there is a three step qualification process. The first is to become a Registered Conveyancer (Ms BB became a Registered Conveyancer in [date]). The next step is to become a Conveyancing Practitioner (which enables the signing and certification of e-dealings) – this happened in [Date]. The third step is being able to practise on your own account, and at that stage you are issued with a practising certificate to operate on your own (and at this point you are not allowed to be employed by a law firm).

[42] A “conveyancing practitioner” is defined in s 2 of the Lawyers and Conveyancers Act as a person who holds a current practising certificate. Mr DD advises that Ms BB became a conveyancing practitioner on [Date]. The copy of the practising certificate provided by Mr DD expired on [Date]. The events which give rise to Ms CC’s complaints occurred from [Date] into early [Date]. The evidence is therefore, that Ms BB was a conveyancing practitioner at the time she was acting for Ms CC, and, notwithstanding Mr DD’s advice that a conveyancing practitioner may not be employed by a law firm, she was in fact employed by [The Firm].

[43] The Standards Committee described Ms CC’s employment status as an unregistered legal executive, and therefore proceeded to consider the complaint on the basis that Ms CC was an employee of a law firm.

[44] Section 132(1) of the Lawyers and Conveyancers Act provides that:

any person may complain to the appropriate complaints service about-

- (a) the conduct –
 - (i) of a practitioner or former practitioner; or
 - (ii) of an incorporated firm or former incorporated firm; or
 - (iii) of a person who is not a practitioner but who is an employee or former employee of a practitioner or an incorporated firm ...

[45] A “practitioner” is defined in s 2 as “a lawyer or a conveyancing practitioner, as the case may be”. Ms BB was therefore a “practitioner” as that word is used in s 132(1)(a)(i).

[46] Section 121(2) of the Lawyers and Conveyancers Act requires the New Zealand Society of Conveyancers to establish a complaints service to receive complaints about conveyancing practitioners. Section 2 defines a conveyancing practitioner as “a person

who holds a current practicing certificate issued by the New Zealand Society of Conveyancers”.

[47] The “appropriate complaints service” is identified by s 135. Section 135(1) provides that if the complaint relates to a lawyer or former lawyer, an incorporated or former incorporated law firm, or an employee or former employee of a law firm, then the appropriate complaints service is the complaints service established pursuant to s 121(1) by the New Zealand Law Society – The Lawyers Complaints Service.

[48] Section 135(2) provides that if the complaint relates to a conveyancing practitioner, or a former conveyancing practitioner, an incorporated, or former incorporated conveyancing firm, or an employee or former employee of a conveyancing practitioner, then the appropriate complaints service is the complaints service established under s 121(2) by the New Zealand Society of Conveyancers – the Conveyancers Complaints Service.

[49] The effects of these sections of the Act dictate that the complaint about Ms BB should have been referred to the Conveyancers Complaints Service. The only question to be considered is whether there was the option of referring the complaint to the Lawyers Complaints Service on the basis that she was an employee of a law firm.

[50] Section 132(1) refers to complaints about practitioners (lawyers or conveyancing practitioners) or about persons who are not practitioners but employees. When s 135 refers to the appropriate complaints service for consideration of complaints about employees, therefore, it is referring to persons who are not practitioners. Ms BB was a practitioner. There is therefore no ability to also treat her as an employee.

[51] The above discussion leads me to the conclusion, that the appropriate complaints service to consider the complaint about Ms BB was the Conveyancers Complaints Service. The Lawyers Complaints Service did not have jurisdiction to consider and determine this complaint. Ms CC now has a decision as to whether or not to lodge her complaint with the Conveyancers Complaints Service.

Decision

[52] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee to take no further action in respect of this complaint is reversed. The Lawyers Complaints Service did not have jurisdiction to consider the complaint about Ms BB.

[53] Pursuant to s 209 of the Act, I direct the Standards Committee to reconsider this complaint as a complaint against [Name] Ltd. Given the history of this complaint, and the time that has now elapsed since the complaint was first made, the Standards Committee is requested to afford consideration of this complaint with as much priority as possible.

Publication

[54] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 I direct publication of this decision to the New Zealand Society of Conveyancers. I also direct that an anonymised version of this decision be published in LawTalk. The anonymised version will also be published on the website of this Office in the usual way.

Comment

[55] Ms EE, was understandably, somewhat critical of the handling of this complaint by the Lawyers Complaints Service. She submitted that the Service should consider reformatting section 2 of the Complaint Form to provide for multiple parties where an incorporated law firm is involved. In addition, whilst Ms CC had included the name of the law firm as [The Firm] in the complaint form, there does not seem to have been any recognition on the part of the Service, that [The Firm] was the trading name of Lawyers of [City] Ltd, whereas all of the correspondence from that firm clearly identified the fact that the firm was an incorporated company. It would seem that some form of educative action should be taken by the Service to alert staff to these possibilities. This recommendation is made pursuant to s 192(c) of the Lawyers and Conveyancers Act.

[56] The other issue to arise from this decision, is that where a person is described as a registered conveyancer, a check to ascertain whether or not that person has been issued with a practising certificate should be undertaken, to ascertain whether the Lawyers Complaints Service has jurisdiction to receive and consider the complaint.

DATED this 11th day of December 2015

O W J Vaughan
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms CC as the Applicant

Ms EE as Representative for the Applicant

Ms BB as the Respondent

Mr DD as Representative for the Respondent

[City] Standards Committee [X]

The New Zealand Law Society