

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2023] NZLCRO 087

Ref: LCRO 198/2020

CONCERNING

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

AND

CONCERNING

a decision of the [Area] Standards Committee [X]

BETWEEN

CO and EA

Applicant

AND

LT

Respondent

Introduction

[1] Mr CO and Ms EA have applied for a review of the determination of their complaint about Mr LT in which the Committee made two findings of unsatisfactory conduct against Mr LT.

Background

[2] Mr CO and Ms EA instructed Mr LT to act for them on the purchase of a house and land package. This involved the purchase of a section in a subdivision for which title had not issued. Contemporaneously, Mr CO and Ms EA entered into a contract for the construction of a house on the land following issue of title.

[3] The Agreement for the purchase of the land included the following conditions:

Purchaser's conditions

- 19.3 This Agreement is conditional on the Purchaser's solicitor's approval of the form and content of this Agreement within three (3) working days of the date of this Agreement. This condition is inserted for the sole benefit of the Purchaser and may be waived by the Purchaser at any time before the Agreement is avoided.

Issue of title

22.1 This Agreement is conditional upon the Vendor achieving a deposit of the Plan of Subdivision and the Certificate of Title for the Lot being available for searching in the Landonline database on or before 20 December 2018. The Vendor may at its sole discretion extend the condition date for a period not exceeding six months by giving notice in writing to the Purchaser, such notice to be given on or before 20 December 2018. This condition is inserted for the sole benefit of the Vendor and may be waived by the Vendor at any time before this Agreement is avoided.

[4] The Agreement was also conditional on the purchaser arranging sufficient finance by the 10th working day from the date of the Agreement, which was dated 10 December 2018.

[5] Rather than repeat the content of the correspondence between Mr LT and Mr CO/Ms EA, I have taken the liberty of including the timeline provided by Mr CO with his complaint as a Schedule to this decision.

[6] It is important to include here details of some of the correspondence between Mr LT and his clients towards the end of the matter:

EA to LT – 17 April 2019 (11:20 am) (in response to email from Mr LT enclosing the letter from the Vendor's solicitor waiving the condition as to title):

What exactly does this mean? That titles will not be issued by 20 June?

Do you have any idea why it is taking so long? I talked to SK beginning of April and he said titles would be issued end of April. All the work had been completed and they were just waiting on council.

I find it hard to believe that it takes from 20th December, first expected title date till later than 20 June.

That's 6 months for council to process titles.

Would be good to hear your thoughts on this.

LT to EA – 17 April 2019 (11:30 am):

This does not mean that Titles will not be issued by 20 June. Were Titles not issued by 20 June the Vendor had the right to cancel the Agreement.

They have waived that right to do so, and implicit in that is confidence that Titles will in fact issue.

I will enquire as to an anticipated date.

EA to LT – 17 April 2019 (12:38 pm):

OK thanks LT for the clarification, we were assuming the worst.

CO and I have accepted that the date is forever changing so we're just waiting.

However we did change our Agreement to say that if the titles weren't issued by April 20th we had the right to pull out. We will need to apply for an updated date bank approval as I have a new job (my 90 day period ends tomorrow)

At this stage CO and I have no intention of canceling so long as we get a new pre approval.

EA to LT – 9 June 2019 (2:39 pm):

After all that hard work with Company B and Property B, we would like to withdraw. From the clause we added regarding the April deadline I'm assuming this will be no problem. Please can you checkover to make sure there will be no issues especially with getting our deposit back.

Just an FYI, I talked to the developers assistant on Friday and he said titles were expected end of June – same story just a different month.

So we are on the same page in regards to cost, you had quoted \$1,575 incl gst to complete the sale of Company B, will this price stay the same or be reduced?

We have a couple of other deals we are looking at and will be in touch sooner rather than later regarding our next step. ...

Letter LT to Law firm A¹ – 10 June 2019:

We note and record those agreed variations to the Agreement for Sale and Purchase as set out in our email dated 18 January 2019, in particular the date provided in clause 22.1 of 20 June 2019, (your letter dated 20 December 2018) be substituted for 16 April 2019 in view of our clients' conditions of finance approval.

Title has still not issued.

We advise our clients' instructions to cancel the Agreement, clause 22.1 being for the mutual benefit of the parties, and we give notice of cancellation accordingly.

Would you kindly arrange a refund of the deposit.

Letter Law firm A to LT – 12 June 2019:

Thank you for your letter of 10 June 2019.

We note that although the title issue date contained in clause 22.1 of the agreement was varied to 16 April 2019 by way of email exchange between our offices, the clause was never varied for the benefit of both parties and the clause remains for the sole benefit of the vendor.

Further, the same clause was waived by our client as set out in our letter dated 17 April 2019 (faxed to your office on 17 April 2019).

Accordingly your client is not entitled to cancel the agreement under clause 22.1.

¹ Law firm A was the law firm acting for the Vendor. It is not clear whether the firm also acted for the builder.

[7] After correspondence between Mr LT and Law firm A in which Law firm A held to their view that Mr CO and Ms EA could not cancel the Agreement, Mr CO and Ms EA instructed another solicitor.

[8] Mr CO and Ms EA were unable to cancel the Agreement, and as at the date of their Application for Review of the Standards Committee determination (22 September 2020) their house was still not completed.

Mr CO's and Ms EA's complaints

[9] Mr CO and Ms EA lodged their complaint with the Lawyers Complaints Service on 14 August 2019. The essence of their complaints is set out in the email from them to Mr LT on 12 June 2019:

From what EA and I's terms were in the Agreement, if the title is not issued by the 20th of June then we are entitled to a refund plus interest.

[10] They detail their complaints as being that Mr LT:

1. Failed to advise [them] on the key terms of the Agreement which would affect [their] purchase.
2. Failed to give explanation or response to [their] questions around key attributes of the contract.
3. Failed to act upon [their] written instructions.
4. Provided false confirmation of these instructions being completed.
5. Failed to advise [them] of the final correspondence before going unconditional.
6. Maintained his position of the title condition (which [they] are being held to) being for the benefit of both parties.

Mr LT's response

[11] Mr LT provided his entire conveyancing file to the Standards Committee and noted that both the Agreement for Sale and Purchase of the land and the building contract had been signed prior to his involvement. He says that he could "see no record of instruction from them to [him] to withhold solicitor's approval as to form and content" unless a clause giving Mr CO and Ms EA the right to cancel the contract if title was not available by 20 June 2019.

[12] He referred to his initial reporting email to his clients on 12 December 2018 in which he advised that the deposit would be refundable if “title did not come through within the stipulated timeframe”.

[13] He says that, when advising Mr CO and Ms EA that the Vendor had exercised the option to extend the date by which title was to issue,² he asked them whether he should approve the Agreement. He also says that he did not receive any instructions to redraft cl 22.1.

[14] Mr LT says that Mr CO and Ms EA were aware that the start and finish dates of the build needed to be entered into the building contract.

[15] He refers to the fact that he sent a draft of his proposed letter approving the Agreement to Mr CO and Ms EA before sending it to the Vendor’s solicitor. He says that this was approved by Ms EA but if he “had received a clear instruction as against the relay of some discussions between Ms EA and SK, it would have been a straightforward exercise to have put to the Vendor’s solicitor a suitable amendment of cl 22.1”.³

[16] He notes that it was necessary for the builder to agree to any proposed variation to the contract whilst his approval was limited to the form and content of the contract.

[17] Mr LT refers to the email from Ms EA on 17 April 2019⁴ in which she advises that she and Mr CO accepted that the date for issue of title was forever changing and that they were just waiting. He says that “Ms EA went on to record that they did change their Agreement to say that if title was not issued by 20 April 2019, then they had the right to cancel”.⁵

[18] He says that was not in fact the case and that “Ms EA went on to record that at that point they had no intention of cancelling the Agreement upon the basis they obtained new loan pre-approval”.

[19] Mr LT advised that his view of cl 22.1 remained that it was for the mutual benefit of both parties.

[20] Mr LT accepts that he omitted to provide terms of engagement as required by rr 3.4 and 3.5 of the Conduct and Client Care Rules.⁶

² In accordance with cl 22.1 of the Agreement.

³ SK was the selling agent.

⁴ This was after Mr LT had sent a copy of the waiver letter to Ms EA.

⁵ Letter LT to Standards Committee (26 September 2019) at [29].

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

The Standards Committee determination

[21] The Standards Committee identified the following issues to be addressed:⁷

- a. Whether prior to commencing work under a retainer, Mr LT failed to provide in writing to Mr CO and Ms EA, information on the principal aspects of client service (rr 3.4, 3.5);
- b. Whether Mr LT failed to follow instructions and/or act competently and in a timely manner consistent with the terms of the retainer and duty to take reasonable care (r 3); and
- c. Whether Mr LT charged more than a fee that was fair and reasonable for the services provided (rr 9, 9.1).

Rules 3.4, 3.5 – Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (CCCR)

[22] The Committee noted that Mr LT had acknowledged he had not forwarded terms of engagement to Mr CO and Ms EA and accordingly, had not complied with rr 3.4 and 3.5. The Committee determined that this oversight amounted to unsatisfactory conduct as defined in s 12(c) of the Lawyers and Conveyancers Act 2006.

Rule 3 – Duty to act competently

[23] “The Committee considered that this issue centred around the advice that Mr LT gave in relation to the conditions of the contracts, specifically whether a title condition clause existed which would have enabled Mr CO and Ms EA to exit the Agreements if the title did not issue by a specific date.”⁸

[24] “Having reviewed the file, the Committee considered that Mr CO and Ms EA had asked Mr LT on numerous occasions whether they could exit the Agreement if the title did not issue by a specific date.”⁹

[25] The Committee referred to Ms EA’s email of 15 January 2019 in which she noted her expectation that they would receive a refund of their deposit if titles had not issued by 20 June and could not find any evidence that Mr LT had advised them that this was not the case.

[26] The Committee could also not find any evidence that Mr LT had addressed their concerns to ensure that there were start and finish dates included in the building contract.

⁷ Standards Committee determination (22 September 2020) at [16].

⁸ At [20].

⁹ At [22].

[27] The Committee determined that these failures amounted to unsatisfactory conduct by way of the breach of r 3 of the Conduct and Client Care Rules.¹⁰

Fees

[28] The Committee considered the three invoices issued by Mr LT for attendances relating to the matters on which he had been instructed.

[29] It formed the view that:¹¹

...Mr CO's and Ms EA's main motivation in instructing Mr LT was to seek his guidance in respect of any and all matters arising out of purchasing the Property together. The term loan Agreement and drafting of a relationship property Agreement were clearly closely interrelated to the purchase of the Property and the provision of the legal services in question was contemporaneous. The Standards Committee was therefore satisfied that the work undertaken constituted a single legal service. ...

[30] Having made these observations, the Committee determined to consider the complaint about Mr LT's fees.¹²

[31] Although the Committee did not have Mr LT's time records, it considered that:¹³

...based on the voluminous size of the file and work that was required to be completed, Mr LT needed to expend a significant amount of time and labour on the matters. The Committee was therefore satisfied that the fees charged by Mr LT were consistent with the time and labour that Mr LT was required to expend on the matters.

[32] It also took note of the fact that the fee for the work undertaken on the property contract amounted to 80 per cent of the fee quoted by Mr LT and that the fee charged similarly amounted to 80 per cent of the quoted fee.

[33] Having made these observations, the Committee determined to take no further action on the complaint about fees.

Orders

[34] Having made two findings of unsatisfactory conduct against Mr LT, the Committee ordered Mr LT:

¹⁰ Rule 3 of the Conduct and Client Care Rules provides that a lawyer must act competently and in a timely manner.

¹¹ Standards Committee determination, above n 7, at [29].

¹² Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations) provides that a Committee must not deal with a complaint relating to a fee that is less than \$2,000 unless there are special circumstances.

¹³ Standards Committee determination, above n 7, at [35].

- (a) To pay costs to the New Zealand Law Society in the sum of \$500.
- (b) To pay a fine of \$1,000.
- (c) To reduce the fees charged by 80 per cent, “being a reduction of \$1,640”.

Mr CO’s and Ms EA’s application for review

[35] Mr CO and Ms EA do not think that the findings of unsatisfactory conduct against Mr LT are adequate. They submit that:¹⁴

...not only did Mr. LT ignore the set of instructions made to him (and at times even recommended by him), but he actively lied about the inclusion of those critical conditions which we had instructed him to add to the contract. This not only shows that he was aware of the fact that he had been asked multiple times to include those conditions, but made the decision without our knowledge not to include the conditions and also cover up the fact that he did this.

[36] Mr CO and Ms EA take issue with the determination that Mr LT’s fees were fair and reasonable. They say that they provided evidence that they had been charged for work that had not been completed. They also say that:

... The fact that one of the Agreements we had asked for was simply a copy and paste of another customers Agreement, including their names and conditions specific to them, is not only a breach of confidentiality or privacy for those customers but is totally unacceptable to charge on to us.

[37] They also consider that the calculations in the Committee’s determination are incorrect.

Outcome

[38] By way of summary of their supporting reasons for the review, they say:

We would like for this case to be reviewed with determinations of misconduct on the counts outlined in the original complaint, and an appropriate penalty that matches the findings be given. As we said in our complaint, we believe Mr LT is not fit to practice property law of any kind due to the dishonesty and the impact of his agency in acting against the interests of his clients without their knowledge. Additionally, he also has shown no regard for the Client Engagement and confidentiality processes which any lawyer should abide by. In terms of compensation, the Law Society has found there is no way to quantify or demonstrate a loss incurred. We also disagree with this, as of today’s date we still do not have a completed house, therefore it is possible to quantify the extra rent paid by us against what would have been a reasonable completion time or cancelled contract due to the conditions we had asked to be included in our property contract.

¹⁴ Application for review supporting reasons (24 July 2023).

Mr LT's response

[39] Mr LT advised that he was not minded to respond to the application and confirmed that he had abided by, and complied with, the determination of the Committee.

Nature and scope of review

[40] The High Court has described a review by this Office in the following way:¹⁵

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.

[41] This review has been conducted in accordance with those comments.

Process

[42] Mr CO's and Ms EA's application for review was lodged on 23 October 2020. Because of delays in this Office, the review was not able to be addressed until recently assigned to myself.

[43] Given that the outcome sought by Mr CO and Ms EA is a finding of misconduct against Mr LT, I considered that it was necessary to hold a telephone conference with them to advise the limitations on the jurisdiction of this Office. That conference took place on 9 August 2023.

[44] Mr CO attended for himself and Ms EA and Mr LT exercised his right to also attend. At the beginning of the call, I extended my apologies to the parties for the length of time taken to process this review, and repeat that apology here.

[45] I advised Mr CO that this Office does not have jurisdiction to make a finding of misconduct and if that were considered to be an appropriate outcome, charges would need to be laid before the Lawyers and Conveyancers Disciplinary Tribunal, either by the Standards Committee or this Office. The process before the Tribunal would then come into play.

[46] I also advised Mr CO that the amount of compensation that could be ordered by this Office was limited to \$25,000¹⁶ and that any claim to recover damages in negligence would need to be pursued in the courts.

¹⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹⁶ Reg 32 of the Regulations.

[47] The correctness of the monetary orders made by the Committee was also addressed.

Review

Misconduct v unsatisfactory conduct

[48] Mr CO and Ms EA consider that Mr LT's shortcomings are sufficiently egregious that he should be struck off the roll of barristers and solicitors. The definitions of those terms in the Lawyers and Conveyancers Act 2006 (insofar as they are relevant) are:

7(1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm,—

(a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—

(i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or

(ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or

...

(iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm;

...

12 In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is 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; or

...

(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this 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); or

...

The contracts

[49] The two contracts in respect of which Mr LT was instructed were:

- (a) the Agreement for the purchase of the section; and
- (b) the building contract.

[50] Mr CO and Ms EA conducted negotiations with the selling agent (Mr SK) and both contracts were delivered to Mr LT after they had been signed.

[51] The terms of any contract can only be amended when agreed by both parties. In the case of the land purchase, any variation to the Agreement was not enforceable unless in writing, and signed by the person against whom the amendment is to be enforced.¹⁷ It does not appear that Mr LT advised his clients about this fundamental requirement at any time.

[52] In addition, unless the parties agreed voluntarily to amend the terms of the contracts, the only means by which any variation could have been introduced was by way of the solicitor's approval clause in the Agreement for the purchase of the land,¹⁸ which read:¹⁹

This Agreement is conditional on the Purchaser's solicitor's approval of the form and content of this Agreement within three (3) working days of the date of this Agreement. This condition is inserted for the sole benefit of the Purchaser and may be waived by the Purchaser at any time before the Agreement is avoided.

[53] It is a matter of law as to what is included in the term 'form and content', but I proceed on the basis that the variations required by Mr CO and Ms EA fall within that term.

[54] Ms EA sent an email to Mr LT on 10 December:

The contract mentions we have three days to have a lawyer look over the documents however SK has said there is flexibility and can extend to five days if not more.

[55] Mr LT sent a reporting email to Ms EA on the following day. He pointed out that:

The deposit of \$40,778.08 is payable on satisfaction of my approval of the Agreement (currently scheduled for Thursday 13 December 2018) and satisfaction of the finance condition by Monday 24 December 2018.

At [5] of his letter he referred to clause 22.1 of the Agreement:

¹⁷ Section 24 Property Law Act 2007.

¹⁸ There was no solicitor's approval clause in the building contract.

¹⁹ Further Terms of Sale, cl 19.3.

... Clause 22.1 also provides that the Agreement is conditional upon the Vendor achieving a deposit of the plan of subdivision and issue of the certificate of title on or before 20 December 2018, though that condition date may be extended for a period not exceeding 6 months, that notice to be given on or before 20 December 2018.

[56] He did not refer to, and explain, the remainder of the clause, which provided that it was for the sole benefit of the Vendor, and could be waived by the Vendor at any time before the Agreement was avoided.

[57] Mr LT did explain the provisions of s 225 of the Resource Management Act 1991, which provides a limited option for a purchaser to cancel if progress is not made towards obtaining a resource consent.

[58] It can take many months to obtain a resource consent, in some cases extending into years. When acting for the purchasers of a section in a subdivision for which resource consent has not issued, the initial enquiry to be made is what stage the application for consent has reached. Unless issue of the consent was imminent, it would be highly unlikely, or even impossible, for titles to issue within 10 days of the Agreement being signed.

[59] At the time the contract was signed, the date for approval of the form and content of the Agreement, was 13 December. Following Mr LT's email to Ms EA summarising the terms of the contracts, Ms EA responded:²⁰

I have been told the land will get its title early January 2019. One concern of ours is what happens if it does not come through. SK said we could put a clause stating that if it wasn't issued by second week of February we could bow out and cancel our Agreement.

[60] It is difficult to accept that this was not a clear indication by Ms EA that certainty around the date on which title was to issue was important to her and Mr CO. However, Mr LT's response²¹ with regard to the issue of title was:

4. With respect to Title, I can check availability with the Vendor's Solicitors. You could include the clause suggested by SK. As it stands, the Vendor's obligation is to obtain Title by 20 June 2019, should it elect to extend the period to obtain Title for the period of 6 months from 20 December 2018.
5. If title does not come through within the stipulated time frame, your deposit is refundable together with net interest accrued thereon.

[61] This response seemed to turn the responsibility for any amendments to the contract on to Mr CO and Ms EA, instead of Mr LT obtaining confirmation from his clients that he should make this a condition of approving the terms of the Agreement.

²⁰ On 11 December 2018.

²¹ Email LT to EA (12 December 2018 at 2:42 pm).

[62] In addition, expressing the meaning of the clause as imposing an 'obligation' on the Vendor to obtain title by 20 June, gave Mr CO and Ms EA a false impression, adding to their misunderstanding of the terms of the Agreement.

[63] It must be noted at this point that the building contract did not include any condition requiring solicitor's approval and it is unclear to me what the status of that contract would be if the Agreement to purchase the land had not been approved or the various conditions not satisfied.

[64] At that stage, Mr LT requested the Vendor's solicitors to advise what the current status of the application for resource consent was, and for an anticipated date for issue of title.

[65] There was no response from the Vendor's solicitors.

[66] Ms EA raised the need for certainty around the issue of title again in an email to Mr LT in the early hours of 13 December, which was, at that time, the date for satisfaction of the solicitor's approval condition. She said:

Can we bring forward the due date of title by 31st March? We would also ideally like the build date to be completed by 31 October. If for some reason title doesn't come through by March 31st we would want to have the right to choose to extend or be refunded. Our current house we rent, the lease expires 25th November 2019 hence wanting to be moving in end of October/ early November.

[67] At 11:06 am on that day, Mr LT suggested that he should ask for an extension of the date for his approval. He says:

I think it wise to request an extension of the time within which to give my approval to the Agreement which otherwise would be due today. The terms and conditions of these contracts need to be made clear and certain.

He then wrote to the Vendor's solicitors requesting that the date for his approval be extended to 21 December.

[68] On 17 April 2019, the Vendor's solicitors advised that its client waived the condition relating to obtaining the resource consent and the sale of a sufficient number of sections. They also advised that the Vendor had exercised its right to extend the date for issue of title to 20 June 2019.

[69] Mr LT advised his clients of these developments. In the same email,²² he reminded Ms EA that he had requested an extension of the date for his approval to 21 December i.e. the following day.

²² Email LT to EA (20 December 2018).

[70] Again, the certainty that his clients were asking for about the issue of title was not addressed and again, on the same day, Mr CO raised the issue:

Our main concerns in terms of the contract are still as follows:

It needs to have a date range for the build start to build finish. We need to find out more about what is happening with the Titles because pushing the build back to potentially June is quite a difference from where they were three weeks ago intending on building in January.

[71] Mr LT requested a further extension of the solicitor's approval condition to 18 January 2019. It was not until 9 January 2019 that Mr LT's request to extend the date for his approval of the Agreement to 18 January was agreed.

[72] During this phase, and subsequently, Mr LT does not seem to have taken on board his clients' requests for certainty about issue of titles.

[73] It would have been possible at that time, for Mr LT to advise the Vendor's solicitors that his approval was subject to titles issuing by a certain date, which, if not agreed, would have left his clients in a position where they could cancel the contract at any time. It would also have meant that the requirement for payment of the deposit would not have been triggered.

[74] The issue was raised again by Ms EA on 13 January. She said:

We saw SK in the weekend and titles have not yet been issued, they are now saying mid February.

[75] Matters drifted on. Mr LT did not provide any clear guidance to his clients who had not been involved in the purchase of a property before. The purchase of a section for which title had not issued, coupled with a building contract, is more involved than the purchase of an existing house. This required even more careful and clear advice by Mr LT.

[76] On 15 January, Ms EA advised Mr LT that:

The developer has agreed to having the date changed to 20th April for title to be issued. If it is not done by this date then we can terminate the deal with a full refund of deposit.

[77] This understanding, as expressed by Ms EA, needed to be corrected immediately. The developer had exercised its ability to extend the date for title to 20 June and Mr CO and Ms EA did not have the right to cancel the Agreement.

[78] On 18 January, Mr LT then sent a draft letter to Mr CO and Ms EA for their approval. The letter was to be sent to the Vendor's solicitors confirming satisfaction of

the finance condition. With regard to the solicitor's approval clause, the draft letter included the following:

Variations

...

- b. The date provided in c[l]ause 22.1 of the Agreement (Issue of Title) of 20 June 2019 (your letter dated 20 December 2018) be substituted for **16 April 2019;**

...

[79] Clause 22.1 still provided that the condition could be waived by the Vendor at any time before the Agreement was avoided. Mr LT's conditional approval did not address that.

[80] The Vendor's solicitors confirmed the condition attaching to Mr LT's approval on 12 February and that triggered the requirement for payment of the deposit which was then made.

[81] On 17 April, the Vendor exercised its rights to waive the condition as to title.

[82] Mr LT did not explain the consequences of this to Mr CO and Ms EA, and they continued to believe that they could cancel the Agreement if title did not issue by 20 June. It was not until they instructed Mr LT to cancel the Agreement on 9 June, that the misunderstanding became clear.

[83] Shortly afterwards, they instructed new solicitors.

Discussion

Should Mr LT's conduct be referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal?

[84] Mr CO and Ms EA unexpectedly found themselves committed to the purchase with much uncertainty around when title would issue and their new build started, despite having it made clear throughout that they required certainty.

[85] I have not been able to deduce from the material provided, that Mr LT 'actively lied', to his clients. It may be that is what they considered Mr LT's words to be, but that only serves to underline the fact that Mr LT's advice to them was not comprehensive and clear.

[86] The question is whether Mr LT's failure to provide clear advice and guidance about the terms of the contracts amounts to a lack of competence to the degree that should be referred to the Lawyers and Conveyancers Disciplinary Tribunal.

[87] I include here a discussion by the authors of the text *Ethics, Professional Responsibility and the Lawyer*²³ of the circumstances where allegations of incompetence would support charges being brought before the Tribunal:

In most cases, practitioners' mistakes or omissions will not amount to a basis for charges before the Disciplinary Tribunal. As with any profession or trade, some errors are inevitable, and while this may reflect on the practitioner's skill, they do not usually reflect on the practitioner's professional conduct. The same can be said of incidents of delay or a failure to respond to telephone calls and the like. Such errors are considered to be unsatisfactory conduct rather than misconduct.

However, in the event that the mistake shows a degree of recklessness or there are numerous instances of incompetence, this may be a matter for disciplinary intervention. To be a basis for charges before the Disciplinary Tribunal, the negligence or incompetence must be serious enough to require potentially protective orders of the Tribunal (such as suspension). Justice Kirby's approach is instructive (noting that the question there was whether conduct amounted to misconduct):

but the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference to and abuse of the privileges which accompany registration as a medical practitioner.

[88] Although a charge of unsatisfactory conduct can be brought before the Tribunal, it is usually as an alternative to a charge of misconduct. As discussed in the next section of this decision, I do not consider that Mr LT's conduct reaches the degree of egregiousness that would warrant charges being laid before the Tribunal.

Unsatisfactory conduct

[89] The Standards Committee determined that Mr LT had not met the standard of competence required by the Lawyers and Conveyancers Act and the Conduct and Client Care Rules. The Committee's finding of unsatisfactory conduct against Mr LT, focused on his failure to respond to Mr CO and Ms EA's requests to ensure that they could cancel the contracts if title did not issue by 20 June.

[90] In my view, Mr LT's advice to his clients did not measure up to the appropriate standard of competence and diligence in other ways:

²³ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 116.

- There was no clear advice to Mr CO and Ms EA that the contract for the land purchase could only be varied by Agreement between the parties and the variation recorded in writing and signed. Mr CO and Ms EA seem to have had an understanding that the contract could be varied unilaterally by Mr LT.
- Mr LT seemed to leave his client to take the necessary action to effect the variation by advising them that “they could include the clause ...” suggested by Mr SK. Mr LT should have taken the lead here and ensured that the appropriate variation was effected.
- Mr LT did not advise his client about the effect of the waiver option in cl 22.1 of the Agreement. There was no mention of it in his initial reporting letter and when the Vendor exercised the waiver, he endeavoured to argue an alternative interpretation of the clause. This was a matter that should have been clarified prior to approving the contract as his different interpretation clearly had significant consequences for his clients.

[91] Overall, Mr LT did not give clear advice and guidance to his clients. These failures extend the consequences beyond that focused on by the Committee.

Orders

Compensation

[92] Mr CO and Ms EA take issue with the Committee’s orders, in particular that they remain liable for Mr LT’s fees while the Law Society is the recipient of the fine and costs. As the ‘victims’ of Mr LT’s shortcomings, they say this is unfair.

[93] They also take issue with the Committee’s determination that it could not make any orders for compensation as it could not be certain that any losses flowed from Mr LT’s conduct. In the application for review they say that the additional rental they were obliged to pay is easily quantified.

[94] The complaints and disciplinary process is focused on professional standards. Claims for compensation are primarily a matter for the courts to consider in the form of damages following a successful claim of negligence.

[95] The claim for additional rental is not as simple as it might seem. It is unlikely that builder would have accepted a finish date for the building works as delays can be caused by a number of reasons beyond the builder’s control. In addition, payments of

mortgage interest that would have been incurred if the building had been completed, would have to be offset against the additional rental. These, and other matters to limit any payment to Mr CO and Ms EA, would no doubt, also be raised.

[96] In summary, I agree with the Committee's determination to decline to engage in consideration of a possible claim for compensation flowing from the findings of unsatisfactory conduct.

Fees

[97] The Committee determined that special circumstances existed to enable it to consider Mr CO and Ms EA's complaint about Mr LT's fees. It formed the view that Mr LT had completed 80 per cent of the work that he had been instructed to do and that Mr LT was able to charge for that work. The Committee then ordered Mr LT to reduce the fees charged to Mr CO and Ms EA by 80 per cent, which it calculated to be a reduction of \$1,640.

[98] Mr CO and Ms EA say that the amount calculated by the Committee is not correct.

[99] There is no question that Mr CO and Ms EA have been adversely affected by the lack of care and advice provided to them by Mr LT. It would certainly have come as something of a surprise to them that they were unable to cancel the contracts.

[100] Even though Mr LT had completed a considerable amount of work, the outcome for his clients was unsatisfactory and no doubt diminished their experience of buying their first home.

[101] In the circumstances, I have formed the view that, in recognition of this, they should not have to pay any part of Mr LT's fees.

[102] I acknowledge that the orders made below do not meet Mr CO and Ms EA's expectations, but findings of unsatisfactory conduct against a lawyer are not matters which are lightly dismissed by a lawyer, as they remain against the lawyer's professional record.

Decision

[103] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

- (a) I confirm the two findings of unsatisfactory conduct by the Committee against Mr LT;²⁴
- (b) The determination of the Committee is modified by the order that Mr LT cancel the three invoices dated 29 July 2019.²⁵
Any amount that has been paid by Mr CO and Ms EA is to be refunded to them.²⁶
- (c) The fine and order for payment of costs is confirmed.

Publication

[104] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published in anonymised format.

Costs

[105] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 and in accordance with the Costs Order Guidelines issued by this Office, Mr LT is ordered to pay costs of \$1,200 to the New Zealand Law Society.

Enforcement of costs order

[106] Pursuant to s 215 of the Act, I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

DATED this 29th day of AUGUST 2023

O Vaughan
Legal Complaints Review Officer

²⁴ This includes the finding of unsatisfactory conduct by reason of the breach of rr 3.4 and 3.5 of the Conduct and Client Care Rules.

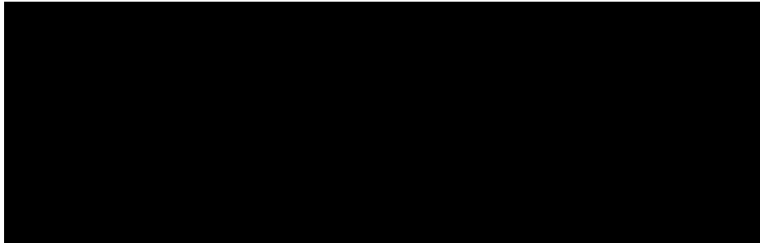
²⁵ This order is made pursuant to s 156(1)(f) of the Act.

²⁶ This order is made pursuant to s 156(1)(g) of the Act.

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

Mr CO and Ms EA as the Applicants
Mr LT as the Respondent
Mr TF as an Interested Party
[Area] Standards Committee [X]
New Zealand Law Society

Schedule 1



Timeline

December 2018:

December 11th - [REDACTED] outlined the clauses, but did not advise us the Vendor had the right to waive the condition on the clause. *See Exhibit A1*

December 11th - [REDACTED] instructed to include the right to cancel if title was not received in January. *See Exhibit A2*

December 11th - [REDACTED] instructed to add building start and finish dates. *See Exhibit A2*

December 12th - [REDACTED] confirms if title does not come through by 20 June 2019, we are entitled to a full refund plus interest on the deposit. *See Exhibit A3*

December 13th - Solicitors approval window is extended while variations to the build contract are being quoted for. [REDACTED] instructed to bring forward the title date to 31st March, and 31st October to be the build completion date. If title did not come through by 31st March, we would have the right to extend the contract or refund our deposit. *See Exhibit B1*

January 2019:

January 13th - [REDACTED] instructed if the build has not been started by May 15th 2019, we reserve the right to abandon the deal with a full refund on any and all costs including the deposit. *See Exhibit C1*

January 14th - [REDACTED] responding saying this is only to be included in the build contract, and we will still own the land. *See Exhibit C2*

January 14th - As a response to [REDACTED] reply - [REDACTED] asked if we went unconditional on the land and if for whatever the bank changes our loan condition, then we are able to cancel the build contract. *See Exhibit C3*

- Also in the response - [REDACTED] asked for confirmation that if titles were not issues by June then we can cancel both contracts and receive a full refund of our deposit, noting she believed this is already in the contract. *See Exhibit C3*

- Also in the response - [REDACTED] instructed [REDACTED] to add the build start date of 15th May in. *See Exhibit C3*

January 15th [REDACTED] then added to the reply, instructing the build start finish dates to be written into the contract. And also that the contract needs to be conditional on finance. *See Exhibit C4*

January 15th - [REDACTED] sends another email after receiving pre-approval until April 20th 2019. She instructs [REDACTED] if the title has not been issued and for whatever reason the bank does not renew finance or for any other reason, we will receive a full refund. *See Exhibit C5*

January 18th - Andrew copies us in on the correspondence sent to the other side, it does not include all of our instructions and is conditional upon satisfaction with the Geotechnical Report. *See Exhibit D1*

February 2019:

February 8th - Confirmation sent to the other side with satisfaction on the Geotechnical Report. [REDACTED] arranged the deposit to be sent. *See Exhibit D2*

February 15th - [REDACTED] confirms the contract is now unconditional. *See Exhibit D3*

April 2019:

April 17th - The Vendor waives the condition where titles must be available by April 17th. *See Exhibit E1* [REDACTED] asks what this means. *See Exhibit E2*

[REDACTED] responds by saying if Titles were not issued by 20th June the Vendor had the right to cancel the agreement, and that they have now waived the right to do so, implying confidence. *See Exhibit E3*

- This is incorrect, it in fact means that the Vendor is waiving the condition where titles must be available by 20th of June, as this was never removed from the contract or identified by [REDACTED] as being for the benefit of the Vendor only, despite the contract saying it is for the sole benefit of the Vendor. *See Exhibit E4*

June 2019:

Jun 9th - We contact [REDACTED] requesting to cancel our agreement with [REDACTED] *See Exhibit F1*

Jun 12th - The Vendors solicitor responds in saying they will hold us to the contract based on Clause 22.1 (seen in Exhibit E4). *See Exhibit F2*

Jun 12th - Our response to [REDACTED] Beginning the dispute. *See Exhibit F3*

July 2019:

July 2nd - We advise [REDACTED] of our official complaint. *See Exhibit G1*