LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 031

Ref: LCRO 20/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**WD and FJ** Applicants
AND	**EG, SN and PL** Respondents

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

DECISION

Introduction

[1] Mrs WD and Mr FJ (the complainants) have applied to review a determination by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of their complaints concerning the conduct of the respondents, Messrs EG and PL, and Mrs SN (the practitioners).

[2] I apologise to the parties for the delay in completing this decision.

Opening remarks

[3] Everything that can possibly be said by both sides to this review application (and earlier, at the complaint stage), has been said by them. The issues have been thoroughly traversed, and there is an abundance of information before me.

[4] However, and despite the voluminous quantities of paper that the complaint and review application have generated (two Eastlight folders and some bound volumes of documents), the issues distil to the questions of whether certain client instructions in connection with a conveyancing transaction were followed, and how subsequent concerns about the management of that transaction were dealt with.

[5] That brief description is not to be taken as trivialising the complaint and review application. I acknowledge that the matters raised by the complainants have been a source of real distress to them which continues to this day, some four to five years after the events themselves.

[6] That being said, I also acknowledge that, for the practitioners, the disciplinary processes have been protracted and unpleasant. Very serious allegations have been made against them, including that they have all been dishonest.

[7] This complaint arose against a background of the complainants and Mr EG having enjoyed a long and warm professional relationship. Indeed, the complainants still speak highly of Mr EG's legal work on their behalf over many years.

[8] For reasons which follow, on all but one issue I agree with and confirm the determination of the Committee to take no further action on the complaints.

[9] I part company with the Committee on the issue of whether Mr EG breached professional duties to the complainants, specifically in relation to the complaint that he was consistently unresponsive.

[10] My view is that this conduct amounted to breaches by Mr EG of rr 3 and 3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).[1]

[11] Nevertheless, my ultimate conclusion about those breaches is that they do not warrant any disciplinary response.

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[1] Rule 3: In providing regulated services to a client, a lawyer must always act … in a timely manner consistent with the terms of the retainer and the duty to take reasonable care. Rule 3.2: A lawyer must respond to inquiries from the client in a timely manner.

Background

[12] At the relevant time (late 2017 and during 2018), Messrs EG and PL were principals in a law firm (the firm), and Mrs SN was employed by them as a registered legal executive.[2]

[13] During 2017, the complainants decided to move from [City X], to [City Y]. They located a suitable home (the home) to purchase, which was being offered by the vendor in a private sale.

[14] Shortly before 21 November 2017, the complainants instructed Mrs A, a legal executive employed by the firm, to assist with negotiating with the vendor's solicitor, appropriate terms and conditions to be included in the purchase agreement.[3]

[15] As indicated by me above, Mr EG had been the complainants' solicitor for a number of years, and Mrs A (generally supervised by Mr EG) had also acted in matters on their behalf.

[16] Terms and conditions were agreed, and on 21 November 2017 the complainants and the vendor signed a conditional agreement to purchase the home (the agreement).

[17] The agreement was conditional upon the complainants obtaining finance, and on them being satisfied as to the condition of the house on the basis of a LIM report.

[18] The date for satisfaction of those conditions was 5 December 2017 (the conditions date), with settlement scheduled for the following day – 6 December 2017.

[19] Mrs WD ordered the LIM report on 21 November 2017.

[20] The LIM report was issued on 28 November 2017, and included two matters which concerned the complainants. The first related to incomplete drainage work, and the second concerned a garage standing next to the home, for which a Code of Compliance Certificate (CCC) did not appear to have been issued (the LIM issues).

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[2] The partnership was incorporated on 26 March 2019. Mr PL is the incorporated firm's only director. At the time of hearing the review application, Mr EG continued to work as a consultant to the firm.

[3] It seems to be the position that because this was a private sale (i.e. there was no real estate agent involvement) the complainants initially negotiated directly with the vendor, including signing (but not dating) an agreement for sale and purchase. On 20 and 21 November 2017, the parties' lawyers agreed to some amendments to that document, which the parties initialled. The agreement was then dated 21 November 2017.

[21] The complainants (almost exclusively through Mrs WD) spoke to and exchanged emails with Mrs A about the LIM issues.

[22] Those discussions included advice about negotiating with the vendor to complete the drainage work and have the garage approved before settlement; alternatively, negotiating with the vendor for a retention sum to be held by the firm after settlement, to be paid out according to when and if the vendor satisfactorily dealt with the LIM issues.

[23] On 29 November 2017, Mrs A informed the vendor's solicitor that the complainants had obtained finance.

[24] In the same email, Mrs A raised the LIM issues with the vendor's solicitor, suggesting that if the vendor was unable to resolve those before settlement, "moneys [could be] held back from settlement proceeds pending completion." Mrs A suggested a period of eight weeks following settlement for that to occur.

[25] As it happened, Mrs A ceased employment with the firm at 5.00 pm on 1 December 2017, to take retirement.

[26] Before Mrs A's retirement, little progress had been made in connection with the LIM issues. She had suggested that Mrs WD might negotiate an agreed retention sum directly with the vendor.

[27] The vendor's solicitor emailed Mrs A on 1 December 2017 – at 3.19pm – expressing a degree of confidence that the LIM issues could either be resolved before settlement or not long after that, with an acknowledgement that in the latter event, a retention sum could be held by the firm pending completion.

[28] The solicitor followed that up with a suggestion of a $2,000 retention sum and completion of the LIM issues by 31 January 2018.

[29] Upon Mrs A's retirement at 5.00 pm on Friday 1 December 2017, files that she had been managing were distributed to other practitioners in the firm. Mrs SN took over the carriage of the complainants' purchase file.

[30] The complainants attempted to speak to Mr EG, without success, on Monday, 4 December 2017.

[31] First contact between the complainants and Mrs SN took place on the conditions date, Tuesday 5 December 2017.

[32] Mrs WD and Mrs SN exchanged emails over the course of the day on 5 December 2017, and finally spoke on the telephone about the transaction, at approximately 4.15 pm, and again shortly after that.

[33] During those telephone discussions with Mrs SN, the complainants expressed frustration about the unresolved LIM issues. The complainants asked whether they might be able to cancel the agreement.

[34] Following that telephone call, Mrs SN and the vendor's lawyer continued to negotiate the LIM issues. They finally agreed upon a retention sum of $5,000 ($2,500 per issue) and a date by which the vendor had to complete the LIM issues – 31 March 2018 (the agreed work).

[35] Mrs SN spoke to Mr EG about whether the complainants could cancel the agreement. He advised her that they could not do so, as agreement about the LIM issues had been reached.

[36] Mrs SN informed the vendor's solicitor that the LIM issues had been resolved, and the agreement was declared unconditional shortly before 5.00 pm on 5 December 2017.

[37] The complainants met Mr EG the following day, Wednesday 6 December 2017, to execute the necessary settlement documents. They again raised the question of whether the agreement could have been cancelled. Mr EG informed them that, as a matter of law, they had been unable to do so.

[38] Settlement was finalised that day. As had been agreed with the vendor's lawyer, the firm retained the sum of $5,000 in its trust account pending completion of the agreed work by the vendor by 31 March 2018.

[39] However, difficulties arose with the vendor completing the agreed work by that date. Those difficulties persisted during 2018.

[40] Mrs WD endeavoured without success to discuss the problems with Mr EG, by email and by telephone.

[41] In July 2018, the complainants instructed a barrister to raise concerns with the firm about its overall management of the conveyancing transaction.

[42] At that point, Mr PL became involved in the matter for the first time.

[43] In early September 2018, Mr PL paid the complainants the retention sum that the firm had been holding. This was against the vendor's objection.

[44] It subsequently transpired that the garage did not require certification, although the complainants were concerned that it was nevertheless sub-standard.

[45] Matters about the firm's overall management of the conveyancing transaction, were unable to be resolved to the complainants' satisfaction.

The complaint

[46] The complainants lodged their complaint with the New Zealand Law Society Complaints Service (Complaints Service) on 1 October 2018. The substance of that complaint may be succinctly summarised as follows:

Mrs SN

(a) Mrs SN failed to make contact with the complainants immediately before or after Mrs A's retirement. Her first contact with the complainants was on the morning of the conditions date (5 December 2017).

(b) Mrs SN failed to negotiate a retention sum of $20,000, as had been suggested by Mrs A and agreed to by the complainants. Instead, and contrary to instructions, she settled on a figure of $5,000 with the vendor's lawyer.

(c) Mrs SN was instructed by the complainants to cancel the agreement, during the afternoon of 5 December 2017 and failed to carry out those instructions. Moreover, Mrs SN incompetently advised the complainants that they could cancel the agreement, in circumstances where that was apparently not legally possible.

(d) Mrs SN subsequently confirmed the agreement with the vendor's lawyer, again contrary to instructions.

Mr EG

(e) Mr EG did not involve himself in the pre-settlement work in circumstances where he ought to have done so. This included failing to make contact with the complainants, particularly in circumstances where Mrs A had retired part way through the transaction.

(f) Mr EG brushed over the complainants' concerns when he met with them to complete execution of the settlement documents on 6 December 2017. He was dishonest during that meeting.

(g) Mr EG was consistently unavailable to assist in connection with issues that arose with the vendor and the agreed work.

(h) Mr EG failed to respond to the complainants' several requests for telephone discussions and meetings during 2018.

(i) Mr EG failed to give necessary advice in relation to the agreed work and the retention sum, during 2018.

Mr PL

(j) Mr PL failed to respond to letters sent to the firm on 1 and 2 March 2018.

(k) Mr PL wrongly released the retention sum to the complainants.

(l) Mr PL has misled the Complaints Service by his dishonest responses to the complaints.[4]

[47] The complainants said that if the practitioners (including Mrs A) or the vendor's solicitor had properly checked the LIM report prior to settlement, they would have ascertained that the garage had been "permitted" in 1989, and that there were no outstanding Council concerns. This fact came to light in September 2018, when the senior council inspector wrote to the parties with that information.

[48] The outcomes sought by the complainants included compensation, which they listed as follows:

(a) The sum of $20,000, being the amount that Mrs A had advised the complainants to insist upon as a retention sum for the garage, and the amount that they had instructed Mrs SN to secure.

(b) The sum of $1,141.81, being legal fees incurred for advice in February and March 2018 when they could not contact Mr EG.

(c) The sum of $9,000 (estimate), being legal fees incurred to instruct a barrister to write to the practitioners.

[4] This issue of complaint was included by the complainants as part of their comments on the practitioners' responses to their initial complaints.

(d) The sum of $2,686.17, being the amount lost when a holiday was cancelled because the complainants needed to remain in New Zealand to resolve matters.

(e) Sum of $569.44, being concert tickets bought and paid for in advance of the holiday.

(f) The sum of $400 (estimate) for a quote for a new garage.

(g) The sum of $5,000, which the vendor's solicitor was threatening to recover from the complainants on grounds that the retention sum had been improperly released by Mr PL.

Response by the practitioners:

Mr PL and Mrs SN

[49] On his own behalf, and on behalf of Mrs SN, Mr PL wrote separate letters to the Complaints Service, both dated 26 October 2018, responding to the complaint.

[50] Mr PL summarised both responses in a third letter to the Complaints Service, also dated 26 October 2018. It is sufficient for me to refer to the third, summary letter, at this point. In that letter, Mr PL said:

(a) The firm endeavoured to resolve the complainants' concerns through its internal complaints process. This included apologies and offers to carry out work at no cost.

(b) The complainants appeared to accept that in correspondence with the firm on 13 September 2018.

(c) A figure of $20,000 as a retention sum was never recommended by Mrs A, nor were those instructions given by the complainants.

(d) The figure of $5,000 as a retention sum was proposed by the vendor's solicitor and Mrs SN forwarded that proposal to the complainants on 5 December 2017. Mrs WD agreed with that amount.

(e) The undertaking and retention sum were obtained in accordance with the complainants' instructions, which included that the agreement could be confirmed as unconditional.

(f) A CCC was issued for the drainage work. Certification for the garage was not required as that had been approved prior to the commencement of the Building Act 1991. This was ascertained by the vendor as required.

(g) The retention sum was forfeited by the vendor to the complainants because the vendor did not complete the agreed work by 31 March 2018. Those funds were released to the complainants by Mr PL on 3 September 2018.

(h) The actual cost to the complainants of the agreed work was less than $5,000.

Mr EG

[51] Mr EG responded to the complaint on his own behalf, in a letter to the Complaints Service also dated 26 October 2018. In summary, Mr EG said:

(a) When Mrs A briefed Mr EG when handing over the complainants' file upon her retirement, she did not refer to a retention sum of $20,000 having been advised, discussed or instructed. Mr EG said that he "would have recalled such a sum if it had been mentioned … because it is significantly greater than one might expect for retention purposes in these circumstances."

(b) Mrs A corroborated this in a discussion with Mr EG.

(c) None of the correspondence between any of those involved mentions such a figure. Specifically, it was never mentioned by Mrs WD in her correspondence to either Mrs A, or Mrs SN.

(d) The work involved to get the transaction ready for settlement on 6 December 2017, was "Herculean."

(e) The agreed retention sum ($5,000) was adequate.

(f) The matters about which the complainants wished to speak to Mr EG during January 2018 were "contractor works" issues, rather than legal issues.

(g) Specifically, Mrs WD "is a very experienced and capable property owner [who] has owned a considerable number of properties." The issues which arose in early 2018 were largely drainage related, about which Mr EG would have been unable to offer any advice.

(h) Mr EG's file reveals a degree of contact between him and Mrs WD in the first few months of 2018.

(i) Nevertheless, Mr EG acknowledged that he "did not follow-up with regard to the [2017 transaction] matters after [a] meeting [with the complainants] on 14 May 2018 as [he] should have." He further said that he "very much [regretted] that [he] did not deal with those matters promptly."

(j) When the complainants indicated that they would be lodging a complaint with the Complaints Service, Mr EG telephoned Mrs WD "both to apologise for [his] delay in following up the matter of the monetary retention and to emphasise that [he had wished] to meet with [the complainants] to make that apology." Mrs WD accepted those apologies.

The complainants' comments

[52] The complainants provided comprehensive comments on the practitioners' responses to their complaints, in emails to Complaints Service dated 30 October, 31 October and 3 November 2018.

[53] I mean no disrespect to the complainants by briefly summarising those comments.

[54] There is always a degree of repetition in what complainants and practitioners say during a disciplinary investigation. This is completely understandable because they are all anxious to emphasise what they consider to be critical information relating to their particular case.

[55] In summary, the complainants said:

(a) Mr PL has been untruthful, and comments he has made have been taken out of context by him. The complainants had never met Mr PL, though understood him to be a litigator and thus perhaps prone to prevarication and evasion.

(b) After Mr PL became involved, matters were delayed and his approach was frustrating.

(c) Mr PL had no first-hand knowledge of the events in question. He did not become involved until after 23 July 2018, when the complainants had instructed a barrister to write to the firm.

(d) Conversely, the complainants are honest and ordinary, with no agenda nor any need to fabricate their account. The practitioner's responses to the complaints do not match the complainants' account of events.

(e) Significantly, Mr PL responded on Mrs SN's behalf. She has not endorsed what has been said with her own signature. Her account of the events of 5 December 2017, is untrue.

(f) Mr EG is generally "a nice man" whom the complainants liked and respected. However, he simply failed to engage with them or the vendor's solicitor, after settlement of the transaction on 6 December 2017. This "created a range of other problems over the next eight months."

(g) The complainants "have never had much confidence in" Mrs SN, including before she became involved with the transaction on 5 December 2017. Mrs SN "did invite [the complainants] to cancel the contract on 5 December 2017 and [they] did instruct her to do so [reiterating] that twice more."

(h) Mr PL's comment that Mrs A "did not recommend [a retention sum of $20,000]" differs from Mr EG's comment that Mrs A "had no recollection of that figure as a recommended retention sum." This is an illustration of Mr PL's tendency to mislead.

(i) Despite the firm suggesting that the complainants had considerable experience with conveyancing transactions, they are nevertheless not lawyers and relied upon the practitioners to guide them through the process competently, and to follow their instructions.

(j) Mrs A "was a very experienced and senior legal assistant" who was timely and competent. She was careful and had an "almost pedantic attention to detail." There is no suggestion that she made any errors with this transaction.

(k) The complainants very clearly recall Mrs A mentioning a retention sum of $20,000 in relation to the garage, and possibly also a figure of $2,000 to $3,000 for the incomplete drainage work.

(l) It was the practitioner's responsibility to ensure that the transaction was competently managed.

(m) The complainants understood that the initial discussions about a retention sum with the vendor's solicitor, related to the incomplete drainage work and did not include a sum for the garage. This was because the vendor had indicated that she was sure she had the necessary paperwork to show that the garage had been properly consented, and that she had until 5 December 2017 to provide that evidence. The complainants understood that if the vendor was unable to do so, there would then be a separate discussion about a retention sum for the garage.

(n) If Mr EG had spoken to the complainants on 4 December 2017, when they telephoned to discuss matters with him, the "disaster" which ensued could well have been avoided.

(o) It was apparent that Mrs SN "didn't have a clue what [the complainants'] expectations were" when they spoke on the telephone at 4.15 pm on 5 December 2017. The complainants instructed Mrs SN to seek a retention sum of $20,000. She "argued with [them] and [said] that it was too much."

(p) It was then that the complainants asked Mrs SN about cancelling the agreement. She advised that this was possible, but that a firm decision would have to be made within 45 minutes. The complainants promptly advised her to cancel the contract. They finished that telephone discussion expecting that this is what Mrs SN would do.

(q) However, because of a lack of confidence generally in Mrs SN, the complainants rang her two minutes later and confirmed their instructions to cancel the contract.

(r) The complainants believed that Mrs SN would do so. However, at 6.00 pm on 5 December 2017, they discovered a number of emails that Mrs SN had sent to them which revealed that she had continued to negotiate with the vendor's solicitor completely without instructions, including confirming that the agreement could be declared unconditional.

(s) This prompted an urgent request to see Mr EG, however when they met the following day (6 December 2017), Mr EG lied about the events.

(t) The events have been extremely stressful including resulting in some medical events.

[56] The complainants emphasised that the thrust of the discussions with Mrs A were that in her view, a figure of between $2,000 and $3,000 would be adequate for the incomplete drainage works. As to the garage, given that the LIM report appeared to show that consent had not been issued for it, it was possible that the Council might ask for it to be removed. It was for this reason that Mrs A suggested a figure of $20,000 as this would cover any replacement costs.

[57] The complainants attached a number of emails relating to these events. Included amongst those emails was one from Mrs WD to Mrs A dated 30 November 2017, and sent at 8.55 am. In that email Mrs WD said "what figure, the garage is concerning? Say $20,000?".

[58] Mrs WD said that she specifically mentioned this figure in her email, as it had been earlier suggested by Mrs A. The complainants also noted that in responding to that email some 25 minutes later, Mrs A did not challenge the $20,000 sum that had been mentioned by Mrs WD. They submitted that this demonstrates consistency in their evidence that Mrs A had first suggested that figure.

Notice of Hearing

[59] The Committee resolved to set the complaints down for a hearing on the papers, and on 27 March 2019 issued parties with a Notice of Hearing in which it identified the issues of complaint. Submissions were invited.

[60] In relation to Mr EG, the issues identified by the Committee concerned his competence and timeliness in overseeing the transaction, including whether he followed the complainants' instructions.

[61] In relation to Mrs SN, the issues identified by the Committee included whether she acted in a competent and timely manner, followed instructions and appropriately kept the complainants informed as to progress with the retainer including in connection with the negotiations with the vendor's solicitor.

[62] In relation to Mr PL, the issues identified by the Committee were whether Mr PL responded to concerns that were raised by the complainants, and whether he properly released the $5,000 retention sum to them.

The practitioners' submissions

[63] Mr PL responded on behalf of the practitioners in his letter to the Complaints Service dated 12 April 2019. He said:

Mrs SN

(a) Mrs SN was not instructed to cancel the agreement. She was asked to consider whether it could be cancelled if appropriate undertakings could not be secured.

(b) Mrs SN was not instructed to seek a retention sum of $20,000.

(c) The complainants' account of events is inconsistent with the contemporaneous documents.

(d) None of the complainants' correspondence at the time makes any reference to a retention sum of $20,000.

(e) There are no emails from the complainants corroborating their instructions to cancel the agreement.

Mr PL

(f) Any dishonesty is denied.

(g) The complainants' 2 March 2018 letter to the firm was dealt with in a timely and prompt way.

(h) Moreover, Mr EG received fresh and separate instructions from Mrs WD, shortly afterwards. This confirms that the complainants must have been satisfied with the firm's response.

(i) Mr PL was not directly contacted by the complainants about any concerns, before the complainants' barrister wrote to the firm on 17 July 2018.

(j) The retention sum was properly paid to the complainants. The date for completion of the agreed work was 31 March 2018, and the vendor failed to meet that deadline. The terms of the undertaking provided for the vendor to forfeit the retention sum in that event. The complainants' barrister requested its release in his letter to the firm on 17 July 2018.

Mr EG

(k) Mr EG denied any dishonesty at any time.

(l) Mr EG's response to the complaints is consistent with the contemporaneous documents.

The complainants' submissions

[64] The complainants forwarded a 16-page submission to the Complaints Service, on or about 9 May 2019.

[65] Again, I mean no disrespect to the complainants by briefly summarising that document. The complainants have been consistent in all of their correspondence with the Complaints Service, as to the issues of complaint and the background facts to support those complaints.

[66] To the extent that the complainants' submissions contain fresh or further material, they have said:

(a) The complainants accept that Mr EG may have been distracted by personal matters during December 2017.

(b) It may have been a mistake for the transactional work to have been started by Mrs A, in circumstances when she was retiring part way through the process.

(c) Nevertheless, Mr EG endeavoured to cover-up the events of December 2017. As well, Mrs SN may not have been truthful when she spoke to Mr EG.

(d) Critical to the way in which the events unfolded, was the fact that Mr EG did not speak to the complainants first thing on Monday, 4 December 2017, knowing that Mrs A had retired and that Mrs SN had taken over management of the transaction.

(e) Mrs SN failed to respond to the complainants' concerns about the garage, set out in an email sent by them on 5 December 2017.

(f) The complainants' failure to confirm details in writing (for example, confirming instructions to cancel the agreement with a follow-up email to Mrs SN) simply reflects that they are "not office people" and that such a step "never entered [their] heads."

(g) As well, the failure to specifically refer to a figure of $20,000 in emails to Mrs SN was simply because the complainants assumed that it was being attended to, consistent with the earlier discussion with Mrs A.

(h) The complainants did not contact Mrs SN after 4.15 pm on 5 December 2017, because they assumed that their instructions to cancel agreement would be carried out.

(i) Mr EG was "distraught" and "overwrought" when he spoke to the complainants in October 2018 about the management of the transaction. However, that was prompted by self-interest and he was otherwise "nonchalant" about the complainants' position.

(j) The complainants were forced to cancel a trip they had planned for late 2018, to Europe. This resulted in them forfeiting money pre-paid, including expensive concert tickets.

(k) The senior council inspector informed the vendor's solicitor during September 2018, that the garage had in fact been permitted. The garage situation was thus immediately resolved. The inspector noted that if both solicitors had paid proper attention to the LIM report in November 2017, they would have seen there and then that the garage had been permitted.

(l) Despite the complainants informing the firm that they were happy and that the firm did not owe them any money, on reflection they concluded that the transaction as a whole had caused them to suffer financial loss of approximately $40,000. It was this which prompted the complainants to lodge their complaint with the Complaints Service.

(m) Despite Mr EG's otherwise exemplary professionalism in other matters, in relation to this transaction he "made some grave mistakes [and] let [the complainants] down very badly [and] wasn't honest … about this on 6 December 2017."

Standards Committee determination

[67] The Committee referred to the issues it had identified in its Notice of Hearing as being those requiring determination.

Mr EG and Mrs SN:

Retention sum for the garage

[68] The Committee held that the complainants "were unable to provide any evidence that a figure of anything like $20,000 was raised with [Mrs] SN or that [Mrs] SN should have known such amount had allegedly been discussed with [Mrs A]".[5]

[69] It was noted by the Committee that the contemporaneous documents referred to a total retention sum of $5,000. Moreover, the Committee considered that even if the sum of $20,000 had been suggested to the vendor's solicitor, "it seems very unlikely that [the vendors] would have agreed to such a figure based on what seemed a relatively minor issue raised in the LIM."[6]

Instructions to cancel

[70] The Committee observed that the complainants had been "unable to provide any evidence that they had instructed [Mrs] SN to cancel the agreement [and] [Mrs] SN denied having been instructed to cancel the agreement."[7]

[71] It was the Committee's view that Mrs SN's email to the complainants sent at 4.29 pm on 5 December 2017, corroborated her evidence that cancellation was only to be considered if agreement could not be reached around the LIM issues.

[72] Further, the Committee noted that "cancelling the agreement for non-satisfaction of the LIM condition was not as simple as [the complainants seemed] to perceive." The Committee set out the steps which a purchaser was required to take under an agreement for sale and purchase, when it appeared that agreement could not be reached about a LIM condition. Cancellation was not an option.[8]

Advice on LIM

[73] The complainants were concerned that none of the practitioners picked up the fact that the garage did not require Council consent, because it had been built before those requirements came into force. Careful reading of the LIM report would, apparently, have revealed this.

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[5] Standards Committee determination (10 December 2019) at [22].
[6] At [25].
[7] At [28].
[8] At [29].

[74] In dealing with that issue of complaint, the Committee noted that the correct position had been subsequently drawn to the parties' attention, by a council inspector.

[75] The Committee's view was that lawyers are expected to act competently, and not perfectly. It noted that the vendor's solicitor had also failed to identify the correct issue in relation to the garage.

[76] The Committee said that it had difficulty understanding the issue of complaint, because if the matter had been identified prior to settlement, then issues of potential replacement or the need for a retention sum, would not have arisen.

Keeping the complainants informed as to progress

[77] The Committee was of the view that Mrs SN "did keep [the complainants] generally informed, despite some delays." Time-critical emails were sent by Mrs SN before 5.00 pm on 5 December 2017. She cannot be held responsible for the complainants' failure to read those emails, until after 6.00 pm.[9]

Responding to inquiries

[78] The Committee recognised that this transaction generated considerable stress for the complainants, including their decision to move to another property altogether because of the unhappy associations with the [City Y] home.

[79] Nevertheless, the Committee considered that any lack of responsiveness by Mr EG "needed to be viewed in the context of not only the entire matter but all matters for which [the complainants] engaged [the firm]."[10]

[80] The Committee held that the firm had been retained to act in the purchase of the home, in circumstances where a "reasonably substantial amount of work" was required. Nevertheless, "settlement was completed, and the original scope of [the firm's] work was effectively completed."[11]

[81] It was the Committee's view that "the issues that then arose in relation to obtaining the relevant certificates were factually complex and had not been foreseeable [and] were further complicated by the additional works required by [the complainants]. Such issues would not have been within the scope of the original retainer."[12]

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[9] At [34].
[10] At [45].
[11] At [46].
[12] At [47].

[82] Having said that, the Committee noted that the complainants still considered that Mr EG was acting for them. In that regard the Committee said:[13]

> If there was an issue with Mr EG's conduct, it was that he should have been firmer or clearer with [the complainants], explaining that [the issues raised after settlement] were not issues he could helpfully advise on or that, if [they] did want [the firm's] assistance, [they] would be charged for dealing with [the] substantial correspondence and queries…

[83] The Committee also said that once the complainants had instructed a barrister to write to the firm, Mr PL became involved and considerable work was carried out to resolve matters and at no cost to the complainants.

[84] Also during this time, the complainants continued to instruct the firm on other property matters.

[85] It was the Committee's ultimate conclusion on this issue of complaint, that further action was unnecessary.

Mr PL – handling of complaints

[86] The Committee considered that the firm completed a "significant amount of work … after [the complainants] raised [their] concerns." This included Mr PL dealing with those issues "in the Committee's view, satisfactorily." No fees were charged for this.[14]

[87] It was the Committee's view that further action on this issue of complaint, was unnecessary.

Mr PL – release of retention

[88] The Committee noted that the complainants' barrister, in writing to the firm in July 2018, had requested release of the retention sum to them. However, this became an issue of complaint because the vendor's solicitor had objected when those funds were released and had threatened to issue proceedings against the complainants for recovery.

[89] Nevertheless, the Committee concluded that "there had been no professional failing on Mr PL's part." The undertaking had been given, and Mr PL "was obliged to honour it and he did so."[15]

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[13] At [47]
[14] At [53].
[15] At [56].

[90] The terms of the undertaking were clear, and "Mr PL was correct to act on the strict terms of [it]; he was entitled to release the funds to [the complainants] on [their] instructions."[16]

Application for review

[91] The complainants lodged their review application on 30 January 2020.

[92] The complainants were critical of the Committee's determination because "it was apparently not able to be recognised, that [the complainants] had told the truth."

[93] It was the complainants' view that they had been disadvantaged by the Committee dealing with the complaint on the papers, rather than hearing from them in person.

[94] As an example, the complainants referred to Mrs WD's telephone discussions with Mrs SN at 4.15 pm on 5 December 2017, and then again shortly afterwards (heard by Mr FJ via speakerphone), in which emphatic instructions were given to cancel the agreement.

[95] The complainants consider that if they had been able to give that evidence in person before the Committee, the truth of what they were saying would have been apparent and Mrs SN's dishonesty in putting forward a different version, would have been equally apparent.

[96] As well, the complainants argue that the practitioners "had the time to fabricate a universal story" whereas a live hearing would not have provided that opportunity.

[97] As to the substance of the review application, the complainants extensively repeat the matters raised by them in their complaint and in their several comments about the practitioners' responses to that complaint.

[98] It bears emphasising that the complainants have consistently maintained the following:

(a) Mrs A specifically recommended a retention sum of $20,000 in relation to the garage.

(b) The complainants expected this to be both negotiated and secured.

[16] At [57].

(c) When, by 4.15 pm on 5 December 2017, agreement had not been reached about the LIM issues – in particular a retention sum of $20,000 for the garage – emphatic and unequivocal instructions were given to Mrs SN to cancel the agreement.

(d) Those instructions were given because Mrs SN had advised the complainants that they could do so.

(e) Mrs SN's actions after the second of the two telephone discussions, were carried out by her not only without the complainants' instructions, but contrary to their emphatic instructions.[17]

(f) The complainants reasonably expected that Mr EG would continue to deal with the post-settlement aspects of the transaction, in connection with the agreed work and the retention sum.

(g) Mr EG was routinely unavailable and non-responsive.

(h) Mr PL was similarly unhelpful.

[99] For the purposes of summarising the complainants' review application, it is not necessary for me to repeat the detail relied on by them to support those core allegations.

[100] By way of outcome the complainants seek "financial reimbursement for [their] financial loss". They do not seek compensation "in relation to the stress caused or, what [they] believe was the negligence on the handling of [the transaction]."

[101] The complainants attached a number of documents to the review application, showing unanticipated costs that they had incurred as a result of the practitioners' conduct.

Responses

[102] Mr PL provided the Case Manager with a brief emailed response to the review application on 4 June 2020, on behalf of the three practitioners.

[103] He simply noted that there were fresh issues of complaint in the review application, but that the practitioners did not wish to add anything to that which they had already put before the Complaints Service.

[17] The complainants described this as Mrs SN "[doing] her own thing."

[104] Mr PL did indicate that the practitioners were "prepared to consider alternative dispute resolution options."[18]

Nature and scope of review

[105] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[19]

> … 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.

[106] In a later decision, the High Court described a review by a Review Officer in the following way:[20]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.
>
> …
>
> [19] … A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion

[18] In relation to that, on the morning of and prior to the commencement of the hearing on 23 April 2021, I offered the parties an opportunity to meet privately to discuss the complaint and review issues. They did so and I was informed by the complainants that they wished to continue with their review application.
[19] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).
[20] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

> rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
>
> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
>
> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[107] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's determination;

(c) form my own opinion about all of those matters.

Hearing in person

[108] The review application was progressed before me at hearings in Auckland on 23 April 2021 and again on 27 July 2021.

[109] Mrs WD and Mr FJ appeared in person. Messrs EG and PL, together with Mrs SN on 23 April 2021, all appeared in person also.

[110] Submissions were made respectively supporting and opposing the review application. The parties all answered questions from me.

[111] At the conclusion of the part-heard hearing on 23 April 2021, I asked the complainants to provide evidence to support their claim for compensation. As well, I asked the practitioners to provide me with a copy of the firm's conveyancing file in connection with this transaction.

[112] Both parties provided the material requested, and each also made additional submissions.

[113] This material was discussed at the resumed hearing on 27 July 2021.

[114] I confirm that I have read the complaint, the responses to that and the complainants' comments about those responses. I have read the Committee's decision.

I have also read the review application and the practitioners' responses to that, and I have heard from the parties in person.

[115] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Discussion

Issues

[116] The heart of the complainants' complaint is that Mrs SN failed to follow explicit instructions to cancel the agreement and, on the contrary, allowed it to be confirmed as unconditional and otherwise ready for settlement the following day.

[117] The fall-out from that has given rise to the other threads of complaints: generally, they are that the transaction as a whole was mismanaged after settlement, particularly in relation to the agreed work and the retention sum.

[118] The mismanagement centred on complaint about inaction by Mr EG, and unprofessional conduct on Mr PL's part.

[119] I have distilled the following issues for determination by me:

(a) What instructions did the complainants give Mrs A about the retention and what advice did they receive from Mrs A about that?

Mrs SN

(b) What advice did Mrs SN give the complainants about the retention and/or cancellation of the agreement?

(c) What instructions did the complainants give Mrs SN about the retention and/or cancellation of the agreement?

(d) Do any conduct issues arise in relation to Mrs SN's advice and representation of the complainants?

Mr EG

(e) As the principal and the firm with ultimate responsibility for the complainants' transaction file, from first instruction until file closure, did

Mr EG "always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care"?[21]

(f) Similarly, did Mr EG "respond to inquiries from [the complainants] in a timely manner"?[22]

Mr PL

(g) Did Mr PL fail to respond to a complaint made directly to the firm by the complainants, in March 2018?

(h) Did Mr PL wrongly release the retention sum to the complainants in September 2018?

[120] I will deal with those issues in the order I have outlined above. This reflects the timeline of events.

[121] First, some general remarks about lawyer disciplinary proceedings.

An inquisitorial process

[122] A complainant in a complaint being considered by a Standards Committee is required to satisfy the Committee that there is substance to their complaint, on the balance of probabilities. This simply means that the Committee must conclude that the evidence supporting the issues of complaint is more probable than not.

[123] If the Committee cannot reach that point then the appropriate course for it to take, is no further action on the complaint.

[124] Similarly, an applicant in review proceedings before a Review Officer must also establish their case on the balance of probabilities.

[125] Standards Committee and Review Officer proceedings are described as inquisitorial. This contrasts with the format for proceedings in conventional courts, which is adversarial.

[126] The difference between the two is that in adversarial proceedings, the decision-maker generally takes an observer role – often likened to that of a referee – allowing the parties to shape their cases and make their arguments, but always subject to rules of procedure and the laws of evidence.

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[21] Rule 3 of the Rules.
[22] Rule 3.2 of the Rules.

[127] Conversely, in an inquisitorial process the decision-maker drives the process and is directly involved in questioning the parties.

[128] In relation to Standards Committees and review proceedings before a Review Officer, there are no rules of procedure. As to evidence, the decision-maker may receive and consider any evidence whether or not it is conventionally admissible. The tests generally applied are reliability and relevance.

[129] The overarching requirement for Standards Committee and Review Officer hearings is for the decision-makers to ensure that the rules of natural justice are observed. Generally, this means conducting a fair and impartial hearing in which all those involved have access to the same material.[23]

[130] Another noteworthy difference between conventional adversarial hearings and inquisitorial hearings before Standards Committees and Review Officers, is that in the latter parties do not give evidence under oath, and are not cross-examined.[24]

[131] That being said, it is of course expected that what a person tells a Standards Committee or Review Officer, will be truthful. Though, as life experience tells us, even truthful people can be mistaken. That does not make them untruthful.

[132] Cross-examination is of course when a party questions the opposing party and their witnesses. It is generally understood to be a robust process, in which the cross-examining party emphatically puts their case to the witness and endeavours to undermine their evidence.

[133] To some extent, the lack of such direct challenge to evidence in review proceedings is ameliorated by questions that may be put to the parties by a Review Officer. But this is never a substitute for cross-examination because the aim of a Review Officer's questions will be to clarify and not to undermine. The need for impartiality, ensures this.

[134] It is not uncommon for Standards Committees and Review Officers to be confronted with diametrically opposed versions of an event. That may leave those decision-makers unable to establish what occurred, even after clarification has been sought.

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[23] A Standards Committee may withhold material from a party in some circumstances see s 149 of the Act in relation to disclosure of investigator reports.
[24] For convenience, what parties say is generally referred to as their evidence.

[135] In that event, the outcome will be expressed as the decision-maker not being satisfied on the balance of probabilities as to the complainant's or applicant's case.

[136] Again, that does not mean that the decision-maker has rejected the evidence of one side or the other: it simply means that when all of the evidence is analysed, no clear picture emerges.

[137] Decision-makers confronted with conflicts in evidence will often look to outside material such as contemporaneous documents, to see whether any light can be shed on the impasse. That exercise can often lead the decision-maker to a conclusion one way or the other about contested evidence.

[138] Ultimately, the question to be asked is whether an assertion, in the face of all of the evidence that has been provided, is more probable than not.

[139] I will now make some general comments about the transaction at the heart of this complaint, before moving to discuss the specific complaints about each of the practitioners.

General comments

[140] There were a number of features of this conveyancing transaction which made it a little out of the ordinary.

[141] First, the property was [redacted text] in [City Y]. The complainants were resident in [City X] and the firm was based in the [Suburb A].

[142] It is accepted that the complainants instructed the firm – Mrs A – to negotiate with the vendor's lawyer as to the terms and conditions in the agreement for sale and purchase. That is unremarkable.

[143] The agreed conditions were as to finance (which was readily satisfied by the complainants) and a LIM Report. That too, is unremarkable.

[144] Secondly, the agreement was executed on 21 November 2017; the conditions date was around two weeks later (5 December 2017) with settlement the following day. That timeline – which included requesting and obtaining the LIM report – gives indication that a good deal of alacrity was required to get the transaction to settlement readiness.

[145] Thirdly, the LIM report – obtained on 28 November 2017, a little over a week before the conditions date – raised two potentially difficult issues: apparently incomplete drainage work and an unconsented garage.

[146] It seems plain that the parties' wish for a condensed time between execution of the agreement and the conditions date, made it virtually impossible for the vendors to complete the drainage work and obtain what appeared to be the missing and necessary consent for the garage.

[147] The complainants did not want to cancel the agreement in the face of that and instead opted to negotiate a position with the vendor which saw the agreement preserved and the agreed work completed to a timetable; absent completion, forfeiture of a retention sum.

[148] As indicated, that left the parties with around one week to negotiate, before the conditions date.

[149] Despite instructing Mrs A in connection with the purchase, Mrs WD negotiated directly with the vendor between approximately 28 November and 1 December 2017, in connection with the drainage and garage issues, with some input from Mrs A.

[150] That is also largely unremarkable, but it reflects the pressures of time that all were under.

[151] Mrs A's scheduled retirement was Friday 1 December 2017. This event was not something that the complainants could be expected to know when they instructed her. This meant a file handover to another practitioner (Mrs SN), whose first meaningful activity on the file was not until Tuesday 5 December – the conditions date.

[152] Individually many of the above events are not necessarily out of the ordinary. However, in my view their combination made the transaction anything but ordinary.

[153] Indeed, at the hearing Mr EG described the transaction as "a pressure cooker situation."

[154] Having said that, I do not agree with an observation made by the complainants in their submission to the Complaints Service responding to the Committee's Notice of Hearing, in which they said that their "case is quite complex."

[155] The issues raised by the complaint and to be considered by me on review, essentially boil down to the question of what instructions were given, and whether those instructions were carried out; and if so were they carried out competently.

[156] This includes both pre- and post-settlement events.

[157] The fact that there is a chasm of difference between the two sides' accounts of the pre-settlement events, does not make the case complex. Ultimately, as an objective decision-maker, I am required to determine whether the allegations that have been made have been established on the balance of probabilities. That means a careful consideration of the evidence. However, I do not regard any of the evidence as being complicated or technical.

Mrs SN

[158] There are two aspects to the complaint about Mrs SN's conduct. First, in relation to the retention sum. Secondly, in relation to instructions that the complainants say they gave Mrs SN, to cancel the agreement and which she did not follow.

[159] I will deal with each in turn.

The drainage, the garage and the $20,000

[160] First, some general observations.

[161] In relation to the agreed works and the retention sum, the contemporaneous documents – such as they are – provide limited assistance in discerning what instructions the complainants gave Mrs A and Mrs SN.

[162] I say "documents … such as they are" because there is a noticeable lack of any file notes or other memoranda on the firm's conveyancing file, recording (for example) discussions and instructions.

[163] I would have expected that experienced legal executives such as Mrs A and Mrs SN – given the somewhat out-of-the-ordinary nature of this transaction (including that Mrs A was handing it over to Mrs SN two working days before the conditions deadline) – might document the discussions they had with the complainants, the advice they gave and the instructions they received; not to mention telephone discussions with the vendor's solicitor.[25]

[164] For example, Mrs SN describes how she sought guidance from Mr EG, late in the afternoon of 5 December 2017, as to whether or not the complainants were able to cancel the agreement. This was prompted by an earlier question from Mrs WD to that effect. Mr EG apparently advised Mrs SN that it was not then possible for the complainants to cancel the agreement.

[25] There is a short hand-written file note, by Mrs SN, dated 5 December 2017 and timed 4.20 pm, recording a discussion with Mrs WD and to which I will later return. This is relevant to the cancellation issue.

[165] Given Mrs SN's uncertainty about that legal issue, together with the fact that it was obviously regarded as important by Mrs WD because she asked the question, I would have expected Mrs SN to make a careful file note of both Mrs WD's question to her and Mr EG's advice.

[166] Had there been more diligent file noting, I suspect that this complaint might never have been made as there would be clear and unequivocal, contemporaneous evidence of the transaction's journey.[26]

[167] Nor do the emails exchanged between the legal executives and the complainants shed much light on the events. In the absence of separate file noting, a practitioner will often confirm discussions, advice and instructions in correspondence to their client. That does not appear to have been done – at least comprehensively – here.

[168] I now turn to deal with the retention sum issue. This engages a consideration of Mrs SN's conduct.

[169] The only written reference to a retention sum of $20,000 in the contemporaneous documents, appears in Mrs WD's email to Mrs A on Thursday morning, 30 November 2017. To repeat, she said (in a form of shorthand):

> What figure, the garage is concerning? Say, $20,000?

[170] Mrs WD has said the context for this was earlier advice that Mrs A had given in connection with the garage; namely, that if it was unconsented and had to be removed, then $20,000 might reasonably cover any replacement costs.

[171] None of that advice is in writing, although in terms of the firm's overall conveyancing file that seems par for the course.

[172] Mrs WD has acknowledged that Mrs A's almost immediate reply to that email made no reference to the sum of $20,000. However, she submitted that the conclusion to be drawn from this, is that Mrs A was unsurprised by Mrs WD's reference to $20,000 as it was consistent with their earlier discussions.

[173] As against that, Mr EG has reported that in his discussion with Mrs A, she said that she had no recollection of any advice about a $20,000 retention sum. I take

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[26] There is a document headed "MEMO – 1 December 2017" but that appears to be a handover note from Mrs A to Mrs SN. The memo is brief and the only reference to a retention amount is "At this stage [Mrs WD] is not willing to go ahead unless they agree to a retention of funds will prove that the works have been done." This is against a background of the vendor's solicitor having suggested a figure of $2,000, in an email to Mrs A sent at 4.45 pm on 1 December 2017. It is not entirely clear whether Mrs A forwarded this email to Mrs WD.

Mrs WD's point that "no recollection" is equivocal; it leaves room for the possibility that an event may have occurred.

[174] Nevertheless, I have a considerable degree of uncertainty about the issue of a retention sum for the garage, of $20,000.

[175] I am not helped – indeed I am troubled – by the fact that there is only one reference to this sum in the contemporaneous documents, which is Mrs WD's email to Mrs A, described by me above.

[176] Despite Mrs WD's explanation for her comment in that email – that it was reflecting Mrs A's earlier advice – I regard that comment as equivocal at best, rather than confirming something that had already been discussed.

[177] It asks a question (and I interpose words here): "what figure [for] the garage [which is] concerning? $20,000?"

[178] That does not appear to me to be an illustration of the complainants repeating advice they had earlier been given. It is a question followed by a figure – suggested by the complainants but also framed as a question.

[179] I am not subjecting the language and grammar of Mrs WD's email to exacting scrutiny by putting it in this way. My assessment of the sentence in that email, is its ordinary and natural meaning. This is especially so when there is literally no other document in which that figure has been mentioned.

[180] Even allowing for the fact that Mrs A did not, as one might expect or even hope, confirm her instructions in writing with the complainants, it is likely that she would have explicitly referred to that figure (or something in the vicinity of it) in her correspondence with the vendor's solicitor, if indeed those were her instructions from the complainants.

[181] She did not.

[182] The complainants described Mrs A as being fastidious about detail and conscientious to a fault when doing her work and when carrying out her instructions.

[183] Assuming that to be true – and I have no reason to believe otherwise – it is indeed surprising that she would not refer to those instructions in her correspondence with the vendor's solicitor.

[184] I conclude that, because she did not do so, the position concerning a retention sum for the garage is far less clear than the complainants would have it.

[185] To the extent that further clues exist in the documents about the retention sum, these emerge on Friday, 1 December 2017, from about 1.00 pm and on. The vendor's solicitor sent an email to Mrs A, suggesting that if the LIM issues could not be resolved, the parties "could agree to funds being retained."[27]

[186] Mrs A's response at 3.26 pm suggested that they "agree on a retention figure now and time frame for completing works."

[187] As observed by me above, I am confident that if Mrs A had been instructed by the complainants to seek a retention sum of $20,000 for the garage, then this would have been mentioned by her to the vendor's solicitor – especially given the very short time before the conditions date and settlement (less than three working days for the former).

[188] Indeed, Mrs A's email to the vendor's solicitor alludes to the pressure of time.

[189] Further, there was no mention by Mrs WD of a specific retention sum in an email she sent Mrs SN on 5 December 2017 (10.10am). This email was also expressing anxiety about the incomplete drainage work and the apparently unconsented garage.

[190] The vendor's solicitor returned to the LIM issues in emails to Mrs SN at 1.02 pm and 2.04 pm on 5 December 2017, suggesting a total retention sum of $5,000 to be split in half according to the two issues (the drainage and the garage).

[191] At around 3.00 pm on 5 December 2017, Mrs SN forwarded those emails to Mrs WD and specifically referred to "the full retention monies of $5,000".

[192] Significantly in my view, Mrs WD's reply email to Mrs SN, sent at 4.08 pm on 5 December 2017 was silent on the retention amount. She said:

> This discussion is ONLY referring to the drainage issue.
>
> …
>
> I am NOT happy to settle on this house tomorrow until BOTH of these issues are sorted out with a proper undertaking to remedy BOTH situations.
>
> …
>
> I am more than happy to cancel my purchase of this House altogether if legally possible if we are not going to get a proper and honest undertaking here with regards to BOTH the garage AND the drainage issues.

[193] As indicated this email is silent as to the retention sum. In circumstances where the vendor's solicitor had specifically referred to a total sum of $5,000, I would have expected there to be explicit reference to this by Mrs WD in that email. After all, when

[27] Email from the vendor's solicitor to Mrs A (1 December 2017, 3.19 pm).

she sent that email there were but 52 minutes left within which to secure agreeable undertakings.

[194] I acknowledge that by the time Mrs WD sent her email, she was frustrated and anxious, and understandably so. Nevertheless, there is a significant difference between a retention sum of $20,000 (as Mrs WD would have it), and $5,000 (as mentioned by the vendor's solicitor and passed on by Mrs SN).

[195] One could reasonably expect there to be some comment about that stark difference by Mrs WD in her email.

[196] My view is that the lack of any emailed instructions to Mrs SN with a specific retention sum in the face of a clear offer that had been made by the vendor's solicitor, undermines the emphatic nature of Mrs WD's evidence that she had given instructions to seek a sum of $20,000 in connection with the garage. If the figure of $20,000 was so critical, why did she not explicitly say so in writing?

[197] I am not to be taken as saying that I disbelieve Mrs WD's evidence about this issue. On the contrary, I am in no doubt that she is honest and trustworthy in all areas of her life. She impressed me as a person of integrity and with very firm and clear principles.

[198] Mrs WD has acknowledged the stress the transaction was causing, aggravated by silence from the firm on Monday 4 December 2017. Her 4.08 pm email on 5 December is expressed in very emphatic terms and provides good insight into that stress.

[199] As well, the complainants were managing at least one other transaction – unrelated to this one – and contemplating a significant shift to [City Y].

[200] I do not intend to be patronising, but this combination of factors does not give a decision-maker confidence about the absolute certainty with which evidence is expressed, especially when that is not corroborated by contemporaneous documents in circumstances where that can reasonably be expected.

[201] As to that reasonable expectation, I note the complainants' reference to a long lawyer/client history with Mr EG. This gives indication of some familiarity by them with transactional processes, including the need for accuracy and clarity.[28]

[28] Mr EG described Mrs WD as a "confident and assertive" person.

[202] On that topic, I have some difficulty accepting the complainants' self-descriptions of being experienced and even astute with property issues (about which I have no doubt), yet apparently casual when it comes to ensuring that critical details are explicitly expressed and fully understood. Reducing these to writing is not the sole domain of lawyers and other professionals. It is a hallmark of the careful and the astute.

[203] Support for this observation can be found in the fact that the complainants did not, as I have noted above, raise the retention sum issue with Mrs SN in the early part of 5 December 2017. Their explanation was that because it had been made so clear with Mrs A, they safely assumed that those instructions would be carried through and carried out.

[204] Again, I am compelled to observe that this is not consistent with their self-description as experienced and astute. Matters of such importance as whether a garage might have to be removed and replaced, at no small cost, would surely be something that someone with experience and success in property dealing would want to see in black and white, especially as it raised issues of potential compensation by the vendor.

[205] None of the above is to be critical of the complainants' credibility. This reasoning process merely reflects the factors that a decision-maker must take into account and balance when confronted with diametrically opposed evidence about events.

[206] As I have earlier noted, experience teaches that truthful witnesses may also be mistaken witnesses. That is a conclusion reasonably available to me in relation to the amount of the retention sum.

[207] I am not persuaded on the balance of probabilities that the complainants gave instructions to Mrs SN (or earlier to Mrs A) that a figure of $20,000 was required, and no less.

[208] I am satisfied that the instructions given were to negotiate suitable undertaking terms, and that the complainants conveyed to Mrs SN that total figure of $5,000 was acceptable to them.

[209] I add that I do not necessarily accept that if either Mr EG or Mrs SN had spoken to the complainants first thing on Monday, 4 December 2017, then the subsequent events would not have occurred.

[210] I certainly do agree that it is disappointing that no one spoke to the complainants on Monday, 4 December 2017. This, despite Mrs WD telephoning and asking to speak

to Mr EG. Indeed, I have difficulty understanding why no contact would be made in circumstances where the file had been handed over from Mrs A to Mrs SN with only two working days available to satisfy the LIM issues, and settlement of the matter was the following day.

[211] Nevertheless, the evidence does not persuade me that, had this occurred, things would have been different. Quite apart from anything else, there is the legal question (and one which I am not required, much less able, to answer) as to whether it was ever open to the complainants to cancel the agreement.

[212] I now turn to deal with that issue.

Cancellation?

[213] From Mr EG's perspective, that issue was simply not contestable: the complainants could not as a matter of law, cancel the agreement at the point at which they claim to have given Mrs SN those instructions. I do not think for a moment that this is something that Mr EG has come up with after the event.

[214] The question of cancellation instructions is also something about which there is no clear evidence.

[215] The complainants both say that express instructions to this effect were given to Mrs SN, on two occasions. First, in the 4.15 pm telephone discussion on 5 December 2017, and then very soon after that call ended, when Mrs WD called back and confirmed the cancellation instructions. Although the call was made by Mrs WD, Mr FJ was able to hear because Mrs WD put the telephone on "speaker".

[216] Mrs SN's position is that the question of cancellation was raised – and on the two occasions described by Mrs WD – but Mrs SN told the complainants that she was unsure and had to get advice from Mr EG.

[217] Mrs SN further said that her understanding of the two telephone discussions was that her instructions were that if agreement as to suitable undertakings could not be reached, then the process for cancelling the agreement might be triggered.

[218] Mrs SN's file note recording the discussion/s she had with Mrs WD late in the afternoon of 5 December 2017 is brief, and says (in full):

> TF [Mrs WD]
>
> She was not sure if both certificates included the garage. I advised one [certificate] was for the garage and would make sure this was clarified with

> [the vendor's solicitor]. If garage not included she would like to cancel. I said we may be able to cancel if we could not get issues resolved.
>
> 5/12/17. 4.20pm

[219] If Mrs SN's file note accurately reflects the instructions she received from the complainants, then it would seem that, as at the time of those two telephone calls (between 4.10 pm and 4.17 pm on 5 December 2017) there was still opportunity for agreement to be reached with the vendor's solicitor as to undertakings in connection with the LIM issues.

[220] The complainants have been frequently critical of Mrs SN's competence and professionalism, not only in relation to this transaction.

[221] Despite the complainants' criticisms, Mrs SN's employers say otherwise noting that she has been employed by the firm for a considerable number of years. It would present as unusual for a law firm to continue to employ someone as a legal executive who had a history of marginal competence as has been described by the complainants.

[222] I found the complainants' repeated references to their opinions about Mrs SN's competence, throughout the complaint and review material and in their submissions at the hearing before me, unhelpful.

[223] These references were frequent and struck me as unnecessarily gratuitous and exaggerative.

[224] My assessment is that this has tended to devalue the complainants' overall evidence as it seemed designed to shift the focus away from their part in and responsibility for the events themselves.

[225] That part included the observations I have made above as to the lack of any explicitly expressed instructions either to Mrs A or to Mrs SN about the retention sum, or any explicit follow-up in writing following the 4.15 pm 5 December 2017 telephone call, and the one which followed.

[226] If Mrs WD was so concerned about Mrs SN's ability to manage the transaction at that critical time, I would have expected there to be something in writing from her recording those explicit instructions.

[227] I simply do not accept the complainants' explanation that they did not email Mrs SN after the late afternoon telephone calls on 5 December 2017, because they thought she might not see that email in time. There is no logic to that explanation and it presents as disingenuous.

[228] Again, this is not suggested by me with a benefit of hindsight or with an expectation that the complainants ought to have conducted themselves as a lawyer might be expected to. Careful recording of expectations and instructions are not – once again – the exclusive domain of lawyers and professionals. They are hallmarks of the astute and the experienced.[29]

[229] Further, I am not persuaded that Mrs SN gave the complainants unequivocal advice that the agreement could be cancelled, and an assurance that those instructions would be carried out.

[230] I think it far more likely that Mrs SN indicated during – probably both – of the telephone discussions with Mrs WD, that she was unsure about cancellation and would check the position out with Mr EG.

[231] I also think it likely that during at least one of the two late afternoon telephone discussions, Mrs WD indicated that suitable undertakings would satisfy them, and that this informed the steps that Mrs SN took after those telephone calls.

[232] Again, this conclusion is to some meaningful extent corroborated by the complainants' submissions as part of their review material:[30]

> Our bottom line was that we were never prepared to accept the property on 5 December at 5 pm unless either, the papers for the garage were presented by then or, we could agree on a figure, separately each for the drainage as per the quote and, the $20,000 for the garage with no building consent.

[233] This is also consistent with the complainants' email to Mrs SN sent at 4.08 pm on 5 December, to which I have referred above at [192].

[234] And, in relation to that email, Mrs WD was incorrect when she said that the vendor's email had only referred to the drainage issue. On the contrary, it very clearly suggested a total figure of $5,000 to be split into two $2,500 sums as each of the LIM issues was completed by the vendor.

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[29] In the complainants' review application, they summarise the legal work carried out by Mr EG over many years as including "all of our legal business … : Wills, conveyancing, Family Trusts, Company Deeds, Property Relationship Agreements, other transfer of property titles, conveyancing for other family members and perhaps more than [can be recalled at that time]." This suggests that the complainants are careful, methodical business people employing a number of legal devices to manage their business and personal affairs. This is commendable. However, I am satisfied it also reflects a greater level of sophistication about these matters than the complainants have claimed. Indeed, this is confirmed in submissions made by the complainants as part of the review, responding to Mr PL's submissions dated 24 May 2021. They said "our legal business was often complex involving a family trust and a property relationship agreement plus of course all the government anti-money laundering documents today, the new Inland Revenue tax rules and then bank documents too."

[30] The complainants' written submissions (20 May 2021), at p 4.

[235] Moreover, Mrs SN's email to the complainants, forwarding the vendor's solicitor's email, went further and advised that the full $5,000 should be retained once both of the LIM issues had been attended to.

[236] The position, based on those emails, was tolerably clear by the time that Mrs SN sent them to the complainants at around 3.00 pm on 5 December 2017.

[237] I think it improbable that Mrs SN would embark upon an uncharted course of conduct in the face of what Mrs WD has described as emphatic cancellation instructions (leaving aside the legal problems associated with that), and negotiate a resolution leading to confirmation of the agreement shortly before 5.00 pm.

[238] I regard it as unlikely that a legal executive – no matter how competent or experienced – would take it upon themselves to give emphatic, unequivocal advice to a purchaser about cancellation of an agreement, 45 minutes before the expiration of a conditions deadline. There are well-understood potential financial consequences for a purchaser if they cancel an agreement when they are not entitled to do so.

[239] My expectation is that a legal executive would invariably receive advice and instruction from their managing partner about an issue as potentially fraught as cancellation. After all, the managing partner assumes ultimate responsibility for the carriage of a conveyancing transaction and potentially bears the burden of any errors.

[240] I consider that relevant telephone calls at around 4.15 pm on 5 December 2017 were briefly but nevertheless accurately summarised in Mrs SN's file note: "if garage not included she would like to cancel."

[241] What this meant was that Mrs SN had instructions to get the garage included as part of the agreed work with the LIM issues, within the remaining time available before 5.00 pm.

[242] Mrs SN and the vendor's solicitor then spoke by telephone and he confirmed that the full $5,000 – earlier offered by him, and conveyed to the complainants – would be retained until both LIM issues had been completed.

[243] Mrs SN sought instructions from the complainants in her 4.29 pm email to them. In that email she said (after explaining the retention sum arrangements):

> Please advise your instructions, if you accepted their suggestion, or if you are not agreeable we will check the cancellation of the Agreement, but we need to respond before 5pm today.

[244] Despite apparently asking the complainants for instructions, Mrs SN has said that she nevertheless considered that she already had sufficient instructions from the complainants from which to indicate to the vendor's solicitor that the LIM issues were agreed. Thus, the way was paved for the vendor to declare the agreement to be unconditional.

[245] Mrs SN has not said whether she followed that email up with a telephone call to the complainants to seek the instructions she had asked for in her email. Certainly, from the complainants' perspective, they did not hear further from Mrs SN after the second telephone call ended at approximately 4.17 pm, until they received a series of emails from her at around 6.00 pm.

[246] It is less than ideal for a practitioner to ask for instructions and, not having received them, to then act upon what they believed those instructions were in any event.

[247] This is a troubling aspect of the way in which this transaction drew to a close, shortly before 5.00 pm on 5 December 2017. There is a gap of some 29 minutes between Mrs SN asking the complainants for instructions, and informing the vendor's solicitor at 4.58 pm that the LIM issues were resolved on the terms agreed.

Mr EG's advice

[248] I suspect that the answer to this aspect of the transaction – described by me as troubling – is that between ending the second telephone call from Mrs WD and completing the file note (4.17 pm), and sending an email to Mrs WD seeking instructions (4.29 pm), Mrs SN was, as I have noted above, carrying out the final negotiations with the vendor's solicitor about the LIM issues.

[249] She did so on the basis of her understanding of her instructions – recorded in her brief file note.

[250] Mrs SN's 4.29 pm email to the complainants noted that "we will check the cancellation of the agreement" and I anticipate that after sending that email, Mrs SN sought Mr EG's advice and guidance.

[251] I have already referred to the lack of any file noting as to what advice Mrs SN received from Mr EG. However, it is not difficult to work out what that would have been: at that point, Mr EG's understanding of the legal position was that the complainants were unable to cancel the agreement because the parties had reached agreement in relation to the LIM issues.

[252] It would seem to be the case that Mrs SN told Mr EG that the amount that had been discussed with Mrs WD – $5,000 – had been finally agreed by the vendor (including the release terms and the cut-off date). This prompted the conclusion that, at that point (i.e. after 4.29 pm) the practitioners had sufficiently clear instructions from the complainants that the LIM issues had been resolved on terms they had earlier expressed willingness to accept.

[253] On that account, it is noteworthy that there is no significant difference between the final retention sum terms, and the terms proposed by the vendor's solicitor in his 3.26 pm email to Mrs SN. The amount was the same and the agreed work was the same. The final terms simply made it clear that the full amount of $5,000 would be held until both matters had been completed; this being to the complainants' advantage.

[254] Of course, the danger with Mrs SN's approach of not confirming the instructions, is that in between concluding the 4.15 pm discussion and 5.00 pm, the complainants might have changed their mind.

[255] That is not a risk that I would encourage any practitioner to take.

[256] However, the complainants have not suggested that this is what occurred because their position is that unequivocal instructions to cancel the agreement had been given at 4.15 pm and separately again, shortly after that.

[257] For the reasons outlined above, I am not satisfied on the balance of probabilities that the complainants instructed Mrs SN to cancel the agreement, or that Mrs SN exceeded any other instructions she had received or that she otherwise acted without instructions.

Mr EG

[258] In concluding that Mr EG had not breached any of his professional duties, the Committee appeared to be influenced by what I regard as a narrow, if not incorrect, view of the scope of the firm's retainer.[31]

[31] Mrs A forwarded Mrs WD a copy of the firm's "standard terms of engagement letter" in an email dated 22 November 2017. Mrs WD replied by saying that she was "happy to accept" the terms. A copy of those terms does not appear to have been put on the firm's file. Doubtless, those terms would have included a description of the scope of the firm's retainer. However, I am satisfied, for reasons explained above, that even if that scope was relatively narrow in the terms of engagement, developments after it was sent – including in relation to the LIM issues – meant that the scope was at least impliedly broadened.

[259] For example, the Committee held that "the issues that … arose in relation to obtaining the relevant certificates were factually complex and had not been foreseeable."[32]

[260] I am not persuaded that "foreseeability" is a relevant factor in this matter.

[261] The reality is that the 2017 purchase was settled on the basis of the vendor undertaking agreed work by a particular date, and the firm holding a retention sum against that agreed work being completed. This naturally anticipated ongoing work by the firm; at the very least, negotiating with the vendors at some future point about the retention sum.

[262] The Committee also acknowledged that Mrs WD "considered that Mr EG was still engaged to advise her."[33]

[263] In that regard, the learned author in *Lawyers' Professional Responsibility* noted:[34]

> [W]here the evidence consists of the lawyer's word against that of the client, *all else being equal*, the court ordinarily sides with the client. An oft-cited judicial pronouncement to this effect is that of Denning LJ in *Griffiths v Evans*, who reasoned that "the word of the client is to be preferred to the word of the solicitor" because "the client is ignorant and the solicitor is, or should be, learned", and that a lawyer who does not take the precaution of getting a written retainer "has only himself to thank for being at variance with his client over it and must take the consequences". There is Australian authority giving effect to this view, largely due to the special knowledge and position the lawyer is presumed to have as compared to clients. Moreover, it is reasoned:
>
> > … it is the client who actually knows what he wants the solicitor to do, and so it is the solicitor's business to ascertain the client's wishes accurately, bearing in mind the possibility that the client, through ignorance of the correct terminology, may not have correctly expressed it.
>
> [Citations omitted]

[264] I think it clear that the complainants' retainer with the firm in connection with the 2017 purchase, continued until the agreed work and the treatment of the retention sum had been resolved. After all, the firm held the retention sum in its trust account.

[265] The fact that resolving that issue may have been compounded by additional matters raised by the complainants, does not change my view.

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[32] Standards Committee determination (10 December 2019) at [47].
[33] At [47].
[34] G E Dal Pont *Lawyers Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.55].

[266] Indeed, it would be an artifice to suggest that the matters referred to by me above at [248] could be carved off from what may have been the narrow scope of the retainer (as evidence by the terms of engagement forwarded to Mrs WD on 22 November 2017), and treated as separate legal work. In reality, all issues were related to and grew from the initial agreement dated 21 November 2017.

[267] This view – i.e. that the scope of the retainer included the agreed work and the retention sum – finds comfort in the fact that Mr EG noted his regret "that he did not deal with matters promptly" and that he had "telephoned Mrs WD in August [2018] to apologise."[35]

[268] I consider that the Committee was wrong to conclude that there was effectively no retainer between the complainants and the firm during 2018. In making that error, the Committee misdirected itself as to whether Mr EG breached his obligation to be responsive.

[269] There was a retainer, and Mr EG was unresponsive, contrary to the requirements of rr 3 and 3.2 of the Rules.

[270] My views are reinforced by Mr EG's comments during the review hearing to which I refer further below (not to mention directly to the complainants in 2018).

[271] As a senior and very experienced practitioner with a history of competence, Mr EG knew that he could have done better and has candidly acknowledged that.

[272] That issue requires no further elaboration by me.

[273] Although I have found that Mr EG was unjustifiably unresponsive to the complainant's several requests to discuss matters, and for advice, and that this amounted to a breach by him of rr 3 and 3.2 of the Rules, as indicated by me at the beginning of this decision, I do not think that these breaches justify any formal disciplinary response.

[274] My reasons for that conclusion now follow.

[275] At the time to which these events relate, Mr EG was more or less on the cusp of retirement. As I have noted above, he was regarded as a senior, experienced and competent property lawyer.

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[35] Standards Committee determination (10 December 2019) at [40].

[276] Mr EG had been the complainants' lawyer for many years and it was evident to me from the comments made both in the written material, and during the course of the hearing, that the complainants held, and continue to hold, Mr EG in very high regard.

[277] This acknowledgement is all the more gracious given their dismay at the management and outcome of the 2017 conveyancing transaction.

[278] There were also references to health issues affecting Mr EG's immediate family, and which understandably assumed priority for him during late 2017 and into 2018.

[279] For his part, Mr EG attended both hearings. He listened attentively to the complainant's narrative and their criticisms, which were often expressed with a great deal of anger.

[280] Mr EG candidly acknowledged that there were shortcomings in his client care which were uncharacteristic for him, and which he deeply regrets. He offered a sincere and unqualified apology, directly to the complainants.

[281] Whether to impose a finding and a penalty for a conduct breach is an inexact science, and even amongst decision-makers there will be divergent views about the appropriate outcome. There is room for genuine debate and disagreement about those outcomes.

[282] A breach of the Act or the Rules, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the High Court observed:[36]

> The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[283] That position was affirmed in *Chapman v Legal Complaints Review Officer* where the High Court noted that:[37]

> … it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

[284] In *Wilson v Legal Complaints Review Officer*, Hinton J observed:[38]

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[36] *Burgess v Tait* [2014] NZHC 2408 at [82].
[37] *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].
[38] *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 (citations omitted).

> [43] This court has said on several occasions that the Rules are to be applied as specifically as possible. In my view, they are also to be applied as sensibly and fairly as possible. These are practice rules, not a legislative code.

[285] The Act is underpinned by the principles of consumer protection and public confidence in the legal profession.[39] Those values must inform and anchor every Standards Committee and Review Officer decision about lawyer conduct.

[286] As many lawyers will acknowledge, seniority, competence and experience do not necessarily provide shields against a conduct finding. Nor does an apology.

[287] Nevertheless, disciplinary outcomes must be proportionate. This requires careful and difficult balancing, by a decision-maker, of several factors.

[288] It is no small matter for a lawyer to be at the end of a satisfying legal career and to then find themselves under close disciplinary scrutiny.

[289] I consider that Mr EG will feel the sting of the complainants' rebukes, their complaint and the finding I have made that his conduct fell below acceptable standards on this occasion, more than most lawyers might.

[290] Although the conduct lapses were not technical, I do not think that there are any broader issues of consumer protection or public confidence engaged by Mr EG's conduct.

[291] As to the latter, the complainants instructed Mr EG in at least one other matter in 2018 and this speaks convincingly to their confidence in him.

[292] I am satisfied that a fair, just and proportionate outcome in the case of Mr EG's conduct breaches, is for me to take no further action on them on the basis that it is neither necessary nor appropriate.

Mr PL

[293] There are three aspects to the complaints about Mr PL's conduct. First, he was unresponsive when the complainants sought his assistance when they were unable to get hold of Mr EG. Secondly, he wrongly paid the retention sum to them. Thirdly, he has been dishonest in his responses to both the Complaints Service and on these review proceedings.

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[39] Section 3(1) of the Act.

Unresponsive

[294] The complainants wrote to the firm on 2 March 2018, in an email addressed to the Practice Manager, Mrs MY.

[295] This email began with the complainants saying that they were "still asking for help." This related to their unsuccessful attempts to speak to Mr EG about difficulties they were experiencing in connection with the agreed work. Apparently also the vendor's solicitor was experiencing similar difficulties in contacting Mr EG.

[296] The email summarised the events before and after settlement of the transaction on 6 December 2017.

[297] That email was passed to Mr PL. He spoke to Mr EG, who reassured him that he would immediately contact the complainants and address the matters they had raised.

[298] Mr PL was then confident that matters were being progressed.

[299] On 13 March 2018, Mr EG asked Mr PL to assist with fresh instructions that Mr EG had received from the complainants, in connection with a s 21 agreement under the Property (Relationships) Act 1976.

[300] Thereafter, Mrs WD communicated directly with Mr PL about those instructions. As well, during April Mrs WD contacted Mr PL directly about other legal matters, including instructing the firm to act on the purchase of another property in [Suburb B].

[301] There was some communication from Mrs WD during May about the agreed works, and in fact the complainants travelled to [City X] and saw Mr EG about the [Suburb B] purchase. The 2017 transaction was, apparently, also discussed.

[302] Mr PL next heard from the complainants' barrister, in mid-July 2018. A response was made on behalf of the firm by Mr PL in mid-August 2018. Further correspondence was exchanged between them.

[303] The above narrative reveals no shortcomings whatsoever in Mr PL's management of what was clearly a complaint that the complainants had made directly to the firm, on 2 March 2018.

[304] He took the appropriate step of speaking to Mr EG when the complaint email was passed to him. Mr EG assured him that matters would be dealt with.

[305] Given the nature of the further dealings in March, April and May 2018 during which the complainants did not raise any further concerns directly with Mr PL about the 2017 transaction, he was entitled to conclude that their earlier concerns had been attended to satisfactorily by Mr EG.

The retention sum

[306] The complainants instructed Mr PL to write to the vendor's solicitor indicating that the retention sum would be paid to them. Mr PL did so on 31 August 2018, and paid the money to the complainants on 3 September 2018.

[307] Thereafter it appears that the vendor's solicitor took exception to the retention sum being paid to the complainants. He indicated that he would be issuing proceedings on behalf of the vendors for recovery of that sum.

[308] To some extent, I leave to one side the fact that it seems clear that the complainants, including through their barrister, instructed Mr PL to do so.

[309] This is because a lawyer who is operating on the basis of undertakings that have been given, is first and foremost required to comply strictly with those undertakings even if instructed by their client otherwise.

[310] If the lawyer reasonably concludes that the terms of an undertaking permit him to release a sum of money to their client, then instructions may be given as to when and where that payment is to be made.

[311] As the Committee observed in its determination, "Mr PL was obliged to honour [the undertakings] and he did so." It was the view of the Committee that the undertaking "was in clear terms."[40]

[312] As indicated by me above, the vendor's solicitor appeared to have a different view about the terms of the undertaking. He considered that the complainants were not entitled to have it released to them.

[313] I do not know whether the vendor's solicitor has made good with his threat to the complainants to issue proceedings for the return of that money.

[314] The proper place to resolve the question of whether the retention sum was properly paid out by Mr PL, would be in contested litigation about it. If that contested

[40] Standards Committee determination (10 December 2019) at [56].

litigation revealed professional shortcomings on Mr PL's part in releasing the retention sum, then a disciplinary inquiry about that conduct might be indicated.

[315] If, however, the vendor's solicitor has not taken the matter any further, then I am left in the position of Mr PL's submissions to the Complaints Service, and repeated in these proceedings, that his view of the terms of the undertaking was such that he was obliged to pay the retention sum to the complainants.

[316] On that account, I express the view – for whatever it is worth – that Mr PL's assessment of that undertaking and the obligations imposed by it, was patently correct.

[317] Having come to that conclusion, Mr PL quite properly carried out the complainants' instructions as to when and where to make the payment to them.

Honesty

[318] I do not accept that Mr PL has been dishonest during any part of the complaint or review processes.

[319] This case is similar to many which come before all jurisdictions, in that there are diametrically opposed views about events that have taken place.

[320] My experience is that parties will often resort to accusing their opponent of being untruthful when their opponent's evidence disagrees with their own. Sometimes it is indeed the case that one of the parties has been untruthful.

[321] Accusing an opponent of lying, is a very serious allegation to make. This is all the more so when the target of that allegation is a lawyer – and Officer of the Court with statutory and ethical obligations to be scrupulously honest in all of their professional dealings.

[322] That is not to say that there have not been instances of lawyers who have either admitted, or been found to have breached that core obligation. But the evidence required to establish blatant untruthfulness requires more than a repeated assertion to that effect.

[323] Serious allegations of dishonesty require evidence of a commensurate nature to support them. Repeating that someone has been dishonest, does not make it so.

[324] I have conducted a painstaking review of all of the evidence relating to this transaction, in the lead up to 6 December 2017. Because of what could be described as

the deadlocked positions of the parties about critical evidence, I have taken the conventional decision-making approach of looking at the surrounding circumstances, in particular, the supporting documentation.

[325] As I observed earlier in this decision, resort to evidence of that nature will often lead a decision-maker to their conclusions, one way or the other, about contested facts.

[326] Although I have identified shortcomings by both sides, I am completely satisfied that none of those shortcomings engage the honesty or integrity of any of the parties to this matter.

Conclusion

[327] As foreshadowed by me at the beginning of this decision, my conclusions are that the Committee's decision to take no further action on the complaints about the practitioners' conduct, was – respectfully – correct.

[328] I have disagreed with the Committee's conclusions about the scope of the firm's retainer with the complainants, and to that extent I agree with what the complainants have said about that themselves.

[329] It followed from my conclusion about the scope of the firm's retainer, that I disagreed with the Committee's finding that Mr EG did not breach his obligations to be responsive and timely. I have found that Mr EG did breach rr 3 and 3.2 of the Rules. Nevertheless, my conclusion about those breaches is that they do not require the imposition of a disciplinary mark against Mr EG.

[330] Finally, I must emphasise that none of the findings I have made in the course of this decision about the contested facts, have been based on findings of credibility about what any of the parties have said.

[331] I have been critical about aspects of both the complainants' evidence, and of the way in which Mrs SN and Mr EG administratively managed this transaction. I have referred to troubling aspects of the timeline – for example, Mrs SN's 4.29 pm, 5 December 2017, email to the complainants seeking instructions, but which she did not follow-up.

[332] However, after considering all of the material that has been provided – and it has been extensive – and as well as hearing from all of the participants in person, I am

left in the position whereby the complainants have been unable to establish that their version of the critical events, is more probable than not.

Decision

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

Anonymised publication

[334] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 7th day of April 2022

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R Hesketh
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:

Mrs WD and Mr FJ as the Applicants
Messrs EG and PL and Mrs SN as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society