LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 137

Ref: LCRO 091/2019

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

DECISION

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

Introduction

[1] Ms CL has applied for a review of a decision by the [Area] Standards Committee (the Committee) which made findings of unsatisfactory conduct against Mr BK, and Mr AM, both lawyers who at the relevant time were an associate, and partner respectively at [ABC], Lawyers (the firm).

[2] The Committee determined that (a) Mr BK failed to act competently for Ms CL on the purchase of a residential property by not advising her of the risks of not obtaining a Land Information Memorandum (LIM), and a building report, and (b) Mr AM failed to competently supervise and manage Mr BK's work.

[3] Ms CL says on 16 September 2013, after viewing for the second time a residential property with a cross lease title (the property), she signed a purchase agreement for that property prepared by the vendor's agent.

[4] Importantly for the purposes of this review, the purchase agreement was subject to two conditions for Ms CL's benefit: (a) Ms CL's solicitor's approval that the "form and contents" of the purchase agreement were "satisfactory" to her (clause 18); and (b) Ms CL obtaining "written confirmation of the availability of comprehensive insurance" for the property "acceptable" to her.

[5] On 17 September 2013 Mr BK received Ms CL's copy of the purchase agreement from the vendor's agent.

[6] His handwritten file note of his telephone conversation with Ms CL that day included that (a) there were "no finance/LIM" conditions on the "front page" of the purchase agreement, (b) "approval form and content ok 23/9/13", (c) "insurance: 5 w[orking] days = 2[4]/9/13", and (d) "Cross lease title: no common areas - own access from street".

[7] In another undated handwritten file note Mr BK included (a) "drive below level of road - drainage", (b) "also steep - retaining wall above: below - seem to be okay", and (c) "fuel burner - [Ms CL] to check Council file".

[8] On 19 September 2013, Mr BK sent the firm's letter of engagement to Ms CL. In another letter to Ms CL that day Mr BK summarised the main terms of the purchase agreement. He referred to the conditions. He advised he "d[id] not see any issues with the title or the agreement".

[9] He also (a) advised Ms CL to request "either a council property search or LIM" to "ensure that all appropriate consents have been obtained" for any alterations to the house, or for the installation of a fuel burner, noting her "advice" she "would check the council records for the property", and (b) drew Ms CL's attention to the "warnings printed on the back page" of the purchase agreement which, as I discuss later, include reference to the cross lease flats plan.[1]

[10] On 23 September 2013 after speaking with Ms CL on the telephone, Mr BK file noted (a) "Ok with form/title - to confirm that"; (b) Ms CL was "seeking insurance" with an insurance company; (c) Ms CL had spoken with the Council about "separation" of the stormwater from the sewer; and (d) "flooding/drainage as road above property & no sump visible", "[query] if any flooding/water drainage issues/run-off from road" which Ms CL was "checking".

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[1] Mr BK advised such enquiries should also disclose whether the stormwater drainage and sewer were separate facilities, explaining if not the Council could request "a relatively major plumbing job".

[11] He then informed (by letter) the vendor's lawyer that day that the solicitor's approval condition was "satisfied", and he would "advise" as to the insurance condition "tomorrow". He also received (by email) from Ms CL's insurer an insurance policy schedule for the property which noted the bank's interest in respect of a bank loan arranged by Ms CL.

[12] Mr BK spoke with Ms CL again on 24 September 2013 and file noted "held insurance", "Ok to confirm".[2]

[13] On 4 October 2013, in response to a request (by letter) the previous day from the estate agent for an "early release" of the deposit, and after speaking with Ms CL on the telephone, Mr BK file noted "Ok with early release".

[14] Soon after settlement of the purchase on 18 October 2013, Ms CL discovered the presence of rot in the timber subfloor framing of the house.

[15] Acting on a barrister's advice Ms CL subsequently sold the property to realise the diminution in value of the property equivalent to the cost of repairs. The estate agent Ms CL instructed to sell the property informed her that two structures on the property, an outdoor conservatory, and a shed (the outdoor structures), were not identified on the cross lease flats plan and therefore did not form part of the title to the property.

Complaint

[16] Ms CL lodged a complaint with the Lawyers Complaints Service (LCS) on 23 April 2018. She alleged Mr BK failed to advise her the outdoor structures were not recorded on the cross lease title for the property, and claimed Mr BK's failure to do so had caused her financial loss.

[17] Ms CL also claimed the firm's Chief Executive, "tried to fob [her] off" when she made her complaint to the firm about Mr BK.[3]

(1) Act competently

(a) Cross lease title – outdoor structures

[18] Ms CL claimed when she first instructed Mr BK she told him, in response to his question whether there were "any outdoor structures" on the property, there was a

[2] Mr BK also noted Ms CL was "unsure" about the sum insured but "so long as [the] bank [was] covered" the "amount need[ed] to be reviewed each year anyway".
[3] Ms CL, letter to LCS (29 May 2018).

conservatory. She said she expected Mr BK, as “a diligent lawyer”, would have file noted that response.[4]

[19] She explained although Mr BK drew the location of the outdoor structures on a copy of the cross lease plan “in relation to the boundaries and the carport”, he failed to tell her the structures were not recorded on the flats plan provided to Mr BK by the estate agent on 17 September 2013.

(b) Solicitor’s approval – clause 18

[20] Ms CL said she expected Mr BK “to provide expert advice and protect [her] interests in relation to the conditional…purchase [agreement]”, and the presence of structures not recorded on the flats plan.

[21] She claimed Mr BK, although file noting on 23 September 2013 “Ok with [form?] And title”, failed to advise her the outdoor structures were not recorded on the flats plan thereby “den[ying]” her the opportunity to (a) have the outdoor structures inspected, or (b) avoid the purchase agreement, and possibly renegotiate the purchase.

(c) Insurance – clause 19

[22] Ms CL claimed having later discovered rot in the subfloor framing she could not fully insure the property. She said Mr BK could have advised her that some house builders in the 1960s-70s did not “build to specifications”, and local authorities did not give final approval of such houses.

(2) Supervision

[23] Ms CL claimed Mr GF, and Mr AM, managing partner and partner respectively with the firm, and Mr BK’s supervisors, failed to protect her when Mr BK acted for her on the purchase.

[24] She said contrary to her expectation Mr BK “had the capacity to protect her” interests, he had not done so because Mr GF and Mr AM failed in their professional duty to ensure he was properly trained and supervised.

Response

[25] I refer to Mr BK’s and Mr AM’s response in my later analysis.[5]

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[4] Letter, Ms CL to [ABC], 11 July 2016.
[5] Letter, Ms HJ /Mr BT [(RST)], to Lawyers Complaints Service, 2 July 2018.

Standards Committee decision

[26] The Standards Committee delivered its decision on 21 May 2019 and determined pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) (a) Mr BK failed to provide competent advice to Ms CL thereby contravening r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and (b) Mr AM failed to competently supervise and manage Mr BK's work thereby contravening r 11.3, which both constituted unsatisfactory conduct:

[27] The Committee made orders that Mr BK, and Mr AM each pay costs to the Law Society.

(1) Act competently

(a) Cross lease title – outdoor structures

[28] In deciding to take no further action on this aspect of Ms CL's complaint the Committee stated Ms CL had "no basis" for asserting the outdoor structures were "not legal", and described their absence from the cross lease flats plan as a "minor…clerical mistake".

[29] In the Committee's view, Mr BK's 23 September 2013 file note "OK with form/title. To confirm that" was evidence of Ms CL's instructions "to confirm satisfaction" of his approval of "the form and contents" of the purchase agreement under clause 18.

[30] The Committee considered because clause 18 did not extend to approval of "title", Ms CL could not cancel the purchase agreement on that ground. Moreover, there was no title "defect" Ms CL could requisition because the outdoor structures were situated on exclusive use area Court A, and there was no common area.[6]

[31] For that reason, the Committee said there was no need for Mr BK's and Mr AM's counsel to concede Ms CL (a) could have asked the vendor to obtain the lessor's consent to those structures (clause 8.6), and (b) if the lessor failed to do so, to requisition the title (clause 8.2), or require amendment of the flats plan in circumstances where the structures "were not attached" to the flat, and "[not] enclosed" (clause 5.3).[7]

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[6] Clause 12 of the cross lease conferred exclusive use on the owner of the property of Carport A, and of Court A on which the outdoor structures were "located".

[7] The clauses referred to are in the purchase agreement. The Committee also referred to the Registrar's power to correct errors and supply omissions rectification of the title under s 80 Land Transfer Act 1952, since 12 November 2018 replaced by s 21 Land Transfer Act 2017.

[32] The Committee explained that a requisition could lead to cancellation by the vendor if the purchaser, having required the vendor to deposit a new flats plan which incorporated the outdoor structures, did not either waive the requisition, or cancel the purchase agreement.

(b) Solicitor's approval of purchase agreement – form and content – clause 18

[33] The Committee concluded that, in contravention of r 3, Mr BK did not advise Ms CL (a) about the risks of the absence of both the LIM, and building report conditions from the purchase agreement, and (b) about the "impossibility" of obtaining a LIM before the date for satisfaction of the condition in clause 18.

[34] Also, Mr BK had not advised Ms CL whether his approval of the purchase agreement could be (a) declined on that ground, or (b) withheld with a view to reinserting the LIM, and building report conditions, or (c) declined followed by a new offer to purchase subject to LIM, and building report conditions.

[35] In the Committee's view a "reasonably competent" lawyer would provide his or her client with advice on the effect of clause 18 where, "on its face" in the absence of the LIM and building report conditions, Ms CL might be at "appreciable risk"

[36] The Committee explained that a lawyer's professional duty was to "ensure" the client's decisions "are properly informed by adequate advice as to the risks, benefits and other implications of those decisions and as to the alternative courses of action open". It followed that Mr BK, unless "alive to at least to some of the risks Ms CL was exposing herself to", would not have advised Ms CL to obtain a LIM.

[37] Concerning the underfloor rot Ms CL later discovered, the Committee stated it was "speculative" to say a building report would have "identified" the underfloor rot which Ms CL claimed had been "concealed" by the vendor's "underfloor insulation".

[38] The Committee noted although Ms CL claimed the vendor's agent represented to her, before she signed the purchase agreement, the condition of the house did not necessitate a building report, Mr BK did not know this when he advised Ms CL about the agreement.

(c) Insurance – clause 19

[39] In the Committee's view, this aspect of Ms CL's complaint "was unfounded".

[40] The Committee stated the information produced "was consistent" with Ms CL (a) having signed the purchase agreement without the building report condition;

(b) knowing about "potential issues with flooding or drainage from the road"; (c) assuming "responsibility" for council enquiries about those matters; and (d) concerning insurance of the property, having obtained "appropriate" advice from Mr BK, then making her own insurance arrangements and instructing Mr BK on 24 September 2013 the insurance condition had been satisfied.

[41] It followed Mr BK "could not be expected to know" whether a final Council inspection had been made at the time the house was built, and if not had advised Ms CL to obtain a LIM.[8]

(2) Supervision

(a) Cross lease title – outdoor structures

[42] The Committee decided Mr AM, in contravention of r 11.3, failed to competently supervise and manage this aspect Mr BK's work, but stated if wrong in its conclusion how that rule applied, any contravention did not warrant an adverse finding against Mr AM.

[43] The Committee stated (a) Mr BK was at that time "a specialist property lawyer with 15 years' experience in th[at] field", (b) Mr BK's "lapse" in advising Ms CL about the outdoor structures was "minor, had no material legal, practical or financial consequences and did not meet the threshold for a finding of unsatisfactory conduct", and (c) in such circumstances Mr AM, as supervising partner, could not have been expected "to check the title review and report for [such] minor technical oversights".

(b) Solicitor's approval – clause 18

[44] However, the Committee found Mr AM had contravened r 11.3 by not competently supervising and managing Mr BK's work which resulted in Mr BK's failure to advise Ms CL of the risks of the purchase agreement not being subject to the LIM, and building report conditions.

[45] The Committee said this failure went "to the core of the firm's advisory role and to the responsible partner's supervisory responsibility" which was more than "a simple technical oversight such as a failure to properly review a title".

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[8] The Committee noted engineering evidence presented to the Real Estate Agents Disciplinary Tribunal ran contrary to Ms CL's contention houses constructed in the 1960's and 1970's "were not signed off by councils".

(3) Other issues

(a) Negligence claim – jurisdiction

[46] The Committee explained that the function of the Committee, as a "professional disciplinary body", was to determine whether or not there had been a failing or shortcoming of professional standards by Mr BK and Mr AM, whereas it was for the Court to hear and consider any claim in negligence against them by Ms CL.

(b) Protect interests – estate agent

[47] In the Committee's view this aspect of Ms CL's complaint most likely concerned her allegation Mr BK did not provide her with adequate advice about (a) the risks brought about by the absence of LIM, and building report conditions from the purchase agreement, and (b) the effect of the solicitor's approval condition.

[48] In dismissing Ms CL's claim Mr BK did not protect her from "the illegal actions" of the vendor's agent, the Committee observed because Mr BK was not consulted by Ms CL before she signed the purchase agreement he was deprived of the opportunity to advise her beforehand.

[49] The Committee further observed it was Mr BK's responsibility, having been instructed by Ms CL, to review and report to Ms CL about the title independently from the agent.

(c) Finance

[50] The Committee decided no further enquiry was warranted in respect of Ms CL's claim she did not know the purchase agreement was not subject to her arranging finance observing that Mr BK's 17 September 2013 file note appeared to be "consistent" with Ms CL having told him she intended raising a loan.[9]

Application for review

[51] Ms CL filed an application for review on 2 July 2019. She contends the Committee's finding of unsatisfactory conduct "minimises/fails to acknowledge [Mr BK's] sustained and deliberate breach of client trust", and is disproportionate to his "deliberate actions" which constitute misconduct by him.

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[9] Guaranteed by Ms CL's husband, secured against another property owned by them.

(1) Act competently

(a) Cross lease title – outdoor structures

[52] Ms CL repeats Mr BK did not act competently when “reviewing and reporting” to her about the title for which she says he “was responsible”, and says an adverse finding against Mr BK was warranted. She says she disagrees with the Committee that the absence of the outdoor structures from the cross lease flats plan was a “minor…clerical mistake”.

[53] She says the fact Mr BK had not produced contrary evidence suggested his failure to advise her was due to his “laziness”, not “a one-off incident”, and not expected from a property lawyer with 15 years’ experience.

[54] Ms CL says Mr BK “chose to ignore” (a) the solicitor’s approval condition “deliberately inserted” by her for her protection, and (b) the option for her under the purchase agreement to require the vendor to obtain the “current lessors’” consent to the outdoor structures, failing which to requisition the title.[10]

(b) Solicitor’s approval – clause 18

[55] Ms CL repeats that without advising her to obtain a LIM, and a building report, Mr BK communicated his approval of the purchase agreement to the vendor’s lawyer which “den[ied] [her] the option to walk away” from the purchase, and led to “protracted, expensive and highly stressful” litigation for her.

(c) Insurance – clause 19

[56] Ms CL says Mr BK’s 19 September 2013 advice letter to her was confined to whether (a) the house had been altered, (b) a fuel burner installed, and (c) the stormwater was separate from the sewer.[11] She says she “knew” the house had not been altered, and had the relevant “paperwork for the fire”.

[57] She says Mr BK did not advise her to enquire with the council about “flooding and drainage or sump”, and contrary to the Committee’s statement she did not make such enquiries.[12]

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[10] Clauses 8.6 (unauthorised structures); 5.2(3), (4) (requisition). It appears clause 5.3 would not have applied because those structures were situated on Court A for the exclusive use of the owner of Flat A.

[11] Ms CL again refers to the August 2017 engineer's report she later obtained which explained that the “timber decay and the steel rust” would have started soon after the house had been constructed.

[12] Ms CL says when she signed the purchase agreement "there was nothing to indicate" any “potential issues flooding or drainage from the road”.

[58] She explains without Mr BK having advised her whether these matters could be included in his approval of the purchase agreement under clause 18, there was “potential” for the house insurance she had arranged “to be voided”.

(2) Supervision

(a) Cross lease title – outdoor structures

[59] Ms CL disagrees with the Committee that Mr AM could not have been expected “to check” Mr BK’s title review and report for such “simple technical oversights”. In her view Mr AM’s failure to competently supervise and manage Mr BK’s work was serious enough to constitute misconduct.

(b) Solicitor’s approval – clause 18

[60] Ms CL says Mr AM is equally responsible for Mr BK’s failure to competently advise her before [Mr BK] approved the purchase agreement which resulted in her purchasing an “uninhabitable house”. She says such advice would have avoided the need for her to issue proceedings against the vendor, and to make a complaint against the estate agent.

(3) Estate agent

[61] Ms CL disagrees with the Committee that this aspect of her complaint was “ill considered”. She says it was Mr BK’s professional duty to protect her interests “from the illegal acts of a real estate agent and corrupt vendor”, and from the actions of “the government-subsidised insulation installers”.

[62] In her view the vendor listed the property for sale knowing about the subfloor rot covered up by the installers of the underfloor insulation.

Response

[63] Mr AM and Mr BK say Ms CL’s complaint had no merit, and therefore her application for review should be dismissed.

[64] They say although they did not agree with the Committee’s conclusions, they did not apply for a review of the Committee’s decision, but since Ms CL had done so, they maintain that they were not negligent, and acted competently.[13]

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[13] Mr BK’s and Mr AM’s response was provided by their counsel, Ms HJ, and Mr BT of [RST] in a letter to LCS (8 August 2019).

[65] Concerning Ms CL's claim for compensation, in their submission (a) Ms CL "erroneously seeks to link" her allegations "to the building and legal issues she later encountered" which had "nothing to do with the defects" the subject matter of her proceedings against the vendor, and (b) because neither of them had made any errors in their legal work for Ms CL, there was "nothing" for them to rectify.[14]

(1) Act competently

(a) Cross lease title – outdoor structures

[66] Mr BK says he provided Ms CL with "appropriate and competent advice".

[67] He explains as an experienced property lawyer, who had not previously received a complaint, his standard practice on purchases incorporated an initial report such as his 19 September 2013 letter to Ms CL in which he drew Ms CL's "attention to the warnings" on the cover page of the purchase agreement.[15]

[68] He explains Ms CL, previously "involved" in a number of other conveyancing transactions through the firm, and with "experience and confidence in buying, owning, selling and renting properties", had purchased the property to let without finance, LIM, and building report conditions for her benefit.

[69] He says Ms CL and her husband undertook due diligence on the property, including checking the outdoor structures and the retaining wall, and making council enquiries. He says Ms CL told him she had arranged bank finance for the purchase to be secured against another property she and her husband owned.

[70] Mr BK further explains on 23 September 2013, after Ms CL had reviewed the council property file, he "checked" the "title plan and the existing structures" with Ms CL who instructed him "there was a [conservatory] in the southern corner", and a "garden shed in the eastern corner…behind the carport" which he understood were "small standalone structures".

[71] He says he drew the location of the outdoor structures on a copy of the cross lease flats plan when speaking to Ms CL on the telephone that day.

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[14] Ms CL's claim of $130,000 compensation sought in her complaint considerably exceeds the maximum amount of $25,000 a Standards Committee, or a Review Officer, can order: s 156(1)(d) of the Act; reg 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[15] Such warnings included in the recommendations that the purchaser investigate "whether all necessary consents ha[d] been obtained" for building works, assisted by obtaining a LIM, and where the title to the property was a cross lease title, to compare the title plan against the physical location of existing structures which, if not shown on plans "may result in the title being defective".

[72] In his submission, because the outdoor structures were situated on exclusive use area Court A, Ms CL could not requisition the title (clause 5.3(1)). He acknowledges Ms CL could have required the vendor to obtain the current lessor's consent to those structures, but not wanting to "jeopardise" the purchase she elected not to do so (clause 8.6(1)).

(b) Conditions

[73] Mr BK says contrary to Ms CL's contention he acted without her instructions when he informed the vendor's lawyer the conditions in clauses 18, and 19 were satisfied, his 23, 24 September 2013 file notes state otherwise.

Solicitor's approval – clause 18

[74] He says "consistent with" Ms CL being unable to requisition the title, and not wanting to "upset the bargain" by risking the possibility of the vendor cancelling the purchase agreement, she instructed him on 23 September 2013 to confirm satisfaction of this condition.

Insurance – clause 19

[75] He says on 24 September 2013 Ms CL informed him she had arranged insurance on the property, and therefore this condition was satisfied. He disagrees with Ms CL's contention the "illegal" outdoor structures could invalidate the insurance arranged.

(2) Supervision

[76] Mr AM denies he did not competently supervise and manage Mr BK's work for Ms CL. In his submission, taking into account Mr BK's considerable conveyancing experience, and the fact this "unremarkable" purchase was similar to "many" transactions on which Mr BK had acted, there was no need for him to supervise Mr BK's work, other than in a "general" way which did not constitute a professional failing or shortcoming that contravened r 11.3.

Review on the papers

[77] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all

information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

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

Nature and scope of review

[79] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[16]

> … 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.

[80] More recently, the High Court has described a review by this Office in the following way:[17]

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

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

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[16] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39] - [41].
[17] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Issues

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

(a) Did Mr BK provide competent advice to Ms CL concerning the possibility, or existence of any outdoor structures on the property not recorded on the cross lease flats plan?

(b) Did Mr BK provide competent advice to Ms CL concerning the solicitor's approval condition in the purchase agreement (clause 18.0)?

(c) Did Mr BK provide competent advice to Ms CL concerning the insurance condition in the purchase agreement (clause 19.0)?

(d) Did Mr AM competently supervise and manage Mr BK's legal work for Ms CL concerning the purchase of the property?

Analysis

(1) Cross lease title – outdoor structures – issue (a)

(a) Parties' positions

Ms CL

[83] Ms CL says when she first instructed Mr BK she told him, in response to his question whether there were "any outdoor structures" on the property, there was a conservatory, and a shed.

[84] She says Mr BK's only advice, provided in his 19 September 2013 letter, was that he "d[id] not see any issues with the title or agreement".[18] She says Mr BK did not admit to drawing the outdoor structures on the cross lease flats plan until she later forwarded a copy of that drawing to the LCS.[19]

[85] She explains although she wanted to buy a house with a garage or carport, and a shed, had Mr BK told her the shed "was not legal" she would not have purchased the property.[20]

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[18] Ms CL, letter to [ABC] (11 July 2016).
[19] [RST] to LCS (2 July 2018).
[20] Ms CL says Mr BK's file notes do not record her having told him she was "keen" to purchase, and wanted to "keep costs to a minimum.

[86] Ms CL says she did not find out the outdoor structures were not recorded on the flats plan until she was later told by the estate agent she engaged to on-sell the property following settlement of the purchase.

[87] She says she finds it "extraordinary" Mr BK could remember advising her to make enquiries of the Council about the separation of stormwater from the sewer, but not whether he discovered, when checking the title, the outdoor structures were not recorded on the flats plan.

[88] She says when making his 17 September 2013 file note, "Cross lease title…no common areas – own access from street", Mr BK may have "erroneously associated" separate street access with "no common areas on a cross lease". This, she says, may explain why he did not advise her the flats plan needed to be updated to record the outdoor structures.

[89] Ms CL says, as shown on Mr BK's handwritten drawing on a copy of the flats plan, the garden shed was attached to Carport A. Contrary to the Committee's observation she says the report she obtained on the property in May 2014 recommended the flats plan be amended to incorporate the outdoor structures.

[90] She says she would have obtained a LIM, and a building report had Mr BK made her aware of the risks of not doing so. In her view Mr BK knew there was "potentially a matter with the title" yet failed to consider "the importance of any potential adverse outcomes" for her due to the absence of the LIM, and building report conditions in the purchase agreement described by the Committee as an "appreciable risk".

[91] She says contrary to the firm's statement in its response to her earlier complaint to the firm about this matter, she had previously purchased only three houses to live in and was "not a sophisticated vendor/purchaser".[21]

Mr BK

[92] Mr BK says at the time he reviewed the purchase agreement, the title, the flats plan, and the cross lease, and then sent his 19 September 2013 reporting letter to Ms CL advising he "d[id] not see any issues with the title or the agreement".

[93] He says he did not know at that time there was a "shed and a [conservatory]" on the property which he says he had neither seen nor discussed with Ms CL hence

[21] Ms CL says she owned her first home for approximately 13 years, the second home for a similar period, and her present home purchased six years earlier.

recording in that letter Ms CL would make her own enquiries by searching the council property file.[22]

[94] He explains because he received the purchase agreement from the vendor's agent on 17 September 2013, the day after Ms CL signed it, he did not have an opportunity to advise Ms CL beforehand.

[95] He says the purchase agreement was not subject to LIM, building report, and finance conditions, Ms CL had carried out her own “due diligence”, and had arranged finance for the purchase.

[96] He says he “believes he gave Ms CL proper advice” and received Ms CL’s subsequent instructions to approve the purchase agreement albeit the outdoor structures Ms CL “told him” about, which he “marked …on the copy of the flats plan on file as he was discussing it with her”, were not recorded on the flats plan itself.

(b) Discussion

(i) Receipt of purchase agreement

[97] The tasks expected of a conveyancing lawyer who acts for a client on the sale or purchase of residential property are set out in the Property Transactions and E-dealing Practice Guidelines published by the Property Law Section of the Law Society.[23]

[98] It follows that upon receipt of the signed the purchase agreement from the vendor’s agent, as the purchaser’s lawyer Mr BK’s professional duties would have included (a) searching the title including the cross lease, and “where relevant” the cross lease of adjoining Flat B, (b) explaining the cross lease “concept”, to Ms CL and how cross leases “work”, (c) identifying “any problems” with the cross lease, in particular, provisions which add to or amend standard terms, and (d) “check[ing]” with Ms CL that exclusive use area Court A “correspond[ed] with the physical layout and usage”.

[99] Although not reproduced in Mr BK’s 19 September 2013 letter itself, as noted earlier, he refers Ms CL in that letter to the “warnings” on the cover sheet of the purchase agreement which include advice to a purchaser of a cross lease property (a) to “compare the title plans against the physical location of existing structures”, and that (b) “[s]tructures or alterations to structures not shown on the plans may result in the title being defective”.

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[22] Mr BK’s responses and submissions to both Ms CL’s complaint, and application for review were made by his counsel, Ms HJ, and Mr BT of [RST].

[23] Property Law Section, New Zealand Law Society, *Property Transactions and E-dealing Practice Guidelines*, July 2012 at [3.12].

(ii) Ms CL's instructions

[100] Ms CL says when she first instructed Mr BK to act on the purchase she told him about the outdoor structures.

[101] Mr BK says relying on his "standard practice" he "believes" he provided Ms CL with "proper advice". He says he did not know about any outdoor structures on the property when he reported to Ms CL in his 19 September 2013 letter, and was "told" about them by her when she instructed him on 23 September to approve the purchase agreement.

[102] As noted above, Mr BK says before he obtained Ms CL's instructions concerning satisfaction of the purchase agreement conditions, he discussed with her the location of buildings on the property as shown on the cross lease title, and provided her with options.

(iii) Consideration

[103] It is reasonable to expect that assuming Ms CL told Mr BK about the outdoor structures at the outset, he would have recorded that information in either his 17 September 2013 file note, his undated file note, or in his 19 September 2013 reporting letter.

[104] However, apart from recording in these file notes there (a) were "no common areas", (b) the property had its "own access" from the road, and (c) there could be a "drainage" issue because the drive was "below the level of road", Mr BK made no reference to any outdoor structures.

[105] Similarly, no mention is made of outdoor structures by Mr BK in his 19 September letter in which he (a) recommended Ms CL obtain a LIM "to ensure that all appropriate consents have been obtained" if the house had been "altered", or a "fuel burner" installed, (b) recommended she ascertain whether the stormwater drainage and sewer were separate noting her instructions she would "check" the property's "council records", and (c) drew her attention to the advisory note/warnings on the cover page of the purchase agreement which included the recommendation to compare the title plans against "the physical location of existing structures".

[106] In that regard, Mr BK acknowledges that when told by Ms CL about the outdoor structures during their telephone conversation on 23 September 2013, he drew them on a copy of the flats plan. As noted above, he says he understood from Ms CL that the outdoor structures were "small [and] standalone", were not "alterations", and were

situated on exclusive use area Court A set apart in the cross lease for the exclusive use of the owner of the property.[24]

[107] He says having provided Ms CL with "proper" advice, she instructed him to approve the purchase agreement even though she knew the outdoor structures were not recorded on the flats plan.

[108] From my analysis of the information produced by the parties common ground between them is that during their telephone conversation on 23 September 2013 they discussed the issue of outdoor structures before Mr BK informed the vendor's lawyer that day of his approval of the purchase agreement.

[109] However, where they disagree is that Ms CL says she did not understand from Mr BK that the outdoor structures were not recorded on the flats plan, and what that meant.

[110] The purposes of the Act include maintaining public confidence in the provision of legal services, and protecting the consumers of legal services. To that end, "unsatisfactory conduct" by a lawyer includes, in s 12(a) of the Act, "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".[25]

[111] This professional standard has been described as "an articulation of the well-established reasonable consumer test which focuses not on the views of professional people (i.e., a peer based standard) as to proper standards, but the reasonable expectations of ordinary people".[26]

[112] Aligned with that standard, r 3 provides that "[i]n providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".

[113] A lawyer's duty to act competently has been described as "the most fundamental of a lawyer's duties", but does not impose "a high level of service to clients", and "in reality, [is] a duty not to be incompetent … aimed at ensuring minimum standards

[24] Letter, HJ to LCS, 8 March 2019.
[25] Sections 3(1) and 12(a).
[26] Duncan Webb, *'Unsatisfactory Conduct,'* September 2008) available at the Ministry of Justice website *Legal Complaints Review Officer – Guidelines and Resources*. "While in practice the two [standards] will frequently converge, the shift in focus is an important signal".

of service".[27] The duty is concerned with "the outcome of lawyer's work rather than the way in which they deal with clients".[28]

[114] A lawyer's competence is gauged by the lawyer's (a) knowledge in his or her field of practice, (b) ability and skill in practice, (c) management of his or her practice, (d) ability to identify relevant issues outside the lawyer's field of practice, (e) diligence in his or her carriage of the legal work, and (f) the lawyer being "intellectually, emotionally, and physically capable" of carrying out the legal work.[29]

[115] It follows that in the particular circumstances of this aspect of Ms CL's complaint, if I am to be satisfied that Mr BK's conduct was deficient to the extent that the imposition of a disciplinary sanction is warranted, the evidence to support that finding must be sufficiently strong to meet the requisite standard of proof. That standard is the balance of probabilities, the civil standard, to be applied flexibly according to the nature of the case.[30]

[116] As stated in the PLS Guidelines, upon receipt of a client's purchase agreement, a conveyancing lawyer is expected to spell out for the client the nature of a cross lease property, and highlight the pitfalls where alterations to the flat, or buildings not incorporated in the flats plan have been constructed on the property.

[117] Although Mr BK, in his 19 September letter to Ms CL, did not reproduce the advisory note, or warning, printed on the cover sheet of the purchase agreement, he did, as noted above, draw Ms CL's attention to it. As they both acknowledge, they discussed the issue of outdoor structures during their 23 September telephone conversation.

[118] The conclusion I have reached from the information produced is that the evidence Ms CL has advanced in support of her allegation that Mr BK failed, when she told him about the outdoor structures, to provide her with appropriate advice falls short of proving on the balance of probabilities that Mr BK did not act competently at that particular time when acting for Ms CL on the purchase of the property.

(2) Solicitor's approval – clause 18 – issue (b)

[119] Ms CL's allegation about Mr BK's approval of the purchase agreement also concerns the outdoor structures. For that reason, there is some overlap with my consideration of the previous issue.

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[27] Duncan Webb, Kathryn Dalziel, Kerry Cook, *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[28] At [11.3].
[29] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, 2017) at [4.20].
[30] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

(a) Parties' positions

Ms CL

[120] Ms CL claims Mr BK failed to protect her interests, and was negligent. She denies she instructed him to inform the vendor's lawyer the solicitor's approval condition in clause 18 was satisfied.

[121] Ms CL says despite stating in his 23 September 2013 file note "Ok with form/ title to confirm that", Mr BK failed to (a) inform her the outdoor structures were not recorded on the flats plan, and (b) advise her to obtain a LIM, and a building report.

[122] She says Mr BK thereby "den[ied]" her the opportunity to inspect the outdoor structures, or to avoid, or possibly renegotiate the purchase agreement. She says she expected Mr BK would "provide expert advice and protect [her] interests" by carrying out "a review of the contract, search the title and report" including informing her whether the outdoor structures were recorded on the flats plan.

[123] She further claims although she told Mr BK about the outdoor structures at the outset, he did not, as he says was his standard practice, "explain the implications" of the omission of the outdoor structures from the flats plan, "outline the options", and "obtain [her] instructions".

[124] She says, he did not mention them in his 19 September 2013 letter, and he did not tell her he had drawn the outdoor structures, which had "independent access" and were not for common use, on a copy of the cross lease flats plan.

[125] Ms CL says in that letter Mr BK (a) advised her to obtain a LIM, and a building report concerning the house which she says had not been altered, and the wood burner for which she had seen "the paperwork", and (b) he asked her whether the stormwater and sewer were separate.

[126] She contends Mr BK "knowingly and willingly" failed to protect her interests by not advising her of the "effect of" clause 18, and the "appreciable risk" she faced due to the outdoor structures not being recorded on the title.

[127] Yet she says on 23 September Mr BK informed the vendor's lawyer the solicitor's approval condition in clause 18 was satisfied thereby leading her into "protracted, expensive and highly stressful" litigation. In her view, the qualification "in all

respects" in clause 18 was sufficiently wide to enable her to obtain a LIM, and a building report to avoid "exposing" her to "appreciable risk".[31]

[128] She says without that advice it later came as a "complete shock" to learn Mr BK had informed the vendor's lawyer the condition was satisfied. She explains she could not therefore say at that time whether she would have gone ahead with the purchase but had Mr BK told her the structures were not recorded on the flats plan she would have avoided the purchase agreement.[32]

[129] She says Mr BK "now acknowledge[d]" he had "consider[ed]" at that time whether the outdoor structures "would have entitled" her to requisition the title, but "concluded" they did not.

[130] Ms CL says she did not discuss with Mr BK whether the purchase of the property was "a bargain", but says even if she had Mr BK's professional duty was to provide her with competent advice.

Mr BK

[131] Mr BK says Ms CL's allegations are without merit. He says his 23 September file note records Ms CL's instructions to confirm satisfaction of the solicitor's approval condition in, and his advice about clause 18 was "reasonable and competent". He says he protected Ms CL's interests "as far as he could", and "in the circumstances" his conduct was satisfactory.

[132] In his submission, Ms CL is "erroneously" attempting to link the subfloor rot issue with her allegation that he did not provide her with competent advice about the outdoor structures before he approved the purchase agreement.

[133] He repeats that before entering into the purchase agreement Ms CL made her own enquiries about the property, arranged finance, and did not include LIM, and building report conditions in the purchase agreement.

[134] Mr BK says in his 19 September 2013 letter he (a) recommended Ms CL obtain a LIM, and search the council property file, (b) referred to the purchaser warnings, noted above, on the cover page of the purchase agreement to make enquiries for which a LIM

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[31] Ms CL says she later learned from her instructing lawyer, who advised her to obtain a council property search, of a discrepancy between the Council approved concrete floor, and the as built piles. Ms CL also refers to the August 2017 engineer's report – followed earlier reports in December 2013, February 2014 and April 2014 – she obtained in respect of her complaint against the estate agent which explained the cause of the underfloor dry rot, namely, the builder's failure to comply with the Council approved specifications – no basement vents, and wall vents blocked with builder's paper.

[32] [ABC] invoice (18 October 2013).

"would assist", and (c) recommended Ms CL compare the "physical property and the title to identify any potential defects".

[135] He says the cross lease flats plan, unlike the flats plan attached to the title, identifies exclusive use areas Court A on which the outdoor structures were situated.

[136] He says whilst he does not recall discussing the outdoor structures with Ms CL, he considers it is "probable" he gave "proper advice" to her "about structures not being noted on the flats plan" whereupon she instructed him she "wished to proceed" with the purchase.

[137] He says as an experienced conveyancing lawyer at that time his standard practice which he "believes" he followed included (a) "discuss[ing]" with Ms CL the "buildings physically located" on both the property and the title, (b) "outlin[ing] the options" for Ms CL, and (c) obtaining Ms CL's instructions concerning satisfaction of the purchase agreement conditions.[33] He explains it was "not uncommon" for structures not to be recorded on a flats plan.

[138] He says notwithstanding his advice, Ms CL did not prior to settlement obtain a LIM, or make further enquiries about the condition of the house, and "did not raise any concerns" with him about his advice until after settlement when she discovered rot in the subfloor. He says due to her "defective due diligence" Ms CL "largely failed" in her claim against the vendor about the dry rot matter.

[139] He says the cross lease flats plan identifies exclusive use areas Courts A, and B. For that reason he says he "is likely" to "have given thought to, and discussed" with Ms CL whether she could requisition the title under clause 5.3(1) of the purchase agreement, but would have concluded in the circumstances she "was likely" not entitled to do so.[34]

[140] Therefore, he says for the purposes of clause 8.6 of the purchase agreement, "at [Ms CL's] instructions", the issue of Ms CL requesting the vendor to obtain the lessor's consent to the outdoor structures did not arise.[35]

[33] Ms HJ, letter to LCS (2 July 2018).
[34] Clause 5.3(1): "If the title to the property being sold is a cross lease …and there are: (a) in the case of a cross lease title: (i) alterations to the external dimensions of any lease to structure; or (ii) buildings or structures not intended for common use which are situated on any part of the land that is not subject to a restricted user covenant;".
[35] Clause 8.6: "Unauthorised structures - cross leases…(1) where structures (not stated in clause 6.0 to be requisitionable) have been erected on the property without: (a) in the case of a cross lease title any required lessors' consent: or (b)…– the purchaser may demand [within a specified time period] that the vendor obtain the written consent of the current lessors…", and failing the vendor doing so "(2) then the procedure set out in subclauses 5.2(3) and 5.2(4) shall apply with the purchase's demand under subclause 8.6(1) being deemed to be an objection and requisition".

[141] Mr BK explains he understood from the information provided by Ms CL that the "small [and] standalone" outdoor structures were not "alterations" to the house as defined in clause 5.3(2) of the purchase agreement because they were not attached to the flat or the carport, and were enclosed.

[142] In his submission, "consistent with the position" Ms CL could not requisition the title under clause 5.2, and not wanting to "upset the bargain", she instructed him on 23 September 2013 to confirm satisfaction of the solicitor's condition in clause 18 as recorded in this file note that day.[36]

[143] In his view, Ms CL was a "sophisticated purchaser" who had completed a number of property transactions through the firm. He says having obtained his "full and complete advice regarding her rights and entitlements", and "in light of her desire to complete" the purchase Ms CL "instructed" him to "satisfy clause 18".

(b) Discussion

[144] As with the previous issue, this aspect of Ms CL's complaint similarly concerns Mr BK's conduct between 17 September 2013, the date Mr BK received the purchase agreement from the vendor's agent, and 23 September 2013, when he spoke again with Ms CL on the telephone, file noted her instructions to approve the purchase agreement, and then informed the vendor's lawyer the condition in clause 18 was satisfied.

(i) Receipt of purchase agreement

[145] The PLS Guidelines I have referred to concerning the previous issue also recommend that a purchaser's lawyer, with the purchaser's approval, obtain a LIM irrespective of whether or not (a) the LIM condition is included in the purchase agreement, and (b) a LIM has been provided by the vendor's agent.

[146] The advisory note, or warning, on the cover page of the purchase agreement similarly recommends that purchasers obtain a LIM to assist investigation whether consents and code compliance certificates had been obtained from the local authority by the vendor, or a previous owner.

(ii) Advice

[147] In addition to claiming, as noted earlier, Mr BK did not tell her the outdoor structures were not shown on the flats plan, Ms CL says Mr BK did not advise her in his 19 September 2013 letter (a) to obtain a LIM, or a building report concerning any outdoor structures that might be on the property, and (b) in order to obtain those reports, whether

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[36] Ms HJ, letter to LCS (11 December 2018) at [11] – Ms L "instructed" Mr K "to confirm…".

the solicitor's approval condition in clause 18 enabled him to withhold his approval of the purchase agreement.

[148] Mr BK's position is that he discussed with Ms CL the "location", and "type" of the buildings on the property, "explained" the implication of "any omissions from the flats plan", and provided her with "options".

[149] He says although he does not recall discussing the outdoor structures with Ms CL it is "probable", before Ms CL instructed him she wished to go ahead with the purchase, he gave "proper advice" to her "about structures not being noted on the flats plan". He says because Ms CL (a) for the above reasons could not requisition the title in respect of the outdoor structures, and (b) did not want to "upset the bargain", she instructed him on 23 September 2013 to confirm satisfaction of the condition in clause 18.[37]

(ii) Solicitor's approval condition – clause 18

[150] Ms CL contends clause 18 enabled Mr BK to withhold his approval of the purchase agreement while she obtained a LIM to ascertain whether the outdoor structures were consented.

[151] The jurisdiction to determine contractual issues is reserved to the Courts, not with a Standards Committee, or a Review Officer in this complaints jurisdiction. For the purposes of this review I do however make brief mention of the approach taken by the Courts in interpreting such conditions.

[152] As noted earlier, the condition in clause 18 for Ms CL's benefit provided that the purchase agreement was "subject to and conditional upon the Purchaser…obtaining approval from [her] Solicitor, that the form and contents of [the] agreement is satisfactory to the Purchaser in all respects by 4 pm on Monday, 23 September 2013…".

[153] Pursuant to the standard agreement for sale and purchase of land, unless the parties otherwise agree, solicitor's approval clauses are regarded as conditions subsequent. This means such conditions are contractual, and concern how the purchaser's lawyer decides or considers to provide his or her approval to the agreement concerned.[38]

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[37] Ms HJ/Mr BT, letters to LCS (2 July and 11 December 2018).

[38] Real Estate Institute of New Zealand, Auckland District Law Society Inc. Standard Agreement for Sale and Purchase of Real Estate, 9th edition, 2012 at clause 9.8(1); CCH Intelliconnect NZ *Conveyancing Law and Practice Commentary: Solicitor's or director's approval* (Wolters Kluwer, online loose-leaf ed) at [7.076].

[154] The parties will be bound by the agreement which the purchaser must refer to his or her lawyer who, in broad terms, may take into account the "conveyancing aspects" of the purchase, but not the "appropriateness" of the agreement from the purchaser's perspective, or "commercial" considerations.

[155] This is to prevent a lawyer who acts for the party for whose benefit the condition was inserted from being able to withdraw from the agreement at will.[39]

[156] The view has been expressed that the words "form and contents" in clause 18 do not have "any particular meaning" hence conditions containing those words are not regarded as a typical "solicitor's approval clause", and must be considered "in the context" of the agreement.[40]

(iv) Conclusion

[157] To recap, Ms CL says although she told Mr BK about the outdoor structures before he approved the purchase agreement, he did not explain to her how that effected the cross lease title. She denies she instructed Mr BK to inform the vendor's lawyer the solicitor's approval condition in clause 18 was satisfied.

[158] Mr BK says although he doesn't recall discussing the outdoor structures with Ms CL, as noted earlier he says he "believes" in accordance with his standard practice he would have advised her about structures not recorded on the flats plan.

[159] As with the previous issue, it would have been preferable had Mr BK set out in either his 19 September 2013 letter, or a subsequent letter or email the advice he says he would have provided to Ms CL during their 23 September telephone conversation about structures not being shown on the flats plan.

[160] However, with Mr BK having stated in his 23 September file note "Ok with form/title – to confirm that", it is open to me to conclude it is probable during their telephone conversation that day he provided Ms CL, as he says he did, with "proper advice" about structures not being recorded on the flats plan.

[161] Mr BK may or may not have advised Ms CL during that telephone conversation to obtain a LIM, but as noted, in this 19 September letter he had already provided that advice albeit the consent examples he provided concerned alterations to the house, or the installation of a fuel burner.

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[39] At [7.076]: for that reason, it is suggested an option to purchase would be preferable where the purchaser requires the ability to withdraw for any reason.
[40] At [7.076], *Dashwood Vineyards Ltd* v *Hammond* HC Blenheim CP 15/99, 21 July 2000.

[162] As also noted, in that letter he drew Ms CL's attention to the advisory note/warnings on the cover page of the purchase agreement to obtain a LIM which is not inconsistent with his position that matter was not discussed until their subsequent 23 September telephone conversation.

[163] From my analysis of the parties submissions and supporting information, without having produced evidence in support of her opposing view, Ms CL has been unable to prove on the balance of probabilities that Mr BK failed to competently advise her, and obtain her instructions concerning his approval of the purchase agreement.

(3) Insurance – clause 19 – issue (c)

(a) Parties' positions

Ms CL

[164] Ms CL claims in order to protect her interests it was Mr BK's professional duty to "alert [her] to any detail", and "illegal" structures which may affect her ability to obtain "comprehensive insurance for the property…acceptable to her".

[165] She says Mr BK's 19 September 2013 advice was confined to whether the house had been altered, a fuel burner installed, and the separation of stormwater from the sewer.[41] She explains the property could not be fully insured when she later discovered rot in the subfloor framing but acknowledges she did not expect Mr BK would "look for rot".

[166] As noted, Ms CL says she "knew" the house had not been altered, and had the "paperwork for the fire". She says Mr BK did not advise her to enquire with the council about "flooding and drainage or sump", and contrary to the Committee's statement she did not make such enquiries.[42]

[167] For these reasons, she says there was "potential" for the house insurance she had arranged "to be voided" without Mr BK having advised her whether these matters could be included in his approval of the purchase agreement under clause 18.

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[41] Ms CL again refers to the August 2017 engineer's report she later obtained which explained that the "timber decay and the steel rust" would have started soon after the house had been constructed.

[42] Ms CL says when she signed the purchase agreement "there was nothing to indicate" any potential flooding or drainage from the road issues.

Mr BK

[168] Mr BK says his 24 September 2013 file note records he discussed the insurance condition that day with Ms CL who “told” him it was “ok to confirm the insurance condition”.[43] He says his only input on this issue was to discuss with Ms CL the adequacy of the sum insured.

[169] He disagrees with Ms CL’s contention the “illegal” outdoor structures could invalidate the insurance she arranged. In his submission, the fact the lessor may not have provided consent to the outdoor structures “w[ould] not invalidate the insurance cover”.

[170] He explains that in accordance with the firm’s standard practice that clients obtain their own property insurance, Ms CL “assumed [that] responsibility”, and he acted on her instructions when informing the vendor’s lawyer the insurance condition in clause 19 had been satisfied.

(b) Discussion

[171] As noted in the introduction, in his 19 September 2013 letter to Ms CL, Mr BK summarised the main terms of the purchase agreement including reference to the insurance condition in clause 19.

[172] On 23 September 2013 Mr BK included in his file note of his telephone conversation with Ms CL that day that she was “seeking insurance” with an insurance company.

[173] He also noted Ms CL had spoken with the Council about “separation” of the stormwater from sewer, “flooding/drainage” due to the road being above the property without there being a “visible” sump, and that Ms CL was “checking” if there were any run-off and flooding issues from the road.

[174] Also that day, when informing the vendor’s lawyer the solicitor’s approval condition in clause 18 was satisfied, he informed the vendor’s lawyer he would “advise” the next day concerning satisfaction or otherwise of the insurance condition in clause 19.

[175] Mr BK and Ms CL spoke again on the telephone on 24 September 2013 following which Mr BK file noted Ms CL “held insurance” for the property and it was “Ok to confirm” satisfaction of that condition, and hence the purchase agreement. He also

[43] Mr BK says his file note records that with insurer is not providing replacement cover at that time, Ms CL was "unsure about the insurance amount", and he advised Ms CL the amount, which would be "reviewed yearly" should "cover" the bank.

noted Ms CL was "unsure" about the sum insured, but added to his note "so long as [the] bank [was] covered", the sum insured would be "reviewed each year".

[176] In my view, there is nothing in these communications and interactions that gives rise to any professional issues adverse to Mr BK.

(4) Supervision – issue (d)

(a) Parties' positions

Ms CL

[177] Ms CL claims Mr AM did not competently supervise and manage Mr BK's legal work carried out for her on the purchase of the property. She says Mr AM did not provide "a professional environment conducive to protecting" her, and therefore did not protect her from Mr BK's actions.

[178] In particular, Ms CL says Mr AM did not provide appropriate or sufficient training and supervision of Mr BK to ensure he knew the purchase agreement was "conditional". She claims she "should have been warned about a number of things including the structures on the property".

[179] She says although Mr AM claims his supervision was "adequate", she suspects the firm considered Mr BK was "suitably qualified" and therefore "left him to it". She says she suspects "lack of consistent and on-going training and supervision" by the firm of its employees.

[180] Ms CL also says Mr AM ought to have known local authorities did not "sign off new builds" in the 1960s-70s, and ought to have had systems to ensure the firm's employees identified "potential misrepresentations" by agents, and attorneys of vendors.

Mr AM

[181] Mr AM denies Ms CL's allegation.[44] He says at the relevant time Mr BK was an experienced conveyancing lawyer who had not previously received a complaint, and the firm provided "proper, adequate and competent" legal services which included "training and conveyancing processes".

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[44] As for Mr BK, Mr AM's response and submissions to both Ms CL's complaint, and application for review, are made by Ms HJ, and Mr BT, of [RST].

[182] In Mr AM's submission, taking into account Mr BK's conveyancing experience there was no need for [Mr AM] to supervise Mr BK's work other than in a "general" way which applied to all the firm's staff. He says he "had no reason" to question Mr BK's capabilities, and Mr BK received Ms CL's instructions direct without referring them to [Mr AM].

[183] He says the firm "had no reason to believe" Mr BK required more than general supervision when acting on Ms CL's "unremarkable" purchase which was not complex, did not involve any novel issues that required supervision, and was similar to "many" transactions on which Mr BK had acted.

[184] In his view such general supervision did not result in a professional failure or shortcoming that led to him to contravening r 11.3 of the Rules which applied at the relevant time.

(b) Discussion

(i) Supervision – professional rule

[185] Rule 11.3 imposes a positive duty on a partner, director or principal of a law practice, being a lawyer who is "who is qualified to practise on his or her own account", to "ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed".

[186] This rule applies to both non-legal, and qualified employees.[45] It has been described as "represent(ing) a more basic requirement' whereby 'the practice and its employees must always be competently supervised by a lawyer qualified to practise on own their account".[46]

[187] The observation has been made concerning a complaint about a relatively inexperienced lawyer with three years post qualification experience, that r 11.3 requires "at the very least, regular meetings to discuss progress to satisfy the supervising lawyer that there are indeed no issues; or, if there are, to recognise them and address them".[47]

[188] It has also been observed that a finding of misconduct by a junior lawyer through inexperience and insufficient supervision may lead to the supervising partner or principal being held partly responsible".[48]

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[45] Webb, Dalziel, Cook, above n 28 at [4.3.6].
[46] *Canterbury Westland Standards Committee v Simes* [2012] NZLCDT *4* at [60].
[47] *DV v LS* LCRO 91/2017 (December 2018) at [188], [199].
[48] Webb, Dalziel, Cook, above n 28 at [4.3.6].

[189] Illustrations of contraventions of the rule include (a) where the lawyer, a partner in a firm, failed to respond to a client's repeated inquiries over a period of seven months about an employed lawyer;[49] and (b) where a partner in a firm was held not to have provided supervision of an employed lawyer, who had three years post-admission experience, in leaky building litigation, "a specialist area of law".[50]

(ii) Consideration

[190] As noted, at the time Mr BK acted for Ms CL on the purchase of the property he was an associate with the firm having had the benefit of 15 years' experience as a conveyancing lawyer.

[191] The position of associate is commonly a senior position in a law practice and a stepping stone to partnership recognising the practice's confidence placed in the lawyer concerned, and the lawyer's value to the practice gained through knowledge of the lawyer's experience, and competence.

[192] That position frequently carries with it duties, in addition to clients' legal work, including mentoring and supervision of recently admitted, and junior lawyers employed by the firm, and legal executives.

[193] Without detracting from the mandatory supervisory and management duties of a partner or principal required by r 11.3, the observation has been made that the "actual supervision required in any situation will depend on the facts and circumstances applicable" and the "appropriate degree of supervision will vary depending on the complexity of the issue".[51]

[194] In a practical sense the degree of supervision of a recently admitted, or junior lawyer could be expected to lessen as the lawyer concerned gained experience, and competence, and with increased confidence by the partner or principal responsible for supervision.

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[49] *JV v QG* LCRO 65/2011 (September 2012) at [12], [34]. The partner had received and replied to the client's first letter having discussed the letter with an employed lawyer who was attending to the matter. The matter concerned litigation which the partner acknowledged was outside his area of practice. In concluding that the lawyer had contravened the rule this Office stated that to "ensure" a response was sent required supervision of "a very basic nature", and did not require "any specific knowledge on a particular area of law".
[50] *DV v LS* at [133], [166], and [172]: the observation was made that the lawyer would not "be sufficiently experienced to recognise some of the problems that may arise in the conduct of [the] proceedings".
[51] *Simes* [2012] NZLCDT 4 at [66] and [80].

[195] For these reasons, I do not consider that Mr BK required supervision by Mr AM, or for that matter by any other partner or principal in the firm, other than as Mr AM submits, in a "general" way.

[196] By appointing Mr BK as an associate the firm acknowledged Mr BK's experience and competence, and the confidence the firm placed in him. The responsibilities a person appointed to that position has include the expectation he or she would consult with another associate, or partner, concerning more challenging or complex matters. Just as a partner would consult with another partner or colleague in such circumstances.

[197] The conclusion I have reached concerning this aspect of Ms CL's complaint is that taking into account Mr BK's seniority in the firm, and my findings Ms CL has not proved, on the balance of probabilities, her allegations about Mr BK's conduct when acting for her on the purchase of the property, it would not be appropriate to make a finding that Mr AM had failed in his supervisory and management duties concerning Mr BK.

(5) Negligence

[198] Finally, Ms CL alleges Mr BK was negligent when acting for her.

[199] In broad terms, a lawyer who is negligent may be liable in both tort (civil wrong) and contract. Because a lawyer owes his or her client a duty of care in tort, as well as in contract, a cause of action in negligence may lie if the lawyer does not achieve the standard of competence "expected by law".

[200] The retainer between a lawyer and his or her client has been described as "substantiat[ing] the existence of the relationship that has given rise to that duty", and contains "the scope of the lawyer's duty of care".[52]

[201] Any action in contract or negligence brought by a client against his or her lawyer claiming loss is heard by the Courts before whom evidence, frequently including expert evidence, can be tested by cross examination.

[202] In other words, the disciplinary process which, as much as anything, involves an inquiry rather than a trial, does not sufficiently allow for the testing by cross-examination of evidence as is required for the just resolution of significant civil disputes.

[203] Although decisions of both Standards Committees, and Review Officers have frequently stated that the complaints process is not an alternative to court proceedings,

[52] Dal Pont, above n 30 at [5.05], [5.10].

if arising out of an action in negligence brought by a client against a lawyer there are issues or doubts about the lawyer's competence, then it is open to the client to lay a complaint with the LCS.

[204] As noted, it is the role of a Standards Committee, a Review Officer on review, or the Disciplinary Tribunal to inquire into whether, for example, a lawyer's conduct did not meet the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[53]

[205] If a Standards Committee, or a Review Officer on review after hearing such a complaint considers that a lawyer has been negligent or incompetent "of such a degree or so frequent as to reflect on [the lawyer's] fitness to practice or is to bring [that] profession into disrepute" then the matter may be referred to the Disciplinary Tribunal.[54]

Decision

[206] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee is:[55]

(a) Reversed as to the finding of unsatisfactory conduct against Mr BK that by not providing competent advice concerning the absence of the LIM, and building report conditions in, and concerning approval of the purchase agreement he contravened r 3 of the Rules.

(b) Reversed as to the finding of unsatisfactory conduct against Mr AM that by not providing competent supervision and management of aspects of Mr BK's legal work for Ms CL, Mr AM contravened r 11.3 of the Rules.

(c) Confirmed as to the Committee's decisions not to take any further action concerning all other allegations made by Ms CL in her complaint against Mr BK and Mr AM.

[207] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed as to the Committee's orders that Mr BK, and Mr AM each pay to the New Zealand Law Society the sum of $1,500.00 by way of costs under s 156(1)(n).

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[53] Section 12(a) of the Act: unsatisfactory conduct. See also r 3 of the Rules – "In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".
[54] Sections 152(2)(a), 241(c) of the Act.
[55] Section 12(c): "unsatisfactory conduct includes a lawyer's conduct "consisting of a contravention of [the] Act, or of any regulations or practice rules made under [the] Act… (not being a contravention that amounts to misconduct under section 7); or…".

Anonymised publication

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

DATED this 31st day of August 2021

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B A Galloway
Legal Complaints Review Officer

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

Ms CL as the Applicant
Mr BK as a Respondent
Mr AM as a Respondent
[Area] Standards Committee
New Zealand Law Society