

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

[2020] NZLCRO 37

Ref: LCRO 101/2019

CONCERNING

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

AND

CONCERNING

a determination of the Canterbury [Area] Standards Committee [X]

BETWEEN

YK

Applicant

AND

RN

Respondent

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

Introduction

[1] Ms YK has applied to review a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Ms RN.

Background

[2] Ms YK instructed [VIC] Law to act for her on the purchase of a residential property.

[3] Ms RN, an employee of [VIC], acted for Ms YK on the purchase.

[4] Ms RN is not a lawyer.

[5] The contract for sale and purchase included a number of conditions that were required to be satisfied before the contract could be declared unconditional. Amongst

those conditions, was a provision that the agreement was subject to Ms YK obtaining finance and insurance cover, before 13 August 2018.

[6] The insurance condition could not be satisfied by 13 August 2018. An extension of time for satisfying the condition to 15 August 2018 was secured.

[7] At 3:41 PM on 15 August 2018, Ms YK made request of Ms RN to secure a further extension of 48 hours. At around 3:45 PM on that day, Ms RN made request of the vendors' solicitor for a further extension. She received no response to that request.

[8] The following day (16 August 2018) the vendors cancelled the contract.

The complaint and the Standards Committee decision

[9] Ms YK lodged a complaint with the New Zealand Law Society Complaints Service on 10 September 2018.

[10] Her complaint named Ms RN and Mr [VIC] as the parties against whom she was advancing her complaint.

[11] The Complaints Service advanced Ms YK's complaints as two separate complaints. The complaint in respect to Mr [VIC] was that he had behaved discourteously to Ms YK. That complaint has been dealt with in a separate Committee decision and forms no part of this review.

[12] The substance of Ms YK's complaint in respect to Ms RN was that:

- (a) She (Ms YK) had secured finance and insurance for a property that she was proposing to purchase (the first property) but before that purchase was finalised, identified another property (the second property) that she preferred; and
- (b) she considered that it would be a relatively easy task to utilise the work completed in organising finance and insurance for the first property for benefit of the second transaction, and
- (c) she had, on the advice of Ms RN, decided to obtain insurance from the company that had current insurance over the second property rather than use her insurance company; and
- (d) she had made request of Ms RN to seek a further extension of time for satisfying the insurance condition in the contract; and

- (e) Ms RN had failed to inform her that the vendors of the second property had not agreed to a further extension; and
- (f) Ms RN was aware that she would have been content to affirm the contract and then look to organise insurance through the company that had agreed to provide finance for the first property; and
- (g) attempts by Mr [VIC] to resurrect the lapsed contract on the second property were unsuccessful.

[13] By way of remedy, Ms YK sought that:

- (a) Ms RN be reprimanded; and
- (b) an apology be provided; and
- (c) reimbursement of costs incurred in obtaining a building report (\$575); and
- (d) compensation for psychological trauma she had endured, and was continuing to experience, as a consequence of losing the house that she was committed to buying.

[14] Mr [VIC] responded to the complaint on Ms RN's behalf. He submitted that:

- (a) a letter of engagement was provided to Ms YK on 31st of July 2018; and
- (b) the finance provider required insurance to be in place as a condition of the proposed loan advance; and
- (c) three extensions for compliance with the insurance condition were sought from the vendors; and
- (d) in a lengthy discussion with Ms YK on Tuesday, 14 August 2018 the implications that could follow if further extensions were not granted was explained to Ms YK; and
- (e) Ms YK had made request to extend the time for securing insurance cover on Wednesday 15 August at 3:41 PM as she didn't have insurance in place at that time; and

- (f) Ms RN was prepared to swear an affidavit confirming that she advised Ms YK of the potential risk of the vendors cancelling the agreement, in the event they did not agree to the granting of a further extension; and
- (g) Ms YK had entered the vendors' property prior to confirmation of the insurance condition with purpose to prune the vendors' roses; and
- (h) this action had infuriated the vendors and was instrumental in their decision not to proceed with the contract; and
- (i) he was shocked at suggestion that his firm was responsible for the contract not proceeding.

[15] The Standards Committee identified the issues to be considered as:

- (a) Whether Ms RN acted competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care; and
- (b) Whether Ms RN's conduct when providing the legal services to Ms YK fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (in accordance with s 14(a) of the Lawyers and Conveyancers Act 2006 (the Act)).

[16] The Standards Committee delivered its decision on 10 July 2019.

[17] The Committee determined, pursuant to s 138(2) of the Act that no further action on the complaint was necessary or appropriate.

[18] In reaching that decision the Committee concluded that:

- (a) Ms YK's inability to proceed with the purchase was not attributable to any failure on the part of Ms RN.
- (b) Ms RN's recommendation to attempt to organise finance through [123] Insurance, presented as a responsible recommendation for her to have made.
- (c) On a consideration of the materials before it the Committee did not have any concerns relating to the services provided by Ms RN, and concluded that she had acted competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

Application for review

[19] Ms YK filed an application for review on 18 July 2019.

[20] She submits that:

- (a) Ms RN had a responsibility to advise her that the vendors had rejected a further request to extend time for meeting the insurance condition; and
- (b) had she been aware of the possibility that the further request for an extension would be rejected, she would have elected to nevertheless confirm the agreement was unconditional; and
- (c) by failing to advise her that the vendors would not extend the time for her to obtain insurance cover, Ms RN had effectively denied Ms YK an opportunity to finalise her purchase.

[21] Mr [VIC] was invited to provide a response to Ms YK's application for review but indicated that he relied on the submissions filed with the Complaints Service.

Hearing

[22] A hearing proceeded on 26 February 2020.

[23] Ms RN attended the hearing with Mr [VIC].

Nature and scope of review

[24] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[25] More recently, the High Court has described a review by this Office in the following way:²

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.

[26] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

[27] The issues to be addressed on review are:

- (a) After receiving instructions to seek an extension, was Ms RN required to follow-up with the vendors lawyer to ascertain as to whether the vendors had agreed to the extension sought?
- (b) Was Ms RN's advice to Ms YK to endeavour to obtain insurance cover from the existing insurer of the property competent advice?

After receiving instructions to seek an extension, was Ms RN required to follow-up with the vendor's lawyer to ascertain as to whether the vendors had agreed to the extension sought?

[28] Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides that a lawyer must, when providing regulated services to a client, always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[29] It is Ms YK's position that a lawyer instructed to seek an extension of time for satisfying of a condition in a contract, has a duty to refer back to their client to advise if

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

the extension has been granted. This obviously, would need to occur before the expiration of any existing timeframe for satisfying contractual conditions.

[30] A failure to take such steps suggests Ms YK, would amount to a serious professional lapse.

[31] Framed as a disciplinary complaint, this would be that in failing to report to Ms YK, Ms RN failed to act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care as she is required to do by r 3 of the Rules.

[32] The issues traversed by Ms YK's complaint are sharply focused on the question as to whether a lawyer has responsibility, after receiving instructions to seek an extension of time for fulfilling conditions in an agreement for sale and purchase, to take steps before the existing time frame for confirming satisfaction of conditions in the contract expires, to establish whether the extension sought has been agreed to.

[33] The Committee's decision does not directly address the question as to whether Ms RN had a duty to follow up with the vendor's lawyer. Its analysis of what was clearly the pivotal issue of Ms RN's complaint was limited to observation that Ms RN had received instructions late in the day to seek an extension, and explanation that it had considered the service provided by Ms RN as a whole and had concluded that Ms RN had provided competent representation to Ms YK throughout.

[34] Whilst there would frequently be circumstances in which it would be required of a lawyer to take steps to ascertain (before the expiration of extensions granted) as to whether a further request for extension had been agreed, I would be reluctant to reach emphatic conclusion that a lawyer must, on every occasion, assume responsibility for ascertaining as to whether a request for an extension of a time condition has been agreed to.

[35] Every case must be considered on its particular facts.

[36] As is commonly the case in a conduct inquiry, it is important in this case to consider the context from which Ms YK's complaint arises.

[37] Ms YK noted in her submissions, that she had owned a number of residential properties. I am confident that she would have been aware of the possibility of the vendor taking steps to cancel the contract, if the vendor was not amenable to granting the further extension sought.

[38] My confidence in that position is bolstered by the fact that I accept Ms RN's evidence that she had a lengthy telephone discussion with Ms YK the day before request was made for the third extension, during which she had cautioned Ms YK as to the consequences that could follow if the vendor was not prepared to agree to extending the time for fulfilling the conditions in the contract.

[39] It is clear that Ms YK was having difficulty satisfying the insurance conditions.

[40] The extension requested on 15 August was the third sought.

[41] The first request for an extension was made on 13 August 2018. The second on 14 August 2018.

[42] When Ms RN received instructions to seek a further extension, those instructions were promptly acted on.

[43] The instructions were received late in the day.

[44] Those instructions were provided in circumstances where Ms RN had been alerted to the possibility of the contract not proceeding if conditions were not satisfied in the timeframes required, and in circumstances where Ms RN would have been acutely aware of the limited time available for confirming the third extension.

[45] In her initial complaint, Ms YK says that Ms RN was made aware that she was happy to confirm the contract with the insurance she had organised.

[46] There is, apart from Ms YK's recollection, no evidence to substantiate Ms YK's position.

[47] Nor is there evidence to suggest that when Ms RN was instructed to secure a third extension, that she was advised to confirm the contract if the vendors would not agree to granting the third extension sought.

[48] Ms YK did not, when advancing her application for review, suggest that she had informed Ms RN that it was her intention to confirm the contract even if insurance cover had not been able to be finalised.

[49] In her application for review, Ms YK says this:

"when the third extension was sought by Ms RN and she had not received a reply from the vendors solicitor as 5 PM was approaching, she should have notified me so I could make the choice whether to confirm or not. Having heard nothing I assumed as previously that the extension had been granted. Had I been made aware of the fact that no response had been received I would have asked Ms RN to phone the vendors solicitor for a response (which I would

expect someone actively managing the matter to have already done. I now feel I can't trust lawyers to do their job but have to check up on them all the time to make sure they are being proactive for me). Had I been aware the extension was not going to be granted I would have just confirmed the deal".

[50] Whilst Ms YK contends that she would, if she had been made aware that her extension had not been granted, have instructed Ms RN to confirm the contract, that is a position that appears to have been adopted with the benefit of hindsight.

[51] If (as Ms YK suggests was the case here), a client instructs their lawyer to seek an extension of time in circumstances where the client is nevertheless prepared to declare the contract unconditional if the request for an extension is declined, it is in my view, the responsibility of the lawyer's client to clearly convey those instructions to their lawyer. That could reasonably have been expected of Ms RN, particularly bearing in mind that her instructions to seek a third extension were provided late in the day, and shortly before the expiration of time provided by the second extension.

[52] Whilst Ms YK says that her commitment to securing the property was such that she would have been prepared to declare the contract unconditional without the comfort and assurance of having her insurance confirmed, the period of time that had been spent endeavouring to secure finance and insurance cover, and the request made by Ms YK to seek three extensions to the contract, would indicate that she was sensitive to the need to ensure that she was securely positioned to proceed with the purchase.

[53] Ms RN, understandably, was cautious to ensure that Ms YK had confirmed both the finance and insurance conditions, before Ms YK committed to purchasing the property.

[54] I accept that Ms YK genuinely believed that Ms RN would advise her if the further extension sought was not granted, but I do not consider that Ms RN's failure to report to Ms YK reflected a failure on her part to provide competent representation to Ms YK.

[55] It will of course be the case that in many instances, lawyers will take steps to ascertain whether conditions have been satisfied, and indeed Ms RN conceded that it was her usual practice to do so.

[56] On occasions, a lawyer will become alerted to the possibility that the vendor may be indicating a reluctance to grant further extensions. That information may come to a lawyer from a variety of sources.

[57] It would be common practice and expected of a lawyer alerted to such concerns, to address those concerns with the client, and clarify with the lawyer acting for the other party, what response was anticipated to the request for an extension.

[58] Ms RN was aware that the vendor's lawyer had indicated that his client was not completely at ease with the agreement remaining conditional for a lengthy period of time. As noted, Ms RN had discussed with Ms YK the potential for the agreement to fall over if conditions could not be promptly satisfied.

[59] But it falls to be determined on the facts of each particular case as to whether a lawyer's failure to take steps to ascertain if a client's request for an extension of time for satisfying conditions has been accepted, constitutes a professional lapse.

[60] In this instance, Ms RN was dealing with a client experienced in property matters, who had been made aware that a failure to satisfy a time condition could result in the contract falling over.

[61] Ms RN received instructions late in the day to request a further extension. If Ms YK's position was that she was prepared to declare the contract unconditional irrespective as to whether she had confirmed her insurance cover, it could reasonably have been expected of her that she would have made her position clear to Ms RN.

[62] Whilst I accept that it may have been prudent for Ms RN to have made inquiry of the vendor's lawyer as to whether the request for a further extension had been met with a positive result (and she indicated it was her usual practice to do so), considering the circumstances of the transaction in its totality, I am not persuaded that her failure to do so was conduct that required a disciplinary response.

Was Ms RN's advice to Ms YK to endeavour to obtain insurance cover from the existing insurer of the property competent advice?

[63] It is well recognised that obtaining insurance for residential properties situated in [City] has proved problematical for many prospective purchasers since the [City] earthquakes.

[64] Invariably, prospective lenders demand evidence of a property being insurable, before approving loan advances over the property.

[65] Ms YK says that she had organised both finance approval and a guarantee of insurance cover for a property that she was on the point of purchasing, before she

discovered and fell in love with the property that Ms RN was instructed to manage the conveyance of.

[66] It is Ms YK's view that it would have been a relatively simple matter to have utilised the finance and insurance facilities that had been organised for her proposed first purchase, for the second purchase. This seemingly logical approach was, says Ms YK, discouraged by Ms RN who suggested that any potential hurdles with obtaining insurance could best be addressed by arranging insurance with the insurance company [123] that had an existing policy of insurance over the property that Ms YK wished to purchase.

[67] Ms YK argues that delays in securing approval for insurance with [123] were significantly responsible for the delay in her being able to satisfy the contract conditions and were instrumental in her having to seek the extensions of time which, ultimately, cost her the property.

[68] There is insufficient evidence provided by Ms YK to substantiate argument that Ms RN failed to provide her with competent advice.

[69] At first step, there is no independent evidence to support Ms YK's argument that the finance and insurance companies who were prepared to assist her into the first property, would have been prepared to assist her with the purchase of the second.

[70] It is also clear, that it was Ms YK who was organising her finance and insurance. If it was the case that organising finance and insurance was as straightforward as she suggests, the question can reasonably be asked as to why she simply didn't proceed with those arrangements. The fact that such a seemingly straightforward approach was not followed, suggests that there may have been obstacles with either the finance company or insurer.

[71] Ms RN's suggestion that attempts be made to organise insurance cover with the existing insurer presented as a responsible and sensible recommendation.

[72] I do not consider that Ms RN's recommendation to Ms YK that attempts be made to secure insurance cover from the existing insurer, presented as a failure on her part to competently advise Ms YK.

Conclusion

[73] I see no grounds which could persuade me to depart from the Committee's decision.

Anonymised publication

[74] 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 bereft of anything as might lead to their identification.

Decision

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

DATED this 17th day of March 2020

R Maidment
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 YK as the Applicant
Ms RN as the Respondent
Mr [VIC] as the Related Person
[Area] Standards Committee [X]
New Zealand Law Society