LCRO 136/2016

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee
BETWEEN	**AB** Applicant
AND	**DE and GH** Respondent

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

DECISION

Introduction

[1] Ms AB has applied for a review of a decision by the [City] Standards Committee to take no further action in respect of her complaint concerning the conduct of Mr DE, a lawyer, and Ms GH, a legal executive, both employed by [Law Firm] at the relevant time.

[2] Ms AB, and her sister Ms JK owned (as joint tenants) a residential property in [Town], New Zealand (the NZ property). Ms AB and her husband (the ABs), and Ms JK and her husband (the JKs) owned a residential property in [Town] ([State]) (the Australian property). Each couple held an undivided one-half share as tenants in common.

[3] The ABs and the JKs resolved that they would sell the Australian property, and that Ms AB would sell her interest in the NZ property to the JKs.

[4] For that purpose, during January 2015 the JKs instructed Mr DE to act for them on those transactions. Mr DE, and later Ms GH, also acted for Ms AB "in the registration aspect" of the sale of her interest in the NZ property to the JKs.

[5] Ms AB's complaints against Mr DE and Ms GH, alleging delay, and against Ms GH, alleging she registered the transfer of the NZ property to the JKs without Ms AB's authority to do so, arise from Mr DE and, after he departed [Law Firm], Ms GH acting on those matters.

Background

[6] The ABs requested the JKs to enter into a Deed of Arrangement which would provide, amongst other things, for the contemporaneous settlement of both transactions and for the distribution of the sale proceeds of the Australian property.

[7] On 27 March 2015 Mr DE sent the proposed Deed of Arrangement to Ms AB's agents in [City], [State], accompanied by other documents concerning the NZ property. Those documents included the agreement for sale and purchase and a "Notice of Possible Conflict of Interest" in respect of Mr DE also acting for Ms AB "in the registration aspect" of the sale of her interest in the NZ property to the JKs.

[8] Ms AB took legal advice from Ms MN, a lawyer in [City], [State], who was acting for the ABs on the sale of the Australian property.

[9] Between the end of March 2015 and mid-June 2015, Mr DE and Ms MN exchanged communications concerning the terms of the Deed of Arrangement. Each alleged delay by the other in progressing the matter.

[10] On 26 June 2015, with the Deed of Arrangement not yet in an agreed form, Ms AB instructed Mr DE not to register the transfer of the NZ property until she had "physically received" the transfer of the Australian property signed by the JKs.[1]

[11] Ten days later Ms MN reminded Mr DE of the requirement in the proposed Deed of Arrangement for the "contemporaneous" settlement of both transactions.[2]

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[1] Email from AB to DE (26 June 2015).
[2] Email MN to DE (6 July 2015).

[12] In the fourth week of July 2015 Mr DE left [Law Firm] having first briefed Ms GH on the transactions. From that time until mid-August 2015 Ms GH and Ms MN exchanged further communications concerning the terms of the Deed of Arrangement which were finalised by correspondence on 13 August 2015.

[13] Ms GH then forwarded the transfer of the Australian property to Ms MN that day. She asked Ms MN to advise her of the settlement date of the Australian property. She informed Ms MN of the arrangement to uplift the JKs' agreed share of the sale proceeds of the Australian property.

[14] On 20 August 2015 Ms GH registered the transfer of the NZ property to the JKs. The following day she requested from Ms MN an acknowledgement of receipt of the transfer of the Australian property. She informed Ms MN that the transfer had been forwarded to her in reliance on the confirmation received from her concerning the arrangement for uplifting the JK's agreed share of the sale proceeds of the Australian property. She again asked for notification of the settlement date for the sale of that property.

[15] A week later, Ms MN acknowledged receipt of the transfer of the Australian property. She informed Ms GH that the purchaser's finance approval had lapsed due to "you and your clients … [having] delay[ed] forwarding the duly executed transfer of land document".[3] She stated that the purchaser was re-applying for finance and would advise when re-approval had been obtained.

[16] Three months later Ms MN informed Ms GH that the purchaser was unable to obtain finance, and that the property would be placed on the market again. In the meantime, she stated that "[Ms JK] should not transfer the NZ [property] into [her] sole [name] as settlement of the Australian property has not yet taken place".[4]

Complaint

[17] Ms AB lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 15 February 2015.

[18] In essence, her complaint was that:

(a) Due to their delay, Mr DE and Ms GH did not send the transfer of the Australian property to Ms MN in sufficient time so that the purchaser's

[3] Email from MN to GH (28 August 2015).
[4] Email from MN to GH (26 November 2015).

finance approval lapsed, and the sale of that property fell through. Ms MN had requested the documents on a number of occasions "to no avail".

(b) Despite having instructed Mr DE on 26 June 2015 that she did not want the transfer of the NZ property to proceed until she had received the transfer of the Australian property, Ms GH had nonetheless transferred Ms AB's interest in the NZ property to the JKs on 20 August 2015. This was:[5]

> … some three months prior to my lawyer notifying them that the [Australian property] sale fell through and particularly after [she] told them that it wasn't to be settled because of the transfer … being withheld from my lawyer.

[19] Ms AB claimed compensation by way of reimbursement of legal fees incurred with Ms MN due to [Law Firm]'s "incompetence".

Mr DE's Response

[20] In response Mr DE stated that he acted for the JKs from January 2015 until mid-July 2015 when he left [Law Firm].[6]

[21] He says that:

Australian property

(a) He acted for the JKs, not for Ms AB. As such he owed no professional duty to Ms AB.

(b) The JKs instructed him not to send the transfer of the Australian property to Ms AB until "the [Deed of Arrangement] had been signed on the terms agreed" and had been received by [Law Firm]. That had not occurred at the time Mr DE left [Law Firm].

NZ property

(c) Although Ms AB "had apparently agreed to sign the [Deed of Arrangement] and send the documents to [Law Firm] … [those documents] never arrived".

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[5] Complaint, at 3.
[6] Letter PQ (of [Law Firm B]) to Lawyers Complaints Service (18 March 2016).

(d) Ms AB had informed the JKs that "she had not sent the documents as she was still not happy with some of the provisions of the [Deed of Arrangement]".

Ms GH's response

[22] Ms GH states that when Mr DE left [Law Firm] in mid-July 2015 she met with him "to discuss the handover of the file". In addition to Mr DE's points she says that:[7]

Australian property

(a) Upon the terms of the Deed of Arrangement having been finalised on 13 August 2015, she sent the transfer of the Australian property to Ms MN that day.

NZ property

(b) The JKs then instructed Ms GH to transfer the NZ property to them. That transfer took place on 20 August 2015.

(c) Ms GH "did not see [Ms AB's email instructions of 26 June 2015 to Mr DE], in the file or on [Law Firm]'s electronic storage system". It had been "received and saved under an email sent to the JKs … for some reason, neither emails were ever printed out and placed on the file". She contends that "[o]nce [Ms AB] had received" the transfer of the Australian property "she would clearly have given her instructions to settle".

(d) Because she was acting for the JKs, not Ms AB, on the sale of the Australian property she had "no obligation" to send the transfer of the Australian property to Ms AB.

(e) Had there been a problem with the purchaser's finance then "this ought to have been brought to the attention of the JKs" by Ms AB.

[23] Concerning Ms AB's claim for compensation, Mr DE and Ms GH state that:

(a) Assuming that the basis of her claim is that "Ms AB was unable to purchase the Australian property because of the alleged delay by Mr DE

[7] Letter PQ (of [Law Firm B]) to Lawyers Complaints Service (18 March 2016).

and Ms GH in sending [Ms AB] the JKs' signed [transfer of the Australian property]", then Ms AB "herself contributed significantly to any delay by not agreeing, signing and returning the [Deed of Arrangement] and the other documents to [Law Firm] to enable the sale of the Australian property to proceed earlier".

(b) Ms AB has no claim for compensation against Ms GH in relation to the registration of the transfer of the NZ property. This is because Ms AB agreed to that transfer "on the basis that she received the documents from the JKs for the sale of the Australian property". Having received those documents Ms AB was "effectively free to dispose of the Australian property, subject only to any claim by the JKs for payment of AU$[Amount] …".

Standards Committee decision

[24] The Standards Committee delivered its decision on 20 May 2016. It determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[25] The Committee identified two issues, namely, whether Mr DE and Ms GH:

(a) were required to comply with Ms AB's instructions of 26 June 2015. If so, did Ms GH's failure to do so constitute unsatisfactory conduct?

(b) had a legal duty to provide the transfer of the Australian property to Ms AB's lawyer?

NZ property—first issue

[26] The Committee:

(a) considered that Ms AB's email of 26 June 2015, which "withdrew her consent for the transfer of the NZ property", was "superseded upon Ms GH sending [the transfer of the Australian property] to [Ms MN] on 13 August …". By doing so "the condition imposed by Ms AB's email … was met upon the documentation being sent"; [8]

[8] Standards Committee (20 May 2016) at [30].

(b) was satisfied that Ms GH forwarded that document to Ms MN "prior to transferring the NZ property to the JKs". The Committee referred to the subsequent emails received from Ms MN, which "contemplated settlement of both properties upon Ms GH 'forward[ing] [the transfer of the Australian property] to [Ms MN] for settlement'";[9] and

(c) these subsequent events "superseded the [26 June] email and amounted to a waiver". It followed that "Ms AB was entitled to transfer the NZ property to the JKs on 20 August 2015".[10]

Australian property—second issue

[27] In the Committee's view, Mr DE and Ms GH:

(a) followed the JKs' instructions not to forward the transfer of the Australian property to Ms MN "until such time as the [Deed of Arrangement] and related documentation had been executed by Ms AB and her husband";[11]

(b) did not act for Ms AB on the sale of the Australian property; and

(c) were "not professionally improper". Their actions were 'in accordance with their clients' instructions".[12]

Conflict of interest

[28] The Committee referred to the "Notice of Possible Conflict of Interest" which Ms AB and Ms JK signed. In the Committee's view:[13]

(a) it was not professionally improper for Mr DE and Ms GH to act for both the JKs and Ms AB "in relation to the transfer of the NZ property"; and

(b) concerning r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), Mr DE and Ms GH "were able to, and did, discharge the obligations owed to their respective clients".

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[9] At [31] referring to email MN to GH (13 August 2015). Other emails from Ms MN contain similar statements.
[10] At [32].
[11] At [35].
[12] At [37].
[13] At [39].

[29] In conclusion, the Committee observed that Mr DE and Ms GH ought to have agreed with Ms MN a process for settlement of the two properties which may have avoided the complaint being made by Ms AB. Of particular concern to the Committee was the fact that "[Ms AB's] email of 26 June … appeared to have been overlooked which, in other circumstances, may have contributed to a breach of Mr DE's and Ms GH's obligations".[14]

Application for review

[30] Ms AB filed an application for review on 30 May 2016. She seeks compensation for her time off work, travel to and from New Zealand, and the cost of instructing a lawyer "to sort this out and [lodge] caveats".

[31] She submits that:

Mr DE

(a) The sale of the Australian property was unconditional, and Mr DE would not return the transfer to Ms MN in [City], [State].

(b) Concerning the transfer of the NZ property, Mr DE "was acting on my behalf and … [for Ms JK] as he issued a conflict of interest [notice] …"

(c) Because she was a "part owner" of the NZ property, having received her email of 26 June 2015, Mr DE "should have conferred with [her] as [she] had a right to request that the transfer not take place until the obligation as per the agreement that the settlement takes place [contemporaneously] …".[15]

Ms GH

(d) Ms GH "[admits] that she knew she was to send the transfer … back to [City] [before] the transfer of [the NZ property]".

(e) The transfer of the NZ property ought not to have taken place until Ms GH had obtained confirmation that the transfer of the Australian property had been received by Ms MN. She says that express mail between New Zealand and Australia takes 10 days. Having posted the

[14] At [41].
[15] Deed of Arrangement, clause 4.1.

transfer of the Australian property to Ms MN on 13 August 2015 she claims that it would be unlikely to arrive in [City], [State] before 24 August 2015.

(f) Instead, Ms GH registered the transfer of the NZ property on 20 August 2015 without finding out from Ms MN that the purchaser's finance approval had lapsed.

[32] Ms AB disagrees with the Committee's view that her instructions of 26 June 2015 were superseded or overtaken by Ms GH sending the transfer of the Australian property to Ms MN on 13 August 2015. She contends that this overlooked the requirement in the Deed of Arrangement (cl 4.1) that the settlement of both transactions "are interdependent and shall be effected contemporaneously".

Reply from Mr DE and Ms GH

[33] Mr DE and Ms GH replied through their counsel who explained why:[16]

(a) Ms AB sent her email of 26 June 2015 to Mr DE; and

(b) the Deed of Arrangement and related documents were not received by [Law Firm] around that time.

[34] They state that when Ms MN forwarded the Deed of Arrangement and documents accompanied by her letter dated 17 July 2015 "there was no instruction not to proceed with settlement of [the NZ property] until [receipt of] Ms AB's permission".[17]

[35] Concerning Ms AB's 26 June 2015 instructions, they contend that before sending those instructions she retrieved the documents from the post because she "…wished to make some changes to [the Deed of Arrangement], which Ms JK refused". Being unable to retrieve the documents, she sent her email of 26 June 2015 to Mr DE. They say that the documents were not received by [Law Firm] which suggests that Ms AB "ultimately successfully recalled …" them.[18]

[36] Mr DE and Ms GH "believe that [this] reinforces the Committee's decision", namely, that the events which followed Ms AB's 26 June 2015 email "extinguished the effect of the … email [which] was no longer relevant as it was only sent as a result of

[16] Letter PQ to Legal Complaints Review Office (7 July 2016).
[17] At [7].
[18] At [6].

issues arising out of the documents that [Law Firm] never received. Those issues were subsequently resolved".[19]

[37] They also contend that, by acting for Ms AB "in the registration aspect" of the sale of her interest in the NZ property, Mr DE:[20]

(a) "… would be entitled to say that there was no more than a negligible risk that he would be unable to discharge the obligations owed to her as well as to the JKs" (r 6.1).

(b) Had obtained the informed consent of both Ms AB and the JKs (r 6.1.1).

(c) Was not prevented from continuing to act for the parties having received Ms AB's instructions of 26 June 2015, the effect of which was "… to wait until further instructions before settling" (r 6.1.2).

Review on the papers

[38] 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.

[39] 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

[40] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[21]

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[19] At [8].
[20] Letter PQ to Legal Complaints Review Office (20 September 2017).
[21] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> … 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.

[41] More recently, the High Court has described a review by this Office in the following way:[22]

> 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.

[42] 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.

Issues

[43] The issues concerning this review are:

(a) Was Ms AB a client of Mr DE, and Ms GH? If so what was the scope of the retainer?

(b) Were Mr DE, and later Ms GH, required to forward the transfer of the Australian property to Ms MN in [City], [State], and if so, did they delay doing so (r 3 of the Rules)?

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

(c) Did Mr DE, and Ms GH fail to carry out Ms AB's instructions contained in her email of 26 June 2015 not to register the transfer of the NZ property to the JKs until Ms AB had received from them the transfer of the Australian property? Relatedly, was Ms GH required to obtain Ms AB's instructions before registering the transfer of the NZ property on 20 August 2015 (rr 7 and 7.1).

(d) In respect of the NZ property, did r 6.1 prevent Mr DE acting for both the JKs, as purchaser, and Ms AB as vendor "in the registration aspect" of the sale of Ms AB's interest in the NZ property to the JKs?

If not, was Mr DE able to continue acting for both parties following his receipt of Ms AB's email of 26 June 2015 (r 6.1.2).

Analysis

(a) Were Mr DE and Ms GH retained by Ms AB?

[44] "Retainer" is the term used in the rules to describe an agreement between a lawyer and the lawyer's client whereby the lawyer is to provide legal services to the client. It appears in a number of the rules and is defined in r 1.2 of the Rules as:

> … an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[45] Although not defined in the Act or the Rules, the term "client", is included in this definition and is described as the recipient of legal services from a lawyer.[23]

[46] The term "legal services" is defined in the Act as "…services that a person provides by carrying out legal work for any other person"; the definition of "legal work" lists a number of categories of work carried out by lawyers. The overarching term "regulated services" includes "legal services".[24]

[47] This Office has stated that "the question of whether or not a lawyer has been retained is to be determined objectively". Importantly, "the fact that (the lawyer) had

[23] The Australian Solicitors' Conduct Rules 2011 similarly provide that "client" "with respect to the solicitor or the solicitor's law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter."
[24] s 6 of the Act.

personal reservations as to whether he [or she] was going to take the case are relevant only in so far as they were objectively ascertainable."[25]

[48] Ms MN acted for Ms AB concerning the Deed of Arrangement and the sale of the Australian property.

[49] Mr DE, and following his departure, Ms GH, were retained by the JKs to act on the negotiation of the Deed of Arrangement, the purchase of Ms AB's interest in the NZ property, and sale of the Australian property.

[50] They were also retained by Ms AB in a limited role, namely, "in the registration aspect" of the sale of her interest in the NZ property to the JKs as set out in the "Notice of Possible Conflict of Interest" prepared by Mr DE, forwarded by him to, and signed by, Ms AB. [26]

[51] As discussed below, the scope of Ms AB's retainer of Mr DE and, following his departure, Ms GH, is relevant to issue (c) concerning first, Ms AB's instructions of 26 June 2015 to Mr DE not to register the transfer of the NZ property; secondly, the requirement in the Deed of Arrangement and the Agreement for Sale and Purchase of Ms AB's interest in the NZ property of "contemporaneous" settlement of that sale and the sale of the Australian property; and thirdly, whether Ms GH was obliged to obtain Ms AB's further instructions before registering the transfer of the NZ property to the JKs.

[52] It is also relevant to issue (d), namely, the professional rules that apply to a lawyer who acts for more than one client on a matter or transaction.

(b) Delay

[53] Rule 3 states 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". It will be noted that the application of the rule requires that the lawyer concerned be "providing regulated services to a client".

[54] In addition to the requirement that a lawyer "must always act competently", r 3 also requires that lawyers must provide regulated services to clients "in a timely

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[25] *Hartlepool v Basildon* LCRO 79/2009 (3 September 2009) at [23]*;* see also discussion by GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Pyrmont, (NSW), 2016) at [3.20] and 75.

[26] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 217.

manner". By doing so the Rules '… do place some emphasis on timely action as part of expected client service',[27] which is also reflected in rr 3.2, 7, and 7.2.

[55] Between 27 March 2015 and 20 May 2015 Mr DE and Ms MN exchanged communications concerning the terms of the proposed Deed of Arrangement. These terms included the JKs' proposed share of the sale proceeds of the Australian property.

[56] On 19 May 2015 Ms MN requested Mr DE to "release the duly executed transfer … for the Australian Property immediately" for settlement of the sale of that property. She alleged delay by Mr DE which he rejected.[28]

[57] It is clear from the interactions between Mr DE and Ms MN during this period that the fact that Ms AB sought legal advice on the proposed transactions also contributed to the time taken to finalise the terms of the Deed of Arrangement.[29]

[58] Ms AB contends that the failure of Mr DE to send the transfer of the Australian property to Ms MN led to [Ms AB] sending her email of 26 June 2015 to Mr DE instructing him not to register the transfer of the NZ property to the JKs until he had sent the transfer of the Australian property to her.

[59] As noted earlier, Mr DE suggests that the reason behind Ms AB's instructions of 26 June 2015 was that she wanted to make changes to the Deed of Arrangement.[30]

[60] From that date Mr DE continued in his endeavours to finalise the terms of the Deed of Arrangement. Ms GH took over from him from the third week of July.[31] There was a regular exchange of communications between Mr DE and Ms GH on the one hand, and Ms MN on the other. The terms of the Deed of Arrangement were finalised on 13 August 2015 by correspondence.[32]

[61] Overall, in my view, these interactions do not indicate delay by Mr DE or Ms GH in responding to Ms MN such as would constitute a professional discourtesy.[33] Moreover, Mr DE and Ms GH were acting for the JKs concerning the negotiation of the Deed of Arrangement and the sale of the Australian property. As such they did not owe a professional duty to Ms AB who was represented by Ms MN on those matters.

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[27] *KD v WW* LCRO 83/2011 (30 March 2012) at [84].
[28] Letter (via email) MN to DE (19 May 2015); and email DE to MN (20 May 2015).
[29] Email Signature Settlements to DE (14 April 2015).
[30] Letter PQ to Legal Complaints Review Office (20 September 2015).
[31] Email DE to MN (23 July 2015).
[32] Emails (1) MN to GH; GH to MN; MN to GH (13 August 2015); Letter (via email) GH to MN (13 August 2015).
[33] Rules10 and 10.1 [the Rules].

(c) Ms AB's instructions

[62] With limited exceptions, a lawyer risks a complaint from a client with the possibility of a disciplinary response if the lawyer does not carry out the client's instructions.

[63] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[34]

[64] However, if, a prospective client's instructions to the lawyer "could require the lawyer to breach any professional obligation" then the lawyer may decline the instructions.[35] If, during the carrying out of the work on a retainer, the client's "instructions … require the lawyer to breach any professional obligations," then the lawyer may terminate the retainer.[36] Subject to these exceptions it has been observed that a lawyer:[37]

> … must not act in contravention of a client's instructions. It may be appropriate for the lawyer to counsel against a particular course of action when it is considered not to be in the client's best interests. But when clients are firm in their instructions, the lawyer may not substitute the lawyer's own judgment for that of the client.

[65] Where the lawyer is unsure about the client's instructions then "… it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action".[38]

[66] As noted earlier, Ms AB retained Mr DE on a limited basis, namely, to act for her "in the registration aspect of …" the sale of her interest in the NZ property to the JKs. In particular, the "… discharge of mortgage, lodgement of transfer …".

[67] As noted above, on 26 June 2015, with the Deed of Arrangement not having been finalised and the transfer of the Australian property not having been forwarded by Ms DE to Ms MN, Ms AB instructed Ms DE not to register the transfer of the NZ property.

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[34] Rules 7 and 7.1.
[35] Rule 4.1.
[36] Rule 4.2.1(a).
[37] Webb, Dalziel, Cook, above n 26 at 10.3, 291.
[38] At 291, referring to *Ismail bin Ibrahim v Lim, Lim & Oon* [1998] 1 AMR 339.

[68] By the time Mr DE departed from [Law Firm] four weeks later the terms of the Deed of Arrangement had still not been finalised by the parties.[39] This did not occur until a further three weeks later on 13 August 2015 when the outstanding points were settled by correspondence between Ms GH and Ms MN. Ms GH then forwarded, that day, the transfer of the Australian property to Ms MN.

[69] Ms GH states that she was "unaware" of Ms AB's 26 June 2015 instructions which had been stored on [Law Firm]'s electronic storage system under the JKs' name. She says that the email had not been printed out and placed on the file.[40]

[70] Although Ms GH does not, in her submissions to the Standards Committee, refer to the Deed of Arrangement, she acknowledges that "[s]he knew that she was required to send the JKs' documents to Ms AB before she arranged for the registration of the NZ property". She claims that "[s]he had all of the relevant authorities from Ms AB to attend to the registration".[41]

[71] Relevant to this discussion is cl 4.1 of the Deed of Arrangement which provided that "settlement of the sale of the Australian property and the transfer of the NZ property are interdependent and shall be effected contemporaneously". In other words, each transaction was dependent on the other and settlement of both transactions had to be effected at the same time. The agreement for sale and purchase of the NZ property contained an equivalent provision in cl. 21.0.

[72] In her instructions of 26 June 2015 Ms AB stated "… once I have physically received something [from] you or your clients, the JKs, are currently holding in your or their possession …". Ms GH contends that the word "something" refers to the transfer of the Australian property. She claims that "[o]nce [Ms AB] had received [that transfer] [Ms AB] would clearly have given her instructions to settle".[42]

[73] In my view that may or may not be so. From the time Mr DE briefed Ms GH and handed over the JKs' file to Ms GH in the fourth week of July, she was tasked with concluding the negotiation of the terms of the Deed of Arrangement. From the information provided to this Office, those negotiations largely concerned the amount to be received by the JKs on the distribution of the sale proceeds of the Australian property (cl 3.1(a)), and the details relating to the transfer of the NZ property (cl

[39] Email DE to MN (23 July 2015).
[40] Letter PQ to Lawyers Complaints Service (18 March 2016) at [27].
[41] At [29].
[42] At [30].

4.3). Throughout the negotiations there was no discussion of the "contemporaneous" settlement provision (cl. 4.1) which remained unchanged.

[74] In summary, by the time Mr DE departed from [Law Firm] during the fourth week of July he had received from Ms MN copies of the documents concerning the sale of Ms AB's interest in the NZ property including the "Notice of Possible Conflict of Interest", Authority and Instruction (for registration), and the agreement for sale and purchase, all signed by Ms AB. By 13 August 2015 Ms GH and Ms MN, had by correspondence, finalised the terms of the Deed of Arrangement. Ms GH then forwarded the transfer of the Australian property to Ms MN.

[75] Although Ms GH states that she was unaware of Ms AB's instructions of 26 June 2015, it is more probable than not that she would have been aware of the requirement contained in both the Deed of Arrangement, and in the agreement of sale and purchase of the NZ property that settlement of the sale of Ms AB's interest in the NZ property, and the sale of the Australian property were to be effected "contemporaneously".

[76] Concerning matters a lawyer must attend to comply with a client's instructions, the courts have stated that solicitors' duties are: [43]

> governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

[77] As already noted, Mr DE acknowledges that before his departure from the firm he had briefed Ms GH on the matter. From then she had taken over and concluded the negotiation of the terms of the Deed of Arrangement. It is my view that Ms AB's retainer of Mr DE, and later Ms GH, limited as it was to the "registration aspect" of the sale of Ms AB's interest in the NZ property, necessarily included "within [its] scope" the contractual requirement of "contemporaneous" settlement. It follows that the professional duties owed by Mr DE and Ms GH to Ms AB "in the registration aspect" of the sale of Ms AB's interest in the NZ property included the agreed "contemporaneous" settlement term.

[78] However, without consulting Ms AB for whom she was acting on "the registration aspect" of the sale of Ms AB's interest in the NZ property, on 20 August 2015 Ms GH registered the transfer of Ms AB's interest in the NZ property to the JKs. From the information provided to this Office she did not report this to Ms AB, nor did

[43] *Gilbert v Shanahan Partners* [1998] 3 NZLR 528 (CA) at 537 per Tipping J.

she inform Ms MN. Three months later, after the sale of the Australian property fell through, Ms MN informed Ms GH that the JKs "should not transfer the NZ [property] into their sole names as settlement of the sale of the Australian property has not yet taken place". She requested Ms GH to "…contact [Ms AB] directly if [Ms GH had] any queries…".[44] Ms AB's evidence is that Ms GH did not do so.

[79] I find that by failing to inform Ms AB of the "contemporaneous" settlement requirement and to consult with her about that before registering the transfer that Ms GH contravened rules 7 and 7.1.

(d) Acting for Mr and Mrs JK, and Ms AB

Consistent with the consumer purposes of the Act and lawyers' fundamental obligation to protect clients' interests,[45] r 6 requires that:

> [i]n acting for a client, a lawyer must, within the bounds of the law and [the rules], protect and promote the interests of the client to the exclusion of the interests of third parties.

[80] The principle that applies to a lawyer who acts, or proposes to act for more than one client on a matter has been described as "… an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients conflict".[46]

A more than negligible risk

[81] In such circumstances r 6.1 contains a qualified prohibition that:

> [a] lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[82] The threshold, "a more than negligible risk" above which the prohibition in r 6.1 applies, is very low. It has been described in a decision of this Office as circumstances where there is "no meaningful risk that the obligations owed to the parties would not be able to be discharged", and "a real risk of an actual conflict of interest …".[47]

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[44] Email MN to GH (24 November 2015).
[45] The Act, ss 3(1) and 4. But see s 4(d).
[46] Webb, Dalziel, Cook, above n 26, at [7.1], referring to *Moody v Cox & Hyatt* [1917] 2 Ch 71 at 781 per Lord Cozens-Hardy MR.
[47] *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [27] and [36]. In this context, the word "negligible", which is not defined in either the Act or the Rules means, "unworthy of notice or regard; so small or insignificant as to be ignorable": *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003) Vol 2.

[83] The distinction between contentious and non-contentious matters provides a useful way to assist in determining whether or not a conflict of duty exists for a lawyer, or is likely to arise in a particular situation.[48] In the latter category, where the parties "…are negotiating and significant terms remain to be resolved, it would be more or less impossible for a lawyer to act for both parties … an advantage acquired by one client will often result in a detriment to the other client."[49] The responsibility for making that determination rests with the lawyer concerned.[50]

Informed consent

[84] In circumstances where a lawyer considers that the prohibition in r 6.1 does not apply, r 6.1.1 contains a qualified permission for a lawyer to:

> … act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

[85] Rule 1.2 defines "informed consent" to mean:

> …. consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[86] The process of obtaining informed consent under r 1.2 requires that positive steps be taken by the lawyer who must first, explain to the parties (i) the material risks to each of them of the lawyer acting for the parties and (ii) the alternatives available, for example, each party instructing an independent lawyer; and secondly, believe, on reasonable grounds that the clients understand these issues. Informed consent must be given without influence, and independent from the other clients.[51]

[87] These rules still apply where different lawyers in a firm act for different parties in a matter or a transaction.[52] Moreover, "[a]n information barrier within a practice does not affect the application of, nor the obligation to comply with, rr 6.1 or 6.2".[53]

No longer able to discharge professional obligations

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[48] See Dal Pont, above n, at [7.35], [7.95] and [7.115]; and Webb, Dalziel and Cook, above n 37, at [7.2].
[49] At [7.2].
[50] *Taylor v Schofield Peterson* [1999] 3 NZLR 434 at 440 per Hammond J, applying *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 646; see Webb, Dalziel and Cook, at 7.3.
[51] *Sandy v Kahn*, above n 46, at [41] and [42]; see also Webb, Dalziel and Cook, above n 35, at [7.4].
[52] The Rules, r 6.2.
[53] Rule 6.3.

[88] Under rule 6.1.2, even though a lawyer may have obtained the prior informed consent of all parties concerned to act:

> .. if …it becomes apparent that the lawyer will no longer be able to discharge the lawyer's professional obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

[89] This rule acknowledges the possibility that the interests of the clients for whom a lawyer is acting may or could diverge to the extent that by continuing to act the lawyer considers himself or herself no longer able to carry out of his or her professional obligations owed to all of the clients for whom the lawyer is acting.

[90] For example, a lawyer may (a) receive information from one client which the lawyer would be duty bound to disclose to the other client(s) (see r 7), but in doing so may breach the duty of confidence owed to the client who provided the information to the lawyer (see r 8);[54] or (b) act to protect one client's interest at the expense of another client(s) for whom the lawyer is also acting on a matter (in contravention of rr 6 and 6.1).[55]

[91] In such circumstances r 6.1.2 requires that the lawyer concerned "must immediately inform each of the clients of this fact and terminate the retainers with all of the clients." This Office has stated that "it is unacceptable for a single firm to act for two parties who are in dispute with each other", and that "[o]ther than when proceedings are actually filed there can be no clearer conflict of interest".[56]

[92] Although the backing sheet of the agreement for sale and purchase of the NZ property which Mr DE forwarded to Ms AB's settlement agents in [State] stated that Ms AB's settlement agents in [State] were acting for Ms AB on that transaction, as already discussed, Mr DE and following him Ms GH, acted for Ms AB "in the registration aspect" of the sale of Ms AB's interest in the NZ property to the JKs.[57] Mr DE submits that by acting for Ms AB on this limited retainer that there was a "negligible" or less risk of him being unable to discharge his professional obligations owed to one or more of Ms AB, as vendor, and the JKs, as purchasers.[58]

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[54] See *Black v Taylor* [1993] 3 NZLR 403 (CA) at 419 per McKay J, referred to in *Torchlight Fund No 1 LP (In Receivership) v NZ Credit Fund (GP) Limited* [2014] NZHC 2552, [2014] NZAR 1486 at [15] per Gilbert J.
[55] See *Sandy v* Kahn, above n 46, at [25] and [32].
[56] At [34].
[57] Email DE to Signature Settlements (27 March 2015).
[58] Letter PQ to LCRO (20 September March 2017) at [27].

[93] I am satisfied that at that early stage the limited scope of the retainer carried minimal risk to Mr DE not being able to discharge his professional obligations owed to both Ms AB and the JKs.[59]

[94] Concerning the requirement of "informed consent" noted above, Mr DE forwarded a "Notice of Possible Conflict of Interest" to Ms AB's settlement agent for signature by Mr and Mrs AB. The notice stated that the [Law Firm] had "been nominated by both [Ms AB] and the [JKs] to act in the registration aspect" of the sale of Ms AB's interest in the NZ property to the JKs.

[95] The notice:

(a) Drew attention to the "possible conflict of interest" as the matter progressed.

(b) Explained the nature of the conflict by reference to the ability of a lawyer to discharge his or her professional obligations.

(c) Stated that there may be instances when the interests of one party may be "adversely affected".

(d) Referred to the tension between the duties of disclosure and confidentiality owed to each client.

(e) Informed the parties that in such circumstances [Law Firm] considered that there was no, or a negligible, risk of a conflict, but that if a conflict arose, and could not be resolved, then each party would be referred for independent advice.

(f) Stated that each party had the option of instructing another lawyer from the outset, or at any subsequent stage.

[96] On 19 May 2015 Ms MN forwarded to Mr DE copies of documents signed by Ms AB which included the "Notice of Possible Conflict of Interest".[60]

[97] Mr DE submits that following receipt of Ms AB's instructions of 26 June 2015 that "there was nothing" in those instructions that "would prevent Mr DE being able to discharge his obligations to Ms AB …".[61] He says that the effect of the instruction was

[59] Webb, Dalziel, Cook, above n 26 at [7.5], 217.
[60] Letter (via email) MN to DE (19 May 2015).
[61] Letter PQ to LCRO (20 September 2017) at [10].

"to wait until further instructions before settling". He adds that by the time Ms GH registered the transfer he had left the firm. This implies that in these circumstances Mr DE could not be held responsible for the registration of the transfer by Ms GH on 20 August.

[98] However, Ms AB's instructions of 26 June 2015 were not limited to a withdrawal of her permission to settle the sale of the NZ property. She stated that she gave her instructions "despite Ms MN, on her behalf, having sent a copy of the signed Deed of Agreement to Mr DE."[62] She stated that "ignoring the request" would lead to legal proceedings against Mr DE. In conclusion, she stated that it was for the JKs to choose whether they signed the transfer of the Australian property "… but the main point is I do not give permission to settle the [NZ] property".

[99] Mr DE responded to Ms AB that day requesting that she phone him.[63] No evidence has been produced that a telephone conversation took place. On 6 July 2015 Ms MN informed Mr DE that Ms AB had instructed her that [Ms AB] had forwarded the transfer of the NZ property to her, and had requested the transfer of the Australian property so that both transactions could be settled "contemporaneously". Ms MN also referred to delay by Mr DE.

[100] The trigger for the application of r 6.1.2 is if "it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts". The Committee did not discuss or make comment on this issue.

[101] In my view, given the position taken by Ms AB first, in respect of the terms of the Deed of Arrangement not having been agreed, secondly, the transfers for each property not having been exchanged at that time, and thirdly, Ms MN's allegation of delay, Mr DE would have been placed on notice that he would no longer be able to discharge his professional obligations to both the JKs, and Ms AB. Ms AB's failure to respond to Mr DE's email of 26 June 2015 inviting her to phone him to discuss her instructions presents as another clear signal of the seriousness of her instructions and his position of conflict if he was to continue acting for both clients.

[102] On the information provided to this Office, the conclusion I have reached is that placed in that position, upon receipt of Ms AB's instructions of 26 June 2015 the

[62] Letter (via email) MN to DE (19 May 2015).
[63] Email DE to AB (26 June 2015).

course for Mr DE, as required by the rule, would have been to inform the other client, the JKs, and terminate both retainers.

[103] The combined result of him not doing so, and his subsequent departure from the firm left Ms GH in the identical position of having to complete the transactions where tensions between the parties had clearly risen, and, assuming the risk of acting in one client's interest against the other. As events transpired, that is what happened when Ms GH registered the transfer of the NZ property on 20 August 2015 contrary to the requirement in the Deed of Arrangement that the sales of both properties be settled "contemporaneously".

[104] I find that by continuing to act for the parties after receiving Ms AB's instructions of 26 June 2015 Mr DE contravened r 6.1.2 of the Rules.

Decision

[105] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee in respect of the conduct of Mr DE, and Ms GH is reversed and substituted with the following findings:

(a) In respect of Mr DE, a contravention of r 6.1.2 which constitutes unsatisfactory conduct pursuant to s 12(c) of the Act.

(b) In respect of Ms GH, a contravention of rr 7 and 7.1 which constitutes unsatisfactory conduct pursuant to s 12(c) of the Act.

Orders

Reimbursement of legal fees, airfares

[106] In her complaint, Ms AB sought reimbursement for legal costs of $[AMOUNT] she incurred with Ms MN following registration of the transfer of Ms AB's interest in the NZ property to the JKs. In her application for review she seeks reimbursement of airfares for her travel from [City], [State] to New Zealand and return to "sort this out". Whilst she has provided a statement from Ms MN, she has not provided Ms MN's invoices. She has not provided the actual cost of her airfares.

[107] Section 156(1)(d) of the Act, supplemented by reg 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, provides:

> [w]here it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner … [it may] order the practitioner … to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000].

[108] The section provides that the person who seeks compensation must have "suffered loss by reason of any act or omission of [the lawyer]".

[109] I observe from the information provided to this Office that earlier this year the parties, through their respective lawyers, were endeavouring to reach agreement on how to deal with the Australian property, and other property interests in which they were involved. In my view it does not necessarily follow that Ms AB would not in any event have incurred costs arising from Mr DE's and Ms GH's conduct.

[110] I am not satisfied that there is a clear "causative link" between their conduct and the loss claimed by Ms AB after the sale of the Australian property fell through. It follows that I do not consider that Ms AB has established an entitlement to be compensated for the costs she claims relative to her dispute with the JKs that followed.

Other penalty

[111] In giving consideration as to whether it is appropriate to order a penalty I refer to guidance provided by the Lawyers and Conveyancers Disciplinary Tribunal which has stated that the "predominant purposes [of orders] are to advance the public interest (which include 'protection of the public'), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases".[64]

[112] In Mr DE's case, given the allegation of delay that had already been made by Ms MN, it was clear that Ms AB's instructions of 26 June 2015 were to be taken seriously and acted upon. Instead, it is evident that having unsuccessfully attempted to contact Ms AB, that Mr DE did not follow up the matter, which, as it turned out, led to Ms AB's instructions being misfiled, and as Ms GH states, not passed on to her. I order a fine of $1,000.00 to be paid by Mr DE to the New Zealand Law Society by 17 November 2017, pursuant to s 211(1)(b) of the Act.

[113] Concerning Ms GH, it is my view that a finding of unsatisfactory conduct is sufficient in itself to mark the conduct without further penalty.

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[64] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [22].

Costs

[114] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr DE and Ms GH are ordered to pay costs in the sum of $1,200.00 ($600.00 each) to the New Zealand Law Society by 17 November 2017, pursuant to s 210(1) of the Act.

[115] Pursuant to s 215 of the Act, the costs order may be enforced in the District Court.

DATED this 16th day of October 2017

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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 AB as the Applicant
Mr DE and Ms GH as the Respondents
Mr ST as a Related Person
Mr VW as a Related Person
Mr YZ as a Related Person
[City] Standards Committee.
The New Zealand Law Society