

LCRO 141/2013

CONCERNING

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

AND

CONCERNING

a determination of [city] Standards Committee X

BETWEEN

TM

Applicant

AND

DC

Respondent

DECISION

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

Introduction

[1] Mr TM has applied for a review of the determination by [city] Standards Committee X to take no further action in respect of his complaints about Mr DC.

Background

[2] In July 2011 Mr TM instructed Mr DC to act for him in connection with the proposed purchase of a business in [city] known as [Company] (the business). The business comprised [certain facilities].

[3] Mr DC had been recommended to Mr TM as having expertise in the sale and purchase of healthcare facilities. He also had personal experience in the ownership of associated facilities due to the fact that his family trust owned a one-half share in a [service facility] in [city].

[4] Negotiations for the purchase of the business were long and difficult and both parties have commented on the difficulties in getting to the stage where contracts were signed.

[5] A deposit of \$25,000 was paid to the vendor's solicitor, but as the date for settlement approached, problems seemed to escalate.

[6] Amongst the problems were:

- (a) the proposed [appointee] withdrew;
- (b) the vendor would not accept a valuation which, in terms of the contract, was to establish the price to be paid for part of the business;
- (c) the temporary [staff] manager was going to leave;
- (d) difficulties in attracting qualified staff; and
- (e) poor [customer] numbers.

[7] The matters referred to above are recorded as examples of the types of issues arising. Mr TM asserts he had answers for some or all of the problems but he said in his complaint "it would be fair to say the deal staggered from crisis to crisis". Mr DC agrees.

[8] Mr DC says he also became concerned about his obligations to the [M] bank which was advancing \$1.6 million to Mr TM and/or his companies for the purchase. The bank's instructions to Mr DC included the standard provision which required him to "advise [the bank] immediately if [he became] aware of any specific circumstances which are likely to affect the validity or enforceability of [the] securities, deeds and agreements".¹ A lawyer also has a general obligation to a lender in these circumstances to advise the lender of any matters which might affect data provided to the bank in support of the loan which come to the lawyer's knowledge. This obligation arises due to the fact that a lawyer acts for the bank as well as the client.

[9] Mr DC says he became concerned the bank might withdraw its funding when it became aware of the problems. This would have placed Mr TM in the situation where he could not settle and render him liable to be sued for breach of contract.

¹ Letter of instructions from [M] to DC at [43].

[10] As the settlement date approached Mr DC formed the view that Mr TM should not proceed with the purchase and that the vendor had repudiated the contract by refusing to accept the valuation provided (in terms of the contract) by Mr TM's valuer. He advised Mr TM to cancel the contracts. Mr TM says this advice was forceful to the extent of being overbearing and has described Mr DC as taking over the decision-making process.

[11] Mr TM accepted Mr DC's advice and instructed Mr DC to cancel the contracts. Mr DC gave notice of cancellation. The vendor declined to accept the cancellation and refused to repay the deposit. Mr DC rendered an account² in which he showed his fees as being "\$52,100 reduced to \$25,000" plus GST and disbursements. He had offered to reduce his account as an acknowledgement of the circumstances in which Mr TM found himself. At that stage Mr TM had paid \$1.48 million of his own funds into Mr DC's trust account for the purchase.

[12] Mr TM sought advice from a barrister (Mr B) as to the possibility of recovering his deposit. Mr B advised there were not strong grounds to do so and Mr TM formed the view that Mr DC's advice as to his ability to cancel the agreements had been defective. He then wrote to Mr DC:³

To sum up:

You gave my companies and I the wrong advice. This left my companies and I massively out of pocket and exposed to possible legal action by the vendor.

[13] Mr TM proposed that Mr DC should waive all his fees and pay some of Mr TM's out of pocket expenses.

[14] That letter "came as a shock"⁴ to Mr DC and he withdrew his offer to reduce his fees by 50 per cent.

[15] Mr TM responded:⁵

DC - you have never been given permission or authority to make deductions from money held in trust for me. Please immediately return all of my funds.

[16] Mr DC responded by referring to authorities which had been signed by Mr TM allowing Mr DC to deduct fees from funds in his trust account. He provided copies to Mr TM.

² Account (21 August 2012).

³ Letter from TM to DC (28 August 2012).

⁴ Email from DC to TM (29 August 2012).

⁵ Email from TM to DC (30 August 2012).

[17] The vendor did not refund the deposit but did not pursue Mr TM or his companies for breach of contract either.

Mr TM's complaints

[18] Mr TM lodged his complaint by letter dated 3 December 2012 addressed to the [city] District Law Society. The main points of Mr TM's complaints were:

- (a) Mr DC has a conflict of interest in that he operates the same type of business in close proximity to the business Mr TM was purchasing.
- (b) Mr DC stole the funds deposited into Mr TM's trust account for the sole, and only purpose of purchasing the business.
- (c) Mr DC has during this process changed from being the advisor to the decision-maker.

[19] Mr TM noted his complaints were not limited to these issues. I have carefully reviewed Mr TM's letter of complaint and the remainder of his correspondence with the Lawyers Complaints Service and noted the following additional matters raised by him:

- (a) Mr DC directed Mr TM to pay the deposit to the vendor's solicitor rather than to the agent.
- (b) Mr DC's intention was to sabotage the deal.
- (c) While Mr DC says he considered various matters constituted "serious difficulties" he did not put these to the vendor's solicitor.
- (d) He was outraged that Mr DC took until 14 January 2014 to resign as a trustee of Mr TM's family trust.

[20] No additional matters may be considered on review.

[21] In his letter of complaint Mr TM specifically directed that the:

Law Society must not, independently from me, lay a complaint with the police. This is because on the surface it may appear to the police to be a civil matter, but in reality it is a simple case of a person in a position of trust unlawfully stealing my money.

The Standards Committee determination

[22] The Standards Committee addressed the three major issues raised by Mr TM in his complaint.

[23] It found no evidence of a conflict of interest on the part of Mr DC. It noted the [service facility], which was part owned by Mr DC, “is an entirely different kind of facility to [the business] and is located a considerable distance from [city]”.⁶ The Committee considered that the “most significant” fact in connection with this complaint was “Mr TM’s acknowledgement that he was aware of Mr DC’s involvement in the [service] sector from the outset and that in fact was one of the reasons he chose to instruct him”.⁷

[24] With regard to the deduction of fees, the Committee noted and set out the provisions of s 110(1)(b) of the Lawyers and Conveyancers Act 2006 (the Act) and regs 9, 9.3 and 10 of the Trust Account Regulations.⁸ These are not set out in this decision as they are included in full in the Standards Committee determination.

[25] The Committee then referred to *A v Z*⁹ and the High Court judgment of *Heslop v Cousins*.¹⁰ Again, I have not summarised either of these two decisions as they are fully and adequately discussed in the Standards Committee determination.

[26] The Standards Committee determined Mr DC was not in breach of the Act or regulations as Mr TM had provided Mr DC with written authority to deduct his fees.

[27] The Committee did not seem to directly address Mr TM’s complaint that Mr DC had assumed the role of the decision maker, but determined that Mr DC had acted competently and carefully to protect and assist Mr TM.

[28] The Committee concluded that Mr DC was not in breach of any professional standards and determined to take no further action in respect of Mr TM’s complaints.

⁶ Standards Committee decision (29 April 2013) at [11].

⁷ At [11].

⁸ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

⁹ *A v Z* LCRO 40/2009.

¹⁰ *Heslop v Cousins* [2007] 3 NZLR 679.

The application for review

[29] Mr TM applied for a review of the Standards Committee determination and identified five points to be addressed:

1. the high cost of the legal advice for a failed transaction;
2. the competence of the advice given, “especially as it was given in a very forceful manner”;
3. the “authority ambush with its consequential unconscionable behaviour”;
4. the unauthorised use of his funds held in trust;
5. the “double dipping” into the funds held on trust.

[30] Mr TM also referred to specific parts of the Standards Committee determination with which he had disagreed. Each of these issues are addressed in this decision.

[31] The outcome sought by Mr TM is somewhat academic as the determination of the Standards Committee to take no further action is confirmed on review. However, it is assumed Mr TM sought to have the proposal which he put to Mr DC in his letter dated 28 August 2012 (as to waiving his fees and paying costs) into effect.

Review

[32] An applicant-only hearing took place by telephone with Mr TM on 25 May 2017. Mr DC was not required to join the hearing and did not exercise his right to do so. The hearing was conducted by Mr Vaughan acting as a delegate duly appointed pursuant to clause 6 of schedule 3 of the Act. The final determination of the outcome of this review as set out in this decision is made after full consideration of all matters by myself following discussion with Mr Vaughan.

The allegation of incompetence

[33] In his complaint, Mr TM says:

Two additional Sale and Purchase Agreements were drafted by DC. In both cases I believe they were faulty and left me exposed. It may be part of the rationale behind DC's covetous behaviour in wanting to cancel the deal.

[34] It was ascertained at the review hearing that Mr TM was referring to his exposure to suit by the vendor for breach of contract. That exposure arises not by reason of any faulty drafting of the agreements, but by reason of the simple fact that Mr TM had entered into contracts to purchase the business.

[35] Mr TM also alleges that the advice provided by Mr DC as to the grounds for cancelling the contract was wrong. This allegation followed on from advice received from Mr B that the grounds for cancelling the contract were not strong enough to enable him to advise Mr TM to pursue recovery of the deposit which the vendor had retained.

[36] Any finding against Mr DC would be a finding of unsatisfactory conduct and the definition of unsatisfactory conduct in s 12(a) of the Act is the most relevant for the purposes of this decision. That section defines unsatisfactory conduct as "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".

[37] The detail of Mr B's advice is not available and it would be exceeding the role of this Office to enter into a consideration of whether or not the contract had been validly cancelled. However, Mr B's advice would no doubt have taken into account the economics of commencing proceedings to recover the deposit and whether or not commencement of proceedings would "encourage" the vendor to issue a counter-claim against Mr TM and/or his companies. The fact the vendor did not institute proceedings against Mr TM and/or his companies is an indicator that the vendor did not consider there were firm grounds to do so which serves to reinforce the advice provided by Mr DC.

[38] The allegations of incompetence cannot be sustained.

The alleged conflict of interests

[39] At the review hearing, Mr TM asserted that Mr DC "had never liked the place from the word go". That is perhaps a different way of presenting Mr DC's comments as to the drawbacks of the proposed purchase which the parties have agreed seemed to accumulate as the transaction proceeded towards settlement.

[40] The issues which Mr DC identified included:

- (a) location;
- (b) withdrawal of [appointee];
- (c) potential resignation of [staff] manager;
- (d) difficulties in attracting qualified staff;
- (e) competition;
- (f) conversion of the [facilities] into occupation licences requiring additional capital.

The above matters are not comprehensive.

[41] In his text, *Ethics Professional Responsibility and the Lawyer*,¹¹ Professor Duncan Webb says:

A lawyer is obliged to provide frank and objective advice. To do less would be to fail in the duties owed to the client ... Rule 5.3 explicitly requires that the lawyer give objective advice, but the need for the lawyer to exercise proper “professional judgment” runs through all the rules.

[42] Mr DC would have failed in his duties to Mr TM if he did not express his misgivings about the proposed purchase. In the circumstances where there were many and varied potential problems with the transaction and/or the ongoing success of the business, it may have seemed to Mr TM that Mr DC was opposed to the transaction proceeding at all.

[43] In searching for an understanding as to why this should be, Mr TM has rationalised that Mr DC was opposed to the transaction because of his interest in the [city] hospital. This has translated into the allegation that Mr DC had a conflict of interest in acting for Mr TM in relation to the proposed purchase.

[44] There is an inherent flaw in this reasoning. The business Mr TM wished to purchase was an existing business and whether or not Mr TM purchased it, the business would continue to be operated, whether by the vendor or by another purchaser. The Standards Committee identified specific reasons why there was no conflict between the two businesses and these are also accepted as valid reasons for why there was no conflict.

¹¹ Duncan Webb, Kathryn Delziel and Kerry Cook *Ethics Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, 2016) at 189.

[45] At the review hearing Mr TM advised that the vendor and operator of the business at the time was a corporation which did not have an “on the ground” presence. The business was not running well and consequently Mr TM considered the agreed purchase price to be favourable to him, being somewhat at an undervalue. Mr TM intended to be an owner/operator and to aggressively pursue clientele for the business. He made the point that the nature of the business meant that every occupied bed made a big difference towards the overall profitability of the business. He considered that Mr DC was concerned that Mr TM’s proposals to be more aggressive in pursuing clientele would affect his own business in [city].

[46] Before any adverse finding may be made against a lawyer any allegations must be capable of being proved to the requisite standard of proof. The speculative nature of Mr TM’s allegations, coupled with the observations of the Standards Committee, means that the allegations of a conflict of interest cannot be sustained.

Decision-maker or advisor?

[47] Having formed the view that Mr DC was concerned about potential competition from Mr TM, Mr TM alleged that Mr DC was so forceful with his advice to cancel the contracts that he became the decision-maker, rather than remaining Mr TM’s legal advisor.

[48] That allegation means that Mr TM became incapable of resisting Mr DC’s conviction that Mr TM should cancel the agreements.

[49] At the commencement of the review hearing Mr TM was requested to provide some information as to his business background. He advised that:

- (a) After leaving school, he had undertaken an apprenticeship as a fitter and turner.
- (b) In 1981, he had acquired and operated a service station.
- (c) He then purchased and operated a [business] in [city].
- (d) Following that, he purchased another service station and operated that for some years.
- (e) At that stage, he undertook and completed a Bachelor of Laws degree.

- (f) Following completion of his degree, he sought (unsuccessfully) employment in a law office.

[50] It was at that stage Mr TM entered into negotiations to purchase the business. He advised he is single and has no family. Mr TM says:¹²

I do however have a wide, varied business and worldly experience having been involved with [services] at the [service facility] in [city] as far back as 1978.

[51] Mr TM does not go so far as to say Mr DC failed to follow instructions. That would be a clear breach of the Conduct and Client Care Rules.¹³ Mr TM says he felt pressured by Mr DC to cancel the agreements to the extent that, in effect, Mr DC himself made the decision to do so.

[52] The overall picture of Mr TM is a person who has experience in the business world, having owned and operated several businesses. It is understandable he relied heavily on Mr DC, as he had no one else to share and discuss matters with. That, however, only serves to highlight the responsibilities undertaken by Mr DC when acting for Mr TM and the reliance that Mr TM placed on his advice. If Mr DC had not lived up to these expectations Mr TM would quite justifiably complain that Mr DC had breached his duty to provide full and frank advice. It may also help to explain why it is that Mr TM feels Mr DC became the decision maker.

[53] However, Mr TM's allegations of Mr DC as overbearing and becoming the decision maker rather than legal advisor present an unfair portrayal of the advice provided by Mr DC. I cannot ascertain anything other than the fact that Mr DC was fulfilling his duty to Mr TM to ensure he was fully and properly advised.

[54] Mr TM's complaints in this regard cannot be sustained.

Fees

[55] At the review hearing, Mr TM indicated that the issue relating to the fees charged and the deduction of fees from funds held by Mr DC in his trust account, was at the core of his complaints. In the review application, Mr TM made reference to the "high cost of the legal advice for a failed transaction".¹⁴ This presents as a complaint about the quantum of Mr DC's fees. However, there is nothing in the complaint and material provided to the Standards Committee that indicated Mr TM was complaining

¹² Emailed letter from TM to Legal Complaints Service (8 February 2013).

¹³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁴ Letter accompanying application for review at 1.

that Mr DC had overcharged. Mr TM's complaints were that Mr DC had unilaterally withdrawn his offer to accept one half of his fees due to the circumstances in which Mr TM found himself and Mr DC had then deducted fees from funds held for Mr TM without authority and in breach of professional ethics.

[56] Mr TM is aware that no new matters may be addressed on review and consequently this review does not address the issue of fees as a simple complaint of overcharging.

Withdrawal of the offer to accept a reduced payment

[57] Mr DC's account dated 20 August 2012 was for \$52,100, reduced to \$25,000 plus GST and disbursements. The account was sent under cover of an email in which Mr DC advised that the account was reduced "provided our account is settled in full within 30 days of the date hereof, otherwise our full fee is payable".¹⁵ Mr TM observes that if Mr DC believed he had a valid authority to deduct fees then there was no need to include the proviso as Mr DC could have ensured his fee was paid. However, once Mr DC became aware of Mr TM's dissatisfaction with his services¹⁶ he withdrew the offer to accept half his fee,¹⁷ but indicated in a follow up email on the same day that he would still honour that proposal if Mr TM's solicitor advised within 14 days that Mr TM's "threats" of legal proceedings were withdrawn. That did not occur.

[58] The consequences of the series of communications following receipt of Mr DC's account reduce to a decision as to whether Mr DC was bound by his offer to reduce his fees. This is a matter of contract. Mr TM refers to it as such in his supporting letter attached to the review application¹⁸ and elsewhere. However, in his final letter on review¹⁹ Mr TM says, in response to a comment by Mr DC:

DC is trying to suggest my letter of this date was in the form of a contractual 'offer and acceptance' type of situation. This is an incorrect interpretation of the rules of contract. It is also an incorrect interpretation of what was stated in my letter.

[59] Whether or not Mr DC was bound by the offer made in his email of 21 August 2012 is a matter of contract. This Office cannot engage in determining matters of contract. No professional standards issues arise unless and until the underlying

¹⁵ Email from DC to TM (21 August 2012).

¹⁶ Letter from TM to DC (28 August 2012).

¹⁷ Email from DC to TM (29 August 2012).

¹⁸ At [6].

¹⁹ Letter from TM to LCRO (8 August 2013).

contractual dispute is determined and that is a matter that must be determined elsewhere.

The deduction of fees from funds held in the trust account

[60] Mr TM has referred to the deduction of fees by Mr DC from funds held in his trust account as “theft”. Theft is a crime and the body charged with investigations of a crime is the Police. Mr TM advises he has not laid a complaint with the Police, perhaps, understandably, for the reason that he considers the Police would not be inclined to investigate until the complaints process has run its course. However, if Mr TM wishes to pursue allegations of theft, they must be directed to the Police.

[61] Mr TM also refers to the deduction of fees by Mr DC as an “offence” as specified in s 110(4) of the Act. Before that can be considered, there has to be a breach of the provisions of s 110 which I now address.

[62] Mr TM signed four letters and terms of engagement addressed to him and each one of his separate companies. The terms of engagement included the following authority:

The client authorises the firm to deduct any outstanding fees and disbursements from funds the firm may be holding in the firm’s trust account on behalf of the client.

[63] This constituted clear authority for Mr DC to deduct his fees. However, Mr TM argues that the authority was defective because:

- (a) Mr DC had “slipped in an authority”²⁰ amongst numerous documents which he had signed on 9 December 2012, the implication being that Mr DC had not drawn his attention to what it was he was putting before Mr TM to sign.
- (b) This was unethical and unconscionable behaviour on the part of Mr DC.²¹ The alleged unethical behaviour by Mr DC is at the core of Mr TM’s complaints.
- (c) Mr TM instructed Mr DC to remit his funds back to him thereby countermanding the authority to deduct fees.

²⁰ Letter of complaint (3 December 2012) at 3.

²¹ Above at 4.

[64] It is undisputed that the terms of engagement contained a statement that Mr DC was able to deduct fees from funds held in trust. There is no requirement to have terms of engagement signed but Mr DC went a step further (acting prudently and as recommended by New Zealand Law Society and this Office)²² and had Mr TM sign and accept the terms of engagement.

[65] That is a difficult obstacle for Mr TM to overcome. Mr DC had written authority to deduct his fees and although it was not expressed to be irrevocable, it was given at a time when substantial work had been undertaken by Mr DC.

[66] Mr TM had been involved on a daily basis with the work Mr DC was undertaking and cannot have failed to be aware that a substantial amount of work was being carried out. It is unconscionable for Mr TM himself to suggest that Mr DC should do all of the work for no fee as proposed by him in his letter of 21 August 2012. Mr DC is entitled to be paid for his work.

[67] I have already established that Mr TM has not complained that Mr DC had overcharged for the work carried out. Mr TM's complaints relate to the retraction by Mr DC of the offer to reduce his fees and the deduction of fees from the funds held. In *AR v ZE* it was suggested by the LCRO that the authority to deduct should be expressed as being irrevocable but there is a measure of logic in the submission made by counsel for the lawyer in that case that a lawyer cannot be expected to proceed to undertake work on the basis of an authority if that authority could be "countermanded as the whim of a client".²³

[68] The case of *Heslop v Cousins*²⁴ has also been referred to by the parties in this matter and by the Standards Committee. In simple terms, that case establishes that if funds are held by a lawyer for a specific purpose then the lawyer is not entitled to deduct fees from those funds. The funds must be held for a general purpose before that can be done. In the present case, the funds had been paid into Mr DC's trust account for the purpose of completing the purchase. However, once the contract had been cancelled and it was clear the transaction was not going to proceed, it can be said the funds were held for general purposes and therefore available to fulfil the direction given by Mr TM for fees to be deducted.

[69] Having considered all of these issues what is left is:

²² *AR v ZE* LCRO 83/2012 at [55].

²³ At [56].

²⁴ Above n 10.

- (a) Mr DC carried out considerable work for Mr TM.
- (b) Mr TM authorised Mr DC, in writing, to deduct fees from funds held.
- (c) Mr DC held funds for general purposes after the proposed purchase was cancelled.
- (d) Mr TM has not objected to the quantum of Mr DC's fees.

[70] It is acknowledged here that each of these statements is only arrived at after some fine points are discussed and decided. However, before there can be an adverse finding against Mr DC there must be a conclusion that unsatisfactory conduct has been established on a balance of probabilities. This requires a degree of certainty that cannot be established in the present instance. The determination of the Standards Committee to take no further action in respect of these issues is confirmed.

Additional matters

[71] The main elements of Mr TM's complaints have been addressed above. In paragraph [19] above I noted some additional issues raised by Mr TM in his complaints which have not otherwise been specifically addressed. I now do so:

- (a) *Payment of the deposit*

There is no evidence provided in respect of this issue and it is difficult to see how this affected the outcome of matters as a real estate agent holds a deposit on behalf of the vendor and is subject to direction by the vendor.

- (b) *Mr DC's intention was to sabotage the deal*

This is an extension of the conflict of interest and decision-maker complaints.

- (c) *"Serious" difficulties not put to the vendor's solicitor*

This is a somewhat contradictory complaint in that if additional matters were put to the vendor's solicitor, this would only have served to put further obstacles in the path of the transaction proceeding. In any event, Mr TM advised at the review hearing that all issues could have been resolved.

(d) *Expression of outrage*

Mr TM expressed outrage that Mr DC took until 14 January 2013 to resign as a trustee of his family trust. This issue was not pursued before the Standards Committee or on review. There is no copy of the trust deed on file. It is likely, however, that the settlor of the trust (presumably Mr TM) would have had the power to terminate and appoint trustees and was able to exercise the power at any time to terminate Mr DC's appointment. It is likely it was not necessary to wait for Mr DC to resign.

(e) *The letter and terms of engagement*

In the course of conducting this review an issue has presented which the Standards Committee did not address. The letter and terms of engagement were presented to Mr TM on 9 August 2012. Mr DC had commenced acting for Mr TM in July 2011, more than 12 months previously. Rule 3.4 of the Conduct and Client Care Rules requires the information in the letter and terms of engagement to be provided "in advance" of commencing work for a client. This was not a matter of complaint or addressed by the Standards Committee. Although this Office has all of the powers of the Standards Committee, or could return this issue to the Standards Committee to consider and determine, I have resolved to exercise my discretion not to do so. It is some five years since Mr TM made his complaints and no useful purpose would be fulfilled by prolonging the complaint in this regard. If Mr TM wishes to pursue this issue he should communicate with the Lawyers Complaints Service.

[72] It is not necessary or appropriate to pursue any of the above matters on review.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the outcome of this review is that the determination of the Standards Committee is confirmed.

DATED this 7TH day of June 2017

D Thresher
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:

Mr TM as the Applicant
Mr DC as the Respondent
[city] Standards Committee X
New Zealand Law Society