LCRO 152/2016

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**Mr and Mrs BL** Applicants
AND	**HJ** Respondent

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

DECISION

Introduction

[1] Mr and Mrs BL have applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of their complaint concerning the conduct of Mr HJ.

Background

[2] In May 2007 Mr and Mrs BL purchased Lot 10 of a new subdivision of land at [Address], from [Company A], the vendor. Mr HJ, who was a partner at [Law Firm 1], [Town], acted for them.

[3] The agreement for sale and purchase (the agreement), which was signed on 25 May 2007, was not subject to any conditions save for an implied statutory condition under s 225 of the Resource Management Act 1991 (RMA).[1]

[4] Mr BL says that he telephoned Mr HJ "sometime in April 2007 – May 25th 2007" to inform Mr HJ that Mr and Mrs BL "were looking at a section in [XXX] subdivision".[2]

[5] Mr HJ received Mr and Mrs BL's copy of the agreement on or about 3 July 2007. He informed Mrs BL by phone that he had received the agreement and forwarded a copy to them around that time.

[6] The agreement made provision for land covenants to be noted on the titles, when they issued, to Lots 1-10 on the subdivision plan. The intention of the land covenants was to regulate the type of dwelling that could be built on the subdivision lots. This is often referred to as a building scheme. The residue of the land being retained by the vendor, Lot 11, was not included in the building scheme.

[7] From the time Mr HJ received the agreement until early November 2007, Mr K, a lawyer employed by Mr HJ's firm, acted for the vendor. Mr K moved to another firm in [Town], [Law Firm 2], in November 2007 where he continued to act for the vendor.

[8] Mr HJ settled the purchase in December 2008 and attended to the registration of Mr and Mrs BL as the owners of Lot 10.

[9] At some time following settlement the vendor planted pine trees on Lot 11, the adjoining residue land retained by the vendor. By 2013, the trees started blocking out sea views from Lot 10 purchased by Mr and Mrs BL.

[10] Mr and Mrs BL claimed that before they signed the agreement, the vendor's marketing material advertised that "The elevated sub-division features 10 lifestyle blocks on a 77-hectare property set in park like surrounds with spectacular views",[3] and

---

[1] Resource Management Act 1991 s 225 - where an agreement is signed before local authority approval of the survey plan of subdivision, the purchaser is provided with an opportunity to cancel, or rescind the agreement in the circumstances stated in that section.
[2] Email BL to Complaints Service (9 February 2016) at [1](a).
[3] [Ms X] *"[xxxxxxxxx] at new subdivision"* The [Town] Herald (New Zealand, [Date] at 2.

"… breathtaking views … five of the sites feature sea views looking out over [Area] with two other sites also looking back over [Bay]".[4]

[11] Mr and Mrs BL allege that Mr HJ did not explain the terms of the agreement, including the land covenants, to them. They also claim that Mr HJ did not inform them that Mr K acted for the vendor, and did not obtain their consent for the firm to act for both clients.

The complaint

[12] Mr and Mrs BL lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 15 September 2015.

[13] They allege that Mr HJ:

(a) Acted for them on the purchase when at the same time Mr K acted for the vendor. They claim that Mr HJ did not inform them that Mr K was acting for the vendor and did not obtain their prior informed consent for different lawyers in the firm to act for both parties.

(b) Upon receipt of their copy of the agreement, did not review with them the land covenants, consent notices or the subdivision conditions to ensure that they had an appropriate understanding of the terms of the agreement. In particular that Mr HJ did not ensure that the "covenants promised in the marketing by the Developer were included on the Title".[5]

[14] Mr and Mrs BL seek:

(a) To have the land covenants placed on the title to Lot 11 retained by the vendor to protect the views from those lots on the subdivision which previously enjoyed views of the sea before pine trees were planted on Lot 11; and

(b) Removal of those pine trees.

Standards Committee decision

[15] The Standards Committee delivered its decision on 30 June 2016 and 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.

[4] Bayleys, "[Address]" (undated).
[5] Email BL to Complaints Service (15 September 2015) at 2.

[16] In reaching that decision, the Committee identified two heads of complaint, namely, that Mr HJ failed:

(a) To protect [Mr and Mrs BL's] interests by not ensuring that land covenants had been registered against the title to Lot 11 to protect their views.

(b) To advise them of a potential conflict of interest because another lawyer in Mr HJ's firm was acting for the vendor.

Land covenants issue

[17] The Committee noted that the land covenants that had been registered against the titles to the lots in the subdivision, except Lot 11 retained by the vendor:

(a) Concerned the type of dwelling permitted to be built on the subdivision lots; and

(b) Did not contain covenants designed to protect the views from the lots.

[18] The Committee disagreed with Mr HJ's submissions that because he had not been consulted by Mr and Mrs BL before they signed the agreement, that his retainer was limited to the conveyancing aspects of the transaction, namely, the transfer of Lot 10 to Mr and Mrs BL.

[19] The Committee observed that the subdivision was a "significant" development in [town] and had received local media coverage. It was the Committee's view that Mr HJ would have been aware of "the advertised attractions of the subdivision, in particular the views".[6]

[20] The Committee's conclusion on this issue was that although the agreement did not contain any conditions,[7] "a prudent lawyer would have checked the Agreement for protective covenants". In the Committee's view, if advised, Mr and Mrs BL "could have considered options in relation to the Agreement including refusing to complete settlement unless further protective covenants were included".[8]

[21] In the Committee's mind, although they may have risked both losing the deposit they had paid and being sued by the vendor for damages or specific performance, "their loss … may have been less than the decrease in value of their

[6] Standards Committee decision at [15].
[7] Save for the statutory condition contained in s 225 Resource Management Act 1991.
[8] At [16].

property arising from the obstructed views".[9]

Conflict issue

[22] In the Committee's view, because Mr HJ acted for Mr and Mrs BL, and Mr K acted for the vendor, "a conflict of interest existed at the time the Agreement was signed".[10]

[23] The Committee considered that it did not necessarily follow that because the backing page of the agreement recorded both lawyers at the firm acting for the different parties that Mr and Mrs BL were aware of this fact, and that their failure to raise this as an issue constituted their "prior informed consent". The Committee concluded that it was Mr HJ's obligation to bring this issue to the attention of Mr and Mrs BL.

[24] The Committee observed that if Mr HJ's conduct had occurred after 1 August 2008 then it would have made a finding of unsatisfactory conduct against him. However, the Committee concluded that the degree of seriousness of his conduct did not reach the threshold necessary under s 351(1) of the Act for disciplinary consequences to follow.

Application for review

[25] Mr and Mrs BL filed an application for review on 4 July 2016. The outcomes sought are that:

(a) Mr HJ be required to apply for a court order under ss 333 to 337 of the Property Law Act 2007 for land covenants to be registered on the title to Lot 11 retained by the vendor "to protect our property (tree removal)"; or

(b) Compensation to enable them to purchase Lot 11.

[26] In support of their application they contend that:

(a) There was a conflict of interest at the time Mr HJ commenced acting for them because Mr K, another lawyer in Mr HJ's firm, also acted for the vendor.

(b) After 1 August 2008, the date the Act commenced, Mr HJ did not notify them of this conflict. Had he done so, then they would have had "the opportunity to challenge Settlement" and decide whether to refer the

[9] At [16].
[10] At [18].

matter to another lawyer to ascertain whether they could "challenge the covenants not in place".[11]

(c) The Standards Committee had omitted to acknowledge that Mr HJ had not informed them of the conflict at any time.

Mr HJ's response

[27] Mr HJ seeks confirmation of the Committee's decision of no further action.[12] He says that "in general terms" he accepts the Standards Committee's decision with the following exceptions:

(a) He denies any knowledge of "the advertised attractions of the subdivision, and in particular the views".[13]

(b) Any imputed knowledge of the media publicity of the subdivision. He says that the Committee's finding in this respect has "no factual or evidential foundation" and "is speculative".[14]

[28] He claims that any failure to disclose the initial conflict was "not intentional".[15]

Review on the papers

[29] 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.

[30] 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.

---

[11] Application for review, Part 7.
[12] Letter HJ to Legal Complaints Review Officer (20 July 2016).
[13] At [3](a).
[14] At [3](b).
[15] At [4].

Nature and scope of review

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

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

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

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

[33] 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

[34] The issues for consideration on this review are:

---

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

Conflict issue

(a) Whether Mr HJ contravened rules 1.04 and 1.07 of the previous New Zealand Law Society Rules of Professional Conduct[18] by acting for Mr and Mrs BL when at the same time Mr K, also at [Law Firm 1], acted for [Company A], the vendor.

Land covenants issue – obtain instructions and consult with the client

(b) Whether Mr HJ explained to Mr and Mrs BL the meaning and effect of the agreement they had signed, in particular the nature of the land covenants, the description of the land that both bore the burden of, and received the benefit of the covenants: rule 1.09 of the previous Rules of Professional Conduct.

Relatedly, whether there was any limitation on Mr HJ's retainer that relieved him of that duty.

Because the purchase was not settled until December 2008, whether this duty continued under the regulatory regime prescribed in the Act which commenced on 1 August 2008: rules 7, 7.1.

Analysis

Conflict issue - pre-1 August 2008

(a) Transitional provisions of the Act

[35] Because Mr HJ's conduct is alleged to have taken place before 1 August 2008, the transitional provisions in the Act must be considered,[19] namely, whether a lawyer's conduct is such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982 (LPA).[20]

[36] In such circumstances: [21]

> … then the conduct is treated as subject to a complaint under the Act, and is to be considered by a Standards Committee under current standards and in light of the range of determinations that a Standards Committee could make in relation to the complaint under s 152(2) of the Act.

[18] Rules of Professional Conduct for Barristers and Solicitors, 7th Ed (consolidated).
[19] Lawyers and Conveyancers Act 2006, s 361(1). .
[20] *Waikato Bay of Plenty Standards Committee 2 v XXX* [2010] NZLCDT 14 at [64].
[21] *C v Legal Complaints Review Officer* [2012] NZHC 3528, [2013] NZAR 398 at [50].

(b) Conflict of duty

[37] 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".[22]

[38] Rule 1.04 of the previous Rules of Professional Conduct provided that "A Practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both parties". The rule represents an expression of the duty of loyalty to a client, namely, not to act for another client concurrently where the interests of the clients conflict.[23]

[39] Although it may be contended that the words "A practitioner …" suggest that the rule does not extend to two (or more) lawyers in a firm acting for two (or more) parties to a matter, the commentary to the rule warned that it was:[24]

> … difficult to guard against conflicts of interest through clients being represented by different practitioners in the same firm. There is a danger that information may be imparted by one client to a practitioner in the firm to which the firm should not have access having regard to the interest of another client who is represented by a different practitioner in that firm …

[40] This point was considered in an earlier decision from this Office when, in similar circumstances, two lawyers in the same firm acted for the vendor (a retirement village) and the purchaser respectively of a unit in a retirement village. The transaction took place in 2006 so that the previous Rules of Professional Conduct applied.[25] As in this review, the purchaser had signed the agreement without first consulting his lawyer. The purchaser's complaints included that the lawyer acting for him had not advised him about the form of ownership of the unit and that he was not aware that another lawyer in the firm was acting for the retirement village.

[41] Concerning the second limb of the complaint, the LCRO stated that while "… rule [1.04] in that form was not in force at the time … it is indicative of the pre-existing applicable professional standards. In particular, that the rule recognises that a lawyer or firm should not act for two parties in one transaction…".[26]

---

[22] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, 2016, LexisNexis, Wellington) at [7.1]. .
[23] Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at [7.1].
[24] Above n 18.
[25] *Campbeltown v Dunoon* LCRO 129/2009.
[26] At [32]. Since 1 August 2008 the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 have provided that the conflict rule in "Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than one party".

[42] In finding that there was a conflict between the interests of both clients the LCRO stated that "they were parties on opposite sides of a transaction concerning an interest touching on land and were at arms length. Where "… the interests were in opposition rather than congruence".[27]

[43] Concerning the first limb of the complaint, the LCRO did not accept the lawyer's argument that the lawyer's "role was therefore entirely transactional and there was no scope for him to provide advice on the merits of the transaction".[28]

(c) Informed consent

[44] If, under previous rule 1.04, "a lawyer [or firm]" considered that a conflict of duty owed to each of the clients either did not exist, or that the risk of a conflict was remote, a prerequisite to acting for both clients was to obtain the "[prior] and informed consent of both clients".[29] This obligation or requirement was explained by the Court as:[30]

> … a solicitor must always: (1) recognise a conflict of interest, or a real possibility of one; (2) explain to the client what that conflict is; (3) further explain to the client the ramifications of that conflict (for instance, it may be that [the lawyer] could not give advice which ordinarily [the lawyer] would have given); (4) ensure that the client has a proper appreciation of the conflict, and its implications; and (5) obtain the informed consent of that client. Then, and only then, can the solicitor act.

[45] The Court added that:[31]

> … after the particular conflict has been identified by the legal adviser – that the client must knowingly and intelligently give consent to that adviser acting. It follows that the client must appreciate that the lawyer is acting under a disability, but the client must nevertheless take upon [his/her] head the possible consequences of hobbled advice. In considering whether the requisite element of consent has been reached, the degree of sophistication of the particular client must therefore be relevant.

[46] Previous rule 1.07 provided that:

> In the event of a conflict or likely conflict of interest among clients, a practitioner shall forthwith take the following steps: (i) advise all clients involved of the areas of conflict or potential conflict; (ii) advise the clients involved that they should take independent advice, and arrange such advice if required; (iii) decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved.

---

[27] At [34].
[28] At [33].
[29] Above n 25, at [34].
[30] *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (HC) at 440.
[31] At 440.

[47] While, in particular circumstances, a limitation in the scope of a lawyer's retainer may have the effect of "curtailing the nature"[32] of the lawyer's legal work required by the client, for the reasons expressed below in relation to the next issue, I do not consider that Mr HJ acted for Mr and Mrs BL under a limited retainer.

[48] From the information provided to this Office, there is no evidence that, upon receiving Mr and Mrs BL's copy of the agreement, Mr HJ considered whether previous rule 1.04 applied and, as required by previous rule 1.07, informed them of the conflict or potential conflict.

[49] Equally, there is no evidence that he took steps to obtain the parties' prior informed consent as required by the rule before he commenced acting for Mr and Mrs BL. The onus on a lawyer of establishing that informed consent was obtained has been described as a heavy one.[33] Apart from forwarding a copy of the agreement to Mr and Mrs BL on or about 3 July 2007, no other communication, from that date until settlement of the purchase 17 months later in December 2008, has been produced.

[50] Mr HJ argues that there was no conflict of interest to consider because the agreement he received was unconditional, no action was required by him until settlement and no issue arose in the meantime that alerted him to any concerns that Mr and Mrs BL may have had with the agreement.

[51] This approach does not however take into account that the application of previous rule 1.04 prohibited a lawyer from acting for more than one party in the same transaction or matter without their prior informed consent. Whilst a lawyer acting for more than one party on a matter may have considered that the risk of a conflict of duty was low, before acting for both parties, the lawyer concerned (or as in this case each lawyer in the firm) was required to obtain the parties' informed consent.

[52] Upon receiving the agreement, Mr HJ would have been aware from reading the backing sheet of the agreement that Mr K of his firm was acting for the vendor. That knowledge ought to have prompted Mr HJ to report this fact to Mr and Mrs BL, explain the nature of the potential for a conflict of duty, and whether this may impose any constraint as to the advice that they may require, and obtain their informed consent.[34]

---

[32] Above n 23, at [7.5].
[33] Above n 30, at 440.
[34] Above n 25, at [40].

[53] I agree with the Committee's conclusion that Mr HJ did not raise this matter with Mr and Mrs BL as the rule required him to. In addition to that, Mr HJ did not request their informed consent before he commenced acting for them.

Conflict issue - post 1 August 2008

[54] Mr K moved from [Law Firm 1] to [Law Firm 2] in November 2007. From that date the vendor's retainer with [Law Firm 1] ended.

[55] As noted above, where different lawyers in a firm act for different clients on the same matter, because there is an inherent risk of one client's information finding its way to the other client,[35] there is "a ready inference that confidential information is shared by all members of the firm.[36]

[56] For this reason, after Mr K moved to [Law Firm 2], Mr HJ continued to owe a duty of confidence to the vendor and a corresponding duty of disclosure to Mr and Mrs BL. Conversely, Mr K owed a duty of confidence to Mr and Mrs BL and a corresponding duty of disclosure to the vendor.[37]

[57] The duties of disclosure and consultation Mr HJ owed Mr and Mrs BL are considered next.

Land covenants issue – obtain instructions and consult with the client

[58] Mr and Mrs BL contend that Mr HJ did not provide them with any advice or discuss the covenants or consent notices "as the documentation came over his desk" and that they were "not given the chance to challenge our agreement before settlement".[38]

[59] In response, Mr HJ argues that Mr and Mrs BL signed an unconditional agreement "without seeking [his] advice some six weeks before [he] ever saw the contract which contained the proposed land covenants". He says that they were "therefore contractually bound to complete the purchase with the land covenants registered against the title when it issued", and that his "retainer was limited to conveyancing matters which were completed when the transaction was settled on 4 December 2008".[39]

---

[35] Previous rule 1.04, commentary (3)
[36] Above n 22, at [9.2].
[37] Rules 8, 8.1 (duty of confidence); rules 7, 7.1 (duties of disclosure, consultation).
[38] Email BL to Lawyers Complaints Service (9 February 2016) at [8].
[39] Letter HJ to Complaints Service (10 November 2015) at [9].

(a) Scope of the retainer

[60] Concerning the scope of a lawyer's retainer, the Court has stated that:[40]

> Solicitors' duties are 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 express 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.

[61] Also that:[41]

> The type and extent of advice required of a solicitor in fulfilment of the solicitor's professional responsibility depends on the nature or the subject matter of the retainer and the nature of the client.

[62] Importantly, the observation has been made that:[42]

> … in the absence of express terms limiting the general nature of the retainer, the solicitor runs the risk that a Court will presume that the parties intended a broad retainer.

[63] Mr HJ has not produced any evidence that his retainer was reduced to writing. Whilst prior to 1 August 2008 there was no requirement on lawyers to provide clients with what has become to be known as a letter of engagement,[43] equally no evidence has been produced to suggest that the retainer was in any way limited.

(b) Pre 1 August 2008 – transitional provisions of the Act

[64] A lawyer's duty to obtain a client's instructions and consult with the client has been described as follows:[44]

> One of a lawyer's tasks is to discover the client's wishes then assist the client in deciding how to achieve them. While the lawyer must act in the client's best interest, it is important the lawyer find out from the client what the client thinks is in their best interest. Such a task involves explaining the legal and factual context in which the problem exists.

[65] Importantly, a lawyer must "obtain clarification of those instructions" and "may not proceed on an assumption the client agrees to a certain course of action.[45]

[66] Previous rule 1.09 provided that "In most circumstances, a practitioner is bound to disclose to the client all information received by the practitioner which relates

---

[40] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.
[41] *Hansen v Young* [2003] 1 NZLR 83 (HC) at [77].
[42] Above n 22, at [5.4.1].
[43] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 rr 3.4, 3.5, 3.10.
[44] Above n 22, at [10.3].
[45] Above n 22, at [10.3].

to the client's affairs …". This duty is ongoing and requires a lawyer to keep the client informed of progress with the client's matter.

[67] Reflective of the standards required of property lawyers at the time, the New Zealand Law Society Practice Guidelines[46] contained a list of attendances required of a lawyer consulted by a client before signing an agreement. These included obtaining a title search including encumbrances, showing a plan of the property to the client, and explaining any relevant encumbrances.[47]

[68] Although the guidelines were directed more towards residential property transactions, a prudent lawyer acting for a client on the purchase of a lot on a new subdivision, where the titles had not yet issued, would have worked through the details of the agreement with the client to ensure that the client understood the nature and details of the purchase.[48]

[69] The guidelines stated that if the agreement had already been signed by the client, that the lawyer should "do all things you should have done before the agreement was signed, if relevant."[49]

[70] From the information provided to this Office, apart from Mr HJ's letter to Mr and Mrs BL on or about 3 July 2007 which forwarded a copy of the agreement to them, no further communication was made by Mr HJ to them until they were informed late November 2008 that the new titles had issued for the subdivision lots, settlement of which followed in the first week of December 2008.

[71] I agree with the Committee's conclusion that this deprived Mr and Mrs BL of the opportunity to consider whether they wished to proceed with the purchase. Whilst it is speculative to say that, having had the covenants explained to them they would have decided not to proceed with the purchase, the option of reconsidering their position was not made available to them through a process of consultation with Mr HJ.[50]

(c) Post 1 August 2008 – the Act

[72] A lawyer must promptly disclose to his or her client information that is relevant to the retainer (rule 7), take reasonable steps to ensure that the client understands the

[46] New Zealand Law Society *Property Transactions Practice Guidelines*, November 2004.
[47] At [3.8]–[3.10].
[48] At [3.24](g).
[49] At [3.26].
[50] See *Bilbe v Unkovich* [2011] DCR 285 at [73].

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 (rule 7.1).[51]

[73] 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".[52]

[74] For the same reasons in respect of the corresponding duty under previous rule 1.09, in my view Mr HJ contravened rules 7 and 7.1 by not advising Mr and Mrs BL on all aspects of their proposed purchase before settlement in December 2008.

Conclusion

[75] Concerning pre-1 August 2008 conduct, s 351(1) of the Act provides that a Standards Committee may consider a complaint only if the conduct complained of could have led to disciplinary proceedings under the LPA. The High Court has stated that:[53]

> Once that point is reached, then the conduct is treated as subject to a complaint under the Act, and is to be considered by a Standards Committee under current standards and in light of the range of determinations that a Standards Committee could make in relation to the complaint under section 152(2) of the Act.

[76] Under s 352, a Standards Committee may only impose penalties in respect of conduct which could have been imposed for that conduct at the time the conduct occurred.

[77] The categories of conduct in respect of which disciplinary consequences could arise were described in ss 106 and 112 LPA. They included "misconduct in [the lawyer's] professional capacity" and "conduct unbecoming a barrister or a solicitor".[54]

[78] Whilst "the threshold for disciplinary intervention under the LPA was relatively high" - "misconduct is generally considered to be conduct which is 'reprehensible, inexcusable", "disgraceful, deplorable or dishonourable'" - "conduct unbecoming is perhaps a slightly lower threshold".[55]

---

[51] Rules 7 (and footnote), and 7.1.
[52] Above n 22, at [10.3].
[53] *C v Legal Complaints Review Officer* [2012] NZHC 3528; [2013] NZAR 398 at [50].
[54] Section 106(3)(a), (b); section 112(a), (b).
[55] *Workington v Sheffield* LCRO 55/2009 at [47].

[79] The test whether a lawyer's conduct is "conduct unbecoming" requires a consideration whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners".[56]

[80] The threshold for disciplinary response under the Act, namely, ss 7 (misconduct), and 12 (unsatisfactory conduct) "is somewhat lower"[57] than existed under the LPA.

[81] Where the conduct in question commenced when the LPA was in force, and continued after the Act commenced then both may be applicable. Depending on the rules applicable at the relevant time, and the seriousness of any contravention, a disciplinary response may be warranted under both.[58]

Conflict issue – pre 1 August 2008

[82] In respect of the period before the Act commenced, namely, from July 2007 to November 2007 before Mr K moved to [Law Firm 2], I agree with the Committee's conclusion that Mr HJ did not inform Mr and Mrs BL first, that Mr K was also acting for the vendor, and did not request their prior informed consent (previous rule 1.04), and secondly, of the areas of conflict or potential conflict (previous rule 1.07).

[83] As noted by the LCRO in the decision referred to earlier, "[i]t does not follow automatically that a breach of a professional rule amounts to conduct unbecoming or professional misconduct". [59]

[84] The reason put forward by the Committee for not taking any disciplinary action against Mr HJ is that the Committee did not consider that Mr HJ's conduct was negligent or incompetent "… in his professional capacity … of such a degree … as to reflect on his fitness to practice": section 106(3)(c) LPA.

[85] The Committee did state that if Mr HJ's conduct had occurred after 1 August 2008 then it would have made a finding of unsatisfactory conduct against him, but did not consider whether Mr HJ's conduct might constitute "conduct unbecoming": section 106(3)(b) LPA. In my view, by the narrowest of margins, Mr HJ's contraventions of the previous rules fall short of the threshold that warrants a finding of conduct unbecoming. Whilst the prudent approach is that each party be independently represented, I take into account that, at that time, it was not unusual for firms in smaller centres to act for

---

[56] *B v Medical Council* [2005] 3 NZLR 810 (HC) at 811.
[57] Above n 55, at [48].
[58] At [49].
[59] *Campbeltown v Dunoon* LCRO 129/2009 at [41] citing *Re A (Barrister and Solicitor of Auckland* [2002] NZAR 452.

more than one party to a conveyancing transaction.[60] Also, Mr HJ was not involved in negotiating the terms of the agreement. He says that he received the agreement after it had been signed by both parties.[61] I also take into account that the period during which [Law Firm 1] acted for both parties was short lived.

[86] I do make the observation however that, under the present regulatory regime, if a lawyer considers that he or she is not prevented from acting for more than one client on a matter (rule 6.1), then before commencing to act, the lawyer must obtain the "prior informed consent" of the clients (rule 6.1.1). A lawyer who does not do so risks a finding of unsatisfactory conduct.[62]

Obtain instructions and consult

[87] In respect of the period from July 2007 to 31 July 2008, I also agree with the Committee that Mr HJ did not consult with Mr and Mrs BL about the agreement which they had signed (previous rule 1.09). As discussed earlier, a prudent lawyer taking reasonable care would have consulted with Mr and Mrs BL about the agreement to ensure that they understood its terms. In my view such contravention constitutes "conduct unbecoming in [Mr HJ's] professional capacity" pursuant to s 106(3)(b) of the LPA which, as provided in s 351(1) of the Act, could have led to disciplinary proceedings being taken against him under the LPA.[63]

[88] Having reached that threshold, Mr HJ's conduct is to be considered under the present standards prescribed in the Act. In this regard, s 12(b)(i) of the Act includes "conduct unbecoming" as "conduct that would be regarded by lawyers of good standing as being unacceptable". It follows that Mr HJ's contravention of previous rule 1.09, constitutes unsatisfactory conduct under s 12(b) of the Act.

[89] His failure to consult, which commenced before and continued after 1 August 2008, similarly constitutes conduct unbecoming under section 12(b) of the Act. From 1 August 2008 the contraventions of rules 7 and 7.1 also constitute unsatisfactory conduct pursuant s 12(c) of the Act.

[90] Further, by not ensuring that Mr and Mrs BL understood the terms of the agreement, I consider that from 1 August 2008 Mr HJ also contravened rule 3 which provides that:[64]

---

[60] Above n 23 at [7.1].
[61] Submissions HJ to Lawyers Complaints Service (11 February 2016) at [10(a)].
[62] s12(c) of the Act.
[63] Above n 55 at [56].
[64] *CA v XU* LCRO 196/2010 at [65].

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[91] This constitutes unsatisfactory conduct under s12(c), and under s12(a) which concerns "…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".

Decision

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

Orders

Rectify any errors or omissions

[93] Where a Standards Committee makes a determination of unsatisfactory conduct under s 152(2)(b), then a Committee may make orders under s 156 of the Act. The LCRO may on review exercise any powers that could have been exercised by a Standards Committee.[65]

[94] Mr and Mrs BL request that Mr HJ be required to apply for a court order under ss 333 to 337 of the Property Law Act 2007 for land covenants to be registered on the title of the vendor's adjoining residue land to protect the views from Lot 10.

[95] Section 156(1)(h) authorises a Committee to:

> Order [a lawyer] –
>
> (i) to rectify, at his or her … own expense, any error or omission; or
>
> (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her … own expense, relief, in whole or in part, from the consequences of the error or omission:

[96] The purpose of this provision is to enable the Committee, or this Office on review, to order that the lawyer concerned either be required to rectify the error or omission, or if that is not practicable, to take steps to provide relief from the consequences of the error or omission.

[97] This requires a causal link between the lawyer's error or omission and the consequences flowing from the error or omission. Whether there is a causal link, or otherwise, is an evidentiary matter determined by court process, which is adversarial.

[65] Section 211(1)(b).

This includes pleadings, discovery, examination, and cross-examination. The courts have specialist knowledge and experience with claims of this nature, particularly where causation might be contested. In contrast, the primary concern of this Office is with a lawyer's conduct.

[98] Mr and Mrs BL claim, in effect, that Mr HJ's contravention of the rules was the cause of their loss. They claim that had they been advised of the nature of the covenants before settlement then they would have insisted that land covenants be noted against the title to Lot 11, retained by the vendor, to protect their views; alternatively, they would have cancelled the agreement.

[99] In my view, this is hypothetical for the simple reason that, having been informed of the nature of the land covenants contained in the agreement, in the absence of covenants to protect their view, they may have decided not to proceed with the purchase. On the other hand, they may have decided to go ahead regardless.

Compensation

[100] In the alternative, Mr and Mrs BL claim compensation sufficient to enable them to purchase the vendor's adjoining residue land.

[101] In this regard, s 156(1)(d) provides that a Standards Committee may:[66]

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

[102] It will be noted that the payment of compensation is prefaced by a causal link between the act or omission of the lawyer concerned, and the loss suffered by the claimant as a consequence. For that reason the above discussion concerning s 156(1)(h) equally applies. In my view there is an insufficient causal link to warrant an order being made under this provision.

Other penalty

[103] In giving consideration as to whether it is appropriate to order any other penalty, I refer to guidance provided by the Disciplinary Tribunal which has stated that the:[67]

---

[66] Lawyers and Conveyancers Act 2006 (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

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

> … 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.

[104] In my view, in these particular circumstances, a finding of a contravention of the rules which constitutes unsatisfactory conduct is sufficient in itself without additional penalty.

[105] In reaching this decision, I take into account the fact that Mr HJ states that first, he accepts the Committee's findings, which I have confirmed, namely, that a conflict of interest existed, and that he did not consult with Mr and Mrs BL about the terms of the agreement, and secondly, that his failure to disclose the initial conflict was not intentional.

Costs

[106] Where an adverse finding is made, costs will be awarded in accordance with the LCRO Costs Orders Guidelines. It follows that Mr HJ is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 3 September 2017, pursuant to s 210(1) of the Act.

DATED this 11TH day of August 2017

_____

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:

Mr and Mrs BL as the Applicants
Mr HJ as the Respondent
Mr T as a related person
Mr H as as a related person
[Area] Standards Committee
New Zealand Law Society