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

[2020] NZLCRO 70

Ref: LCRO 190/2019

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|---|---|
| **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 [X] |
| **BETWEEN** | **GK AND UL** |
| | Applicants |
| **AND** | **MH AND [RT] LAW LIMITED** |
| | Respondent |

## DECISION

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

### Introduction

[1] Ms GK and Mr UL (the applicants) have applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of their complaint.

[2] The complaint arises from [RT] Lawyers Limited (the firm) acting for the applicants on the sale of their property (the sale). The firm's directors are Ms MH, Mr SP and Mr AF.

[3] Mr AF is routinely responsible for managing and supervising Ms YG. Ms YG is an employee of the firm who had carriage of the sale on instructions from the applicants.

[4] Mr SP acted for the purchasers on the other side of the sale.

[5] On 10 July 2019 the applicants signed a document prepared by and addressed to the firm which said:

> We Mr UL and Ms GK the undersigned are aware that you act for both parties in respect of the sale and purchase of [street address], [Town] ("Transaction"). We agree that you can act for both parties.
>
> We acknowledge that there could be a conflict of interest arising out of the Transaction. We further acknowledge that in the event of a conflict of interest arising [RT] Lawyers Limited may need to refer both parties for independent legal advice.
>
> We further agree to indemnity [RT] Lawyers Limited in respect of any matters that may arise out of any conflict of interest in the Transaction.

## Background

[6] The applicants agreed to sell their home to the purchasers, and on 27 May 2019 Ms YG received an email from Ms GK instructing her to draw up an agreement for sale and purchase. Ms GK told Ms YG that the purchasers had instructed Mr SP.

[7] Ms YG provided a copy of the standard ADLS 9th Edition Agreement for Sale and Purchase (the agreement). The agreement includes the following:

> **2.0 Deposit**
>
> 2.1 The purchaser shall pay the deposit to the vendor or the vendor's agent immediately upon execution of this agreement by both parties and/or at such other time as is specified in this agreement.
>
> 2.2 If the deposit is not paid on the due date for payment, the vendor may at any time thereafter serve on the purchaser notice requiring payment. If the purchaser fails to pay the deposit on or before the third working day after service of the notice, time being of the essence, the vendor may cancel this agreement by serving notice of cancellation on the purchaser. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.
>
> …

[8] Ms YG recorded her instructions over the payment of the deposit in the following way:

> **Deposit (refer clause 2.0): $60,000** to be paid to the vendor's solicitors trust account once this agreement is unconditional.

[9] Ms YG sent the agreement off to the applicants for approval. They proposed one change to a name, and otherwise approved the agreement. Ms YG made the amendment, sent the agreement to the applicants, they and the purchasers signed it and it was returned to the firm and declared unconditional by Mr SP on 1 July 2019.

[10] Mr SP told Ms YG "that he was arranging for payment of the deposit". Whatever Mr SP did to arrange for payment of the deposit did not bear fruit. As Mr AF put it:[1]

> When it came to our notice that the deposit had not been paid, we followed the matter up with [Mr SP]. [Mr SP] made enquiries of the purchaser and advised us that the purchaser was making arrangements for payment of the deposit.
>
> A further follow up was made, and the same assurances given.
>
> Despite the requests and assurances the deposit was never paid.

[11] The applicants and the firm both say that:

> Immediately prior to the settlement, the purchasers arranged a pre purchase inspection.

[12] Mr AF says:

> We had no reason to suspect that the purchasers were not about to settle.

[13] Settlement would have involved the purchasers paying the whole of the purchase price in one lump sum: the deposit and the balance.

[14] The applicants contacted Ms YG on Friday 12 July 2019. She told them settlement funds had not arrived. She suggested they wait until Monday, 15 July 2019 to see if settlement funds came through.

[15] The applicants discovered from Ms YG on either 12 or 15 July 2019 that the purchasers had paid nothing. About the same time Ms YG discussed the cancellation provisions in clause 2.2 with Mr UL, and Mr UL told Ms YG that "under no circumstances" did the applicants wish to cancel the agreement. He also recorded in an email that:

> At no time had either [of the applicants] been made aware that the purchasers had not paid the deposit on the day the agreement became unconditional.

[16] The applicants found another prospective buyer and on 19 July 2019 Ms GK instructed Ms YG to prepare notices of cancellation to be served on the purchasers under clause 2.2. Ms YG provided the applicants with the draft notice which they signed and returned that to her so the purchasers could be served.

[17] Ms MH spoke to Mr UL and explained that the firm would not be able to continue to act now the applicants had committed to serving cancellation notices under clause 2.2 of the agreement.

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[1] [RT] Lawyers Limited to NZLS (10 October 2019).

[18] On Saturday 20 July 2019 the applicants expressed some reluctance over ending the professional relationship and requested a written explanation with reasons for the lawyers' refusal to act.

[19] On Sunday 21 July 2019 Ms MH advised the applicants that:

> I acknowledge that you feel frustrated at having to instruct a new lawyer, but the fact of the matter is that we are in a conflict situation and we simply cannot act further for you in this matter.
>
> You need to take legal advice from another lawyer about how you proceed. We will provide a copy of your file to the new lawyer you instruct as a matter of urgency so as to limit any delay.

[20] On 3 September 2019 Mr UL sent the firm a substantial bill and an email alleging the firm had breached its duty of care to the applicants by not telling them earlier that the purchasers had not paid the deposit.

[21] Mr AF wrote back on 5 September 2019. He explained why the firm would not be paying Mr UL's bill, told them that the purchasers had breached the agreement and may be liable for the applicants' losses. As between the applicants and the firm Mr AF says:

> We acknowledge that we should have informed you that we were having trouble getting the deposit paid, and we apologise for failing to do so…
>
> …we do not believe we have any liability in this matter…

[22] On 11 September 2019 the applicants made a complaint to the New Zealand Law Society (NZLS).

**The complaint and the Standards Committee decision**

[23] The focus of the applicants' complaint is that they should have been told earlier that the purchasers had not paid the deposit into the firm's trust account. By the time the applicants found out they had acted on the incorrect assumption that the purchasers had paid the deposit and would proceed to settlement, the applicants had entered into commitments and made arrangements they could not meet because the purchasers had not met their obligations on settlement.

[24] The second point the applicants raised was an objection to the firm ceasing to act once the applicants had signed the notice and given instructions to cancel the agreement. They add that they did not receive an invoice from the firm for the work done, and that could be taken as an admission of error on the firm's part.

[25] The firm maintains the position that the facts give rise to a contractual dispute between the applicants and the purchasers under the agreement but that no professional standards issues arise. The firm says once the applicants had instructed them to serve notices under clause 2.2 it was obliged to terminate both retainers because the interests of the applicants and the purchasers conflicted, and because the applicants had indicated an intention to seek to recover their losses on the failed sale from the firm. Mr AF says the firm did not issue a bill for various reasons that are "in no way an admission of fault" on the part of the firm.

[26] The Standards Committee did not consider that the firm was obliged to advise the applicants that it had not received the deposit earlier than it did, and that not having done so was at worst an error. The Committee's view was that the firm could not act further due to conflict and that further action on the applicants' complaint was not necessary or appropriate. The Committee determined the complaint accordingly pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

**Application for review**

[27] The applicants want the firm to pay them compensation for their losses. They say the delay in advising them that the firm had not received the purchasers' deposit gives rise to a professional standards issue and the absence of the deposit has put them in financial difficulties. The applicants say they would have made different decisions if they had realised the purchasers had not paid the deposit. They have not pursued their contention that the firm should have continued to act.

**Strike out – s 205(1)(a)**

[28] This review is determined pursuant to s 205(1)(a) of the Act which says:

> (1) The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—
>
> (a) discloses no reasonable cause of action;…

**Nature and scope of review**

[29] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … 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.

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

> 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.

[30] More recently, the High Court has described a review by this Office in the following way:[3]

> 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.

**Discussion**

[31] The complaint is based on the incorrect premise that the purchasers were obliged to declare the agreement unconditional and pay the deposit more or less simultaneously. The agreement, which the applicants approved before they signed it, does not impose a time limit on the purchasers' payment of the deposit, other than the obligation that they pay all the money due by the date of settlement.

[32] It seems one or both of the applicants may not have properly understood the agreement. Perhaps it did not accurately convey their intentions. It certainly did not align with the expectations of it that Mr UL conveyed to Ms YG on 12 or 15 July 2019 after the settlement date had passed. At that stage Mr UL told Ms YG that he and Ms GK had not been told "that the purchasers had not paid the deposit on the day the agreement became unconditional". As that is not what the agreement says, it is difficult to see why anyone would have told Mr UL or Ms GK that.

[33] Of greater relevance to whether professional standards have been met is a short exchange of emails in the materials between Ms GK and Ms YG before the agreement was signed. In the course of that exchange Ms YG provided a copy of the draft agreement to Ms GK and asked her to confirm whether it accorded with the applicants' instructions. Ms GK said it did. She and Mr UL went on to sign it without

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

seeking any further advice, explanation or comment from Ms YG. One of the provisions the applicants approved says:

> **Deposit (refer clause 2.0): $60,000** to be paid to the vendor's solicitors trust account once this agreement is unconditional.

[34] The agreement provided for the applicants to serve notices under clause 2.2 if the deposit was not paid "on the due date for payment". The agreement could have recorded a due date for payment of the deposit but it did not. It did not require the purchaser to pay the deposit "immediately upon execution" of the agreement. The complaint is not that the deposit clause as drafted does not accord with the applicants' instructions on that point. That complaint would be difficult to sustain because there is evidence of the applicants having approved the agreement before they signed it.

[35] If there was an allegation of negligent drafting to be made, that would not be a cause of action under the Act at first instance, but could possibly be a matter for the civil jurisdiction. Again, proving any such allegation could be tricky because the applicants saw and approved the agreement before they signed it.

[36] The materials suggest that the applicants, or at least Mr UL, did not intend there to be a delay between the agreement being declared unconditional and the purchasers paying the deposit. That too is an argument that would be better suited to determination at first instance by the civil jurisdiction than by this Office on review. The most this Office can say is that on its face the agreement does not impose a time limit on the purchasers' payment of the deposit, other than the obligation to pay all the money due by the date of settlement. The parties to this review agree that the purchasers did not do that.

[37] Deposits are important. They mark a purchaser's commitment to the deal. They provide vendors with leverage and security. Deposits are referred to several times in various iterations of the NZLS *Property Transactions and E-dealing Practice Guidelines* (the guidelines). The guidelines recognise the importance of the person responsible for the sale ensuring that their client fully understands the basic details of the agreement. The basics include things like the purchase price and whether the deposit is adequate. A deposit of 10% of the purchase price is said to be desirable. That is what the agreement provided for.

[38] The guidelines anticipate that whoever is acting for the vendor will make sure the deposit is paid and collect it. Obviously those steps should be taken in accordance with the terms of the agreement.

[39] The mirror expectation on Mr SP in acting for the purchaser was to make sure the purchasers knew when the deposit was due and paid it, again, in accordance with the agreement.

[40] The deposit clause on the front page could have required the purchasers to pay $60,000 to the vendor's solicitors trust account "immediately upon execution" of the agreement by both parties, or at some other time specified in the agreement. As it did not, there is no reason for the firm to have contacted the applicants to advise them that the deposit had not been received. In that respect I disagree with the Committee.

[41] While there was nothing stopping Ms YG from telling the applicants the deposit had not arrived yet, that is not the same as accepting that she made a mistake by not telling them that. Deposits are important. If there had been a date or event that crystallised the purchaser's obligation to immediately pay the deposit, presumably Ms YG would have made a note of that and acted accordingly. As the agreement lacked any such specificity, she did none of those things.

[42] I agree with the Committee when it says the applicants could have checked with the firm. There was nothing stopping them from doing that.

[43] For completeness I note that there is nothing to the complaint that the firm should have continued to act after the applicants gave instructions to cancel the agreement. The firm was obliged to terminate the retainer. An actual and unmanageable conflict had arisen both between the firms' two clients and between the applicants and the firm. It appears from the exchange of correspondence between the applicants and the firm from 19 July 2019 onwards that Ms MH explained the firm's position to the applicants. I agree with the Committee. No standards issue arises.

*Summary*

[44] In summary, I am satisfied that the applicants' application for review discloses no reasonable cause of action under the Act in respect of Ms MH or the firm. Their application is therefore struck out pursuant to s 205(1)(a) of the Act. The Committee's decision is unaffected.

*Anonymised publication*

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

**Decision**

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

**DATED** this 19TH day of May 2020

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**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:

Ms GK and Mr UL as the Applicants
Ms MH and [RT] Lawyers Limited as the Respondents
AF, SP and OL as Related Persons
[Area] Standards Committee [X]New Zealand Law Society