LCRO 2/2013

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 [X]
BETWEEN	**BT** Applicant
AND	**OS** Respondent

DECISION

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

Introduction

[1] BT applied for a review of a decision by Area Standards Committee dated 20 November 2012 in which the Committee decided that it would take no further action on his complaint against OS.

[2] BT's concerns arise from OS's conduct in negotiating and implementing an agreement between OS's client GD, and BT, according to which, she would purchase his fit-out (the fit-out agreement).

[3] BT was director of a company, EK Limited that was lessee of a commercial unit in a unit title development. GD was the lessor. BT describes his relationship with GD in cordial terms, and conveys the impression that initially their relationship as landlady and tenant was relaxed, relatively informal and mutually beneficial.

[4] The situation changed in May 2009, however, when GD instructed OS to act for her in respect of the lease. Initially OS assisted GD in negotiating a variation to the lease (the Variation). OS triggered that negotiation by serving notice of termination of the lease on BT on the grounds that he was in breach of the lease by having sub-let part of the premises, without GD's written consent, to a [business].

[5] BT was represented by his own lawyer, RL, in the negotiations over the Variation. The deed of lease was formally varied by consent with BT and GD signing a deed of variation (the Deed) in July 2009.

[6] After the Deed was signed, GD's instructions to OS continued, and he generally dealt with routine maintenance-type matters arising from the lease on her behalf. At times BT would contact GD as he had done before she instructed OS, and she would refer his concerns on to OS so he could deal with the matters raised.

[7] The termination date on the lease was 31 December 2010. On 22 June 2010 OS wrote to BT reminding him of the termination date and requesting an early indication of whether he intended to renew the lease or leave the premises. Although BT did not respond to OS's email immediately, he drafted an email to RL. Which he accidentally sent to OS's office.

[8] On 19 August 2010 BT emailed OS's office to say that he did not intend to continue in occupation under the lease after 31 December 2010, that he was selling his business, and inviting GD to consider purchasing his fit-out of her premises. On behalf of GD, OS requested further information, which BT provided. Negotiations continued without the parties reaching agreement.

[9] On 16 December 2010, as he had not secured GD's agreement to buy his fit-out, BT began to remove his fit-out from the leased premises, so he could leave the premises in a condition that complied with the requirements of the lease. By that time it appears the [business] had initiated negotiations to lease the premises directly from GD after BT's lease terminated.

[10] Someone from the [business] contacted BT on 16 December 2010 and asked him to stop removing his fit-out because if they took the lease over, they would want the fit-out to remain in place.

[11] BT stopped work on the removals, and contacted OS to rekindle their discussions over GD's purchase of his fit-out. At the review hearing BT said he considered that would be a good outcome for them both, enabling him to recover some of the cost of the fit-out, and GD to enhance the unit's appeal to her prospective new tenant.

[12] Having spoken with OS and GD on the phone, BT retrieved a previous version of an agreement he had drafted, altered it to include amendments proposed by OS, and emailed it to him.

[13] BT acknowledges that the fit-out agreement was a simple document, signed off with a degree of urgency on 17 December 2010. It included a commitment by GD to

pay a specified amount for the "complete tenant's fit-out", which included items BT had listed in a schedule in the agreement. GD was to pay the agreed amount to BT's nominated bank account on 21 December 2010, at which point he says she would own the fit-out, and he would be released from his obligation under the lease to make good the premises. There was provision for GD to cancel the fit-out agreement if she was unable to secure another tenant who wanted to lease her unit with the fit-out in it. Significantly for the purposes of BT's complaint and review application, the fit-out agreement also contained the following vendor warranty "The fitout is sold as is and intact and in good working order..."

[14] OS says, the negotiations with BT before he and GD reached agreement went "down to the wire" on 17 December, which he says was also the deadline for the [business] to sign the new lease on the unit. The same day, BT and WN signed the fit-out agreement, it appears, with OS's assistance, that GD also secured her new tenant.

[15] After the fit-out agreement was signed, OS withheld payment of part of the settlement sum until BT complied with his obligations under the fit-out agreement in a way that satisfied OS and was consistent with GD's best interests.

[16] OS asked BT to meet the costs of repairing a dysfunctional air conditioning unit, and reinstalling bathroom fittings. BT ultimately agreed and bore costs which he says OS should pay back to him.

[17] BT says that the wording of the warranties he gave in the fit-out agreement had been drafted by OS, but the drafting was poor and created uncertainty. The uncertainty in the agreement, combined with the money OS had withheld, enabled OS to gain traction in negotiating what BT considers were new conditions that had not been part of the fit-out agreement.

[18] BT intimated that he only capitulated to OS's demands because it would have cost him more to resist or challenge the uncertainty OS's drafting had created. BT says that since it was OS's contribution to the drafting that caused the difficulties, OS should cover BT's added costs of performing the fit-out agreement to OS's satisfaction.

[19] BT's complaint to the New Zealand Law Society (NZLS) explained his dissatisfaction with OS's conduct, and sought compensation of $4,101.92 to cover the losses he says he incurred in performing the agreement.

Standards Committee

[20] The Standards Committee considered BT's complaint in the context of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and the Lawyers and Conveyancers Act 2006 (the Act). Its particular focus was on whether OS had:

(a) misled BT;[1]

(b) been discourteous to him;[2]

(c) improperly retained funds and failed to ensure the funds earned interest;[3] and

(d) failed to suggest that BT sought independent legal advice.[4]

[21] The Committee set out a brief summary of the facts, including reference to BT's claim for compensation for costs in completing his added obligations to secure the release of the retention, his lawyer's costs, and the loss of interest he claims on the retained funds, all of which he attributes to OS's conduct.

[22] The Committee recorded having considered the complaint and all the material provided by the parties carefully. Although OS acknowledged not having placed the retained funds in an interest-bearing account, the Committee accepted his explanation, which was that he had not anticipated holding the funds for very long, and that in any event any interest would have been for his client's benefit, and she had written a letter in support of him, and appeared to generally be unconcerned about any aspect of his conduct in representing her.

[23] In particular the Committee noted that:[5]

> BT chose to represent himself and had recourse to his own lawyer as required, but that OS had appropriately dealt directly with BT and had offered to deal with his lawyer. BT had clearly expressed his confidence in negotiating matters himself. The Committee accepted OS's explanation of his conduct and his motivation in intervening between his client GD and BT in resolving the matters in dispute.

[24] On the basis of its consideration of the complaint and materials provided, the Committee decided to take no further action on the complaint. The decision records that the Committee relied on s 128(2) of the Act.

---

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 11.1.
[2] Above n 1, r 12.
[3] Lawyers & Conveyancers Act 2006, s 114 and Lawyers and Conveyancers Act (Trust Account) Regulations 2008.
[4] Above n 1, r 12.1.
[5] Standard Committee decision dated 20 November 2012 at [36].

[25] Section 128(2) governs the constitution of Standards Committees, and has no apparent relevance. The mention of s 128 appears to be a typographical error, and should have referred to s 138(2) which is the section under which Committees have discretion to decide that further action on a complaint is unnecessary or inappropriate, in the particular circumstances of the complaint.

[26] BT was dissatisfied with the Committee's decision and applied for a review.

Review Application

[27] The essence of BT's review application was that the Committee misconstrued his complaint, gave undue weight to OS's version of events, made incorrect findings of fact and, as a result reached the wrong conclusion.

[28] BT says that if the Committee had properly construed his complaint, the logical outcome would have been an order compelling OS to cover the added costs BT incurred in performing the more detailed terms of the fit-out agreement, obtaining legal advice, and securing payment of the balance of the settlement sum.

Role of the LCRO

[29] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.[6]

Scope of Review

[30] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review hearing

[31] BT attended a review hearing in Auckland on 29 October 2014. OS was not required to attend, and the hearing proceeded in his absence.

Review Issues

[32] At its heart, BT's complaint is that OS behaved immorally, if not illegally. He also did not consider that he had been properly heard at the Committee stage of his complaint, which was why he wished to be heard in person on review.

[33] At the review hearing BT attributed the Committee's failure to reach the right outcome to it having adopted OS's summary of his complaint, which he says does not accord with the complaint that he made. BT said that OS took advantage of him, to his cost, and reiterated his view that as OS was responsible for his losses, he should compensate him for them.

[34] BT says the Committee was wrong to construe his complaint as alleging that OS had misled him as to the terms of the fit-out agreement. Nor, he says, did he allege that OS had been discourteous, or that he had improperly retained funds or failed to ensure they earned interest.

[35] On the contrary, he says that he was not misled as to the terms of the fit-out agreement, OS was courteous to him throughout, and he had no complaint about the failure to retain funds in an interest-bearing account.

[36] Having reviewed BT's complaint, it does not appear that the allegations or the facts support those aspects of the Committee's analysis. Insofar as the decision refers to alleged breaches of s 114 of the Act, the Trust Account Regulations and rr 11.1 and 12 of the Rules it is therefore reversed on review.

[37] The significant aspect of BT's complaint, and the focus of this review, is whether or not in the circumstances OS was under a professional obligation to advise BT to seek independent legal advice.

[38] BT says if the Committee had properly construed his complaint, the only logical conclusion it could have reached was that OS was under such an obligation, and that his failure to ensure BT obtained independent legal advice before he signed the fit-out agreement was a breach of his professional obligations.

[39] BT says that if he had received independent legal advice before he signed the fit-out agreement, he would never have signed it in the terms that he did. He says that he did not become aware of the deficiencies in the drafting until after OS had refused to pay the whole of the settlement sum, and, playing on the uncertainties in the agreement, sought to impose new conditions on BT. At that point BT says he went to

---

[6] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

his own lawyer for advice and was told that the vendor's warranty clause in the agreement was poorly drafted and created uncertainty.

[40] Having heard from BT at the review hearing, and carefully considered the complaint and other information provided by the parties, the issue at the core of this review is whether OS should have advised BT of his right to take legal advice, pursuant to r 12.1 which says "When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice."

[41] For the reasons discussed below, the answer is that OS was under no obligation at the time to advise BT of his right to take legal advice. I have also been unable to identify any other reason to depart from the Standards Committee's decision not to take any further action on the complaint because, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate, pursuant to s 138(2) of the Act. The Committee's conclusion is therefore confirmed on review.

Lawyers: Conduct and Client Care Rules 2008 (the Rules)

[42] Absent any specific duty to the Court, OS's primary obligations were to his client, GD.[7] As BT is a third party, OS owes him only very limited duties, including those set out in r 12.1.

Circumstances – wide or narrow

[43] In responding to the complaint, OS provided his entire file for attendances on GD arising from her lease over the unit, starting May 2009. He also provided a letter of support from GD. OS's professional relationship with BT, started in May 2009 with the negotiations over the Variation and continued through to mid 2011 when the fit-out agreement was concluded and payment of the balance of the settlement proceeds to BT, after the terms of the agreement had been performed.

[44] BT's view, is that the Committee erred in taking into account the whole history of OS's involvement in lease-related matters when it applied r 12.1. On review he urged a narrower focus on the particular circumstances of the fit-out agreement, which he says was independent of the lease. He says that OS's previous involvement with lease-related matters on GD' behalf is irrelevant to his obligations in respect of the stand-alone fit-out agreement.

[45] BT says that the fit-out agreement created a particular set of legal rights and obligations outside the terms of the lease. He says that he could have sold his fit-out to anyone; he was not limited to GD as a prospective purchaser. BT says that the

negotiations in December 2010 over the fit-out agreement, and him signing it, were completely separate from any previous involvement he had had with OS, and particularly from matters in which he was represented by RL in respect of the Variation to the lease in 2009.

[46] In those circumstances his view is that OS was under a specific obligation to ensure he advised BT of his right to take independent legal advice on the fit-out agreement before he signed it.

Discussion

[47] Rule 12.1 does not impose an absolute obligation on all lawyers at all times to ensure that self represented persons are made aware of their right to take independent legal advice. The proper course of action in each situation will depend on the relevant circumstances.

[48] The obligation to inform arises when a lawyer knows a person is self-represented. It is therefore relevant to consider whether OS knew BT was self-represented in respect of the fit-out agreement.

[49] Although BT objects to the Committee having considered the prior history between him and OS, OS's involvement with BT did not occur in a vacuum. OS's prior involvement is relevant because it demonstrates that OS knew that BT was, at least at first, not self-represented, and also that he was aware of his right to take legal advice. BT exercised his right to take legal advice by instructing RL in respect of the Variation. Correspondence was exchanged between RL and OS[8] leading up to the Variation being signed.

[50] There are a number of examples of direct contact between BT and OS between 2009 and 22 June 2010, when OS contacted BT to enquire about his intentions when the lease expired. OS's file indicates that before he wrote to BT in June 2010, each contact had been initiated by BT personally, not through a lawyer, and OS's responses had been directed to BT, not to his lawyer.

[51] When he wrote directly to BT about the termination of the lease on 22 June 2010, OS did not know whether BT was self-represented or not, but he did know that he was aware he had the right to take legal advice.

[52] After OS emailed BT on 22 June, BT accidentally forwarded the response he had intended to send to RL, to OS. That email is relevant to the extent that it informed OS

---

[7] Above n 1, r 6.
[8] Email RL to OS (15 September 2009).

that in June 2010, over a year after he had been represented by RL, BT was still aware that he could obtain legal advice from his lawyer if he wanted to.

[53] It is also relevant that BT had ample time between August and December 2010 to take legal advice on his proposals to sell his fit-out to GD.

[54] When BT renewed his offer to sell his fit-out to GD on 17 December 2010 OS conducted the negotiations. BT's willingness to conclude the agreement is not in dispute. OS must have been aware of that, and it appears BT's enthusiasm worked to OS's client's advantage. OS was also aware that GD had another prospective tenant ready to sign an agreement to lease on 17 December 2010 commencing when BT's lease came to an end.

[55] There is no evidence to support a finding that OS intended to deprive BT of his right to take legal advice at any stage by rushing him into signing the agreement. As BT says, he could have sold his fit-out to anyone, it did not have to go to GD. On each occasion contact was initiated by BT approaching OS or GD, not vice versa.

[56] There is also no evidence to suggest that BT is an unusually vulnerable person. At the review hearing, he presented as an earnest and capable business person whose complaint arises in a commercial context. Those circumstances are also relevant to this review.

[57] Taking all of the relevant circumstances into account, I consider it likely that OS did not know that BT was self-represented. The circumstances were such that he was not obliged to inform BT he had the right to take legal advice on the fit-out agreement before he signed it. BT knew he could have taken legal advice. He had the opportunity to do so before he signed the fit-out agreement. He did not. That does not signal any failing by OS in meeting his professional obligations.

[58] While it may have been prudent for OS to suggest BT seek advice on the fit-out agreement before he signed it, he was under no professional obligation to do so. As the obligation was not triggered, OS's actions do not constitute a breach of his professional obligations.

[59] On 21 December OS emailed BT specifying matters that GD required him to attend to in order to ensure the "premises are in the same good order and condition they were in at the start of the lease, in terms of the lease, and subject to the fit-out agreement".

[60] On behalf of BT, RL responded on 22 December 2010. RL set out BT's position on the matters specified in OS's email the previous day. He proposed a retention of a

thousand dollars to be held in his trust account pursuant to his undertaking not to disperse the funds until the unit had been repaired and inspected by Mrs Andrew. OS did not agree, and reiterated GD's requirement that the retention of $5,000 plus GST remain in his trust account, and imposing specific requirements saying:

> We are instructed as well to inform you for your client that, if arrangements with [the new tenant] are disrupted, she will hold your client accountable and will have no hesitation to claim her loss from it and BT and to issue court proceedings to pursue the claim.

[61] As noted above, BT's primary concern is that OS was able to lever extra benefits for GD over and above the contractual provisions, because he had control of the retention. BT says OS's actions cost him and/or EK Limited money, and OS should pay it back.

[62] Rule 12.1 imposes an obligation on lawyers to advise unrepresented third parties of their rights to take legal advice. It is significant in the context of BT's complaint that he had received legal advice and representation from RL at various times in OS's dealings with him, including in 2009 and apparently again in 2010 when OS's office had requested an indication of whether BT intended to vacate the premises, or seek to negotiate fresh terms before the lease expired.

[63] Based on those two key features of his professional dealings with BT, OS had reasonable grounds to believe that BT was not self-represented, and that he was already aware of his right to take legal advice.

[64] In the particular circumstances, the obligation in r 12.1 that would normally have rested on OS, if he had known that BT was self-represented, did not apply.

[65] Consistent with the decision of the Standards Committee, the view I have formed independently on review is that OS's conduct did not fall below the standards required in the Act, nor did he breach his obligations under r 12.1. The decision to take no further action is therefore confirmed.

[66] Athough the Committee also considered whether OS's conduct had been misleading, or he had improperly retained funds and failed to ensure those earned interest, as mentioned above, those were not the focus of BT's complaint or his review application, nor do they identify professional conduct issues that require further consideration on review.

Outcome

[67] The outcome is that the decision of the Committee is confirmed subject to removing references to misleading conduct, improper retention of funds and failure to ensure funds earned interest. The decision is also amended to the effect that the decision to take no further action is made pursuant to s 138(2) of the Act.

Costs

[68] The LCRO has discretion to make costs orders on review pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[69] BT was entitled to apply for a review, and did so. He has not conducted himself in a manner that would attract an adverse cost order.

[70] There has been no adverse finding against OS, and he has added nothing to the cost of this review. It is therefore not appropriate to order him to pay costs.

[71] No costs orders are made on review.

Decision

Pursuant to s 211(1)(a) the decision of the Standards Committee is modified to confirm that, pursuant to s 138(2) of the Act having regard to all the circumstances of the case, further action on BT's complaint, is unnecessary or inappropriate.

DATED this 17th day of November 2014

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:

BT as the Applicant
OS as the Respondent
[City] Standards Committee
The New Zealand Law Society