

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

RC (also known as RC) and RD (also known as RD)

Applicants

AND

ZC

Respondent

DECISION

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

Introduction

[1] Mr RC and Ms RD have applied for a review of the determination by [Area] Standards Committee to take no further action in respect of their complaints about Mr ZC.

[2] Mr RC and Ms RD acknowledge their English is poor and that they are not familiar with New Zealand law.¹ Although that reinforces the need for them to have careful and comprehensive legal assistance it also affects their ability to comprehend all that occurred, and to express themselves well both to the Standards Committee and this Office. Because of this it has been somewhat difficult to comprehend some of the material produced by Mr RC and Ms RD to the Standards Committee and on review.

¹ Application for review (24 November 2015) at part 7.

[3] Mr ZC and his assistants were able to converse and correspond with Mr RC and Ms RD in their own language and consequently they were not disadvantaged in any way in their dealings with Mr RC by reason of their difficulty with the English language.

Background

[4] Mr RC and Ms RD were negotiating to purchase a motel in Rotorua and instructed Mr ZC of [Law Firm 1] ([Law Firm 1]) to act for them. It would seem that attendances between Mr ZC and his clients were conducted while Mr RC and Ms RD were in China, they only came to New Zealand in the days before settlement.

[5] The purchase comprised the land and buildings and the business. Mr [RC and RD's Representative], a director of [Law Firm 1] who responded to the complaint on behalf of ZC, says:²

Mr ZC discussed the purchase structure with [his clients] and suggested the property should be purchased in the individuals' names or that of a trust while the business should be purchased on the basis of their accountant's advice but probably through a company.

[6] The purchase was intended to proceed on this basis.

[7] The purchase price for the land and buildings was \$1.22 million while the purchase price for the business was \$330,000. No agent was involved and so Mr ZC prepared the agreements which were then signed by the parties and dated 15 May 2015. The settlement date was Monday 15 June 2015.

[8] Fifty-five per cent of the purchase price was to be provided by way of bank borrowing. Mr RC and Ms RD had engaged the services of [Finance Company 1] to arrange this finance and the managing director of the company (Mr TC) undertook this for them. A proposal was put to the [Commercial Bank 1].

[9] Funding was not confirmed until the week before settlement and the bank's loan instructions were sent to Mr ZC by email at 1.17 pm on Thursday 11 June 2015.

[10] The approved facility was an advance to [General Company 1]³ for an amount up to \$841,500. Security for the advance was to be a registered first mortgage over

² Letter [RC and RD's Representative] to New Zealand Law Society Lawyers Complaints Service (30 September 2015).

³ This company had been incorporated by Mr RC and Ms RD's accountant to acquire the business.

the property together with a General Security Agreement over the company's assets. This meant that the property needed to be owned by the company.

[11] At 4.11 pm on 11 June, Mr ZC copied the bank's instructions to his client, Mr TC and his clients' accountant. He heard nothing from any of these parties and instructed his assistant to make contact with Mr RC and/or Ms RD to have them come in to sign the documents.

[12] It was not until during the course of the day on 15 June (the day of settlement) that Mr RC and Ms RD attended for this purpose. At this time Mr ZC pointed out to them the consequences of the bank's requirements, and they became concerned that the structure of the purchase was not going to be established as intended. However, given the choice between defaulting on settlement and incurring interest for late settlement, or settling on the documentation as provided by the bank, they instructed Mr ZC to proceed.

[13] Settlement took place as required on 15 June 2015.

The complaints

[14] Mr RC and Ms RD raised four issues in their complaint:⁴

- (a) They wanted to "buy property using our individual names but buy business by a company's name. On the date of settlement, we were told we have to buy the property and business by the company only".
- (b) They bought the motel as freehold, including property and business. But after settlement, "we received one paper says about leasehold from TD. We don't know what it is that and ask TD and ZC for the reason. But by now, we still didn't have any answer from [Law Firm 1] or our lawyer about leasehold".
- (c) The fees rendered exceeded what Mr RC and Ms RD say was the agreed fee by \$1,000.
- (d) Mr ZC was "careless, mistakes, unclear, rude manner and dishonesty. Lie to seller's lawyer." (In this complaint Mr RC and Ms RD refer to an error made by [Law Firm 1] as to the funds required to complete settlement).

⁴ Email to Legal Complaints Service (30 July 2015) at 2.

[15] The Standards Committee considered the complaints by addressing the following issues:⁵

- (i) Whether Mr ZC breached rule 3 of the [lawyers' conduct rules]⁶ by failing to act competently and consistent with the duty to take reasonable care in relation to the property not being purchased in Mr RC's personal capacity, and by incorrectly calculating the amount due for settlement.
- (ii) Whether Mr ZC breached rule 3.2 ... by failing to respond to inquiries from the clients in a timely manner.
- (iii) Whether Mr ZC breached rule 3.4 ... by failing to provide Mr RC and Ms RD in advance with information in writing on the principal aspects of client service, including the basis on which the fees will be charged.
- (iv) Whether Mr ZC breached rule 9 ... by charging fees that were unfair and unreasonable.
- (v) Whether Mr ZC breached rule 3.1 and/or rule 10.1 ... by failing to treat his clients and/or vendor's lawyer with respect and courtesy, and by being dishonest.

The Standards Committee determination

[16] The Standards Committee determined to take no further action on any of the complaints raised. The following paragraphs relate to the issues as numbered above.

- (i) In regard to the issue related to the structure adopted for the purchase and to the error in the amount of funds required from the purchaser, the Committee noted:

[27] It was only when the documents were being signed by the clients shortly before settlement was due to be completed, that the clients had first expressed their dissatisfaction about the structure ...

[28] The clients had the option of deferring the transaction until such time as the documents were rectified but they chose to proceed with the transaction, knowing that the documents were unsuitable. The Committee does not consider that there was any breach of the [lawyers' conduct rules] on the part of Mr ZC as he advised the clients of their option to defer settlement but despite this advice, the clients chose to proceed with the transaction.

[29] In relation to the amount required for settlement of the transaction, the committee accepts that Mr ZC had made a mistake, however, the Committee does not consider that this mistake was of such a nature as to amount to unsatisfactory conduct on the part of Mr ZC.

[30] Once Mr ZC became aware of the mistake, he took immediate action and advised the clients of the mistake. There was also no consequential

⁵ Standards Committee determination (23 November 2015) at [8].

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

loss suffered by the clients as a result of Mr ZC's mistake as they were well aware of the purchase price and what they were required to pay.

- (ii) In regard to the issue relating to the queries raised by Mr RC and Ms RD about the leasehold interest, the Committee noted:

[37] ... that there was a significant amount of correspondence exchanged between Mr ZC and the clients. The correspondence indicates that Mr ZC was in regular contact with the clients and that he kept them informed. The Committee also notes that the lease had expired and that the clients obtained freehold title of the property. This was also explained to the clients by Mr ZC. Accordingly, the Committee considers that Mr ZC responded to inquiries from the clients in a timely manner and does not consider that there was any breach of rule 3.2 of the [conduct rules] on the part of Mr ZC and decides to take no further action on this issue pursuant to s138(2) of the [Lawyers and Conveyancers Act 2006].

- (iii) The Committee noted that Mr ZC had provided the clients with a letter of engagement on 7 May 2015 and accordingly there was no breach of rule 3.4 of the lawyers' conduct rules.
- (iv) The Committee determined that the total fee charged of \$2,500 plus GST and disbursements was fair and reasonable for the work undertaken which included negotiating with the vendor's lawyer, drafting the agreements and considerable communications with Mr RC and Ms Lu.
- (v) Mr RC and Ms RD complained that Mr ZC had been dishonest with the vendor's lawyer when he gave the reason for the delay in settling as being that they were in Rotorua. The Committee:⁷

[did] not consider that Mr ZC was being dishonest with the vendor's lawyer by stating that the clients had gone to Rotorua, as he believed that he had a reasonable foundation for the statement to be made.

The application for review

[17] The applicants' reasons for review are set out below in full. In essence they do nothing more than reiterate the issues raised in the complaint.

1. In our previous complain letter and evidence provided, we informed that ZC charged us the unbeknown fees of \$1191 without any invoice. Please note, this was not the extra lawyer's consultation fee that he charged us. This fee is charged without any reason and explanation. ZC never mention it and never told us what's the solution. It is unfair that in Standards Committee decision, it not to be mention and not any solution.

⁷ At [61].

2. In our complain letter and evidence, we delivered a phone call-record to proof ZC cheated us and tried to charge us more. We even provided the translation of the record. There was not any explanation or not any mention from ZC. It is unfair that there was not mention in Standards Committee decision as well.

3. In ZC's statement, he said that he was told us the risk of we signing the contract or no signing the contract. But we want to emphasize that ZC never informed us ahead the structure to be changed. He just told us the structure to be changed on the day of the settlement day. It was too late. We didn't want to be penalty and we didn't have choice, that's why we signed the contract, and let settlement go ahead. It is unfair that Standards Committee don't consider that ZC did not mention us the structure changed ahead.

4. We are not very good at English and we don't familiar with the New Zealand Law. We need lawyer's help who can protect our legitimate right and lead us under the New Zealand Law, and let the buying under our willing. So at the beginning, we were very politeness and trusted ZC so much. It is very grieved that he cheated us and harmed our legitimate right.

Review on the papers

[18] 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, as I do, that the review can be adequately determined in the absence of the parties.

Review

[19] In the course of completing this review [Law Firm 1] was requested to forward a full copy of their clients' file. This was provided. However, much of the correspondence between the parties is in Mandarin and consequently I rely on handwritten translations where provided.

The structure of the purchase

[20] The [Law Firm 1] file shows extensive correspondence between Mr TE of the [Commercial Bank 1] and Mr TC, the clients' finance broker. From this correspondence it is evident that all arrangements with regard to the funding required by Mr RC and Ms RD were made directly between them (and/or their representatives) and the bank.

[21] There is also correspondence between Mr TE and Mr TC (the insurance broker) in which Mr TE confirms that the borrowing is to proceed in the name of the company and therefore title to the property would also be in the name of the company.⁸

⁸ Email TE to TC (12 June 2015).

[22] The [Commercial Bank 1] loan instructions were sent to Mr RC by email at 1.17 pm on Thursday 11 June. The loan agreement provided for a facility up to \$841,500 to be made available to [General Company 1]. The security required was a registered first mortgage of the land and buildings together with a General Security Agreement over the company's assets.

[23] The loan documents were sent by Mr ZC to his clients, Mr TC and the accountant at 4.11 pm on the same day as they were received. The email forwarding the loan document has no message but without specific instructions from his clients Mr ZC could not have taken it upon himself to request the bank to amend the loan documents. In any event, it is likely there would have been insufficient time to have the documents amended in time for settlement on the following Monday.

[24] When Mr RC and Ms RD attended Mr ZC's office to sign the loan documentation, he gave them the option of either delaying settlement (and thereby incurring interest for late settlement) or signing the loan agreement as prepared by the bank. They opted to proceed to settlement.

The leasehold interest

[25] The land and buildings were comprised in a fee simple (freehold) title with identifier [Identifier Code]. The title was subject to [Lease Number]. The title also recorded that a separate leasehold title had issued under number [Number].

[26] However, following an inquiry by [Law Firm 1] about the leasehold interest, the vendor's lawyer had responded: "There is no lease in place. You must be looking at old records. There has not been a formal lease in place ever since our clients have owned the motel."⁹

[27] In their complaint, Mr RC and Ms RD said:

... after settlement, we received one paper says about leasehold from TD. We don't know what it is and ask TD and ZC for reason. But by now, we still didn't have any answer from [Law Firm 1] or our lawyer about leasehold.

[28] In response to this issue Mr [RC and RD's Representative] stated:¹⁰

The motel is freehold. There was a separate registered leasehold title that was issued but that had expired before settlement. In other words, the leasehold estate had come to an end. What they acquired was the freehold.

⁹ Email TF to TG (14 May 2015).

¹⁰ Above n 4.

[29] The memorial on the title to the property records that the lease was for a period of 21 years from 1 July 1994 and therefore on this basis would have terminated on 30 June 2015. Settlement took place on 15 June 2015.

[30] The Standards Committee accepted that the lease had expired before settlement. If that was the case, then there would have been no need for any communications with the purchasers following settlement about the lease as Mr RC and Ms RD say there was.

[31] I accept there must have been some communications about the matter – otherwise Mr RC and Ms RD would not have referred to the matter in their letter of complaint. However, I cannot locate any correspondence on the file following settlement relating to the issue although it may be in correspondence in Mandarin.

[32] The response from the vendor's solicitor to the inquiry about the lease by [Law Firm 1] was somewhat puzzling but whatever the situation, the lease was due to terminate some 15 days following settlement. Mr [RC and RD's Representative]'s responses to the complaint (and subsequently) have not explained the situation at all but a search of the leasehold title on [Law Firm 1]'s file dated 15 June 2015 records [General Company 1] as the proprietor.

[33] Mr RC and Ms RD have not had the matter properly explained to them. This is not satisfactory. However, I do not consider that an adverse finding is either necessary or appropriate. To rectify the situation, I suggest Mr ZC refer to the file, refresh his memory, and advise Mr RC and Ms RD of exactly what occurred.

Fees

[34] [Law Firm 1] rendered invoices totalling \$2,500 plus GST and disbursements for the work carried out for Mr RC and Ms Lu. Mr RC and Ms RD say they were told the work would cost \$1,500. Mr [RC and RD's Representative] advises this was an indicative cost provided by Mr ZC for a standard purchase of a commercial property with one mortgage. He says that Mr RC and Ms RD were advised that any additional work would be charged at \$400 per hour plus GST.¹¹

[35] Clearly it is impossible to make a finding as to what Mr ZC told Mr RC and Ms RD but it is highly unlikely that a lawyer would commit to a fee when he or she is required to negotiate and draft the agreements. Consequently, no weight is attached to the assertions by Mr RC and Ms Lu.

¹¹ Above n 4.

[36] The Standards Committee determined that the fees charged for the work were fair and reasonable. I have no hesitation in concurring with that conclusion as the work involved two sale and purchase agreements and all that was required to take those agreements through to settlement. It also included completing the loan documentation, uplifting funds and settling the transaction, all in a condensed period of time.

[37] Two invoices were issued for the legal work, one from [Law Firm 1] for the purchase of the land and buildings and the other from [Law Firm 2] for the purchase of the business. Both invoices were dated 12 June 2015 and both were addressed to [General Company 1]. Mr [RC and RD's Representative] advised that "the invoice from [Law Firm 2] unfortunately was in error. That was the former practise [sic] name before [Law Firm 1]".¹² This explanation was accepted by the Standards Committee¹³ and there is no reason not to accept it. The issue of importance is the quantum of the fees and that has been addressed above.

The request for additional payment of \$102,851.63

[38] Mr RC and Ms RD have complained about an error by [Law Firm 1] in calculating the amount they were required to pay into the firm's trust account to complete the transactions. [Law Firm 1] prepared a statement relating to the purchase of the land and building with a balance to pay of \$258,839.11. This was paid into [Law Firm 1]'s trust account at 1.25 pm on 15 June.

[39] Another statement was prepared on the [Law Firm 2] letterhead for the business purchase. The debit balance on the statement amounted to \$298,750 with no credits shown. Yet, inexplicably, the statement showed a balance of \$195,898.37 to be paid and this amount was paid into the firm's trust account at 1.10 pm.

[40] The difference between the two amounts is \$102,851.63 and it is this amount the firm realised they were short to enable settlement to proceed and which they needed the clients to pay urgently into the trust account late on the day of settlement.

[41] Mr RC and Ms RD say the person who called to advise that additional funds were required was rude. The loan documents had been late in arriving, the clients had not attended until the day of settlement (for whatever reason) to sign the documents and then there were issues about the borrower as named in the documents. There were also problems in obtaining the appropriate certificate of insurance. It is understandable that the person who telephoned Mr RC and Ms RD may have been

¹² Above n 4.

¹³ Above n 7, at [49].

somewhat brusque as the firm was under considerable pressure to complete settlement that day. The caller has not been identified by Mr RC and Ms RD or by the Standards Committee, and it is likely it was not Mr ZC in any event.

[42] Lawyers are not required to measure up to a standard of perfection and it is understandable that given the pressures of the day an error was made. It is also unrealistic for Mr RC and Ms RD to expect a standard of perfection from their lawyer when they themselves did not draw the lawyer's attention to the fact that he had not asked for sufficient funds.

[43] The combined purchase price for the land and building and the business was \$1.55 million. In their complaint, Mr RC and Ms RD say that they were contributing 45 per cent of the price in cash. That amounts to \$697,500. By the time fees were taken into account they must have been expecting to contribute something in the region of \$700,000.

[44] Deposits totalling \$155,000 were paid leaving approximately \$545,000 to be paid. The first two amounts requested by [Law Firm 1] totalled approximately \$455,000 and it is somewhat puzzling that the clients themselves did not recognise that they had not been asked for sufficient funds to make up the 45 per cent of the purchase price that they were contributing.

[45] In the circumstances it is not appropriate to take any further action on this complaint.

The unexplained sum of \$1,191.11

[46] In the supporting reasons for the review, Mr RC and Ms RD referred to an "additional amount of \$1,191.11 charged to them without an invoice". This issue had been raised by Mr RC and Ms RD in an email to the New Zealand Law Society Lawyers Complaints Service on 6 August 2015.

[47] It is an unwarranted use of this Office's resources to be required to explain the matter which could/should have been readily explained by any number of persons before now.

[48] The figure of \$1,191.11 is made up of the following amounts:

Purchaser's share rates (refer vendor's solicitor's settlement statement 10 June 2015)	\$730.11
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Disbursements on land purchase (refer [Law Firm 1] statement re: land purchase)	\$436.00
Disbursements on business purchase (refer [Law Firm 1] statement re: business purchase)	\$25.00
Total	\$1,191.11

Decision

Having considered all of the issues raised by Mr RC and Ms RD I have reached the same conclusion as the Standards Committee, namely that no further action is required on any of the complaints made by them. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 30th 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 RC and Ms RD as the Applicants
 Mr RC as the Respondent
 Mr [RC and RD's Representative] as the Respondent's representative
 [Area] Standards Committee
 The New Zealand Law Society