

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

[2021] NZLCRO 66

Ref: LCRO 22/2020

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

N&Y LK

Applicants

AND

XZ

Respondent

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

Introduction

[1] Mr and Mrs LK have applied for a review of the determination by the [Area] Standards Committee in which the Committee made a finding of unsatisfactory conduct against Mr XZ and imposed a censure pursuant to s 156(1)(b) of the Lawyers and Conveyancers Act 2006. In imposing this penalty, the Committee also took note of the fact that Mr XZ undertook “to subsequently educate himself to ensure his knowledge of conflicts is sufficient in future”.¹

[2] Mr XZ has subsequently provided evidence of the fact that he has attended seminars concerning conflicts of interest.

¹ Standards Committee determination (18 December 2019) at [24].

Background

[3] Mr and Mrs OF were long-standing clients of PQ & Associates. Mr XZ is a partner in the firm.

[4] Mr and Mrs OF, and/or entities associated with them, owned an [Enterprise] in [Location]. In July 2008, the OF's accountant (Mr GT) incorporated [123] [Enterprise] Limited (123). Mr XZ acted for the company thereafter.²

[5] Mr and Mrs OF held [XX]% of the shares in the company. Mr and Mrs LK³ held [XW]% of the shares. All four shareholders were directors of the company.

[6] Shortly after incorporation, the company purchased an [Enterprise] known as [FR] [Enterprise]. The purchase price was \$XXX which was funded by a combination of bank debt and advances by the OF Family Trust and [TK] Limited, a company wholly owned by the OF Family Trust.⁴

[7] The property was leased to [NLK Contracting] (NLK), a company owned by Mr LK. "The intention was that the LK's would work on [FR] to establish and enhance a [Enterprising] business there."⁵

[8] The business did not succeed, and [NLK] was unable to make lease and other payments due to [123]⁶

[9] Mr and Mrs LK expressed an interest in purchasing the [Enterprise] but were unable to arrange sufficient funding to do so. "By December 2015, the LKs accepted that they would not be able to purchase [FR] and that any sale would be to a third party."⁷

[10] *LK v OF* [Citation redacted] recounts relevant background details:

[The company received an offer for [FR], and made a counter-offer, which was lower than that suggested by the LKs. The LK's wrote to the OFs of their objection.]

[11] On 8 June 2016, Mr XZ sent a letter to Mr and Mrs LK and [NLK], making demand for various (and significant) amounts that the OFs alleged were due to [123], and entities associated with the OFs. The letter also made a call on the shares held by the LKs.

² Mr XZ had acted for the OFs for many years.

³ Mrs LK is the daughter of Mr and Mrs OF.

⁴ The company borrowed \$XXXX from the [Bank]. There is some uncertainty about the amounts advanced by the other lenders but that has no relevance to this decision.

⁵ *LK v OF* [Redacted]

⁶ There is a dispute about how much was owed and to whom.

⁷ *LK v OF* at [12].

[12] In the same letter, Mr XZ gave notice of a shareholders' meeting to be held for the purpose of voting to remove the LKs as directors of the company. Mr and Mrs LK subsequently resigned voluntarily.

[13] The [Enterprise] was placed on the market and negotiations commenced with a prospective purchaser. A counteroffer by the OFs (on behalf of [123]) at \$XXXX was not accepted by the prospective purchaser who themselves counteroffered at \$XXXX. Mr and Mrs OF agreed to accept this offer, but as the sale of the property was a "major transaction",⁸ a resolution by 75% of the company's shareholders agreeing to the sale was required. Consequently, it was necessary for Mr or Mrs LK to sign a company resolution agreeing to the sale.

[14] *LK v OF* recounts further relevant background details:

[The agreement for sale and purchase required approval as a major transaction per s129 of the Companies Act. The LKs declined to give that approval, and requested to meet numerous times instead. These requested meetings did not occur. The OFs said the LKs wanted debts forgiven in exchange for approving the major transaction, which was denied.]

[15] Mr and Mrs OF applied to the High Court for an order that Mr and Mrs LK sign the special resolution to allow the sale to proceed.

[16] The High Court ordered Mr and Mrs LK sign the special resolution forthwith. Mr and Mrs LK complied, and the sale proceeded.

[17] Mr and Mrs LK appealed to the Court of Appeal, but the Court declined leave for the appeal to proceed.

[18] Mr and Mrs LK then appealed to the Supreme Court which quashed the order made by the High Court. The Court also recorded "that the LKs did not seek to invalidate the sale of [FR]..."⁹

Mr and Mrs LK's complaints

[19] Mr and Mrs LK's complaints are succinctly summarised by the Standards Committee as being:¹⁰

⁸ See s 129 of the Companies Act 1993.

⁹ At [75].

¹⁰ Standards Committee determination at [13].

... that Mr XZ acted in a conflict of interest situation, failed to provide all relevant information to the Court, misled the Court, gave negligent advice to the OFs, damaged the LK's reputation in the Court without good cause and caused them to incur \$[XXX] in unnecessary costs.

[20] The issues addressed by the Committee were:¹¹

- i. Whether Mr XZ acted in a conflict of interest situation in breach of Rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("RCCC");
- ii. Whether Mr XZ in his affidavit misled the Court in breach of RCCC 13.1;
- iii. Whether Mr XZ in his affidavit failed to provide all information relevant to the Court in breach of RCCC 13.7;
- iv. Whether Mr XZ in his affidavit may have attacked the complainants' reputation without good cause in breach of RCCC 13.8; and
- v. Whether, if the answer to any or all the above issues is yes, Mr XZ was guilty of unsatisfactory conduct.

The Standards Committee determination

The conflict of interests

[21] The Committee described the conflict of interests as follows:¹²

Mr XZ acted for [123]. When the interests of all its Directors and shareholders were aligned, he could continue to act for [123]. However, when it became clear, or should have become clear, that the interests of its directors and shareholders diverged and they were in dispute, Mr XZ should have ceased acting for [123].

[22] Mr XZ acknowledged the conflict and said:¹³

46 Having reflected on the situation, I accept that in issuing the 8 June 2016 letter, I was issuing notices and pursuing debt on behalf of [123] against [NLK] and the LKs, and that to the extent of exercising those actions on behalf of the company, there was potential for a conflict of interest to the extent the interests of [123] diverged from that of its shareholders and their other entities. I did not seek instructions from all four of the directors. I did not think to do so as N and Y had always been independently represented in all capacities by EYJ.

47 I accept that prior to issuing the letter, I should have advised the company to consider whether it wished to take independent advice.

¹¹ At [14].

¹² At [16].

¹³ Mr XZ, statement in response to NZLS complaint (10 April 2019) at [46]–[47].

[23] The Committee accepted Mr XZ's acknowledgement and agreed that Mr XZ was conflicted. It determined that this constituted unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006, by virtue of the breach of r 6 of the Conduct and Client Care Rules.¹⁴

Mr XZ's affidavit

[24] The remainder of the Committee's determination addresses the issues arising from an affidavit¹⁵ that Mr XZ swore for the High Court proceedings. The relevant paragraphs of the determination are:¹⁶

19. Mr XZ's affidavit stated essentially that the OFs wanted the [Enterprise] sold and the other issues of dispute to be reviewed subsequently whereas the LKs wanted to have all issues of dispute resolved at the same time as the issue of selling the [Enterprise] was resolved which provided them with the [Enterprise] sale as a bargaining point on the other issues in dispute. This was accurate.
20. Mr XZ attached an email chain with the bottom end of the chain cut off. The emails in totality were available on discovery. In such circumstances no intent to mislead the court was established.
21. The situation portrayed in the affidavit was as summarised in 19. above and the financial figures, including the level of debt in the affidavit, were those provided on instructions and by the accountant. In such circumstances there was sufficient cause to portray the situation as he did and include the figures that he included. In addition, the views put forward by Mr XZ in his affidavit regarding the motivations of the LKs were clearly expressed as the opinions of Mr XZ, reached on the basis of evidence which was before the Court.

...

[25] Having found unsatisfactory conduct, the Committee then considered penalty. They considered the conduct was at the lower end of unsatisfactory conduct. The Committee also took into account the steps Mr XZ undertook to subsequently educate himself to ensure his knowledge of conflicts is sufficient in future. The Committee ordered that Mr XZ be censured under s 156(1)(b) of the Act and made no further orders.

¹⁴ See [15] and [22]. The Conduct and Client Care Rules are the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁵ Dated 29 September 2016.

¹⁶ Standards Committee determination, above n 1, at [19]–[21] and [24].

Mr and Mrs LK's application for review

*Conflict of interests*¹⁷

[26] Mr and Mrs LK take issue with the Committee's description of the conflict of interests as being "at the lower end of unsatisfactory conduct". They say:¹⁸

... what the Committee failed to appropriately discuss is the actual consequence of Mr XZ's conflict. Mr XZ's strong alignment with his client's personal interests were advanced alongside the Company's position (determined based on what was best for his client's personal interests) to essentially strong arm us into signing a major transaction that we were uncomfortable signing. As directors and shareholders of the company it is entirely inappropriate for our Company lawyer to place us in that position.

Further to this, we were not comfortable signing the major transaction without discussing all matters and we asked for no less than 8 meetings which we are legally entitled to pursuant to the Companies Act. Instead the path taken was to litigate matters which ended in the Supreme Court. This is a significant breach of Rule 13.4. Not only was a meeting an alternative to litigation it is also a legal requirement to hold a meeting when requested by a shareholder.

[27] In summary, they considered that Mr XZ's conduct was not "at the lower end of unsatisfactory conduct and [they] consider significantly greater penalties are warranted". They submit that "Mr XZ must be held to account for the damage he has caused [them] and [their] family".

Misleading the Court

[28] Mr and Mrs LK disagree with the Committee's description of Mr XZ's affidavit as "accurate".¹⁹ They say that "it was only if a meeting would not be granted that [they] demanded settling of all matters and would walk away".

[29] They assert that "it was Mr XZ that would not provide [them] with a meeting, something that was not mentioned in his affidavit".

Failure to provide all relevant information

[30] Mr and Mrs LK "strongly disagree" with the Committee's conclusion that there was no intention on Mr XZ's part to mislead the Court. They refer to a failure to exhibit an email from Mr XZ to the purchaser's solicitor, which was part of a chain. The email which they say was deliberately omitted was an email from Mr XZ to the purchaser's

¹⁷ The italicised headings in this part of the determination are as presented by Mr and Mrs LK in their application for review.

¹⁸ Application for review at Part 7: Supporting reasons for application.

¹⁹ Standards Committee determination at [19].

solicitor requesting an extension of the date by which the special resolution was to be passed. The email noted that “it will be imperative to present a live contract for sale of the company’s [Enterprise] to the Court in order to obtain judgment allowing the shareholder approval clause to be ratified”.²⁰

[31] The LKs assert:

The inference that must be drawn is that Mr XZ chose to remove that email from the email chain in his evidence to provide the Court with a distorted truth.

Attacking [the LKs’] reputation

[32] Mr and Mrs LK say:²¹

... A lawyer must provide all information relevant not just that information that will benefit his client. The reality is Mr XZ’s evidence more closely represented submissions that provided a very one-sided distorted reality.

They say that Mr XZ distorted the truth, and attacked their reputation.

Mr XZ’s response

[33] Mr XZ’s counsel (Mr UV) submits “that the decision of the Standards Committee came to a finding that was open to it and its decision should be confirmed”.²² He notes the confirmation by the Committee that it had:²³

... looked at everything the parties supplied, and each concern raised, as well as other potential issues which were not raised by the parties (but which the Standards Committee took no further action on). It therefore came to its decision with the benefit of several sets of submissions and all the relevant contemporaneous information including the correspondence between Mr XZ and the LKs’ lawyers regarding the sale of the [Enterprise] and other substantive issues.

[34] He says that Mr and Mrs LK have not provided any further evidence to support their complaints.

Conflict of interest

[35] Mr UV noted that Mr XZ admitted he was conflicted and that “the Committee turned its mind to the consequences of the conduct in coming to its conclusion as to the level of conduct and appropriate penalty”.²⁴

²⁰ Mr XZ, email to purchaser’s solicitor (30 August 2016).

²¹ Part 7: Supporting reasons for application.

²² Mr UV, letter to LCRO (21 February 2020) at [3].

²³ At [6].

²⁴ At [8.3].

The affidavit

[36] Mr XZ disputes that it was he who refused meetings with the LKs and says that he acted on instructions from Mr and Mrs OF. He has also expressed the view that there would have been no different outcome even if there had been a meeting.

[37] With regard to the admissibility of some of the content of his affidavit, Mr UV submits that “had there been any issues with admissibility, the LKs could have taken this up at trial or filed an affidavit in opposition”.²⁵

Summary

[38] Mr UV’s concluding submissions were:²⁶

There has been no misapplication of the Rules by the Standards Committee. The Standards Committee clearly weighed the various issues and material and came to a finding that was open to it. The Standards Committee’s finding should therefore be confirmed.

Nature and scope of review

[39] The nature and scope of a review have been discussed by the High Court in a number of judgments. In *Deliu v Hong*, the Court said:²⁷

... 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.

Review

[40] The review proceeded by way of a hearing with Mr and Mrs LK via audio-visual link on 11 May 2021. Mr XZ and his counsel declined the opportunity to attend.

[41] Mr and Mrs LK agreed that the two issues to be addressed on review are Mr XZ’s conflict of interests, and his affidavit. However, in the course of the hearing it became apparent that Mr and Mrs LK’s dissatisfaction with Mr XZ extended beyond the content of the affidavit and generally, to the content of the correspondence from Mr XZ.

²⁵ At [8.10].

²⁶ At [10].

²⁷ [2012] NZHC 158, [2012] NZAR 209 at [41].

This is reflected in the letter from them of 8 October 2019 to the Complaints Service and it is appropriate to widen the ambit of this review to include that aspect of the complaints.

The conflict of interests

[42] Mr XZ's conflict of interests is evidenced in the opening paragraph of his letter dated 8 June 2016, addressed to [NLK] and Mr and Mrs LK. It reads:

... we act for [123] [Enterprise] Limited ... [TK] Limited, OF [Enterprise]s Limited, the OF Family Trust and OF personally.

[43] Mr XZ was clearly acting for the OF interests. At least one of the LKs were required to agree to the sale to enable the special resolution approving the resolution to be passed. It was not readily apparent that the company needed to have separate representation, as Mr XZ's clients held [XX]% of the shares and would be the only directors of the company when the LKs were removed as directors. In addition, the LKs were separately advised throughout the events giving rise to their complaints.

[44] However, the fundamental question to be answered was whether or not a sale at \$[XXXX] on the terms proposed was in the best interests of the company. What was evolving was a dispute between the shareholders of the company, and the views of the OFs did not necessarily represent the best interests of the company. A careful consideration of the rules and the law relating to conflicts of interest reveals the conflict, and which was acknowledged by Mr XZ.

[45] It must be noted here that it would not have been sufficient for Mr XZ to merely advise "the company to consider whether it wished to take independent advice"²⁸ but the parties must give their 'informed consent'²⁹ to the lawyer continuing to act for all parties.

[46] In *Taylor v Schofield Peterson* the Court said that, to establish informed consent: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 she could not give advice which ordinarily she 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.

²⁸ Mr XZ, statement in response to the complaint at [47].

²⁹ Rule 6.1.1 of the Conduct and Client Care Rules.

³⁰ [1999] 3 NZLR 434 (HC) at 440.

[47] Mr and Mrs LK are convinced that an independent solicitor acting for the company would have convened a meeting between themselves and the OFs where they would have been able to explain their views and to resolve matters. Meetings did take place between the parties in the presence of a mediator. Mr LK says that at these meetings the majority of matters were resolved, but when the OFs discussed their proposals with Mr XZ, matters regressed.

[48] An independent lawyer acting for the company, would not have been able to require the OFs to attend a meeting and speculation as to what may have occurred does not provide any basis for escalating the consequences of Mr XZ's failure to recognise the conflict, beyond those imposed by the Committee.

Mr XZ's affidavit

[49] Mr and Mrs LK's objections to the content of Mr XZ's affidavit are referred to in paras [24]–[26] above. The immediate response to their objections, is that the appropriate manner in which to challenge the content of an affidavit is by way of an affidavit in response, or by way of cross-examination in court. It seems however that this opportunity did not arise, as firstly the LKs were not served with notice of a telephone conference and then the timetable for the litigation was truncated to the extent that Mr and Mrs LK's lawyers had no opportunity to counter the content of Mr XZ's affidavit.

[50] This Office cannot compensate for any procedural issues arising in litigation. However, some of the contents of the affidavit were not objective statements of fact. I refer for example to para [8](d) of the affidavit:

OF's, the directors of the company and the [XX]% majority shareholders, have resolved to sell the [Enterprise] to the prospective purchasing party. The defendants, despite numerous requests, at all times have refused to ratify the special resolution to sell the [Enterprise]. The defendants have unnecessarily convoluted the proposed transaction by attempting to muddy the waters around what they believe they are entitled to from the proceeds of sale of the [Enterprise]. They are also using their ability to refuse to ratify the special resolution to sell the [Enterprise] against the plaintiffs in an attempt to force the plaintiffs to write off, or at least, forgive a significant proportion of considerable debts owed to the plaintiffs and their related entities by the defendants and their related entities.

[51] In [8](e) of the affidavit, Mr XZ swore as a fact, that Mr and Mrs LK were indebted to the OFs. That statement was not modified by an acknowledgement that the debts were strongly disputed. It did not present an accurate account to the court.

[52] The tenor of the affidavit appears designed to portray Mr and Mrs LK as obstructive, resistant to the sale without cause, and that the delays by them were causing a real possibility of the sale not proceeding. The implication that the sale might not

proceed if the Court did not order the LKs to agree to it, presented a misleading portrayal of the situation, as not only was the purchaser in possession, but was clearly prepared to agree to further extensions of the date for satisfaction of the condition in the contract, to allow the application to the Court to proceed.

[53] Overall, the content and tenor of the affidavit does not present an impartial and objective statement of fact to the Court. Relevant rules in the Conduct and Client Care Rules are:

- 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.
- 13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.
- 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
- ...

[54] Notably however, rule 13.5.4 provides:

- 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[55] Mr XZ has aligned himself with the interests of his clients, and the wisdom of his providing an affidavit has to be questioned. All of the evidence presented in his affidavit could readily have been provided by his clients.

[56] Mr XZ has breached r 13.5.4. His comments could also be held to be breaches of rr 10, 13.1 and 13.8. However, the further finding of unsatisfactory conduct pursuant to s 12(c) of the Act flows from the breach of r 13.5.4.

Communications with EYJ

[57] Mr and Mrs LK's complaints about the tenor and derogatory nature of Mr XZ's communications extend beyond the affidavit. Some examples of the nature of this correspondence are:³¹

- ... the instructions advanced by your client continue to show an appalling lack of understanding, ingratitude and unwillingness to take responsibility for the financial predicament in this he finds himself.

³¹ Mr XZ, letter to OB of EYJ (14 June 2016).

- Your client has left our client with no option but to invoke the legal remedies available to it as a result of your client's continued incompetence around running its business operations ...;
- Frankly it is ridiculous for your client to propose that our client owes him any money whatsoever;
- For your client to evince the attitude that he has and advance the position communicated both directly and through your office in the face of the overwhelming and significant benefits and kindnesses bestowed on him by his [redacted] is nothing less than contemptible.

[58] The correspondence from Mr XZ continued in much the same vein.

[59] Whilst these comments may echo, or repeat, comments made by Mr XZ's clients, they do not reflect the objective professionalism that is required of a lawyer. They are further inappropriate when one recalls that Mrs LK is the [redacted] of Mr and Mrs OF, and the situation which had arisen required a more tactful manner of dealing with events, so as not to further inflame the relationship between them.

[60] Rule 10 requires a lawyer to "promote and maintain proper standards of professionalism in the lawyer's dealings."

[61] The commentary on this rule in *Ethics, Professional Responsibility and the Lawyer* includes the following:³²

While lawyers are expected to be loyal to their client's interests, they ought to do so in an even-tempered and independent manner. Even when a lawyer agrees with his or her client's cause, and the other litigants' conduct is considered unreasonable, a lawyer should treat the other party with courtesy and recognise the other lawyer's independence from the client's cause and conduct.

[62] The footnote to that contains a statement from *Law Society of Upper Canada v Kay* 2006 ONLSHP 0058 at [19]:

The committee does not condemn all strongly-worded or ill-received communications. Truthful statements professionally communicated are not misconduct even if they are hurtful to the subject of the statements. Overwrought opinion, misplaced hyperbole, or a desire to intimidate, sully or defame have no place in communications from lawyers, whether directed to colleagues or to members of the public. The line between candour and slander is sometimes fine; a lawyer is advised to err on the side of courtesy. Lawyers have a positive obligation to be courteous to each other and deal in good faith, their communications with each other must maintain the proper tone of a communication from a member of the Law Society, and whatever other stresses face lawyers in daily life or practice cannot be allowed to interfere with these positive and important obligations.

³² Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at p398.

[63] Mr XZ's various statements, both in his affidavit, and correspondence with Mr and Mrs LK's lawyer, do not meet this standard.

Summary

[64] Having reviewed all of the material and hearing from Mr and Mrs LK, I confirm the finding of the Standards Committee, namely that Mr XZ is in breach of r 6.1 of the Conduct and Client Care Rules, resulting in the finding of unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act.

[65] The determination is modified by making a further finding of unsatisfactory conduct pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006³³ and s 12(c) by reason of the breaches of rules 10 and 13.5.4.

Penalty

[66] The Standards Committee determination as to penalty is contained in [24]:

Having found unsatisfactory conduct, the Committee then considered penalty. They considered the conduct was at the lower end of unsatisfactory conduct. It also took into account the steps Mr XZ has undertaken to subsequently educate himself to ensure his knowledge of conflicts is sufficient in future. The Committee ordered that Mr XZ be censured under s 156(1)(b) of the Act and made no further orders.

[67] Mr and Mrs LK object to the description of the conduct as being at the "lower end of unsatisfactory conduct". The outcome they seek, is that further penalties be imposed on Mr XZ, and suggest imposition of penalties pursuant to ss 156(1)(b), (c), (h), (i) and (o). Rather than commenting on each of these sections, the functions of a penalty in the context of disciplinary proceedings must first be considered.

The process of determining penalty

[68] The first step to take when considering penalty, is to refer to the purposes of the Act.³⁴ They are:

- (a) to maintain public confidence in the provision of legal services and conveyancing services:
- (b) to protect the consumers of legal services and conveyancing services:

³³ Section 12(b) defines unsatisfactory conduct as being conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, ...

³⁴ Section 3 of the Lawyers and Conveyancers Act 2006.

- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

[69] In *Wellington Standards Committee 2 v Harper* the Lawyers and Conveyancers Disciplinary Tribunal summarised the means by which penalties imposed in disciplinary proceedings reinforced those purposes. It said:³⁵

- (a) The primary purpose is not punishment, although orders inevitably will have some such effect; the predominant purpose, as set out in s 3 of the LCA is to protect not only the interests of consumers of legal services, but also public confidence in the provision of legal services;
- (b) To maintain professional standards. Not only is this an important purpose (and end) of itself, it also connects with the purpose of maintaining public confidence in the profession. Many cases have referred to reputation as the most valuable asset of the legal profession;
- (c) To impose sanctions on a practitioner for breach of his or her duties. Again, this factor is grounded in the public interest in maintenance of confidence in lawyers' professional standards. A number of decisions have referred to the need for the public to be able to observe a strong and proportionate response by the profession's disciplinary bodies;
- (d) To provide scope for rehabilitation in appropriate cases;
- (e) To carefully consider alternatives to striking off a practitioner, and to adopt the "least restrictive alternative" approach to the imposition of penalty;
- (f) To provide deterrence. This is perhaps more accurately considered as a subcategory of factor (c), the maintenance of professional standards, however the issue of whether suspension is required for the purposes of deterrence, assumed considerable importance in this matter so we set it out separately. Deterrence can be either Specific, directed towards the practitioner, or General and directed to the whole profession, or both.

[70] It now remains to follow the process established by the Tribunal.

The seriousness of the conduct

[71] The perceptions of the Committee and the applicants as to the seriousness of the conduct differ. It was understandable that Mr XZ did not distinguish the company from Mr and Mrs OF. The OFs held the majority of shares in the company. They had also provided significant finance to the company.

[72] Overall, the failure by Mr XZ to recognise the potential conflict of interests cannot be termed serious, although the conflict would, or should, have been more apparent when the leases and securities were executed by the parties.

³⁵ *Wellington Standards Committee 2 v Harper* [2020] NZLCDT 29 at [24].

Aggravating features

[73] Mr XZ has allowed himself to become closely aligned to the OFs, to the extent of adopting their somewhat personal negativity towards the LKs, leading to him swearing an affidavit which was, in part, misleading.

Mitigating features

[74] The mitigating feature that presents itself is that the conflict of interests was not readily identifiable given that the company largely identified with the interests of the OFs.

Conclusion

[75] Stepping back, and taking into account the factors discussed above, I agree with the finding of the Committee that the unsatisfactory conduct arising by virtue of the conflict of interests, is at the lower end. However, the aggravating features of Mr XZ's conduct and the further finding of unsatisfactory conduct against him, require an additional penalty to that imposed by the Committee.

Penalty

[76] The censure imposed by the Committee is confirmed pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 but directed more towards the further finding of unsatisfactory conduct referred to in [61] above.

[77] Pursuant to 156(1)(i) of the Lawyers and Conveyancers Act 2006, Mr XZ is ordered to pay a fine of \$2,000 to the New Zealand Law Society.

Costs

[78] As provided in the Costs Orders Guidelines issued by this Office, whenever an adverse finding is made or upheld, a costs order against the lawyer will follow. Mr XZ is ordered to pay the sum of \$1,600 by way of costs to the New Zealand Law Society.

Enforcement of costs order

[79] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Publication

[80] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, this decision will be published on the website of this Office in an anonymised format.

[81] Pursuant to s 206(1) of the Act, all aspects of this review and this decision must remain private and not be disseminated to any other person.

DATED this 19th day of MAY 2021

O Vaughan
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 LK as the Applicants
Mr XZ as the Respondent
Mr UV and Ms DD as the Respondent's Representatives
Mr PQ as a Related Person
[Area] Standards Committee
New Zealand Law Society