

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

[2020] NZLCRO 185

Ref: LCRO 5/2020

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

AJ

Applicant

AND

BN

Respondent

DECISION

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

Introduction

[1] AJ has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of her complaint about the conduct of BN, at the relevant time a partner with [Law firm] (the firm), who acted for her on the purchase of a residential property (the property).

[2] On 26 March 2019, AJ instructed (by email) BN, who AJ says had previously acted for her on a property purchase and property related issues, to prepare an agreement for the purchase of the property. AJ sent BN information about the property in a “buyers pack” which included a copy of a title search for the property and an easement instrument, which created land covenants, registered against the title.

[3] The purchase agreement, prepared by BN and signed by the vendor and AJ on 26 March, contained (a) a due diligence condition for AJ's benefit to be satisfied "within 10 working days after the date of [the] agreement", and (b) because the property was being let by the vendor through [Company A] which AJ intended to continue, a requirement for the vendor to transfer "control of any website/s relating to the property together with such passwords relating to bookings for the property and account to the purchaser for any forward bookings received...".¹ The agreed settlement date was 30 April 2019.

[4] On 2 April 2019, BN informed (by email) AJ "[at] this stage, we can see no issues with the property and therefore unless your builder has identified any issues, then feel free to pay the deposit to our trust account".

[5] AJ was also interested in purchasing the adjoining property and instructed a valuer to provide her with a valuation which she received on Friday, 12 April 2019.

[6] Importantly, for the purposes of this review, the valuation contained information about the land covenants, in respect of which both the property and the adjoining property had the benefit and the burden, and provided that (a) the owner for the time being of each property would "[n]ot...[p]ermit or suffer [the property] to be used for any trading or commercial purposes, or any other use other than those permitted by the District Plan of the relevant local authority", and (b) any "breach or non-observance" could lead to a claim for liquidated damages of \$5,000", as well as being required to remedy the breach for which entry was permitted by the owner of the property seeking to enforce the covenant.

[7] As detailed in my later analysis, AJ informed (by email) BN on 12 April he had not advised her about the land covenant. BN telephoned AJ on Monday, 15 April stating he assumed because she had sent him information about the property she would have read the land covenant hence not having reported to her about it.

[8] The following day, 16 April, AJ claimed (by email) BN had been negligent. She asked him to advise her whether the land covenant would prevent her being able to have paying guests in the property as she intended.

[9] Later that day AJ sent a formal complaint to YU, the firm's partner responsible for dealing with complaints. YU responded an hour later stating he was "looking into" AJ's complaint, and would revert to her "shortly".

¹ Due diligence condition date: 10 working days after 26 March 2019 = 8 April 2019.

[10] The Easter holiday period began on Friday 19 April. YU responded to AJ's complaint the following Wednesday, 24 April advising her the firm could not continue to act for her without her informed consent given after she had obtained independent advice. Later that day having taken independent legal advice, AJ instructed another partner in the firm to complete the purchase which was settled on 30 April.

Complaint

[11] AJ lodged a complaint with the Lawyers Complaints Service on 16 May 2019. She sought a waiver or refund of the firm's fees on the matter, and reimbursement of legal fees incurred with another law firm from whom she had obtained independent advice.

(1) Act competently, in a timely manner

[12] AJ claimed BN, by not advising her about the land covenant within the 10 working days due diligence period, and informing her he "could see no issues" with the property, had (a) not acted competently, and in a timely manner, and (b) had not protected or promoted her interests, and had been negligent.

(2) Complaints process

[13] She alleged BN, upon receipt of her complaint (a) had not "immediately" advised her to "seek independent advice", but later informed her he could not act for her further unless "after receiving independent advice" she gave her "informed consent", and (b) had taken too long before providing this advice to her whilst continuing to act for her in the meantime.

Response

[14] BN's response was submitted by YU.²

(1) Act competently

[15] BN said he acknowledged he "did not specifically bring the [land] covenant to AJ's attention", but did not consider he had breached his professional obligations to AJ "such as to warrant further action" by the Committee.

² YU (partner, [Law firm]), letter to the Lawyers Complaints Service (24 June 2019).

(2) Complaint process

[16] BN said once AJ informed him on 16 April 2019 she “had an issue” with the land covenant he ceased acting, and referred her complaint to YU who responded to AJ on 24 April 2019.

Standards Committee decision

[17] The Standards Committee delivered its decision on 4 December 2019, and determined, pursuant to ss 138(1)(c) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that any further action on the complaint was unnecessary or inappropriate.

(1) Act competently

[18] The Committee concluded that BN had been “neither negligent nor acted incompetently” by not drawing AJ’s attention to the land covenant.³

[19] In reaching that conclusion, the Committee observed that (a) the property “was already being used as an [Company A]”, which was “noted on the Council’s District Plan”, and (b) the owner of the neighbouring property which had the benefit of the covenant had not objected to that use.

[20] The Committee noted AJ was “a sophisticated and commercially minded client”, who had been in possession of information about the property including the covenant, with the firm having acted for her “on 27 separate commercial property matters since 2012”.

(2) Act in a timely manner

[21] In the Committee’s view, by responding (by phone) on Monday, 15 April 2019 to AJ’s Friday, 12 April 2019 email, and her telephone message that day, BN had not contravened his duty to act in a timely manner.⁴

³ Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) states “In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care”.

⁴ Rule 3.

(3) Complaints process

[22] The Committee decided there had been no delay by the firm in responding to AJ complaint on Wednesday, 24 April 2019.

[23] In arriving at that decision, the Committee took into account (a) the firm had informed AJ on 16 April her complaint “was being looked into and a response would follow”, (b) the intervening Easter holiday period, and (c) AJ, having obtained independent advice, had instructed another lawyer in the firm to attend to settlement on 30 April.

Application for review

[24] AJ filed an application for review on 10 January 2020. She asks that a “clear and strong message” be sent to lawyers that (a) “basic competence in fulfilling a client’s brief”, and (b) acting in a timely manner, is “not optional”.

(1) Act competently

[25] AJ says she disagrees with the Committee that BN’s failure to inform her about the land covenant was “neither negligenc[ce] nor act[ing] incompetently”.

[26] She says had BN looked at the title he would have seen the land covenant prevented “a business ... [being] run from the property”. She says she “was paying” BN to look at the title and therefore had not done so herself.

(2) Complaints process

(a) Delay

[27] AJ says the “delay” in the firm informing her that (a) her complaint prevented the firm from acting for her further unless she obtained independent advice, and (b) she may need to instruct another law firm, was “[not] reasonable”.

(b) Independent advice

[28] She says YU could have told her on 16 April when sending her “a one-line boilerplate” response, or even on 17, or 18 April, she may need to instruct another firm “to complete the transaction”.

[29] Instead, AJ says the firm, although aware settlement was due on 30 April, “chose not to inform” her, and she heard “nothing further” until 24 April.

Response

[30] In his response also made on his behalf by YU and filed on 4 August 2020, BN says he supports the Committee’s decision, and asks that AJ application for review be dismissed.⁵

[31] He says he disagrees with AJ’s “characteris[ation]” of the Committee’s decision that “a lawyer is under no obligation to disclose to the client covenants that apply to a property being purchased”. Instead, he says the Committee’s decision is “a case-specific consideration of the obligations which applied in the relevant circumstances”.

(1) Act competently

[32] BN says he maintains his position stated in his response to AJ’s complaint, but wishes to address the “additional points”, referred to in my later analysis, made by AJ in her application for review.

(2) Complaints process

[33] BN says the firm responded to AJ’s complaint “within three working days” which he says was “not an unreasonable period” considering the “steps ... taken to ensure AJ ability to settle the transaction (should she choose to) was not prejudiced”.

[34] He says before the firm responded, AJ’s complaint had to be discussed within the firm, and included the possibility of obtaining advice outside the firm.

Review on the papers

[35] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[36] I record that having carefully read the complaint, the response to the complaint, the Committee’s decision and the submissions filed in support of and in opposition to the

⁵ YU, letter to Legal Complaints Review Officer (31 July 2020).

application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[37] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁶

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[38] More recently, the High Court has described a review by this Office in the following way:⁷

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.

[39] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to consider all of the available material afresh, including the Committee’s decision, and provide an independent opinion based on those materials.

⁶ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁷ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Issues

[40] The issues I have identified for consideration on this review are:

- (a) Did BN, either upon receipt of AJ's instructions to prepare the purchase agreement, or during the due diligence period, inform AJ about the land covenant, and explain the effect of it to her?
- (b) If not, did BN act competently consistent with the terms of the retainer and the duty to take reasonable care?
- (c) Did BN, upon receiving AJ's complaint, immediately inform her the firm could not act for her further unless, after receiving independent advice, she gave her informed consent?

Analysis

(1) Disclosure, act competently – issues (a), (b)

(a) Parties' positions

[41] AJ claims BN, by failing to advise her about the land covenant, had not acted competently and in a timely manner, had not protected or promoted her interests, and had been negligent.

[42] BN acknowledges he did not inform AJ about the land covenant, but submits he had not breached his professional duties owed to AJ such as required a disciplinary response.

Context

[43] The communications between the parties, commencing from 26 March 2019 when AJ instructed BN to prepare the purchase agreement until 12 April 2019 when she enquired of him about the land covenant, provide the context for consideration of this aspect of AJ's complaint.

[44] As noted in the introduction, accompanying AJ's 26 March 2019 email instructions to BN to prepare the purchase agreement was information about the property in a "buyers pack". That information included a copy of a title search for the property, and an easement instrument which contained land covenants, registered against the title.

[45] The purchase agreement was signed by AJ and the vendor that day. The due diligence period of 10 working days, within which AJ could undertake her enquiries about the property, expired on 8 April 2019.

[46] BN informed AJ on 2 April 2019 that “[at] this stage”, he saw “no issues” with the property, and unless AJ’s builder had “identified any issues”, invited her to pay “the deposit to [the firm’s] trust account”.

[47] On Friday, 12 April 2019, AJ received a valuation she had requested of the adjoining property, and later that day asked BN why he had not advised her about the land covenant which was referred to in the valuation.

(b) Negligence

[48] AJ’s allegations include that, by not advising her about the land covenant, BN had been negligent.

[49] Negligence, known as a “civil wrong” or a tort”, is a cause of action well-understood by the civil courts. Its components include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty.

[50] Findings of negligence may only be arrived at after presentation of evidence, frequently expert evidence, before the Court and tested by the cross-examination of witnesses. Issues that often arise in claims of negligence include whether a person has breached their duty of care, or whether there is a connection between the alleged loss and the breach of duty. Complex arguments often arise about whether any loss has been suffered.

[51] Neither a Standards Committee nor a Review Officer is equipped to make findings of negligence. The default position for a Standards Committee is to conduct their hearings on the papers. A negligence analysis is simply not possible with that process. Equally, a Review Officer who hears the parties on a review, does not hear evidence, and the parties are not cross-examined. The process of both a Standards Committee, and a Review Officer is inquisitorial, and investigative.⁸

[52] However, as discussed below, a Standards Committee, or a Review Officer on review, can determine whether or not a lawyer acted competently.

⁸ Section 203 of the Act; *Deliu v Connell* [2016] NZHC 361; *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209; and the Legal Complaints Review Officer “Guidelines for Parties to Review” (August 2010).

(c) Professional rules

[53] In broad terms, there are two professional duties relevant to AJ's complaint that BN did not advise her about the land covenant: (a) the duty of disclosure, and (b) the duty to act competently.

Disclosure

[54] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.⁹

[55] A lawyer must also respond to a client's inquiries in a timely manner, inform the client if there are any material and unexpected delays in a matter, and promptly answer requests for information or other enquiries from the client.¹⁰

Act competently

[56] The definition of "unsatisfactory conduct" includes "... conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".¹¹

[57] This has been described as "an articulation of the well established 'reasonable consumer test' which focuses not on the views of professional people (i.e. a peer based standard) as to proper standards, but the reasonable expectations of ordinary people. While in practice the two will frequently converge, the shift in focus is an important signal."¹²

[58] Consistent with that standard, r 3 provides that "[i]n providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care". This duty has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help."¹³

⁹ Rules 7 and 7.1. Rule 1.2 defines a "retainer" as "an agreement under which a lawyer undertakes to provide or does provide legal services to a client ...".

¹⁰ Rules 3.2, 3.3, and 7.2.

¹¹ Section 12(a) of the Act.

¹² Duncan Webb "Unsatisfactory Conduct" (September 2008).

¹³ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.1].

[59] Importantly, lawyers' duties are "governed by the scope of their retainer...". However, "... [m]atters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer".¹⁴

(d) Discussion

AJ

[60] AJ explains that had she not obtained the valuation of the adjoining property she would have remained unaware of the land covenant thereby placing her at risk of breaching the covenant if she provided accommodation at the property through [Company A]. She says she did "have other commercial plans, or rather hopes", for what she describes as a "unique" property, "beyond [Company A]".

[61] In her view, the Committee's observation she is a "sophisticated" client knowledgeable about property ownership is "irrelevant" because BN had a duty to "[inform her] of any title issues".

[62] She says it took BN "ten days to supposedly do due diligence" on the property before he reported to her there were "no issues", and knowledge of "building restrictions" in the land covenant "almost certainly would have influenced" the price she offered for the property.

BN

[63] BN acknowledges he did not advise AJ about the land covenant, but does "not accept" the land covenant "would restrict the activity AJ proposed for the property".

[64] He says AJ knew the property was "currently being used" by the vendor for [Company A], and intended to "continue that use".

[65] BN explains the period for satisfaction of the due diligence condition was "within 10 working days", and AJ forwarded (by email) information about the property, including the title, to him on 2 April 2019. He says he was not aware during that time if AJ "considered the use of the property for [Company A] to be a commercial activity triggering a breach of the [land] covenant".

[66] He says having discussed the use of the property for [Company A], which was permitted by the District Plan, with the District Council he did not consider that use was

¹⁴ *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.

“for trading or commercial purposes” intended to be “captured by the [land] covenant”, but “more akin to a residential tenancy”.

[67] BN says “[b]eyond the [Company A] issue” there “can be no obligation” on him to advise AJ on her intentions for the property not previously raised with him or in respect of which she had asked for advice. He says whilst he knew AJ intended to continue having paying guests in the property through [Company A], she had not previously raised that she had “other commercial plans”, or “hopes” for the property.

Consideration

[68] A fundamental task for a lawyer acting for a purchaser of land, especially at the commencement and before settlement, is to search the title to the property.

[69] This includes the relevant deposited plan(s), and all interests registered against the title including easements, such as rights-of-way, utilities, drainage; land covenants; and other memorials including statutory land charges, local authority consents, and public works memorials.¹⁵

[70] The importance of the title search is underscored in the *Property Transactions and E-dealing Practice Guidelines* of the Law Society’s Property Law Section which recommends a purchaser’s lawyer (a) obtain a title search before the purchaser signs the purchase agreement; (b) ensure the purchaser identifies the property on a copy of the deposited plan, or other suitable plan; and (c) “explains” to the purchaser “the effect of any relevant interests, restrictions or encumbrances on the title”.¹⁶

[71] BN has not stated either to the Committee, or in his response to AJ’s review application whether he searched the title, and if he did what documents were included in his search.

[72] However, it is not necessary for me to enquire into that because, as BN acknowledges, although “aware” of the land covenant, he neither “specifically” brought it to AJ’s “attention”, nor “directly discuss[ed]” it with her.

[73] BN says “having discussed” the land covenant with the Council, he “did not consider” use of the property by paying guests through [Company A], which he describes

¹⁵ CCH IntelliConnect *NZ Conveyancing Law and Practice Commentary: Sale of Land – Standard Contract for the Sale of Land* (online looseleaf ed, LexisNexis) at [5-163].

¹⁶ New Zealand Law Society Property Law Section *Property Transactions and E-Dealing Practice Guidelines* (April 2015) at [3.10] to [3.12].

as “more akin to a residential tenancy”, was a use “for trading or commercial purposes”, and was permitted by the Council’s District plan.

[74] He says because AJ, who he describes as “a sophisticated and commercially-minded client”, had sent him information about the property which included the title, and the land covenant she therefore (a) knew about the land covenant, and (b) knew the property was used for [Company A] which she intended to continue, and therefore had arrived at her own conclusion that the land covenant did not present as an obstacle to that use.

[75] This, however, is conjecture by BN because, again, as he acknowledges, he did not speak to, or report to AJ about the land covenant either before she signed the agreement, or during the 10 working day due diligence period. Other than his 2 April 2019 email in which he stated he could see “no issues with the property” he has not produced any file notes of any telephone conversation, letters or emails reporting to AJ about the property.

[76] The conclusion I have reached is that by not advising AJ about the land covenant BN contravened duties of disclosure in rr 7, and 7.1, and his duty to act competently in r 3, referred to above.

(2) Complaints process – issue (c)

(a) Context

[77] The second aspect of AJ’s complaint concerns the way in which BN responded to her complaint to the firm, in particular, (a) the time taken by the firm to respond, and (b) not informing her immediately she must give informed consent, after having obtained independent advice, before the firm could continue acting for her otherwise she would need to instruct an independent lawyer to complete the purchase.

[78] On Friday, 12 April 2019, AJ informed (by email) BN that the valuation she had obtained of “the house next door” referred to the land covenant which she says he “did not mention” to her.

[79] AJ says she telephoned BN that day and left a message for him. She says when he telephoned her on Monday, 15 April he “expressed surprise” she “did not already know” about the land covenant which was included in the “buyer’s pack” she sent him on 26 March. She says he told her he “assumed [she]’d read” the land covenant and therefore “hadn’t told” her about it.

[80] On Tuesday, 16 April at 9:49am, AJ informed (by email) BN that in her “opinion”, his omission to inform her about the land covenant was “negligence” of his “duty to [her] as [his] client”.

[81] Referring to BN’s telephone advice the previous day that the land covenant “only applies to businesses of six or more employees”, AJ says she asked BN (a) how he arrived at that view given the broad nature of the land covenant, and (b) for his written advice whether she could “have pa[y]ing guests ... or not”, which she was “committed to”, and “what, if any, trading or commercial or business activities [we]re possible” at the property.

[82] AJ said BN was “fully aware [she] was attempting to get commercial insurance for the property” which she had obtained. She says she asked him “why [he] would not tell [her] about this or discuss this with [her]”, and whether the house insurance she had obtained was “now null and void?”

[83] At 3:17pm on 16 April, AJ sent (by email) her formal complaint to YU which he acknowledged (by email) at 4:36pm stating that he was “looking into the matters [she] ha[d] raised and w[ould] come back to [her] shortly”. Following the Easter holiday period which commenced on Friday, 19 April, YU provided his substantive response to AJ on Wednesday, 24 April.

(b) Professional rules

Complaints process

[84] For the purpose of responding to clients’ complaints, r 3.8 of the Rules requires that “[e]ach lawyer must ensure that the lawyer’s practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice”.¹⁷

[85] Before commencing to act for a client on a matter, a lawyer must provide the client with certain information on the principal aspects of client service and client care which includes “the procedures in the lawyer’s practice for the handling of complaints by clients”, as well as details of “the Law Society’s complaints service and how the Law Society may be contacted in order to make a complaint”.¹⁸

¹⁷ See “Running an Effective Internal Complaints Process” (New Zealand Law Society practice briefing, March 2014).

¹⁸ Rule 3.4(d) applies to lawyers other than barristers sole; r 3.5A applies to barristers sole.

Independent advice

[86] In circumstances where a client, such as AJ, informs his or her lawyer about a potential claim against the lawyer, r 5.11 of the Rules requires that the lawyer “must immediately— (a) advise the client to seek independent advice; and (b) inform the client that [the lawyer] may no longer act unless the client, after receiving independent advice, gives informed consent”.

*(c) Discussion**AJ*

[87] AJ claims the time taken by the firm to respond to her complaint was not reasonable and, when asked, BN did not tell her how to make a complaint.

[88] She explains she informed BN in her 12 April 2019 email she “had just found out about the covenant”. She says apart from “a brief phone call”, and without receiving a response “to several follow-up questions”, on 16 April she sent BN another email, followed by her complaint to YU later that day.

[89] AJ says the firm could have told her earlier than 24 April that because she had made a complaint the firm could no longer act for her on the purchase without her first obtaining independent advice.

[90] Instead, AJ says although YU was aware settlement was due on 30 April, he did not tell her until 24 April, “two working days” before settlement which she says she could have “miss[ed]”, that she must obtain independent advice before the firm could act further for her.

BN

[91] BN’s position is that YU acknowledged receipt of AJ’s complaint the day he received it, 16 April 2019, stating the matter was being looked into, and a response would follow.

[92] He says before responding he had to follow the firm’s complaints process which included YU reviewing AJ’s file, consulting with “other partners, and external parties”.

[93] However, BN says that process, which included whether “[r] 5.11 [of the Rules] was engaged” and the “appropriate way forward”, although “not able to be completed”

before the Easter holiday period commencing on Friday 19 April,¹⁹ was completed “three working days” later on Wednesday, 24 April, following the Easter holiday period. In his submission, that was “not an unreasonable period” considering the “steps ... taken to ensure AJ ability to settle the transaction (should she choose to) was not prejudiced”.

[94] In the meantime, he says apart from the preparation of settlement documents to be used by the firm, or another firm if instructed by AJ, “[n]o substantive advice” was provided to AJ by the firm. He disagrees that by not responding until 24 April there was “ever a realistic possibility” of “missing” settlement.

[95] In BN’s submission, he did not contravene r 5.11. He says although, as explained in YU’s 24 April email to AJ, [BN] considered he had not breached any professional obligations by failing to advise AJ about the land covenant, erring on the side of caution YU advised her that the firm would require her informed consent, after having received independent advice, to continue acting for her.

Consideration

[96] As noted above, r 3.8 requires each law practice to establish and maintain a complaints process to “ensur[e]” complaints by clients are “dealt with promptly and fairly”.

[97] To assist lawyers complying with that requirement, the New Zealand Law Society has published a Practice Briefing titled *Running an Effective Internal Complaints Process* intended “to provide best practice information for lawyers on responding to complaints and establishing an effective system for complaint investigation and resolution”.²⁰

[98] Included in that briefing are recommendations that the complaint be “[a]cknowledged” at “the earliest opportunity preferably within 2 – 3 days”; the response be “in the same medium (telephone, email, and letter) in which the complaint was made”; an explanation of “the next steps” of the complaints process, and “what, if any, impact the complaint may have on any current matter in which the firm is acting”.

[99] The briefing also notes that complainants “prefer to know” that “a named individual” in the firm, other than the lawyer complained about, is “responsible for handling their complaint”. For example, a senior partner, a managing partner, or in the case of an incorporated law firm, a director.

¹⁹ External parties would most likely include the firm’s indemnifier, and possibly a lawyer experienced in the practice area of lawyers’ professional responsibilities and duties from whom the firm may seek advice.

²⁰ Above n 18.

[100] As noted in the chronology above, on Tuesday 16 April, having informed BN he had been negligent by not advising her about the land covenant, AJ sent her complaint to YU who an hour later informed her the complaint was being “looke[d] into” and he would respond to her “shortly”.

[101] The Easter holiday period commenced on Friday, 19 April 2019.

[102] On the following Tuesday, 23 April, AJ asked (by email) BN to send her “the settlement statement for the balance” of the purchase price payable so she could pay that money into the firm’s trust account that week.

[103] AJ says having received an automatic out of office reply from BN that he was on leave and would be returning to his office on Monday, 29 April 2019, she spoke with another partner in the firm and arranged to pay the balance of the purchase price into the firm’s trust account

[104] On Wednesday, 24 April 2019 at 3:31pm, YU informed (by email) AJ he had considered and discussed her complaint with BN. He said [BN] had “made an enquiry with the ... Council who have confirmed that the use of the property as an [Company A]” is “not restricted by the District Plan”.

[105] For that reason, YU said he considered there was “a sound argument that listing on [Company A] does not amount to a trading or commercial purpose intended to be captured by [the] covenant” and understood the neighbour did not object to the “current use” of the property “as an [Company A] offering”.

[106] He added that if AJ purchased the adjoining property, which had the benefit and burden of the same land covenant, then “the operation of the covenant would be academic and the covenant could be removed at [her] discretion”. That aside, he said having made a complaint about BN he was “obliged to advise [she] seek independent legal advice”, and the firm “could not continue to act for [her] unless, after receiving independent advice, [she] provide[d] informed consent”.

[107] At 4:23pm, AJ informed (by email) YU she had received independent legal advice, and asked the firm to settle the purchase for her adding her claim of negligence by BN “still stands and still needs to be resolved”.

[108] I can appreciate AJ’s concerns that having made her complaint on 16 April, with the Easter holiday period commencing Friday 19 April, there were only eight working days, including Tuesday 23 April, until settlement of the purchase on 30 April.

[109] Nevertheless, in line with the practice briefing, YU acknowledged receipt of AJ's complaint immediately on 16 April. Four working days later on 24 April, albeit not the "2-3 days" recommended in the practice briefing, he provided the firm's substantive response including his advice that for the firm to continue, AJ must provide her informed consent having taken independent advice beforehand.

[110] In the meantime, AJ had been in touch with the other partner in the firm about competing settlement and, having received YU's email 24 April, later that day informed YU she had received independent advice, and asked the firm to complete settlement.

[111] YU says in view of AJ's complaint, the firm had not billed AJ for its legal services, expressed willingness to resolve her dissatisfaction, and for that purpose proposed "a meeting and/or further correspondence" with her to achieve a resolution.

[112] The High Court has stated that whilst the rules are to be "applied as specifically as possible",²¹ they "are also to be applied as sensibly and fairly as possible."²²

[113] Adopting that approach, whilst the four working days it took YU to respond to the complaint was less than ideal for AJ, I do not consider that response time gives rise to any need for a disciplinary response. In reaching that decision, I also take into account that having made her complaint to YU, the matter was effectively taken out of BN's hands.

(3) Conclusion

[114] I have found that BN, as he acknowledges, by failing to disclose the land covenant to AJ, contravened rr 7, 7.1 and 3 of the Rules.

[115] However, having carefully considered all of the material put before me on this review, although it is open to me to make an unsatisfactory conduct finding against BN under s 12(c) of the Act, for the reasons set out below, but by the closest of margins, I have decided not to impose a disciplinary sanction.

[116] A breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the Court observed that:²³

The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action

²¹ *Q v Legal Complaints Review Officer* [2012] NZHC 3082 at [59].

²² *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

²³ [2014] NZHC 2408 at [82].

under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[117] That position was affirmed in *Chapman v Legal Complaints Review Officer* where the Court noted that:²⁴

... it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

[118] In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.²⁵

[119] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.²⁶ That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.²⁷

[120] Reflective of the consumer protection purpose of the Act, the Lawyers and Conveyancers Disciplinary Tribunal has stated that the purpose of the disciplinary process is protection of the public, maintenance of professional standards, to sanction a lawyer who has breached his or her obligations and duties, and as applicable, enable rehabilitation of the lawyer concerned.²⁸

[121] However, for the following reasons I do not consider that the imposition of a disciplinary sanction on BN is necessary or appropriate:

- (a) it is my view that no broader issues of consumer protection or public welfare are directly raised by this review, other than the public interest in lawyers maintaining professional standards and ensuring compliance with the Rules.
- (b) BN acknowledges he did not advise AJ about the land covenant.

²⁴ [2015] NZHC 1500 at [47].

²⁵ Section 211(1)(b) of the Act.

²⁶ Section 138.

²⁷ Section 138(2).

²⁸ *Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349, [2013] NZAR 416. See also s 3 of the Act, the consumer protection purposes; and *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].

- (c) The steps taken by the firm, whilst considering AJ complaint, to ensure AJ's purchase would be settled on 30 April.
- (d) The firm having expressed willingness in resolving AJ's complaint, and not having billed AJ for its attendances on the purchase.

Decision

[122] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee to take no further action in respect of AJ's complaint on the grounds that any further action is unnecessary or inappropriate is confirmed.

Costs

[123] As well as the ability to make a costs order against a lawyer in respect of whom a finding of unsatisfactory conduct has been made, a costs order may also be made against a lawyer where the Review Officer considers "the proceedings were justified and that it is just to do so". The circumstances in which such an order can be made are where the lawyer's conduct, while not warranting a finding of unsatisfactory conduct, is open to criticism.²⁹

[124] It follows that BN is ordered to pay costs in the sum of \$900 to the New Zealand Law Society within thirty days of the date of this decision, pursuant to s 210(1) of the Act. 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.

Anonymised publication

[125] 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.

DATED this 30TH day of September 2020

²⁹ Section 210(3) of the Act; Legal Complaints Review Officer *Costs Orders Guidelines*.

B A Galloway
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

AJ as the Applicant
BN as the Respondent
YU as a Related Person
[Area] Standards Committee
New Zealand Law Society