

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

[2024] NZLCRO 007

Ref: LCRO 171/2023

**CONCERNING**

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

**AND**

**CONCERNING**

a decision of the [Area] Standards Committee [X]

**BETWEEN**

**PF**

Applicant

**AND**

**DS**

Respondent

**DECISION**

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

**Introduction**

[1] The applicant (Mr PF) has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of his complaint concerning the conduct of the respondent, Ms DS, a [City 1] lawyer.

**Background**

[2] The applicant is a trustee of a family trust (the Trust). The Trust was the vendor of a residential property in [City 1] that was the subject of an unconditional sale contract in early 2023. Settlement was scheduled for 21 April 2023.

[3] The vendors and purchasers had known each other since the purchasers first approached the vendors about buying the property in September 2022.

[4] The Trust needed to complete the sale of the property in order to progress the purchase of another property that was to be the retirement home for the applicant and his wife.

[5] The respondent was the lawyer for the unconditional purchasers, who needed to complete a sale of their property in order to complete their purchase from the Trust.

[6] There was flooding in [City 1]. The purchasers' house was affected to some degree by the flooding.

[7] In early March 2023, it seems that the purchasers contacted the applicant about the settlement scheduled for 21 April.

[8] The applicant responded by emailing the purchasers at 10.53 am on 6 March 2023 stating:

okay the one question I will get asked as the trustees will need to sign off is [whether) you [are] in a position to bridge come the 21/4?

[9] One of the purchasers responded immediately by email to the applicant at 11.21 am, copying the applicant's wife, stating:

Yes, with a completed sale and purchase agreement allowing settlement date to be no later than two months over April 21st and a sale price on [our property] of over \$1,750,000.

With the uncertainty of remedial works required on our house due to flooding, it is unlikely we will have them finished by June and/or be able to sell at this price.

[10] It appears that there was then a conversation between the applicant and the Trust's lawyer.

[11] Later on 6 March 2023, at 5:48 pm, the respondent sent an email to the Trust's lawyer stating:

I refer to the above purchase. I understand that our clients have been in direct communication and have agreed to the below.

My clients seek your client's agreement to cancel the sale and purchase agreement on the basis that your clients retain \$90,000 of the deposit and the balance of the deposit is repaid.

Please confirm your clients' ... agreement to the above. Once confirmed, the Agreement will be at an end and the \$260,000 is to be promptly paid to our trust account (deposit slip attached).

[12] The Trust's lawyer then sent an email to the applicant and his wife, at 6.22 pm, stating:

We have received the email below from the buyer's lawyer. The terms match with [the applicant's] and my conversation this afternoon.

Would you mind letting us have your instructions on their request. This is an indulgence on behalf of your Trust and the buyers do not have any leverage to require you to accept this proposal.

Your sale agreement entitles you to forfeit up to 10% of the purchase price if the buyers do not settle by the settlement date. FYI – our costs are circa \$1,100 plus GST, so you could include that in any counterproposal.

Please let us have your instructions.

[13] An hour later, at 6.50 pm, the Trust's lawyer sent an email to the respondent stating:

We have taken instructions and have been instructed to ask the question below.

If your clients' offer is **not** accepted, will your clients be able to complete settlement of the purchase on 21 April 2023?

[14] At 9.16 pm still on 6 March 2023, the respondent sent an email to the Trust's lawyer stating:

At this stage, my clients are unlikely to be able to complete settlement of the purchase on 21 April 2023.

Their house requires remedial works to be completed due to recent flooding, but they have been exploring several options.

[15] The applicant asserts that the purchasers stated that three months' work was required to fix the flooding damage. The relevant communications have not been disclosed.

[16] After the exchanges on 6 March 2023, the applicant was called by a friend to advise that the purchasers' house was still on the market and there was an open home on 11 March 2023.

[17] A dispute developed between the parties. It seems that the purchasers cancelled, or purported to cancel, the sale and purchase agreement and the vendor Trust did not accept the cancellation. There is no information before me about the purported grounds of cancellation.

[18] Correspondence ensued between the Trust's lawyers (a different firm from the firm that had been acting on the sale) and the purchasers' lawyers. It appears from subsequent references that there was a letter from the Trust's lawyers to the respondent or her firm on 6 April 2023 and a reply from the respondent or her firm on 14 April 2023. The applicant has not disclosed any of this correspondence.

[19] The dispute was resolved by a “without prejudice” email exchange between the Trust’s lawyer and the respondent on 17-18 April 2023. The text of the Trust’s lawyer’s email of 17 April 2023 was as follows:

We refer to your letter of 14 April.

For the reasons outlined in our letter of 6 April the agreement was not validly cancelled. That gives our clients the right to demand specific performance of the unconditional agreement – and insist on settlement on the 21st of April.

It is clear that your clients are not in a financial position to settle – and they certainly won’t be in a position to settle on the 21<sup>st</sup> of April. The consequences if the [vendors] seek specific performance – and are unable to comply are significant (sic). The quantum will extend beyond the loss of deposit, including penalty interest and damages for the losses outlined in our letter of 6 April.

As indicated in our letter of 6 April – despite the position that the [purchasers] have put them in – the [vendor Trustees] are prepared to reach a compromise. That compromise is to retain **\$190,000** (incl of GST if any) of the deposit, returning the balance of the deposit to the [purchasers] (in full and final settlement of the issues between the parties). The [purchasers] have until **12 pm tomorrow** to confirm this is acceptable. Thereafter the offer is revoked.

[20] The text of the respondent’s email in reply the following day was as follows:

Thank you for your email. The offer from your clients is accepted. Our deposit slip is **attached**.

We look forward to prompt payment of the \$160,000 balance of the deposit. Can you please advise when payment will be made?

[21] According to the applicant, the Trust was unable to proceed with its purchase of the replacement home for the applicant and his wife.

[22] According to the applicant, no remedial work was ever done on the purchasers’ house and it was subsequently sold in the same flood-damaged condition but at a lower price.

### **The complaint**

[23] The applicant lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (NZLS) on 19 April 2023. The substance of the applicant’s complaint was that:

- (a) the purchasers’ house was not badly damaged;
- (b) after getting legal advice, the Trust "... ended up agreeing to a settlement figure less than the deposit as the stress was too much";

- (c) the respondent was a friend of the purchasers, lived across the road and "... must have been fully aware there was no remedial work";
- (d) the respondent:

... was fully aware the home was being advertised for an open home the day after she made a former letter stating the home needed remedial work which would not allow settlement, plus buyers were going through when she confirmed as did her client that remedial work would not enable settlement. She would have seen the open home advertising on the sign as she arrived home at night. She was fully aware that her answer would mean her clients got released from an unconditional agreement for 3,500,000. There was no remedial work at all. I can understand the buyers [if] they could not sell and had settlement looming, but the solicitor was asked by another solicitor with high stakes, this is terrible.
- (e) the respondent had lied to the Trust's lawyer;
- (f) the Trust had "... been left out of pocket for many things plus having to employ barristers".

[24] The applicant did not seek any specific outcome from his complaint.

[25] The respondent was given an opportunity to respond to the complaint. Her response, in summary, was that:

- (a) the applicant (as complainant) appeared to be disgruntled with the outcome of the settlement of the dispute reached on 18 April 2023 (noting that the complaint was filed the following day, 19 April 2023);
- (b) she acted with integrity throughout the matter and in accordance with her clients' instructions;
- (c) those instructions were that her clients' real estate agent would continue to market their property and disclose the water damage to prospective buyers.

[26] The material on file includes photographs of the damage that had provided directly by the purchasers to the vendor Trustees.

### **The Standards Committee decision**

[27] The Committee inquired into the complaint and delivered its decision on 16 November 2023. It determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

- [28] In reaching that decision the Committee determined that:
- (a) the respondent's role was to provide advice and then to take instructions from her clients on how they wished to proceed in the circumstances that arose;
  - (b) the respondent's professional duty was to her clients, not to a person on the other side of the matter;
  - (c) the respondent nevertheless had a duty to conduct dealings with others with integrity, respect and courtesy and a general duty to promote and maintain proper standards of professionalism;
  - (d) the respondent acted on her clients' instructions when she requested that the agreement be cancelled following the damage to the property;
  - (e) there was nothing in the correspondence indicating a lack of respect and courtesy;
  - (f) there was no evidence before the Committee to substantiate the applicant's allegations.

### **Application for review**

[29] The applicant filed an application for review on 25 November 2023. The outcome he sought is that the respondent be "... held accountable for lying". He asserted (paraphrased) that if the respondent had been honest when asked, she would have said just that the purchasers had had no interest in their house and "instead... they used the [City 1] floods and lie[d] about [the extent] of small water egress" (sic).

[30] The respondent was invited to comment on the applicant's review application. She elected not to do so.

### **Review on the papers**

[31] 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. The parties were invited to comment on this proposed course of action and neither of them objected to it.

[32] 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 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**

[33] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>1</sup>

... 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.

[34] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

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.

[35] 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.

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

## Issues on review

- [36] The issues for consideration in this review are:
- (a) What professional duties of the respondent are owed to the applicant?
  - (b) What other professional duties are potentially relevant in the circumstances?
  - (c) Did the respondent breach any such duty in her correspondence with the Trust's lawyer;
  - (d) What is the appropriate outcome of the review?

## Analysis

- (a) *What professional duties of the respondent are owed to the applicant?*

[37] I agree with the Committee's succinct and accurate explanation of the respondent's professional duties in the circumstances.

[38] The starting point is that, subject to any overriding duties to the Court, a lawyer's duty is to his or her client, not to a person on the other side of the transaction. This principle is expressed for regulatory purposes in r 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), which provides as follows:

In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interest of third parties.

[39] The Committee cited the same fundamental principle under the general law expressed by the Court of Appeal in a different way (in a negligence context) in *Allied Finance and Investments Limited v Haddow & Co*:<sup>3</sup>

... the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection.

[40] The Committee also correctly stated that the respondent nevertheless had a duty to conduct dealings with others with integrity, respect and courtesy. The other person the respondent had dealings with here was the Trust's lawyer.

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<sup>3</sup> [1983] NZLR 22 at 24.



(b) *What other professional duties are potentially relevant in the circumstances?*

[41] As the Committee also correctly stated, the respondent had a general duty to promote and maintain professional standards. Misleading or deceptive conduct in the context of a property transaction can constitute a breach of r 10 of the Rules or unprofessional conduct for the purposes of s 12(b) of the Act.

(c) *Did the respondent breach any such duty in her correspondence with the Trust's lawyer?*

[42] The available, relevant correspondence is set out above. There is nothing in it indicating any lack of respect and courtesy.

[43] The applicant's argument is that the respondent's email of 6 March 2023 to the Trust's lawyer evidenced a lack of integrity because, he says, the respondent must have known the statements she made were untrue.

[44] The respondent's email is quoted in paragraph [14] above. All she stated was that her clients were "...unlikely to be able to complete settlement ... on 21 April 2023" and that "their house requires remedial works to be completed due to recent flooding but they have been exploring options".

[45] If the email accurately recorded the respondent's instructions from her clients, that is the end of the matter. The respondent was under no obligation to verify the factual basis for her clients' instructions and had no duty to test the honesty of their stated intentions. Her obligation was simply to communicate the instructions received from her clients regarding their position on the performance of their contractual obligations to the vendor trustees.

[46] In any event, there is no evidence that there was anything inaccurate, let alone misleading or deceptive, in the respondent's statement. I have no information as to the purchasers' insurance position, or as to the available repair options or their cost, or as to any other relevant facts. Nor did the applicant at the time.

[47] The respondent's clients' position was undoubtedly rather fluid at the time, which is to be expected in the circumstances. Whatever information the respondent had about those circumstances was confidential to her clients. She had no duty to disclose anything about them to the Trust's lawyer and in fact would have been in breach of her duty to her clients to disclose any such information without instructions to do so.

[48] Further, the respondent stated that her clients had been “exploring several options”, which could only have meant alternatives to completing remedial works before sale. This is consistent with either selling the house as an unrepaired, flood-damaged property (which, according to the applicant, is what ultimately occurred) or potentially settling a sale with the buyer having the benefit of their insurance claim for repairs.

[49] In my view, there is nothing about the respondent’s 6 March 2023 email that could conceivably be regarded as in any way unprofessional.

[50] I find as a fact that there is no evidence whatsoever of the respondent “lying” to anyone about anything.

[51] I note further that the applicant’s stated understanding about “three months work” being required to remedy the flood damage does not derive from the respondent’s 6 March 2023 email. I have no information as to whether it derived from the applicant’s communications directly with the purchasers or from the undisclosed April correspondence between the lawyers. Regardless, there is no evidence to suggest it was an inaccurate estimate.

[52] The applicant appears to have been aware within a week of the 6 March 2023 email that the purchasers were continuing to market their property for sale. So, his factual understanding as at 6 March 2023, whatever it may have been, cannot have been relevant to his factual understanding at the time the settlement of the resulting dispute was entered into five weeks later, on 17-18 April 2023.

[53] The respondent has speculated that the applicant was disgruntled with the outcome of the 18 April 2023 settlement. I make the following observations about that matter, albeit without the benefit of seeing any of the relevant correspondence or having knowledge of the pertinent circumstances beyond what the applicant has disclosed:

- (a) The settlement proposal was made by the vendor trustees, not by the purchasers;
- (b) It was the vendor trustees’ decision not to either sue for specific performance or forfeit the entire \$350,000 deposit;
- (c) The vendor trustees were represented throughout by a reputable law firm and it can be assumed that their decision was based on legal advice;
- (d) In that regard, it cannot be said to be an example of acting in haste and repenting at leisure;

- (e) Objectively, the settlement might seem to have been arguably generous to the purchasers but nevertheless pragmatic, in the context of a dispute about the validity of contract cancellation;
- (f) The outcome, involving the Trust's retention of \$190,000, presumably left the Trust with greater flexibility to fund the purchase of a replacement home pending the re-sale of the existing one;
- (g) Regardless of all the above points, if the vendor trustees consider that the settlement agreement was entered into on the basis of a misrepresentation by the purchasers, they can take legal advice as to any remedies they might have in the circumstances;
- (h) Any such remedies would be against the purchasers, not against their lawyer, and I observe that in making his complaint, the applicant largely fails to distinguish between the two.

[54] So far as the professional conduct of the respondent is concerned, I see no grounds that could persuade me to depart from the Committee's decision.

### **Decision**

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

### **Publication**

[56] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made to each of the persons listed at the foot of this decision.

[57] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[58] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

**DATED** this 01<sup>ST</sup> day of February 2024

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**FR Goldsmith**  
**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 PF as the Applicant  
Ms DS as the Respondent  
Area Standards Committee [X]  
New Zealand Law Society