LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 159

Ref: LCRO 29/2023

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	**CP** Applicant
AND	**SW and KM** Respondents

DECISION

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

Introduction

[1] The applicant, Mr CP, has applied for review of a decision by the [Area] Standards Committee [X] dated 16 February 2023 in which it resolved to take no further action regarding a complaint against the respondents, Mr SW and Ms KM.

Background

[2] The first respondent is a director of [city 1] incorporated law firm, [law firm]. The second respondent was an employed solicitor at the firm.

[3] The applicant and his wife, AB, had been clients of the firm since 2018. Between 2018 and 2021, the firm had assisted them with various transactions. During this period, they were represented by Mr ND and Mr BS of the firm.

[4] In December 2021, the applicant and Ms AB entered into an agreement to buy two other properties. The applicant contacted the firm for legal assistance with the transactions.

[5] It appears that Mr BS had left the firm and Mr ND was about to leave it. The first respondent responded on behalf of the firm to the applicant's instructions, copying in the second respondent. Neither respondent had met either Mr CP or Ms AB.

[6] The first respondent sent the applicant a letter of engagement incorporating terms of engagement and an authority to act as agent document dated 17 December 2021. The letter of engagement summarised the two proposed transactions. One was for the purchase of an existing apartment, for settlement on 22 February 2022. The other was a purchase of an apartment yet to be built.

[7] The letter included a cost estimate of $1,500 for handling the conveyancing aspects of each of the transactions and a request for a retainer payment of $500 per transaction, for a total of $1,000 in advance. The letter recorded that the quoted fees covered the conveyancing aspects only and not any "advisory service".

[8] The applicant paid the $1,000 cumulative retainer on 17 December 2021.

[9] On 20 December 2021, the vendor's lawyers emailed the first applicant about various contractual and conveyancing aspects of the first transaction. The first applicant forwarded the email and a copy of the purchase agreement to the applicant.

[10] The applicant responded with various questions for first respondent. The first respondent replied that his quote expressly excluded advice about the contract but that he was prepared to provide brief answers to the applicant's questions provided they were not considered part of the legal service he was providing and he assumed no responsibility for them. In essence, he advised the applicant that if he required legal advice, he would need to pay for it at the firm's hourly rates.

[11] The first respondent then gave brief advice about satisfaction of a due diligence condition, various other conditions in the contract and variations the vendor had requested. He then proceeded to answer the applicant's specific questions, some of which related to the first transaction and some to the second.

[12] Of relevance to the complaint, the first respondent's final answer was as follows:

> She will need to sign the Authority and Instruction form and tax statements. But that cannot be done before 27 December because Authority and Instruction form can only be generated after dealing is created, which is not usually done until close to settlement day. If she is not able to come back to New Zealand before

> settlement day to sign the Authority and Instruction form, then she will have to sign it in a [nationality] Public Notary …. This process is complicated, sometimes it will require advance booking. We normally charge additional fee for having to deal with this extra process.

[13] On 21 December 2021, the first respondent sent the applicant another email explaining how Ms AB's Authority and Instruction form (A&I form) could in fact be generated before 27 December 2021 for her signature with the cooperation of the vendor's lawyer in setting up the e-dealing in the Land Information New Zealand (LINZ) system immediately. The first respondent also explained that the firm's office had closed at the end of the previous week, that he personally was working until the end of 22 December and that the LINZ system would shut off on 24 December 2021.

[14] On his last day at work, 22 December 2021, the first respondent sent the applicant another two emails. In the first, he advised that the documents were ready for signing and asked the applicant and Ms AB to come into the office before 4 pm that day to sign them. He also dealt with payment of the deposit and the need for the applicant to sign the purchase agreement.

[15] It appears that the applicant and Ms AB were in [city 2] at the time. In the second email, the first respondent therefore sent the applicant the documents requiring signature, advised that they needed to be signed in front of the Justice of the Peace (JP) and explained how this needed to be done.

[16] The applicant says that he called the first respondent to tell him that he could not find a JP, that he and Ms AB would be back in [city 1] on the morning of 25 December and could drive to any place near the first respondent's home or office to have the A&I form signed between 25 and 27 December. He stated that first respondent refused to accommodate this request.

[17] On 17 January 2022, there was a series of emails between the first respondent and the applicant regarding the second proposed purchase transaction. In his first email that day, at 2 pm, the first respondent advised the applicant that he had been advised by the real estate agent that the vendor required a document to be certified and if the applicant wished the first respondent to do the certification, there would be a fee involved.

[18] The applicant replied by email referring to himself as a "loyal long-term customer of your lawyer group", expressly accepting the quote of $1,500 plus GST for the conveyancing only on the second transaction, stating that he did not require legal advice about the transaction, advising that he might be going to [country] on a business trip for 2-3 months and asking that if there was any document he needed to sign for it to be prepared immediately.

[19] In his final paragraph, the applicant referred to the first purchase transaction. He instructed the respondents to ask the vendors to prepare settlement documents as soon as possible, advised that he would sign them at the firm's offices that week and stated that he had the funds required for settlement. I note in passing that it is unclear to me what documentation the applicant was referring to, as he had received the necessary documentation for that transaction the previous month.

[20] The next two emails that day were about the second purchase transaction, the fact that it was pursuant to a 117-page bespoke agreement and consequently that there would be a change to the firm's quoted fee for acting on the transaction and about whether the applicant required any legal advice about it.

[21] It appears that there was then either a telephone call between the applicant and the first respondent or an email from the applicant to the first respondent, which is not in the materials available to me, relating to Ms AB's execution of her A&I form on the first transaction. Ms AB was in [country]. The applicant stated, in summary, that:

(a) he had told the vendor of the witnessing difficulty and the vendor had told him that the A&I form could be witnessed using audio-visual technology (AVT);

(b) the applicant had told the first respondent this and the first respondent replied that it was illegal for him to do this;

(c) the applicant told the first respondent that he, the applicant, would take the risk and the first respondent refused to witness the document by AVT;

(d) the applicant asked the first respondent if he would agree to cancel the engagement and provide a full refund and the first respondent refused;

(e) the applicant asked the first respondent again whether it was illegal to use AVT and the first respondent "said YES firmly".

[22] The applicant stated that he had Google-searched the LINZ Interim Guideline 2020 and that, according to the guideline, it was possible to use AVT for both new and existing clients and that the previous restrictions requiring a lawyer to have known the client for more than 12 months and to hold a copy of the client's photo ID on file had been relaxed.

[23] It appears that the applicant had also instructed the first respondent that he wished for the settlement scheduled for 22 February 2022 to be brought forward to 24 January 2022.

[24] The first respondent emailed the applicant on 20 January 2022 in the following terms:

> Firstly we cannot do the A & I remotely. The rule requires the witnessing of A & I to be done in person. This rule is strict, all lawyers must obey. It was only temporarily permitted to be done remotely when COVID lockdown restricted access. That time is gone since Level 3. In any event your wife not being in New Zealand has nothing to do with Covid restrictions so that exception cannot apply even if it was still available. In my email to you on 21 December (see below, last paragraph) I explained that if she does not sign it in NZ she has to do it in [nationality] Public Notary… And we usually charge extra for having to deal with that.
>
> Secondly, as per [KM]'s advice, you can still go to [country] as per your schedule and still have settlement at the end of February 2022. That should leave plenty of time for your wife to do it with Public Notary.
>
> Thirdly, on reflection I do not think settlement can occur on the 24th because for unit titles a vendor must provide purchaser with pre-settlement disclosure five working days before settlement. So even if you tell them now, they cannot comply with this requirement.
>
> Your best course of action is to leave settlement as is, come in to sign your documents tomorrow, arrange for your wife to sign hers before [nationality] Public notary ASAP.

[25] The applicant stated that he sent the LINZ Interim Guideline 2020 to the first respondent and explained the situation to him on the night of 20 January 2022, including that he was concerned that a notary in a [nationality] rural town would get the process wrong and that there might not be enough time to proceed in that manner.

[26] There followed an extensive debate over the next month between the applicant and initially the first respondent and then the second respondent as well as to whether the A&I form could be witnessed by AVT and then whether the A&I form had been properly notarised. I do not propose to relate all the details of the email exchanges but will refer to salient extracts.

[27] In summary, the situation in the last week of January 2022 was as follows:

(a) The applicant sought to insist that there was no reason why the firm should not witness Ms AB's A&I form by AVT.

(b) The first respondent explained why, in his view, he could not do that under the LINZ Guidelines.

(c) The first respondent further explained why, in his view, the interim COVID-19 lockdown exception did not apply.

(d) The first respondent also explained that the exceptions to the in-person witnessing rule were permissive but "… strict and ought to only be exercised sparingly and only when completely justified. Otherwise, the default rule would not need to exist, and everyone could just do it remotely".

(e) The applicant then indicated that he would go to another lawyer who was willing to use the exception to the witnessing rule and the first respondent responded that he understood if the applicant wished to do that.

(f) According to the first respondent's contemporaneous email correspondence, the applicant then changed his mind, sought to insist that the firm witness Ms AB's signature remotely and threatened to complain against the firm if it did not (in the first respondent's words) "cave in".

(g) The first respondent described this as "improper threats" and stated "I am not sure how you think we could work together after you make such threat".

(h) The first respondent set out a proposed process for the retainer to be terminated in a well-managed way so that the applicant could engage another lawyer.

(i) The applicant terminated the retainer in respect of the second transaction, requested the firm to continue to act on the first transaction, again sought to insist that the firm witness Ms AB's signature remotely but sought further advice on how to get the A&I form signed before a [nationality] notary.

(j) The first respondent explained to the applicant that "we have had a case where one spouse pushed for irregular witnessing process and it turned out that it was done without the other spouse's consent. I think given your somewhat irrational insistence, we are rightly put on heightened alert".

(k) There was further correspondence in which the first respondent asserted that the applicant had made "more threats", referred to the firm's right to terminate the retainer for that reason and the applicant disputed that he

had made any “threats” and stated that making reference to a possible complaint did not constitute a “threat”.

[28] The applicant stated that he attended at the firm’s offices on 21 January 2022 and saw a Mr ER and the second respondent. He signed his documentation. He again raised concerns about the notary process in [country] and delay. He stated that “… Mr ER maybe considered to do the audio/visual but [the second respondent] said that [the first respondent] insisted to no (sic).”

[29] The applicant stated that he had a discussion with Mr ER about the notarisation process in [country] and that he told him that the notary might have his own process and that provided he followed instruction of the notary, it would be okay.

[30] It appears that on the same day, the applicant attempted to contact Mr ND by email. His email is not in evidence but there is an automated email reply from Mr ND’s email address advising that he was no longer with the firm from 22 January 2022 and directing enquiries to the first respondent.

[31] On 24 January 2022, the applicant flew to [country] and went into 3 weeks of COVID-19 isolation from which he sent Ms AB’s documents to her for signature and notarisation.

[32] Also on that day, the first respondent confirmed by email an agreement that had been reached with the applicant for the retainer on the second transaction to be terminated, the firm to continue to act on the first transaction, the originally quoted fee of $1,500 plus GST to be confirmed and the $1,000 already paid to be applied against the costs of the transaction.

[33] On 26 January 2022, the applicant sent an email to the first respondent responding to various points made by the first respondent in an email to him on 21 January 2022. Relevantly to this complaint, the applicant asserted that:

(a) the LINZ Guideline had been updated on 14 December 2021 clarifying that the Covid exception did not apply only during Covid lockdown;

(b) the first respondent was not able to meet Ms AB face-to-face until the end of February or early March 2022 “due to Covid [border] control”;

(c) the applicant agreed to pay an additional fee if his understanding of the LINZ interim guideline was wrong but if his understanding of it was correct, paying an additional fee was unfair to him;

(d) the first respondent's advice that there was "no way" that settlement could occur early on 24 January 2022 was correct only if the applicant's understanding of the LINZ interim guideline was incorrect;

(e) he had the right to make a complaint, he had not been told how to make a complaint and it was the first respondent construing his mention of the word "complaint" as "threats".

[34] On 27 January 2022, there was a further lengthy email from the first respondent to the applicant responding to the applicant's continued insistence that the A&I form be witnessed remotely and setting out a process for an application to be made to LINZ for express permission to witness remotely based on documented proof of Ms AB's circumstances.

[35] On 31 January 2022, Ms AB signed the documents and had them notarised, scanned and emailed to the applicant, who emailed them to the respondents.

[36] On 2 February 2022, the second respondent replied by email. The applicant confirmed that the land tax statement and Overseas Investment Office residential land statement were in order but that the A&I form was not compliant because it had not been signed by the person establishing identity with that person's details completed and a certified copy of Ms AB's passport was not attached.

[37] The second respondent referred to the execution requirements previously stated by the first respondent and by Mr ER and instructed the applicant that the documents needed to be returned to the notary for the notary to certify both the A&I form at paragraph 5 and a copy of Ms AB's passport which needed to be attached to the A&I form.

[38] On 2 February 2022, the applicant emailed the second respondent asking why her instructions were different from the instructions he said he had received on 21 January (from Mr ER).

[39] The second respondent replied on 8 February 2022. The applicant stated that on this occasion the format of the notary's certificate was fine and that the certified copy of Ms AB's passport needed to be attached to the certified A&I form and sent to the firm, initially scanned and then in hard copy. She also referred to the alternative previously offered by the first respondent of seeking LINZ permission for the firm to witness Ms AB's signature remotely.

[40] On 9 February 2022, the applicant returned to the second respondent by email the notarised document and a copy of Ms AB's passport.

[41] On 14 February 2022, the second respondent replied by email. I set out the email in full, as it appears to have triggered the further deterioration of what was already a difficult solicitor-client relationship:

> We have reviewed the latest documents you sent to us. We note that this contains a copy of your wife's passport, however we note to things that indicate it has not been properly certified by the notary public it appears that you have simply inserted a copy of your wife's passport into the bundle of documents:
>
> 1. Firstly, there is no certification stamp or signing of the Notary Public on the copy of the passport itself. There is no marking to show that the notary public has in fact witnessed this document at the time of the signing of the A + I form.
>
> 2. Secondly, even if the notary public does not a mark on the copy itself (sic), then the date of the notary public's certificate should be different to that on the first set of signed documents you sent us. Instead both of them show the same date, meaning that you have not gone back to get the document properly certified as we have instructed you that you have simply inserted a copy of your wife's passport into the bundle and scanned it again to us.
>
> We explained to you in our previous email the significance of why a certified copy of your wife's passport needs to be attached to the A+I form. It is so that anyone looking at the A+I can be sure that the person signing the form before the notary public was indeed your wife, as there is proof of ID (certified at the same time) attached to the A+I form. This is for the protection of the clients so as to ensure that all transactions have the proper authority of the parties named therein.
>
> Your many refusals to follow our instructions are not only time-consuming for both you and us, they are also concerning because they called into question your motives for not wanting to follow the proper procedures of which we have advised you on multiple occasions. You can therefore understand our caution in ascertaining that the proper procedures are followed.
>
> We therefore ask that you get your wife's documents signed/certified properly and in accordance with our instructions to you in our previous emails (dated 2 and 8 February 2022). Please note that your prompt compliance is necessary for the transaction to be effected smoothly on the settlement day so we advise that you do not delay in complying.

[42] The applicant took strong exception to the assertion that he had simply inserted a copy of Ms AB's passport into the previously notarised bundle of documents. The applicant stated in his complaint that Ms AB had complied with the second respondent's instructions, returning to the notary's office to have the passport correctly certified. He stated that the notary "stamped a clear steel stamp on the copy of the passport and attached it into the notary document to make a completed document".

[43] On 14 February 2022, the applicant emailed the second respondent asking about how to make a complaint, objecting strongly to the suggestion that he had "counterfeited the notary document" and to the respondents' presumption in forming that

judgement without first contacting the notary. He stated that a copy of the passport was officially bundled into the notarised document to be an official part of the notarised document.

[44] The first respondent replied the following day at 11:51 am. He explained that the applicant had the right to complain to the NZLS and added:

> You have the right to complain and you should complain if you feel it is the right thing to do. But you instead kept *threatening* to complain, it is a threat. We are now at the stage that we need to cease acting for you because the level of conflict between lawyer and client is too high. We will charge you for the amount of work we have done. I suggest that you find another lawyer who can act for you.

[45] The first respondent then summarised the previous relevant course of events and particularly the difficulty he had with the document the applicant had sent on 9 February 2022:

> What you sent to us on 31 January was a notarised document dated 28 January. We told you on 8 February that it was not compliant. What you then send to us on 9 February was clearly the same document that you sent on 31 January, **it is dated 28 January**, but you claim it to be new. If it was new, firstly, it would have official stamp on the passport copy page, as we have requested; and secondly, it would have been dated **8 or 9 February 2020** (sic). This is clearly an attempt to provide false evidence. **At this point we have trouble trusting anything that you may send to us**. This is another reason we must cease acting for you.

[46] On 15 February 2022, the applicant sent the respondents an email attaching "… pictures of the clear seal on the page of the copy of the notary document", asking whether or not they could see the seal, stating that if the respondents still thought the seal was "counterfeit" they could contact the notary's office directly (with contact details provided). He stated that he had done everything respondents requested but that they did not believe him. He requested a "full refund" if the respondents decided to cease acting.

[47] The first respondent replied later that afternoon. He referred pointedly to the previously stated requirement for the A&I form and passport to be certified at the same time and added:

> You did not do this. What you have now given me is a stamped copy from an unknown time. More amazingly this is not the same as the version that you gave us on 9 February either. No refund. We need to charge you. You need to find another lawyer.

[48] There was then a string of nine increasingly terse emails between 15 and 18 February 2022 in which the applicant continued to dispute the first respondent's interpretation of the nature and implications of the documentation, and particularly whether or not and when the passport page had been certified by a notary, and the first respondent continued to insist that his instructions regarding certification be followed.

[49] In the seventh email in the series, the first respondent stated as follows:

> Certify a copy of the passport means exactly what it said. **A copy – of the passport – <u>certified</u>**. You did not do this, and later tried to pretend that you did. I am not going to call some random number to verify something that should not require a phone call to verify in the first place. When I get audited by IRD, NZLS, and/or LINZ for this document, I cannot say that I had called someone so that I believed the document was properly certified when it clearly was not. I will be required to produce properly certified documents…. You cannot convince me that you and the notary both have no idea what a **certified copy of passport** is.

[50] The first respondent proceeded to provide an example of a notary certification done in [country] concluded with the following:

> Again, I believe that you are fully aware that this is what we asked for, but you want to bypass this requirement and instead, you have been wasting many hours – yours and ours – making threats and arguing with us. There is no legitimate reason which I can think of that would explain your behaviour, I have reasonable ground to suspect that you may [be] trying to pull something untoward and want to make us part of what you are doing.
>
> As I said, you need to find another lawyer to act for you. The conflict level is too high between us, and your conducts are too suspicious. We cannot act for you. There is no point in debating with us further.

[51] In reply, the applicant reiterated that the scan of the seal on the copy passport page originally sent may not have been clear, that he had since sent a clear image of the copy of the passport with the "clear steel stamp" on it and requested a WeChat video call to clarify the misunderstanding.

[52] In the ninth email in this series, on 18 February 2022, the first respondent recorded that he had stated the previous day that the firm had ceased acting for the applicant by reason of the applicant's threatening behaviour and that the applicant needed to find another lawyer but that the applicant still wished the firm to act for him and stated:

> I would prefer not to act for you, but I am also conscious that your settlement is now near. If we are to continue acting for you, you need to accept that:
>
> 1. We will charge you extra for our time spent emailing you back and forth about these certification issues.
>
> 2. You waive any claims or right to complain about our disputes. Without this waiver, the level of conflict between lawyer and client is unworkable. You should seek independent legal advice about this before agreeing to it.
>
> 3. You must go back to the notary office, do two certifications at the same time, one for witnessing A & I as you have done, and one for certifying a copy of the passport, as I have shown you.
>
> If you accept and follow the above, and courier the original of both notary certificates to us immediately, we will agree to resume acting for you for this transaction.

[53] The first respondent concluded that email with advice that he would need to see the original documentation for the transaction "because your conducts (sic) so far are too suspicious I cannot trust an electronic version."

[54] On 21 February 2022, the applicant instructed another lawyer.

The complaint

[55] The applicant filed a complaint with the NZLS on 8 March 2022. The complaint appears to include the following elements (in my words);

(a) a complaint that the first respondent's interpretation of the LINZ Guidelines was incorrect, misleading and incompetent;

(b) a complaint that the firm's instructions about the witnessing of the documents amounted to the respondents "… punish[ing] the client by asking infeasible process and ask[ing] the client to pay extra cost" and constituted "hostility";

(c) a complaint that the first respondent's interpretation of the applicant's indication of the possibility of making a complaint as a "threat" was incorrect or inappropriate;

(d) a complaint that the first respondent terminated the retainer without good cause;

(e) a complaint that the first respondent was discourteous in declining to meet with the applicant and Ms AB between 25 and 27 December 2021 to witness their documents;

(f) a complaint that the first respondent was discourteous in not meeting with the applicant on 21 January 2022;

(g) a complaint of lack of timeliness in the second respondent's replies to the applicant's emails in the first and second weeks of February 2022;

(h) a complaint that the first respondent was wrong not to have accepted the certified documents as provided;

(i) a complaint that it was unprofessional for the respondents to assert that the notarised document was a forgery without first contacting the client or

the [nationality] notary directly to satisfy themselves about the veracity of the certification;

(j) a complaint that the first respondent was wrong not to accept the electronic version of the notarised documents and to insist on receipt of the hard copies;

(k) a complaint that it was either discourteous or unprofessional of the first respondent to decline the applicant's requests for voice calls and video calls to clarify matters in dispute;

(l) a complaint that the respondents should not have needed to verify Ms AB's identity when the firm held on file proof of identity from previous transactions on which Mr ND had acted

(m) a complaint that the first respondent's requirement that the applicant waive any claims or right to complain was imposed unfairly.

[56] The outcomes the applicant sought were:

(a) refund of his $1,000 deposit;

(b) a public apology;

(c) permission to publish the story in the news media and on social media;

(d) "terminate the licence of the lawyer because of the bad behaviour of misleading the rules and deliberately seriously 'punishing' the client because of potential complaint".

The Standards Committee decision

[57] The Committee delivered its decision on 16 February 2023. It considered the professional conduct issues to be as follows (paraphrased):

(a) Did the LINZ Interim Guidelines 2020 allow the use of AVT to verify Ms AB's identity?

(b) If so, was the first respondent's insistence that the A&I form be notarised in [country] a breach of professional standards under r 3 or 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)?

(c) Did the first respondent refuse to meet with the applicant to witness documents at any time and, if so, was this a breach of r 3.2 or r 7.2 of the Rules?

(d) Were the notarised documents sufficient to verify Ms AB's identity and, if so, did the respondents' position that they were not sufficient breach r 3 or r 6 of the Rules?

(e) Did the firm terminate the retainer without good cause under r 4.2 or r 5.11 of the Rules?

[58] The Committee appears to have answered "yes, in principle" to the first question. It stated that where a practitioner is unable to meet the client "due to Covid 19", the practitioner may choose to use AVT without having to know the client for 12 months and holding a copy of the client's photo ID on file.

[59] The difficulty in the circumstances that developed was that although the applicant considered that the respondents' inability to meet Ms AB face-to-face was "due to Covid-19", the first respondent did not consider this to be so.

[60] The Committee's answer to the second question was that it was ultimately for the lawyers to satisfy themselves about the identity of their client, the first respondent was in a difficult situation with clients who were not being reasonable, his view was reasonable and it was not a breach of professional standards to maintain that using AVT was not appropriate in the situation.

[61] The Committee stated that it considered "any other issues raised by the applicant were ancillary to the main issues … and were not borne out by the evidence provided." It is therefore implicit that it considered the first respondent had not refused to meet with the applicant to witness documents.

[62] The Committee found that "[l]egitimate concerns were raised about the documents notarised in [country]". Although making no express finding, it is implicit that the Committee did not consider the position taken by the respondents to constitute a breach of either r 3 or r 6 of the Rules.

[63] On the last issue, the Committee found that the first respondent terminated the retainer for good cause, the good cause being that, in his view, the client had threatened the firm and placed the firm in a position of conflict.

[64] The Committee decided to take no action pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This section empowers a standards committee to take no further action if it considers further action to be unnecessary or inappropriate.

Application for review

[65] The applicant filed an application for review on 15 March 2023. The application focused on the following elements of the complaint that the applicant either disagreed with or was uncertain about as a result of the Committee's decision:

(a) whether advice by the client to the lawyer that the client might raise a complaint after conclusion of the matter constitutes a "threat";

(b) whether the lawyer has the right to terminate the retainer and refuse a refund "only because the lawyer does not like the client or the client asks some question of the understanding of the rule" (sic);

(c) whether the lawyer has the right to ask the client to waive the right to make a complaint in future as a condition of providing services;

(d) whether a lawyer can terminate the retainer without refunding fees already paid.

[66] The applicant also sought for this office to examine the notarised documents. This was on the basis that if the notary had inserted the copy passport page into the previously notarised document, then the document could not be "false evidence or fake" and that the first respondent could and should have contacted the [nationality] notary directly to verify the circumstances.

[67] The applicant argued that the question of fact as to whether or not the document was correctly notarised was relevant to the legitimacy of the first respondent's decision to terminate the retainer.

[68] The first respondent made a brief response to the review application to the effect that:

(a) the firm had made very clear to the applicant its instruction and requirement that the notary public certify a copy of the passport at the same time as witnessing the signing of the A&I form;

(b) the applicant never produced a notarised document with a certified copy of the passport and that "instead what he tried to do is to insert copy of the passport into the existing notarised document";

(c) implicitly, whether the applicant did this himself or whether the notary did it was irrelevant;

(d) a trustworthy document must be trustworthy on its own;

(e) it is for the lawyer to be satisfied that a document is properly witnessed and therefore for the lawyer to determine what its requirements are for being so satisfied;

(f) it is not for either the client or a [nationality] notary to determine what process the lawyer will follow.

Review on the papers

[69] 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 given opportunity to comment on this proposed course of action. No objection was received.

[70] 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

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

> … 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

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

> 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.

[72] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[73] 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.

The issues

[74] I will first identify the potential issues that have not been pursued on review.

[75] The complaint that the first respondent's interpretation of the LINZ Guidelines was incorrect, misleading and competent has not been pursued. If it had been necessary to do so, I would have found that the first respondent was correct to consider that the request for witnessing by AVT was not "due to Covid-19". Initially, Ms AB was unable to find a witness in [city 2] or [city1]. Then she was overseas. At neither time was her movement restricted.

[76] The complaint of "hostility" and of "punish[ing] the client by asking infeasible process" has not been pursued. If it had been necessary to do so, I would have found that there were no grounds for this complaint. There was nothing inherently "infeasible" about the four procedural alternatives presented by the first respondent in a series over a two-month period, namely:

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

(a) attending at the firm's offices for the first respondent personally to witness execution (the first respondent being aware at that time that the applicant and Ms AB were in [city 2]);'

(b) executing the documentation before a JP in [city 2];

(c) executing the documentation before a notary public in [country];

(d) the firm seeking LINZ' express permission for remote witnessing based on documented proof of Ms AB's circumstances.

[77] As it happened, the first two of those alternatives proved difficult because the window of time before Ms AB's departure for [country] occurred during a holiday period. This left the other two alternatives. In my view, there was no objectionable professional conduct involved.

[78] The complaint about the first respondent declining to meet with the applicant and Ms AB between 25 and 27 December has not been pursued. If it had been necessary to do so, I would have found that this was not discourteous. The first respondent had advised the applicant that the firm's office had closed but that he personally was available until 4 pm on 22 December 2021. He had no obligation to make himself available to witness a document during a holiday period.

[79] The complaint of lack of timeliness in the second respondent's replies to the applicant's emails has not been pursued. If it had been necessary to do so, I would have found that there was no undue delay. The respondents were clearly concerned about the circumstances and were taking considerable care to ensure that their obligations to LINZ in relation to the e-dealing were properly met.

[80] The complaint of lack of professionalism in the first respondent declining to take the applicant's requested voice calls and video calls does not appear to have been pursued. I can well understand that the applicant would have experienced frustration, being in extended isolation in [country], believing he might be able to persuade the first respondent to change his mind about the witnessing process and not being able to speak to him. However, I do not consider that there was any lack of communication by the firm of its advice and its requirements.

[81] In a situation where that advice and those requirements were clearly spelled out in writing, were not being complied with and were being persistently disputed, it was open to the first respondent to conclude that voice communication would not have assisted in progressing matters.

[82] In a situation where a client is repeatedly indicating the possibility of a complaint, it is prudent for a lawyer to ensure that his position is either put in writing or confirmed in writing. The first respondent did both of those things. When there was a telephone conversation, he followed it up with an email recording its content.

[83] The complaint that the respondent should not have needed to verify Ms AB's identity when the firm held on file proof of identity has not been pursued. If it had been necessary to do so, I would have found that this aspect of the complaint was without merit. Certification of an A&I form is personal. There is no dispute that neither respondent personally knew either the applicant or Ms AB.

[84] This leaves the four matters I have summarised in paragraph [65] together with:

(a) whether the first respondent was wrong not to have accepted the certified documents as provided;

(b) whether it was wrong for the respondents not to have contacted the client or [nationality] notary directly to satisfy themselves about the veracity of the documentation;

(c) whether the first respondent was wrong to insist on receipt of the hard copies;

(d) if the answer to any of these issues is that either respondent breached any professional duty, whether breach of that duty amounts to unsatisfactory conduct.

Discussion

<u>Did the first respondent terminate the retainer for good cause?</u>

[85] I have expressed the first issue in the above way because it incorporates the relevant issues raised directly or indirectly by this aspect of the complaint.

[86] Rule 4.2(c) of the Rules requires a lawyer to complete the regulated services required by the client under the retainer unless the lawyer terminates the retainer for good cause after giving reasonable notice to the client specifying the grounds for termination.

[87] Rule 4.2.1(a) states that good cause includes instructions that require the lawyer to breach any professional obligations. Rule 4.2.1(f)(vi) states that good cause

includes conduct by the client directed towards the lawyer or a person associated with the law practice that amounts to threatening behaviour.

[88] The first email exchange about termination of the retainer was in fact about termination by agreement on 21 January 2021, the first respondent's express concern about the impediments to a continuing solicitor-client relationship being the applicant's "improper threats". As summarised earlier, this resulted in agreed termination of the retainers relating to both transactions, but the applicant changed his mind about the first transaction the following day.

[89] At the time, the first respondent:

(a) stated that he was "…wary that given the breakdown of our relationship, whether it is still feasible for us to act for you for the first transaction";

(b) warned the applicant that there was no way he could settle the purchase on 24 January 2022 and strongly recommended that he withdraw request to bring forward the settlement day, and warned the applicant that he might lose the contract in that circumstance, not just become liable for penalty interest;

(c) recorded that the applicant was aware of the risk but insisted on keeping the early settlement request;

(d) stated that "you made the threat of wanting us to pay for the penalty, this is downright irrational. You're basically walking yourself into a bad situation against our advice";

(e) stated that "you kept on making more threats, this has obviously created some significant conflict between us. I think we are at the verge of any further threats, and conflicts will result in it being impractical for us to continue to act for you. I will have no choice but to terminate our retainer (for both transactions). See cl 24 of our engagement letter.

[90] The applicant disagreed from the outset that he had made any "threats". He stated that:

> I do not understand what is the meaning of "threats". I only said that if there was some disagree of the interpretation and application of the rule (sic). That is my right to make complain and let others judge it in the future (sic). Is that threats?
>
> ...

> I still like to go forward and let others judge who is right and who is wrong in the future.

[91] The first respondent relevantly replied:

> I said *if you continue* to make threats, we *will* have to terminate.
>
> To avoid doubt, your repeated reference about making complaint if we do not comply and that [you] want us to pay your penalties, are clear threats. If you do not want what you to say to be construed as threats, stop making these statements.

[92] It seems clear that the reference to "do not comply" is a reference to compliance with the applicant's insistence on the firm agreeing to witness execution of the documents by AVT.

[93] The applicant immediately disputed that he had said he wanted the firm to pay for any penalties. He stated that he said only that if there was some penalty "due to the different understanding of the rules of LINZ and the delay because of the Covid situation" he was not sure who would be responsible for it. He stated that "I do not think that it is a so-called 'threat'. Of course, others can judge it."

[94] In my view, the applicant was protesting a little much. If the applicant and Ms AB had been unable to settle on an accelerated settlement day, no-one but them could have been liable for penalties. To suggest that they might not have been so liable because of the first respondent's interpretation of the LINZ Guidelines could only have been provocative.

[95] The definition of the word "threaten" in the Oxford English Dictionary is "to press, urge, force". Another dictionary definition is to "to try to influence (a person) by menaces".[3]

[96] The distinction that is usually drawn in decisions on this issue is between a statement of intention to take a particular course of action and a threat to take that course of action unless the other person does something or refrains from doing something. The purpose for which the statement is made often determines on which side of a reasonably fine line the statement falls.

[97] There is no doubt that the applicant stated an intention to make a complaint against the firm or referred to the possibility of his making a complaint on several occasions. In my view, he did so:

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[3] Oxford English Dictionary <www.oed.com>.

(a) firstly, to try to persuade the first respondent to witness Ms AB's signature by AVT;

(b) then to try to persuade the first respondent to accept the notarised document as scanned to him as being compliant with his execution instructions or otherwise acceptable for settlement purposes; and

(c) thirdly, to persuade the first respondent not to charge any additional fee for dealing with the notarised certification process, or otherwise to establish a basis for disputing the firm's fees.

[98] I am less confident than the Committee was that this objectively constitutes "threatening behaviour" within the meaning of that phrase as it is used in r 4.2.1(f)(vi). The first difficulty is that:

(a) in the first instance, the applicant clearly believed his interpretation of the LINZ Guidelines was correct and further believed, mistakenly, that they constituted a rule the first respondent was bound to abide by;

(b) in the latter two instances, the applicant clearly believed that he had done, or arranged to be done, all that was asked of him regarding notarisation of the A&I form and that the first respondent's suspicions arose from a factual misunderstanding.

[99] The second difficulty is that the applicant appears not to have understood that it was the first respondent, not the applicant, who carried any risk associated with the completion of an e-dealing using an A&I form that was not properly completed. Compliance by certifying lawyers with LINZ requirements for verification of A&I forms is absolutely fundamental to the integrity of the land transfer system.

[100] In that respect, compliance by the first respondent with his statutory obligations under the Land Transfer Act prevailed over any duty to comply with the applicant's wishes or instructions.

[101] The applicant wished to get the transaction settled and, for that purpose, to resolve what he perceived to be unnecessary procedural impediments to that outcome and to avoid additional cost. Viewed from his perspective, I can well understand that he would not consider his attempts to persuade, or even cajole, the first respondent as being threatening.

[102] Conversely, I can equally well understand the first respondent's viewpoint that a client's repeated statements of intention to make a complaint if he did not accede to demands to do something that he considered to be contrary to his clearly stated instructions to the client, a breach of his professional obligations, improper, and potentially dishonest constituted threatening behaviour.

[103] In the circumstances, I am not prepared to make a finding that either party was "in the right" because their respective viewpoints were premised on critically differing understandings of the facts.

[104] I consider it unnecessary to make a finding as to whether or not the applicant's behaviour was "threatening" in terms of the Rule, as this was not the sole ground for the first respondent terminating the retainer. In substance, the first respondent's email of 17 February 2022 set out four, inter-related reasons for terminating the retainer. These were:

(a) what the first respondent considered to be the applicant's repeated refusals to follow his clearly expressed and repeated instructions about the proper execution of Ms AB's A&I form and the applicant's consequent argumentativeness;

(b) the making of what the first respondent considered (rightly or wrongly) to be threats to make a complaint;

(c) what the first respondent considered to be "reasonable grounds to suspect that you may be trying to pull something untoward and to make us part of what you are doing", based on what the first respondent believed to be at least three and possibly four different versions of the same document;

(d) a resulting "conflict level" that was "too high".

[105] The relationship between solicitor and client is one of confidence and trust. This is a two-way street. It is clear that the applicant had no confidence in the first respondent's legal knowledge, competence and professionalism, quite apart from his unwillingness to accede to the applicant's requests.

[106] As the applicant eloquently put it on one occasion, "I do think the relationship between your lawyer firm and me should be like professional and client. Not like GOD and the confessor."[4]

[107] It is equally clear that the first respondent had come to mistrust the applicant and to have suspicions (rightly or wrongly) about Ms AB's involvement in the transaction. In that regard, I note that it was unfortunate, to say the least, that at no stage was there any communication between Ms AB and the firm.

[108] Underlying the increasingly testy interaction between the applicant and the first respondent, in my view, were the signals from the applicant that he intended to try to hold the firm to its modest conveyancing-only fees quote despite all the additional time and attendances required by the logistical difficulties in getting an A&I form properly signed. This aspect is not relevant to termination of the retainer but helps explain the dynamics between the applicant of the first respondent. The fact is that both of them were increasingly frustrated, and reasonably so.

[109] The situation was rather more serious and wide-ranging than the applicant's summary that it was "only because the lawyer does not like the client or the client asks some question of the understanding of the rule".[5]

[110] In my view, the professional relationship of confidence and trust had completely broken down. In those circumstances, I do not consider it necessary for the retainer termination hat to be hung on a specific peg in the inclusive r 4.2.1 of the Rules. The "good cause" grounds set out in rule 4.2.1 are not expressed to be exhaustive.

[111] I find that the views held by the first respondent were reasonable for him to hold as at 17 February 2022 based on the history of his dealings with the applicant, the relationship had broken down and there were reasonable grounds to terminate the retainer.

The right to complain

[112] The applicant rightly questions "whether the lawyer has the right to ask the client to waive the right to make a complaint in future as a condition of providing services".

[113] The answer is plainly "no". A client has a statutory right under the Act to make a complaint about the professional conduct of his or her lawyer. This right will always be

[4] CP email to respondents (14 February 2022).
[5] Application for review (15 March 2023) at Step 6.

available regardless of whether it is purportedly waived, whether as a condition of continuing to provide services or not.

[114] I am surprised that the first respondent included this element in his email to the applicant of 18 February 2022 after what had been otherwise a scrupulously rigorous, patient and professional course of correspondence in trying circumstances over the previous two months.

[115] To his credit, the first respondent added "you should seek independent legal advice about this before agreeing to it". That independent advice, if taken, would certainly have been that it was inappropriate for the first respondent to seek to impose that condition and that the applicant should not agree to it.

[116] I consider that the inclusion of this paragraph in his email constituted a breach by the first respondent of his duty under r 10.1 of the Rules to promote and maintain professional standards.

Refund of fees

[117] The next element of the complaint relates to the $1,000 the applicant had paid the firm. The applicant expressed it as a question about whether a lawyer can terminate the retainer without refunding fees already paid.

[118] The short answer is "yes". A lawyer charges fees for providing legal services. The firm had provided legal services to the applicant and Ms AB. Those services included services within the scope of the quote and additional advisory services outside the scope of the quote.

[119] The applicant had paid a $500 retainer and had later agreed that the separate $500 retainer paid for the second proposed transaction could be applied against the firm's fees on the first transaction.

[120] Despite the applicant's complaint about the first respondent's competence in interpretation of the LINZ Guidelines, the Committee considered his position to be a reasonable one for the reasons summarised in paragraph [60] above. I agree.

[121] The first respondent had also spent some time on and given advice about the second transaction, for which the firm will not be paid.

[122] I identify no circumstances warranting any reduction in or refund of any part of the $1,000 of fees paid at the point the retainer was terminated.

Acceptance of the notarised A&I form

[123] The applicant complains that it was unprofessional for the first respondent not to accept the notarised A&I form in the form in which it was scanned to him. In essence, the applicant asks me to make a ruling as to whether or not the document as scanned to the firm was properly signed, certified and notarised.

[124] It is not appropriate for me to do so. I am neither a notary public nor the lawyer whose responsibility it was to complete the in e-dealing and, for that purpose, to satisfy himself that he held fully completed, appropriate documentation.

[125] The applicant and the first respondent remained in dispute about the relevant factual circumstances at the point the retainer was terminated. From what I can gather from the materials available to me:

(a) in the first version of the document, the passport page was not included at all;

(b) in the second version, the passport page was included in the document but was neither certified nor notarised and the applicant considered that it was part of the overall document that was the subject of the notary's notarial certificate;

(c) in the third version, the passport page according to the applicant had a "steel" (which I assume to mean an embossed but un-inked) stamp that was not necessarily readily visible when scanned and, according to the first respondent, carried no seal but was simply inserted in the document (in which case the applicant said it was inserted by the notary and not by him);

(d) in the last version of the document, the passport was clearly embossed with a seal but was not separately certified by the notary at the time.

[126] What I have described as the second and third versions might have been the same version if the steel stamp had been on the document but not visible when scanned. All I can say for certain is that, in the materials available to me, there is a scanned, unembossed copy of the passport page and a scanned, embossed copy of the passport page and that neither is certified by the notary on the page itself. Whether or not it needed to be is not for me to determine. It was for the lawyer acting, the first respondent, to determine. It was certainly not for the applicant to determine.

[127] The Committee's finding was that "[l]egitimate concerns were raised about the documents notarised in [country]". The Committee includes several practising lawyers. Its finding is not one that I am going to disagree with.

[128] I wish to emphasise that this does not mean there has been any finding that the notarised document was "counterfeit" or a "forgery" or "fake", using the terms used by the applicant. It just means that the first respondent had reason to be concerned to verify the document, in all the circumstances. This does not necessarily imply any assertion about the applicant's credibility personally.

[129] I completely understand the applicant's sense of offence at the assumption the first respondent made that it was he who had inserted the passport page into the previously notarised document.

[130] Given the short space of time between the second respondent's email to the applicant on 8 February and the applicant's reply on 9 February with the amended document and the fact that the document had apparently not been re-notarised on 9 February (which appears to be undisputed), the applicant should be able to understand why the first respondent drew that conclusion.

Verification of the document

[131] The applicant asserts that it was wrong for the respondents not to have contacted the client or the [nationality] notary directly to satisfy themselves about the veracity of the documentation.

[132] I agree with the first respondent's position on this issue. As he expressed it, "a trustworthy document must be trustworthy on its own". It is not the responsibility of the lawyer who is responsible for the e-dealing to be making his own enquiries about the circumstances of witnessing, certification and notarisation.

[133] Any file note of a conversation with either the client or a notary in [country] about the circumstances of notarisation would make no difference if the document itself was found to be inadequate on audit.

[134] I make the same observation about the first respondent's requirement for delivery of the original, hard copy notarised A&I form. A prudent lawyer will always hold the original document on file.

[135] It may be that many lawyers will choose to rely on a scanned copy emailed by a known and trusted client. Where the document in question has been signed by a

person the lawyer has never had any communication with and is notarised in a foreign country after numerous difficulties, relying on the scanned copy is unlikely to be prudent professional practice.

[136] In that regard, whatever the applicant's new lawyers were prepared to do in the circumstances is irrelevant.

Does any relevant breach of professional duty amount to unsatisfactory conduct?

[137] I have found that there was no breach of any professional duty by the second respondent.

[138] I have found that the first respondent breached r 10.1 by reason of purporting to impose a condition that the applicant waive his statutory right to complain about the respondents' professional conduct.

[139] The remaining question is whether or not a finding of unsatisfactory conduct should be made for that breach of the Rules.

[140] In normal circumstances, an action of this nature would not be countenanced and would result in a finding of unsatisfactory conduct. In my view, these were not normal circumstances.

[141] I have already noted that, up to that point, the first respondent had been rigorous, patient and professional. Nothing he wrote in his responses to the applicant's demands and objections could be described as disrespectful or discourteous, despite the significant working time that must have been consumed in responding to the applicant's persistent objections and intimated complaints.

[142] When writing his email on 18 February 2022, the first respondent had terminated the retainer the previous day for good cause and then received what he understood to be a request to continue. Although very clearly frustrated by the applicant's attitude, he was also clearly motivated by wanting to assist in getting the transaction completed on the due date, in the applicant's and Ms AB's interests.

[143] In the circumstances, his purported condition was professionally unacceptable but his action in expressing it was understandable and I have already noted his insistence that the applicant take independent advice about the matter.

[144] Not all breaches of the Rules warrant a disciplinary finding and penalty. By a fine line, I consider this to be one of those situations.

Decision

[145] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 and for the reasons stated in this, the decision of the Standards Committee to take no further action on the complaint because further action would be inappropriate is confirmed.

Publication

[146] 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.

[147] 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.

[148] 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 19TH day of DECEMBER 2023

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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 CP as the Applicant
Mr SW and Ms KM as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society