

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

[2023] NZLCRO 146

Ref: LCRO 39/2022

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

ARD & YRD

Applicant

AND

QL & ZH

Respondent

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

Introduction

[1] Ms RD has applied for a review of the determination by [Area] Standards Committee to take no further action on her complaints about Ms QL and Mr ZH.

Background

[2] Ms RD operated a business from a premises in [Town] owned by the [Family Trust].

[3] Ms RD's father (Mr YRD) was the lessee of the premises. At the time of entering into the lease, Mr FT of [Law Firm A] ([Law Firm A]) had acted for Mr RD.

[4] The firm then known as [Law Firm B], acted for the Trust. Subsequently [Law Firm A] merged with [Law Firm B]. The merged firm became known as [Law Firm C Ltd] ([Law Firm C Ltd]).

[5] In 2018, Mr RD's lease fell due for renewal. By that time, Mr FT had retired and as Ms QL had been a member of [Law Firm A], she acted for Mr RD at that time. [Law Firm C Ltd] also acted for the [Family Trust].

[6] The lease was then renewed for a period of two years expiring on 31 March 2020.

[7] Mr RD did not exercise the right of renewal in 2020, and, on instructions from the landlord, Ms QL sent¹ a Deed of Renewal to Mr RD for signature. In the covering letter, Ms QL advised that she had changed teams in the firm, and was then acting for the [Family Trust]. Ms QL also sent an invoice addressed to Mr RD for \$500 plus GST and expenses (total \$600).

[8] Ms RD says that her father did not receive the letter and the documents.

[9] In the meantime, Mr RD had sold his business to Ms RD who operated the business through her company, [Company A Ltd]. They did not advise the landlord or arrange for the lease to be assigned to [Company A Ltd].

[10] Ms RD says that in July she and her father made an appointment to meet with Ms QL. Ms QL thought that the appointment had been made in relation to the renewal. However, Ms RD says that she had made the appointment to start the process of having a new lease prepared for [Company A Ltd].

[11] When it became clear that Ms RD wanted to negotiate terms of a new lease, Ms QL advised Ms RD she could not act for her. She suggested that Ms RD consult with another solicitor in the firm, Mr CU.²

[12] Having been appraised of the matter, Mr CU advised Ms RD that he could not act for her or her father, as there were 'still a number of points to be agreed or resolved between [[Company A Ltd]], your father and the landlord'.³

[13] There was then a further development, and on 19 February 2021, Mr ZH, an Associate in the firm, sent a letter to Mr RD, advising that he was acting for the new owner of the premises ([Trust A]), and gave Notice of Termination of the lease that had been running on, on a monthly basis.

¹ On 29 June 2020.

² Rule 6.3 provides that an information barrier within a firm does not affect the application of, or the obligation to comply with, rr 6.1 or 6.2. Mr CU could not have acted for Ms RD given the conflict of interests already identified by Ms QL.

³ Email CU to ARD (9 October 2020).

[14] Ms RD initially instructed [Law Firm D] to act for her and subsequently Mr EW, a partner in the firm of [Law Firm E].

[15] As a condition of entering into a new lease, the trustees of [Trust A] required Ms RD to pay the costs incurred in terminating the lease to Mr RD and negotiating and completing the lease to [Company A Ltd]. Ms RD accepted this condition, and Mr ZH rendered an invoice⁴ for \$3,400 plus GST and disbursements, a total of \$4,094.60. This was expressed as being 'our agreed fee for professional services rendered relating to negotiating the terms of, and drafting Deed of Lease.'

[16] Ms RD complained to the Lawyers Complaints Service on 7 July 2021.

Ms RD's complaints

Ms QL

[17] Ms RD's first complaint was that Ms QL had a conflict of interest by 'acting for the [Family Trust], [her] father YRD, and [Trust A], as well as **almost** acting for [her], [without any] information barrier.'⁵

[18] Ms RD says that 'the result of [Ms QL's] actions created a very unfavourable situation for [her] where [her] livelihood and that of [her] family was at stake as [they] almost lost the family business due to the lease termination'. She says that she had 'incurred additional legal costs' around \$6,000 in total.

Mr ZH

[19] Ms RD's complaint about Mr ZH was that 'he had accessed information that he would not have had if he was from another firm'. She questioned liability for, and the quantum of, the account rendered by Mr ZH.

Ms QL's response

[20] Mr TS, a director of [Law Firm C Ltd], replied to the complaint on behalf of Ms QL. He says that neither Ms RD or her company [Company A Ltd], are, or have been clients of [Law Firm C Ltd]. He says that 'from the outset, [Law Firm C Ltd] acted for [Family Trust], which was the landlord for the block of shops Ms RD, in part, occupied/leased'.

⁴ Invoice [redacted] (28 April 2021).

⁵ ARD letter of complaint (7 July 2021).

[21] He advised that Ms QL acted for the [Family Trust] and in 2020 prepared Deeds of Renewal for Mr RD and other tenants in the block.

[22] Mr TS says that when Ms QL met with Mr and Ms RD, she advised them that she was acting for the [Family Trust], and not for them.

[23] He says that Ms RD wished to negotiate the terms of a new lease and wanted the landlord to install a separate water meter.

[24] After communicating with the trustees, it became clear to Ms QL that Ms RD needed independent advice. She suggested another lawyer in the firm might be able to assist Ms RD, but that lawyer advised Ms RD shortly afterwards, that neither he nor anyone in the firm could act for her.

[25] Ms RD then instructed other lawyers to act for her.

Mr ZH's response

[26] Mr ZH is 'not exactly clear what the complaint levelled against [him] is in terms of [the] rules of professional conduct'. He advised he was no longer a member of [Law Firm C Ltd] and speculated that Ms RD is 'generally unhappy at her commercial outcome and looking to blame someone for this'.⁶

[27] Mr ZH advises that the landlord required Ms RD to pay the costs incurred in terminating the lease with Mr RD and negotiating the terms of the new lease to be entered into by [Company A Ltd]. When negotiating the new lease, the landlord did not wish to speak directly to Mr RD and asked that all communications be directed through Mr ZH. Mr ZH says he was uncomfortable with this and urged Ms RD to instruct another lawyer to act for her, which she did.

[28] Mr ZH denies that he had information about Ms RD that he would not otherwise have had and points out that neither Ms RD or [Company A Ltd] were clients of [Law Firm C Ltd]. Consequently, Mr ZH says, there was no conflict of interest or breach of confidentiality.

[29] Mr ZH does acknowledge that he sought information from a colleague who had acted for [Trust A] when the Trust purchased the property, but this was not from a lawyer that had acted for Ms RD.

⁶ Letter ZH to New Zealand Law Society (12 August 2021).

The Standards Committee determination⁷

[30] The issues identified by the Committee to address were:

Did Ms QL / [Mr ZH] carry out Ms RD's instructions and did they have a conflict of interest in acting for her.

[31] The Committee also refers to Ms RD's complaints about the fees invoiced by both Ms QL and Mr ZH. It incorrectly recorded that both invoices had been withdrawn.

Conflict of interests

[32] The Committee noted that Ms QL had made it clear to Ms RD that she acted for the [Family Trust] and when she became aware that the existing lease could not be simply renewed⁸ she referred Ms RD to another lawyer in the firm. Ms RD was soon afterwards advised that she needed to take independent advice.

[33] The Committee determined that neither Ms QL or Mr ZH had breached the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) relating to conflicts of interest.

Fees

[34] The Committee noted that the fee for the renewal of the lease was withdrawn as it had been prepared on the instructions of the landlord.

[35] At paragraph 4.3 of its determination, the Committee also recorded that the fee rendered by Mr ZH had been withdrawn.⁹ This is not correct.

Decision

[36] Having made these comments, the Committee determined to take no further action on Ms RD's complaints.

Process

[37] I initially directed that a hearing be convened with all parties. This became difficult for a number of reasons and ultimately this review has been completed on the papers with the consent of all parties.

⁷ In its determination, the Committee wrongly refers to Mr ZH as Mr WB.

⁸ As Mr ARD was no longer the lessee and Ms RD wanted to negotiate terms.

⁹ Standards Committee determination (27 January 2022).

[38] Before commencing, I prepared a summary of the facts and chronology, and sent this to the parties to ensure there were no errors made.

[39] All parties provided a detailed response. Ms RD's response included a number of comments questioning matters that had arisen when negotiating the terms of the new lease, which have no relevance to this decision.

Nature and scope of review

[40] The High Court has described a review by this Office in the following way:¹⁰

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.

[41] This review has been conducted in accordance with those comments and is limited to a review of the Committee's determination of the complaint made by Ms RD in her email of 7 July 2021. No new complaints can be made in this review.

[42] The Committee dealt with the complaints about Ms QL and Mr ZH together. As neither has objected to this,¹¹ I have completed this review on the same basis.

Review

Ms QL

[43] The issue which relates to Ms QL is whether or not she has breached the Rules relating to conflicts of interest.

[44] Mr TS, on behalf of Ms QL, says¹² that neither Ms RD nor her company, [Company A Ltd], were, or had been, clients of [Law Firm C Ltd]. That is correct. Ms QL had acted for Mr RD in 2018, when the lease was renewed.

[45] When Ms QL sent the Deed of Renewal to Mr RD in June 2020, she advised that she had changed teams within the firm and was then acting for the [Family Trust]. As she was not aware that Ms RD had taken over the business, the Deed was prepared with Mr RD as the lessee.

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹¹ Section 206(1) of the Lawyers and Conveyancers Act 2006 requires complaints to be dealt with in private.

¹² Letter TS to New Zealand Law Society (13 August 2021).

[46] Ms RD says that her father did not receive the letter sent by Ms QL.

[47] In that letter, Ms QL requested Mr RD to return the executed documents in due course.

[48] In July, Ms RD contacted Ms QL for an appointment with her and her father. Ms QL wrongly assumed that this was in connection with the renewal.

[49] Ms RD says that Mr TS was not at the meeting and so questions how he can assert that Ms QL had told her and her father when they met that she was acting for the [Family Trust]. Mr TS is responding on behalf of Ms QL, and can rely on facts as advised to him by Ms QL.

[50] When Ms QL became aware that Ms RD wanted to negotiate the terms of a new lease, she referred Ms RD to Mr CU in the firm for separate advice.

[51] Having done so, it would seem that Ms QL had formed the view that there was a 'more than negligible risk'¹³ that she could not discharge her obligations to the landlord and Ms RD.

[52] Although this is not one of Ms RD's complaints, Mr CU could not have acted for Ms RD in any event, as r 6.3 provides that an information barrier within the firm does not affect the application of r 6.1.

[53] Nevertheless, Mr CU readily advised Ms RD that he could not act for her and she then instructed [Law Firm D].

[54] The most applicable Rule that Ms QL needed to address, is r 8 which provides:

A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

[55] However, [Law Firm C Ltd] did not hold any confidential information about Ms RD. The firm and Ms QL had only ever acted for Mr RD. Ms RD has proceeded on the basis that both she and her father were Ms QL's clients.

[56] Whilst Ms RD's assumptions are understandable, Ms QL has not breached any of the Conduct and Client Care Rules.

¹³ Rule 6.1 of the Rules.

Mr ZH

[57] I share Mr ZH's difficulty in establishing what Ms RD's complaint about him is. In her complaint, Ms RD says:

In regards to ZH, he had access to information he would not have had if he was from another firm. He also refused to be transparent about the invoice I am the person chargeable for and I would like a thorough breakdown/investigation of the \$2,650 in relation to work done for [Trust A] prior to the preparation of a new deed of lease. Again, I do not know what these charges are for and had no say on the amount or services.

Confidentiality

[58] Ms RD says that Mr ZH had access to information about her that he would not have had if he had been in another firm.

[59] Mr LS¹⁴ considers this to be a new complaint¹⁵ but I discern that is what Ms RD was referring to in the third paragraph of her email to the Complaints Service with details of her complaint.¹⁶

[60] As has already been noted, [Law Firm C Ltd] had not acted for Ms RD or [Company A Ltd]. Consequently, the firm did not hold any information about her. In addition, it is difficult to contemplate what information would have affected how Mr ZH proceeded when acting for [Trust A].

[61] The lease had not been renewed and was 'running on' on a monthly basis. Mr RD had sold his business to [Company A Ltd], and the lease had not been assigned to the company. Mr ZH says that nothing he knew, or did not know, would have altered his advice to his client.¹⁷

[62] Ms RD refers¹⁸ to the fact that Mr ZH was aware of the content of the correspondence from [Law Firm D] to Ms QL,¹⁹ as an example of information that Mr ZH would otherwise not have had access to.

[63] That does not constitute 'confidential information' within [Law Firm C Ltd] that could not be disclosed to another member of the firm.

[64] Mr ZH has not breached the Rules relating to confidentiality.

¹⁴ Mr LS acts for Mr ZH.

¹⁵ Email LS to LCRO (19 October 2023).

¹⁶ Standards Committee Complaint, above n 5, at [3].

¹⁷ Email ZH to LCRO (28 March 2023).

¹⁸ Application for review (11 March 2023) at section 3.

¹⁹ [Law Firm D] were acting for Ms RD at the time.

Fees

[65] Mr ZH rendered one invoice for \$3,400 plus GST and disbursements, a total of \$4,094.60. The narration to the invoice reads:

Our agreed fee for professional services rendered relating to negotiating the terms of, and drafting the deed of lease.

[66] One of the terms that the landlord insisted on as a condition of granting a new lease to [Company A Ltd] was that the company was to pay the fees incurred in relation to terminating Mr RD's lease and advising on and negotiating the new lease.

[67] Liability for payment of these fees is confirmed by the amended clause in the lease, which reads:²⁰

The tenant will pay the landlords cost for negotiating and preparation of the lease and any deed recording a rent review or renewal.

[68] At the time the terms of the lease were negotiated, Mr EW was acting for Ms RD. Discussions took place between him and Mr ZH and the terms of the lease were agreed and accepted. Mr ZH rendered his invoice, the lease was signed and the fee paid.

[69] However, s 132(2) of the Lawyers and Conveyancers Act 2006 provides that a person chargeable with a bill of costs can complain, whether or not the bill has been paid.

[70] The Standards Committee proceeded on the basis that the bill was withdrawn.²¹ Both Mr ZH and Mr TS have advised that is not correct.²² Where a Committee makes a mistake of fact, and determines a complaint on that basis, the only option is to reverse the finding on that matter, and return it to the Committee to reconsider.

[71] Unfortunately, that can be the only outcome in this instance. However, I consider that it would be preferable for the parties to resolve the matter themselves. I refer the parties to [73] of this decision, and trust that the parties will avail themselves of the opportunity provided to them to resolve the issue.

²⁰ Deed of lease, cl 6.1 (29 April 2021).

²¹ Committee determination, above n 9, at [4.3].

²² Email ZH to LCRO (28 March 2022). TS submissions in reply (21 July 2023) at [25].

Decision

[72] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee to take no further action on Ms RD's complaints about the invoice is reversed.

[73] Pursuant to s 209(1)(a) of the Act, I direct the Committee to reconsider and determine Ms RD's complaint about the fees rendered by [Law Firm C Ltd] under the hand of Mr ZH. This direction is suspended until 31 December 2023 to enable the parties to resolve this issue between themselves.²³ In this regard, I note that Mr TS has previously approached Ms RD to endeavour to resolve Ms RD's complaint.

[74] I also refer Ms RD to Mr ZH's response to the complaint dated 12 August 2021, in which he records the events occurring at the time the lease was completed.²⁴

[75] All correspondence between the parties is to be by email only.²⁵

[76] The parties are also directed to advise the Standards Committee by 31 December 2023 whether a resolution has been reached. The Committee has a discretion to extend the date for resolution at the request of either party.

[77] Pursuant to s 211(1)(a) of the Act, I confirm the determination of the Committee to take no further action on all other matters raised in Ms RD's complaint.

Anonymised publication

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

DATED this 29th day of NOVEMBER 2023

O Vaughan
Legal Complaints Review Officer

²³ I acknowledge that this is a difficult time of year for both parties and refer the parties to [77] above.

²⁴ If Ms RD does not have this, she may contact the Case Manager for a copy.

²⁵ There is to be no contact in person or by telephone.

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

ARD and YRD as the Applicants
QL and ZH as the Respondents
TS & LS as representative for the Respondents
DY, XO, PK, MB and VG as related parties
[Area] Standards Committee
New Zealand Law Society