

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

[2023] NZLCRO 035

Ref: LCRO 68/2022

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 [X]

BETWEEN

YE

Applicant

AND

AL

Respondent

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

Introduction

[1] Mr YE has applied for a review of the determination by [Area] Standards Committee [X] that the advice provided to Mr AL when acting for him on the purchase of a property in City A, was unsatisfactory.

[2] The Committee found that Mr YE had breached rr 3, 5.3, 6 and 7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)¹ and that Mr YE had engaged in unsatisfactory conduct as defined by s 12(b) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] Mr AL has applied for a review of the Penalty determination issued subsequently by the Standards Committee. Although the submissions from both parties have

¹ This decision refers to the Rules in force at the time.

encompassed both determinations, this review is a review of the Findings determination only.

[4] However, as this decision reverses the finding against Mr YE, the consequent orders fall away. I have therefore issued my decision on Mr AL's application for review of the penalty determination at the same time.

Background

[5] Mr AL entered into an Agreement to purchase a 9.2 hectare property in City A. The Agreement was subject to a number of conditions. For the purposes of this review, the relevant conditions were clauses 21 and 24:²

21 Solicitors Approval

This Agreement is subject to and conditional upon the purchasers and the vendors Solicitor sighting and approving this Agreement as to the Title, in particular further investigation is required to understand easements that are in place for right-of-way access for the driveway to the property. The wording of both the "General Terms" and the "Further Terms of Sale" and also any resource consents and tenancy Agreements (if applicable) associated with the property that may transfer to the purchaser within ten (10) working days from the date of this Agreement.

24 LIM

This Agreement is conditional upon the Purchaser in his sole discretion approving a LIM report for the property within 15 working days of this Agreement being signed by all parties.

[6] The date for satisfaction of the Title condition was Friday, 10 May 2019. This date was extended to Monday, 13 May. The date for approval of the LIM report was 17 May 2019.

[7] Mr YE reviewed the Agreement and made a note of the matters that needed to be discussed with Mr AL.

[8] Mr AL did not want to (or was unable to) come to Mr YE's office to discuss matters and a telephone conversation took place between Mr YE and Mr AL on 13 May.

[9] Mr AL advises that he took the call while outside and did not have a copy of the plan annexed to the title before him.

[10] During this call, Mr AL confirmed he was happy with the water supply. Following this conversation, Mr YE gave notice that title was approved.

² Other conditions were satisfied.

[11] At the review hearing, Mr AL advised that the vendor was a forestry worker and had keys to gates that needed to be opened to gain access to the water intake pipe which fed into the tanks which supplied the property with water.

[12] After settlement, relations between the owner of the forestry block and Mr AL deteriorated. The owner turned off the water supply and locked all the gates so that Mr AL was unable to access the intake to remedy this.

[13] At that stage, Mr AL became aware that he did not have an easement which allowed him to do so.

[14] Mr AL then turned his mind to utilising the water supply that existed on his own property, at which time he discovered that the resource consent allowing for this had not been transferred to him. In addition, as the consent had not been activated, it had lapsed.

Mr AL's complaints

[15] Mr AL's complaint was general in nature, and advised of the difficulties he had encountered with regard to the water supply to his property. In essence, his complaint is that Mr YE did not ensure that the water supply was protected and that he could access the intake pipes to clear them when needed.

[16] He also complained that Mr YE did not check that the resource consent for him to draw water from a spring on his property was current.

[17] With his complaint, Mr AL included an email in which he says that Mr YE should have been aware of his health issues. I infer from this that he considers Mr YE should have exercised a greater degree of care to ensure Mr AL was fully advised.

Mr YE's response

[18] Mr YE says he did not at any time, suspect that Mr AL suffered from any form of diminished capacity, and Mr AL did not advise him of this.

[19] He also understood that Mr AL was aware of the water supply arrangements, having spent some time with the vendor prior to signing the Agreement. Mr YE says that he did not know either, that the pipework for the supply from the property had not been installed.

The Standards Committee determination

[20] At the beginning of its consideration of the issues the Committee:³

... noted that there was no face-to-face conversation between the parties, and that Mr YE had relied on a relatively brief telephone conversation with Mr AL on which to base his advice and managing the property transaction.

[21] While it acknowledged “that Mr AL had a significant level of knowledge about the property, the Committee was of the view that he was still relying on Mr YE’s expertise as his lawyer when he sought his advice”.⁴

[22] The Committee acknowledged Mr YE’s submission that his advice was based on a ‘desktop’ examination of the information available, but “... considered that Mr YE should have visited the site himself to fully inform his advice, as would be expected from counsel”.⁵

[23] The Committee was also “concerned by the perceived casualness to Mr YE’s questioning regarding the property and easements and his reliance on Mr AL’s assumed knowledge of the matters. ...”.⁶

[24] Having considered all of the information and submissions, the Committee formed the view that “the advice provided to Mr AL was not competently provided and Mr YE should have been more thorough in both his questioning of Mr AL and in his checks about the subject property”.⁷

[25] Having made this determination, the Committee determined that Mr YE had breached rr 3, 5.3, 6 and 7.1 of the Rules⁸ and determined that Mr YE’s conduct constituted unsatisfactory conduct as that term is defined in s 12(b) of the Act.⁹

[26] The Committee then called for submissions on penalty.

Mr YE’s application for review

[27] Mr YE has applied for a review of the Committee’s determination and is represented by Ms DW.

[28] Ms DW submits:

³ Standards Committee determination (30 March 2022) at [25].

⁴ At [26].

⁵ At [28].

⁶ At [29].

⁷ Ibid.

⁸ The Rules referred to are set out in the Appendix to this decision.

⁹ This definition is set out in the Appendix to this decision.

- 1.7 ... that the Standards Committee erred in respect of its findings that:
- a. Mr YE's actions and advice constituted unsatisfactory conduct.
 - b. Mr YE "should have visited the site himself to fully inform his advice, as would be expected from counsel".
 - c. Mr YE should have been more thorough in both his questioning of Mr AL and in his checks about the subject property.

Mr AL's response

[29] Despite Mr AL's apologies for his lack of understanding of the process and difficulties in expressing his thoughts, his response to the application is easily understood and addresses the matters to be dealt with in this review.

[30] Mr AL does not consider that Mr YE took account of what he refers to as his 'condition'. He refers to the stress he was under, having been required to evict his son from his home so that it could be sold. Mr YE had acted for him in this matter and Mr AL says that Mr YE would have been well aware of the effects that this has had on him. He says that he was also suffering from alcoholism.

[31] Mr AL considers that Mr YE should have asked more questions about the property, particularly the details of the water supply. He says:

If Mr YE [had] done his work properly, he would know I had no storage tanks on my neighbour's property, as he states in his previous submission.

[32] Mr AL also considers that if Mr YE thought his neighbour was drawing water from the spring on his property, he would have realised that his neighbour did not have an easement over Mr AL's property to enable him to access the water supply.

[33] He says that the discussion he had with Mr YE about the water supply was very brief and only consisted of Mr YE asking Mr AL if he was happy with the supply. He says the discussion with Mr YE on 13 May centred more on other issues rather than the water supply.

[34] Mr AL considers that Mr YE should have checked the status of the resource consent that enabled water to be drawn from the spring on his property. He says that if he had done so he would have been alerted to the fact that the spring on Mr AL's property was not the source of the water feeding into the settling tanks on the neighbouring property thereby prompting Mr YE to question where the water was supplied from.

Nature and scope of review

[35] 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.

[36] This review has been conducted in accordance with those comments.

Process

[37] This review proceeded by way of an audio-visual hearing with both parties on 4 May 2023. Ms DW attended as counsel for Mr YE.

Review

[38] The issues to be addressed in this review are:

1. Was Mr YE aware that Mr AL's ability to understand Mr YE's advice was compromised?
2. Did Mr YE have a professional duty to ask Mr AL where the water coming into the tanks on the neighbouring property came from and then to ensure that:
 - (a) if from the forestry block, that there were easements in place to enable Mr AL to access the intake pipe and the supply was legally granted; or
 - (b) if from the spring on Mr AL's property, the resource consent remained in force.

Was Mr YE aware of Mr AL's state of health?

[39] Mr AL says that Mr YE was aware that his ability to comprehend matters which needed to be discussed was compromised by stress and alcoholism. However, Mr YE says he had no reason to doubt Mr AL's assessment of the practical situation on the ground.

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

[40] As there was no meeting in person between Mr YE and Mr AL¹¹ it would have been difficult for Mr YE to assess Mr AL's level of understanding. Mr YE says that Mr AL 'spoke with assurance and certainty about the water supply'¹² and he had no reason to believe that Mr AL did not understand the matters being discussed.

[41] Mr AL says that Mr YE would have been aware of the stress he had been under but stress, in itself, does not necessarily cause cognitive problems.

[42] I do not consider that it can be said that Mr YE should have recognised that Mr AL's ability to understand his advice was compromised.

Duty to enquire

[43] When Mr YE reviewed the title, he formed the view that water was being drawn from the property using the resource consent for the spring situated in the area marked 'A' on Deposited Plan XXX. He noted that the property had the benefit of an easement over area 'S' on which the tanks which supplied the property, were situated. Consequently, on the documents reviewed by Mr YE, the supply of water to the property was provided for and protected.

[44] Mr AL has suggested that if the neighbouring property was drawing water from the spring on his property, then the neighbouring property would need an easement over his property to provide access to the spring and there was no such easement.

[45] Mr YE was not acting for the neighbour and had no duty to turn his mind to this issue. He was concerned only with entries on the title to the property which would affect Mr AL.

[46] Mr YE has advised that the discussion between him and Mr AL on 13 May, took approximately 11 minutes.¹³ Given the number of matters to be discussed, it is surprising that the discussion did not take longer. What is not surprising, is that the discussion with regard to the water supply may have been brief, given the number of matters which were discussed.

[47] The Standards Committee considers that "Mr YE should have visited the site himself to fully inform his advice, as would be expected from counsel".¹⁴ The property was some one and a half hours drive from Mr YE's office and it is not surprising that Mr YE did not visit the site of his own volition and Mr AL did not ask him to do so. Mr AL

¹¹ Mr AL did not want to travel to Mr YE's office.

¹² Letter YE to Lawyers Complaints Service (30 September 2021) at 1(e).

¹³ Letter YE to Lawyers Complaints Service (15 June 2021).

¹⁴ Standards Committee determination, above n 3, at [28].

has, in fact, said that he did not expect Mr YE to do so – he expected Mr YE to check that the easements gave him the protection and rights necessary to ensure the water supply remained in place.

[48] Having acted for Mr AL previously, Mr YE would have been aware that Mr AL had good practical skills. It was therefore reasonable for him to expect Mr AL would have satisfied himself that the water supply to the property was in order. In this regard, it is surprising that Mr AL did not think to mention to Mr YE that the water intake pipe was some distance away from the property and there were gates which he needed to have keys to.

[49] The question remains as to what Mr YE knew, or what he should have asked, to enable him to ensure the water supply was protected. He thought it was. However, even if he had visited the site, it may not have been readily apparent to him that the water intake came from a source other than the spring located on Mr AL's property. That would have needed Mr YE to note that the pipes came from a different direction and that there was no pump to extract the supply from the spring.

[50] Taking the facts as presented to Mr YE, I do not consider that he was on notice that he should enquire further, or had a duty to do so.

The resource consent

[51] Mr AL has also complained that Mr YE did not give written notice to the authority which had issued the resource consent, of the transfer of the holder's interest to Mr AL. When Mr AL advised the authority, he was told that the consent had lapsed as it had not been activated. He says that if he had been made aware of this earlier, he would have then been made aware that he did not have access to the water supply and he would not have bought the property.

[52] I have some doubt that this would have been the case as Mr AL knew where the supply came from and accepted this without telling Mr YE or further investigating himself.

[53] It is also relevant that Mr YE could not have taken the step of advising the authority of the transfer of the resource consent until after settlement had taken place. Consequently, it would have only been at that stage that advice would have been given that the consent had lapsed, and Mr AL would not have had the option of not proceeding with the purchase, as he suggests.

A serious matter

[54] Although the Disputes Tribunal has found that Mr YE did not meet the standard of reasonable care and skill of a competent practitioner when acting for Mr AL, I am not bound by that finding. I am required to form an independent view.

[55] A finding of unsatisfactory conduct against a lawyer is a serious matter and remains on a lawyer's professional record.¹⁵ It is not a finding to be lightly imposed. In this regard, it is important to put the facts giving rise to Mr AL's complaints into context.

[56] The easements affecting this property are complex and establish rights over, and in favour of, the property, other than those relating to the supply of water. The Agreement was also conditional on finance and the approval of the LIM report. There was a limited time within which to discuss all matters relating to the conditions and consequently it is understandable, that Mr YE did not focus on the water supply.

[57] Given Mr YE's assumption that the legal rights provided by the resource consent and the easement were the means by which water was supplied, Mr AL's affirmation that he was happy with the water supply situation and the fact that he did not advise Mr YE that the water intake was some distance away, did not give Mr YE any reason to enquire further.

[58] Mr AL must bear some responsibility for not alerting Mr YE to the means by which water was supplied to the property. This is not a situation where an adverse finding should be made against Mr YE.

Conclusion / decision

[59] By failing to take into account the context within which discussions about the water supply took place and adopting the view that Mr YE should have visited the property, the Committee has imposed an unreasonable and onerous duty on Mr YE. For those reasons, and the other reasons discussed above, and pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed.

A final comment / publication

[60] In its determination, the Committee stated that Mr YE should have visited the property. It would be extraordinary for such an obligation to be imposed on a lawyer or conveyancer acting for the purchaser of a property and I place on record that I strongly

¹⁵ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [44].

disagree with that suggestion. Pursuant to s 206(4) of the Act, I direct this decision to be published in anonymised format.

DATED this 23rd day of MAY 2023

O Vaughan
Legal Complaints Review Officer

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

Mr YE as the Applicant
Mr AL as the Respondent
Ms DW as representative for Mr YE
Ms GC, Mr PH & Ms WM as a related party
[Area] Standards Committee [X]
New Zealand Law Society

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008:

Competence and client service

- 3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

Independent judgment and advice

...

- 5.3 A lawyer must at all times exercise independent professional judgment on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

Client interests

- 6 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 interests of third parties.

Disclosure and communication of information to clients

...

- 7.1 A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client (no being another lawyer acting in a professional capacity) about the steps to be taken to implement the client's instructions.

...

Lawyers and Conveyancers Act 2006:

12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

...

- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
- (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct;

...