

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

[2020] NZLCRO 239

Ref: LCRO 21/2019

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

IV

Applicant

AND

EC and HL

Respondent

DECISION

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

Introduction

[1] Mr IV has applied for a review of the determination by [Area] Standards Committee [X] to take no further action with regard to his complaints about the conduct of Ms EC and Mr HL.

[2] Ms EC is the principal of EC Law. At the time, Mr HL was a Senior Associate in the firm.

[3] Mr IV's complaints relate to the conduct of the lawyers in conjunction with the execution by him of Enduring Powers of Attorney and the sale of two properties owned by a Trust of which he was a Trustee.

[4] A major feature of this complaint is that the events Mr IV complains about took place in November 2012. The complaint was lodged in May 2018.

Background

[5] Mr IV was the sole director and shareholder of [PT] Holdings Ltd. The company operated a business in [Town A] which was managed by Ms RG. The company was in financial difficulties.

[6] Mr IV was one of two Trustees of [PT] Trust. His accountant, Mr DF, was the second Trustee.

[7] The Trust owned a property which was in two titles¹ and shared a common access. Mr IV had constructed a house on the property comprised in one of the titles.

[8] The Trust borrowed a significant sum to support the business. The company's financial position did not improve and the company and the Trust were unable to meet their obligations.

[9] Mr IV says he "had a massive stroke on 1 November 2012" and was hospitalised.

[10] On 5 November, Mr IV's daughter (Ms HS) rang EC Law, and left a message for Ms EC with a request for her to prepare Enduring Powers of Attorney (EPOA) for her father as well as a Power of Attorney and Deed of Delegation for Ms RG to act in his place as trustee of the Trust.

[11] Ms EC prepared the Powers of Attorney and attended Mr IV at the hospital for the purpose of having the documents signed. Mr IV says that this was on the day following his stroke. Ms EC says it was on 7 November. The documents are dated 7 November and Ms EC has produced her diary for this day, which shows an attendance on Mr IV on 7 November.

[12] Prior to suffering his stroke, Mr IV had been negotiating to sell [Lot AB], and part only of [Lot CD]. Negotiations continued and an Agreement for the sale of the whole of [Lot CD] was concluded and dated 13 November 2012. Subsequently, an Agreement for the sale of [Lot AB] to a different party was entered into on 18 February 2013. Both Agreements were signed by Mr IV himself.

¹ Lots 11 and 12.

[13] EC Law was nominated as the lawyers for both vendor and purchaser for the sale of [Lot CD].

Mr IV's complaints

[14] Mr IV's first complaint is about the manner in which his signatures to the Powers of Attorney were obtained. He says that when Ms EC attended on him at the hospital, he was "in no fit state of mind to be doing so" and doesn't "really remember much about it at all".

[15] He says that the doctor at the hospital told him that he "doesn't give permission for 6 – 10 days after a major illness" for the person to sign any documents. Mr IV says also, that the appointed attorneys would not have been the persons he would have chosen. He also asserts that Ms EC attended on him late in the night when there were no doctors on duty.²

[16] Mr IV's other complaints relate to the sale of the properties, which he says, were sold at an undervalue. He also objected to Mr HL acting for the Trust on the sale of the two properties, and refers to the conflict which arose when the firm also acted for the purchaser of [Lot CD].³

[17] Mr IV refers to a number of other issues which are not addressed in this decision, as they relate to decisions made, and transactions carried out, by the Attorneys, which cannot be considered by the Complaints Service or this Office on review.

The Standards Committee determination

[18] The Standards Committee addressed the following issues with regard to Mr IV's complaints:⁴

- a. Whether Ms EC breached any of her professional obligations when preparing the EPOAs and arranging for their execution by Mr IV;
- b. Whether Ms EC's and Mr HL's actions in respect of the properties breached any of their professional obligations; and
- c. Whether Ms EC and Mr HL breached any of their professional obligations in relation to the other aspects of Mr IV's complaint.

The Enduring Powers of Attorney

² Ms EC has produced her diary for the day and the date and time she attended on Mr IV is accepted, being 7 November 2012 between the hours of 10:30 and 11:30am.

³ Mr HL acted for the [PT] Trust and another lawyer in the firm acted for the purchaser.

⁴ Standards Committee determination (20 December 2018) at [14].

[19] The Standards Committee recorded Ms EC's response with regard to this matter:⁵

- a. Ms HS contacted her on 5 November 2012 and asked her to prepare the EPOAs;
- b. she and Mr DF visited Mr IV on 7 November 2012;
- c. the visit was within usual business hours; and
- d. Mr IV was well aware of the reason for her visit and willingly executed the EPOAs.

[20] The Committee accepted the evidence provided by Ms EC as confirming that she had attended on Mr IV on 7 November during usual business hours.⁶

Capacity

[21] The Committee says:⁷

The Committee notes Mr IV has not provided any evidence he lacked capacity to execute the EPOAs at the time of signing, or that Ms EC visited the day after his stroke. In the absence of such evidence, the Committee accepts Ms EC's assertion Mr IV was cognisant and willing to execute the EPOAs when she visited with Mr DF on 7 November 2012.

[22] It continued:⁸

The Committee does not consider any of Mr IV's complaints regarding the EPOAs are supported by the available complaint material. It concludes Ms EC acted in accordance with her professional obligations in respect of the EPOAs.

The sale and purchase of the properties

[23] The Committee's decision records the requirements of rr 6.1, 6.1.1, and 6.2 of the Conduct and Client Care Rules,⁹ which relate to a lawyer (or a firm) acting for both parties on a matter. The Committee said:¹⁰

Ms EC and Mr HL both say an information barrier was established, with different members of the firm acting for Mr IV and the purchaser. They say both parties were informed the firm also acted for the other. ...

[24] The Committee also noted the evidence provided by Ms RG in an affidavit relating to the various matters raised by Mr IV in his complaints. Ms RG deposes that

⁵ At [16].

⁶ See [11] above.

⁷ At [18].

⁸ At [19].

⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁰ At [24].

“she was satisfied the price was reasonable”¹¹ and that “Mr IV was informed and consulted” which the Committee noted was “demonstrated by his co-signature to the sale and purchase Agreement”.

[25] The Committee determined that there was not “a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients”.¹²

[26] It says:¹³

... The negotiation over price and subsequent conveyancing work was managed by different staff with an information barrier in place, allowing each to act in their client’s interests. Further, there was nothing to indicate a particular risk of conflict between the parties (and no such conflict arose).

[27] The Committee determined:¹⁴

For these reasons the Committee was satisfied Ms EC and Mr HL complied with their professional obligations in respect of the sale of the properties. It accordingly resolved to take no further action on this aspect of the complaint.

Professional obligations with regard to other aspects

[28] The Committee declined to consider any other matters raised by Mr IV in his complaints as they related to actions taken by the attorneys which are not matters that can be addressed in a complaint about the lawyers.

Mr IV’s application for review

[29] Mr IV has applied for a review of the Standards Committee determination. His supporting reasons are discursive and do not bear repeating to any great degree. In summary, he objects to the manner in which his signatures were obtained to the Powers of Attorney and to EC Law acting for both the [PT] Trust and the purchaser of [Lot CD]. He attributes ulterior motives to Ms EC and Mr HL which are not supported by any evidence and will not be referred further in this decision.

[30] The outcome Mr IV seeks is for the return of the properties to him on the basis that the Powers of Attorney are ‘illegal’. He refers to other matters which were not before the Standards Committee, and do not form part of this review.

¹¹ Ibid.

¹² Rule 6.1.

¹³ At [25].

¹⁴ At [26].

Review

[31] Mr IV complained about both Ms EC and Mr HL. Distinct issues arise when considering the conduct of each lawyer, but the Standards Committee has addressed the complaints about both lawyers in the same decision. However, neither lawyer has objected to this, and this review proceeds on the same basis.

[32] There are two issues which need to be considered on review:

- (a) Ms EC's conduct with regard to the Powers of Attorney; and
- (b) Mr HL's conduct when acting for the [PT] Trust when another lawyer in the firm acted for the purchaser.

Ms EC

[33] On 5 November, Ms HS rang EC Law, and left a message for Ms EC "re POA for Mr IV". Ms EC acted on the instructions of Ms HS and prepared Powers of Attorney appointing Mr IV's long term partner (Ms NA) for Personal Care and Welfare and Ms HS and Ms RG jointly for Property.

[34] Ms HS also instructed Ms EC to prepare a separate Deed by which Mr IV delegated to Ms RG all of his powers as a Trustee of the [PT] Trust, which were operative "during [Mr IV's] absences from New Zealand and during any periods of temporary physical infirmity."

[35] Ms EC visited Mr IV in hospital on 7 November for the purpose of having Mr IV sign the documents. Mr IV says he remembers nothing about Ms EC's attendance and was in no fit state to be signing such documents. The fact that he does not remember anything does not in itself mean that he was unable to comprehend the nature of the documents at the time Ms EC attended.

[36] The issue that immediately arises, is to examine what steps Ms EC took to establish that Mr IV had sufficient capacity to execute the documents. She says:¹⁵

I saw him in hospital one week after his stroke. His Accountant, DF was also present. Although his speech was impaired he was well aware of why we were there and willingly signed the Powers of Attorney. I had been requested by IV's daughter HS to attend IV at the hospital and arrange for him to sign the Powers of Attorney. He had discussed these with her before she contacted me. I was particularly careful to ensure that IV knew what he was doing because of the circumstances.

¹⁵ EC Law, letter to Lawyers Complaints Service (25 July 2018).

[37] The Standards Committee has not commented on this statement. Instead, it says:¹⁶

The Committee notes Mr IV has not provided any evidence he lacked capacity to execute the EPOAs at the time of signing, or that Ms EC visited the day after his stroke. In the absence of such evidence, the Committee accepts Ms EC's assertion Mr IV was cognisant and willing to execute the EPOAs when she visited with Mr DF on 7 November 2012.

[38] A complainant cannot be expected to produce evidence that he or she lacked capacity at the time when asked to sign documents. That could only be an appropriate requirement where the complainant is someone other than the person whose capacity is being questioned.

[39] It was Ms EC's duty to satisfy herself that Mr IV had sufficient capacity to understand the import of the documents put before him to sign. Ms EC says that Ms HS had discussed the appointment of the attorneys with Mr IV prior to giving Ms EC instructions. She relied on her own assessment of Mr IV's capacity.

[40] In *HF v SZ* the LCRO said:¹⁷

[7] At the review the Practitioner reiterated that his impression of Mrs AW was that she was legally competent at the time he took her instructions and that he had seen no reason to question or further enquire into the circumstances that confronted him. ...

[41] The appointment with the lawyer had been made by Mrs AW's friends, who advised that they were the ones to be appointed as her attorneys. The LCRO commented:¹⁸

What is central to this complaint is the professional judgement of a lawyer.

[42] The LCRO continued:¹⁹

It is the responsibility of practitioners to be alert to circumstances where further enquiry ought to be made, and to be able to undertake basic steps that can assure them of their client's legal capacity.

[43] The Standards Committee had made a finding against the lawyer that his conduct amounted to unsatisfactory conduct and this was confirmed on review. The LCRO said:²⁰

¹⁶ At [18].

¹⁷ LCRO 186/2009.

¹⁸ At [10].

¹⁹ At [13]. I add to this, the need to establish the veracity of instructions received from a third party.

²⁰ At [14].

This complaint is focused on the Practitioner's professional judgement. That he honestly believed that Mrs AW was competent may be indicative of how deceptive appearances can be. However, the Practitioner's best intentions or honest belief are not enough to displace the high degree of responsibility involved in preparing the legal instruments involved in this case. I agree with the findings of the Standards Committee on the substantive complaint.

[44] Mr IV had suffered a severe stroke. He was in a vulnerable situation.

- Ms EC took instructions from Mr IV's daughter to prepare Powers of Attorney appointing persons, including herself, to be Mr IV's attorneys.
- Ms EC attended at the hospital on the morning of 7 November with the documents
- Ms EC has not provided any file notes made at the time
- Ms EC relied on her own assessment of Mr IV's capacity and did not seek any medical advice.

[45] Ms EC's actions were less than satisfactory. In different circumstances there would be a finding against Ms EC. However, I take particular note of s 138(1) of the Lawyers and Conveyancers Act 2006 (the Act) which provides a Standards Committee with a discretion to take no further action on a complaint if "the length of time between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable."

[46] The events which occurred took place in 2012. Mr IV made his complaint in 2018. It is no longer 'practicable' to investigate this complaint. In addition, the outcome Mr IV desires (the return of his properties) is not possible.

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

Costs

[48] Section 210(1) of the Lawyers and Conveyancers Act 2006 provides:

- (1) The Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

[49] Paragraph 4 of the Costs Orders Guidelines issued by this Office provides:

Costs orders may be made against practitioners in favour of the [New Zealand Law] Society even where no finding of unsatisfactory conduct is made. Such

orders may be made where the LCRO considers “the proceedings were justified and it is just to do so”. Such orders will usually only be made where the conduct of the practitioner, while not attracting a finding of unsatisfactory conduct, is nevertheless subject to criticism.

[50] That is the case here and it is only for the reasons provided in [45] that there has been no finding against Ms EC.

[51] Pursuant to s 210(1) of the Act, Ms EC is ordered to pay the sum of \$600 to the New Zealand Law Society towards the cost of this Review, being one half of the amount set out in the Costs Orders Guidelines issued by this Office for a hearing on the papers for matters of average complexity. This amount is payable within 30 days of the date of this decision.

Decision

[52] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Mr HL

[53] Mr HL acted for the [PT] Trust on the sale of [Lot CD]. The Agreement is dated 18 February 2013. EC Law played no part in the negotiations and the Agreement was signed by Mr IV himself. As Mr IV has signed the Agreement, his complaints alleging that EC Law was involved in selling the property at an undervalue cannot be sustained.

EC Law solicitors acting for vendor and purchaser

[54] The issue of concern which arises from Mr IV’s complaints is that Mr HL acted for the Trust while another solicitor in the firm acted for the purchasers. Rule 6.1 of the Conduct and Client Care Rules deals with the conflict which arises where a lawyer acts for more than one client. The Rule provides:

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[55] Rule 6.2 provides:

Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party.

[56] Consequently, the fact that different lawyers in the firm acted for the two parties, did not remove the requirements of r 6.1

Was there a more than negligible risk?

[57] The first issue to address is whether or not there was “a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients”. I refer first to decisions issued by this Office.

[58] *Sandy v Khan* concerned the sale of a travel agency by Ms Sandy.²¹ Mr Khan acted for her and the purchaser. The sale did not proceed and Ms Sandy maintained she had suffered various losses as a consequence. The LCRO first observed that a conflict is not cured by different members of the same firm acting for the different parties. The question to be determined was whether there was a more than negligible risk that the lawyer was unable to discharge his obligation to both parties. The LCRO said:

[27] I consider that in a situation such as the present where a lawyer or firm elects to act for two parties it is incumbent on the lawyer to demonstrate that there was no meaningful risk that the obligations owed to the parties would not be able to be discharged.

...

[29] This was not mere transactional matter where all of the terms had been agreed. ... This is quite distinct from a situation in which an Agreement has been concluded between the parties and the lawyers are merely formalising and settling it.

...

[36] Rule 6.1 is expressed in mandatory terms. Where there is real risk of an actual conflict of interest (that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients) the lawyer or firm may not act.

[59] The LCRO referred to *Kendal v Sherbourne* at paragraph [30] of *Sandy v Khan*. He said:²²

This is entirely different from the situation in *Kendal v Sherbourne* LCRO 69/2009 where a lawyer acted for both vendor and purchaser in a property conveyance. There the interests of the parties were congruent as the sale was from the family Trust of an adult son to his aged mother, the transaction was manifestly beneficial to the mother and the terms of the Agreement were settled before the lawyer became involved. ...

[60] In *MC v QK* the LCRO said:²³

[41] The threshold, “a more than negligible risk” above which the prohibition in r 6.1 applies, is very low. It has been described in a decision of this Office as circumstances where there is “no meaningful risk that the obligations owed to the parties would not be able to be discharged”, and “where there is a real risk of an actual conflict of interest ...”.

²¹ LCRO 181/2009 at [30].

²² *Kendal v Sherbourne* LCRO 69/2009.

²³ LCRO 123/2019 & 124/2019.

[61] In a footnote in that decision, the LCRO refers to the definition of the word 'negligible' in the *Shorter Oxford English Dictionary* (5th ed.) where it is defined as "unworthy of notice or regard; so small or insignificant as to be ignorable".²⁴

Further, *LM v NO* states:²⁵

This rule [r 6.1] is not difficult to understand. The interests of two different clients in one matter must almost exactly align before a lawyer can act for them both.

[62] Finally, a judgment of the Supreme Court also helps. In the case of *Fennick v Naera*, the Court discussed the principles attaching to fiduciary duties. The Court said:²⁶

Liability for the breach of the no conflict rule is generally strict. It is usually no defence to show that any unauthorised profit was made "honestly" or in good faith" or that the transaction was fair. The use of strict liability in the context of a fiduciary relationship stems from fiduciary law's traditional prophylactic approach: it is thought that prevention is better than cure in that this provides good protection to beneficiaries and removes temptation from fiduciaries. ...

There must, however, be a "real sensible possibility" of a conflict and not just a remote speculative, or negligible risk. The standard is objective. As Lord Upjohn said:

The reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you would imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonably person, result in a conflict.

[63] The terms of the Agreement for Sale and Purchase of [Lot CD] were not straightforward and Mr HL has acknowledged that Mr IV was unhappy at having to sell the properties.²⁷

1. The finance condition was not particularly satisfactory, as the purchaser had not indicated how much equity they would have been providing, which in turn would impact on their ability to raise finance and therefore for the sale to proceed.

2. The Agreement was conditional on both solicitors' "approval as to survey, form & content of this Agreement on or before the 10th working day from the date of the Agreement". No information has been provided by Mr HL as to what steps he took before confirming this condition to be satisfied. It is apparent that he did not consult with Mr IV at all and he has acknowledged that

²⁴ At fn 6.

²⁵ LCRO 73/2019 at [62].

²⁶ [2015] NZSC 68 at [73] and [74].

²⁷ Mr HL, letter to Lawyers Complaints Service (26 July 2018) at [4].

3. Clause 23 of the Agreement provided:

This Agreement is conditional upon the purchaser making a due and diligence [sic] search of the property and or the property records and obtaining any reports on the land as they deem necessary and being satisfied with these searches and reports by 15 working days from the date of this Agreement.

The terms of the clause are not particularly clear and this could have resulted in the need for discussion between the lawyers and their clients on the one part, and between the two lawyers on the other.

4. Mr IV needed to consult with Mr DF about the GST information schedule.

5. The requirements of cl 24 of the Agreement relating to the creation of the right of way also needed to be discussed and explored in some detail to ensure that the Trust was going to be able to comply with the requirements.

[64] In these circumstances, the warnings in the text *Ethics, Professional Responsibility and the Lawyer* at [7.12] are helpful.²⁸ The author says:

Because of the likelihood that, within a firm, confidences of clients are shared, a conflict of interest cannot be avoided simply by using different solicitors within the same firm. The House of Lords has stated, “[t]he starting point must be that unless special measures are taken, information moves within a firm”, and the Australian Federal Court has observed:

A firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention. If it purports to continue to act for both clients by imposing a qualification on the duties of partnership it thereby denies the respective clients the services the clients have sought from the firm, namely the delivery of such professional skill and advice as the partnership is able to provide. In such a circumstance the appearance provided to the public is that the interests of the solicitors as partners are in conflict with, and may be preferred to, the interests of one or both clients.

[65] There were some unique provisions in the Agreement which needed to be explained to Mr IV (and Mr DF). Mr HL did not, however, take instructions from Mr IV. It seems that all dealings were with the Attorneys who made the decision that the transaction should proceed.

[66] Upon further investigation, it may have been realised that it was difficult and costly to proceed with the terms of the contract requiring the right of way to be created.

[67] The interests of the [PT] Trust and the purchaser did not align. The interests of both parties exceeded the very low threshold.

²⁸ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016).

[68] The possibility of conflict was not ignorable or so small as to be insignificant.

[69] In my view, there was a more than negligible risk that the lawyers acting for the vendor and the purchaser may not have been able to discharge their obligations to their clients.

Informed consent

[70] These conclusions raise the question as to whether or not Mr HL fulfilled his obligation to obtain the informed consent of the Trustees of the [PT] Trust to the firm acting for both parties.

[71] Rule 6.1.1 provides:

Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties is obtained.

[72] “Informed consent” is defined in s 2 of the Act as being:

.... consent that is given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[73] In his response to the complaint, Mr HL says:²⁹

I was aware that the proposed purchaser of one of the properties was a client of EC. Ms WB in our office was to handle that side of the transaction and I was asked to handle the IV’s side. We disclosed to Mrs HS and Ms RG that the purchaser of the property was also a client of the firm and they consented to us continuing to act.

[74] “Disclosing” to a client that the firm is acting for both parties, is not enough.

[75] The authors of the text *Ethics, Professional Responsibility and the Lawyer* have this to say on the subject:³⁰

Any consent to a lawyer continuing to act in the face of a conflict of interest must be given freely and the client must be made fully aware of the consequences of such consent. It must be more than a mere giving of an opportunity to seek independent advice. It will be necessary to positively advise the parties to seek independent advice. [*Taylor v Schofield Peterson* [1999] 3 NZLR 434] The person giving the consent must be of full capacity and capable of understanding the problems of a conflict of interest. In particular, it is important that the client understand that this may mean the lawyer will not be able to fully disclose all information relevant to the matter in hand to the client or be unable to advise effectively on matters which affect the other client’s interests. It was held in the Privy Council that Mouat [the party in *Clark Boyce v Mouat* [1993] 3 NZLR 641],

²⁹ Mr HL, letter to the Lawyers Complaints Service (26 July 2018).

³⁰ Webb, Dalziel and Cook, above n 28 at [7.4].

met this test, was fully informed, and had firmly declined the offer of independent advice.

[76] There is no indication by Mr HL that he gave Mr IV's attorneys' the option of taking independent advice. All he has said is that he "disclosed" to them the fact that the firm was acting for both parties and they consented to him continuing to act.

[77] I also have reservations about the fact that Mr HL did not revert to Mr IV for instructions, rather than continuing to deal with the attorneys. Ms EC had formed the view that Mr IV had sufficient capacity to execute the Powers of Attorney, so there was no reason why Mr HL could not have approached him directly for instructions.

[78] I note also, that it was Ms RG who was Mr IV's Attorney for Trust matters and there is no evidence that Mr HL had any contact with Ms RG as well as Mr DF, the second Trustee, to obtain "informed consent" for EC Law to act for both vendor and purchaser.

A "Chinese wall"

[79] Rule 6.3 of the Conduct and Client Care Rules provides:

An information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2.

[80] It is quite clear that Ms EC, and by inference Mr HL, was not aware of the requirements of this Rule.

[81] In her letter responding to Mr IV's complaints,³¹ Ms EC says:

We operated a "Chinese wall" and the attorneys negotiated as hard as they possibly could to get the best possible prices for Mr IV.

[82] The concept of a "Chinese wall" (an information barrier) has not been considered sufficient for some time. Rule 1.07 of the Rules of Professional Conduct for Barristers & Solicitors in force prior to the Conduct and Client Care Rules made it clear that an information barrier does not overcome the requirement to obtain "informed consent" from all clients for whom a firm acted on the same matter.

[83] The authors of the text *Ethics, Professional Responsibility, and the Lawyer* discuss the problems which exist with the concept of an information barrier at length³² I leave it to Ms EC and Mr HL to acquaint themselves with the authors' comments.

³¹ Ms EC, letter to Lawyers Complaints Service (25 July 2018).

³² Webb, Dalziel and Cook, above n 28 at [7.12].

Decision

[84] It is incumbent on every lawyer to be fully acquainted with the provisions of the Conduct and Client Care Rules. Even though the same factors exist which I have referred to in paragraph [45] above, I consider that Mr HL's breaches are particularly egregious, as he should have been aware of, and complied with, the Rules relating to conflicts of interest. He has not.

[85] In the circumstances therefore, the determination of the Standards Committee to take no further action on the complaint against Mr HL is reversed and replaced with a finding of unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006.

Orders

[86] The finding of unsatisfactory conduct should, in itself, be sufficient to ensure Mr HL takes the opportunity to acquaint himself fully with his professional obligations, particularly those relating to conflicts of interest. In the circumstances, it is not intended to impose any of the Orders that could be imposed pursuant to s 156(1) of the Act.

Costs

[87] Section 210(1) of the Lawyers and Conveyancers Act 2006 provides:

- (1) The Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

[88] Paragraph [4] of the Costs Orders Guidelines issued by this Office provides:

Costs orders may be made against practitioners in favour of the [New Zealand Law] Society even where no finding of unsatisfactory conduct is made. Such orders may be made where the LCRO considers "the proceedings were justified and it is just to do so. Such orders will usually only be made where the conduct of the practitioner, while not attracting a finding of unsatisfactory conduct, is nevertheless subject to criticism.

[89] Mr HL should not have acted for the [PT] Trust, when another solicitor in the firm was acting for the purchasers. Mr IV's application for review was justified.

[90] Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 Mr HL is ordered to pay the sum of \$600 to the New Zealand Law Society, being one half of the amount set out in the Costs Orders Guidelines issued by this Office for a hearing on the papers for matters of average complexity. This amount is payable within 30 days of the date of this decision.

Enforcement of costs order

[91] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[92] Pursuant to s 206(4) of the Act, this decision is to be made available to the public and the profession with the names and identifying details of the parties removed.

DATED this 21ST day of December 2020

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 IV as the Applicant
Ms EC and Mr HL as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society