

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

[2021] NZLCRO 120

Ref: LCRO 112/2019

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

EQ

Applicant

AND

XD

Respondent

DECISION

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

Introduction

[1] Mr EQ has applied for a review of a decision by the [Area] Standards Committee [X].

Background

[2] Ms XD, together with four other owners of cross-lease properties, wished to convert her property to freehold.

[3] In December 2017, Mr EQ provided the owners with a quotation to complete the work required in free-holding the properties.

[4] It was initially anticipated that the work would be completed by 15 December 2017. It was expected that the sale of one of the properties would be settled on that day.

[5] The work was not able to be completed in the time frame that had initially been anticipated.

The complaint and the Standards Committee decision

[6] Ms XD lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 4 September 2018. The substance of her complaint, as identified by the Standards Committee charged with responsibility for completing the investigation into her complaints was that Mr EQ:

- (a) failed to complete the work in the timeframe required; and
- (b) acted in a passive aggressive manner on a number of occasions; and
- (c) failed to respond to her on a number of occasions; and
- (d) behaved in a rude and unprofessional manner; and
- (e) was conflicted in carrying out the freeholding; and
- (f) was negligent in failing to address the terms of each cross-lease as part of the freeholding.

[7] Complaint was also made against Mr EQ's partner, Mr FT. No conduct finding was made against Mr FT, and Ms XD took no steps to review that aspect of the Committee's decision. This review then is focused solely on the matters of complaint engaging Mr EQ, and more specifically, the conduct complaint that the Committee had upheld which had resulted in the finding that Mr EQ's conduct had been unsatisfactory.

[8] The Standards Committee delivered its decision on 24 June 2019.

[9] The Committee determined that:

- (a) there was insufficient evidence to establish that Mr EQ had failed to act in a timely manner consistent with the terms of the retainer and his duty to take reasonable care; and
- (b) there was insufficient evidence to establish that Mr EQ had failed to treat Ms XD with courtesy and respect; and
- (c) although there was evidence on occasions of Mr EQ taking some time to respond to communications received, considering the number of parties

involved in the transaction, the delays were insufficient to establish reasonable grounds for a disciplinary response; and

- (d) whilst Mr EQ could have done better in keeping parties informed as to the reasons for the delay that occurred, it was satisfied overall with this aspect of Mr EQ's conduct;
- (e) it should have been obvious to Mr EQ as he undertook the work, that the issue of the expiry date of the cross leases should have been raised with the property owners; and
- (f) irrespective as to whether the issue of extending the term of the cross leases had been discussed prior to Mr EQ's involvement, Mr EQ should have addressed the issue with all of the property owners; and
- (g) his failure to do so reflected a failure to act competently.

[10] The Committee determined, pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr EQ's conduct constituted unsatisfactory conduct as defined by s 12(a) and (c) of the Act.

[11] In concluding its decision, the Committee noted that Ms XD maintained that she had suffered significant financial loss as a consequence of the cross lease having not been extended when the property was freeholded. She submitted that she had lost the opportunity for two sales and had suffered considerable anguish as a consequence of the problems that had occurred with the freeholding transaction.

[12] The Committee declined to award compensation, noting that there was no certainty that all the owners would have agreed to extend the terms of the lease. The Committee observed that freeholding of cross-lease properties is a complex and inherently stressful process, but did not consider that the stress Ms XD had suffered post settlement as a consequence of prospective sales not proceeding, whilst understandable, could be held to be attributable to any actions on the part of Mr EQ as there could be no certainty that the terms of the cross lease would have been extended, even if the issue had been raised with the parties.

Application for review

[13] Mr EQ filed an application for review on 5 August 2019.

[14] Mr EQ submits that the Committee had, in the course of its investigation, made a number of procedural errors. He contends that these errors constituted a clear breach of natural justice.

[15] Firstly, Mr EQ contends that the Standards Committee neglected to provide him with a copy of the final submissions filed by Ms XD. This oversight was particularly damaging, says Mr EQ, as it denied him an opportunity to respond to a submission made by Ms XD, which Mr EQ considered had misled the Committee into believing that the issue as to the question of extending the date of the cross leases, had been raised with the owners considerably later than it actually had.

[16] Secondly, Mr EQ raised concern that a member of the Standards Committee had a conflict of interest, and that the Committee member had a close personal and professional relationship with Mr FT. Mr EQ understood it to be the case, that between July and October 2018, Mr FT had discussed confidential matters with the Committee member concerning Mr FT's firm, and his business relationship with Mr EQ.

[17] Mr EQ submitted, that "as a matter of natural justice, all meetings, discussions and decisions by a local Committee about a complaint must be independent and objective. Conflict must be disclosed. A Committee member cannot attend meetings and participate in discussions about a complaint, if he or she is conflicted."¹

[18] Mr EQ considered that there was a reasonable apprehension of bias which provided a proper basis for the Committee member's disqualification.

[19] Further, Mr EQ submits that the Committee erred in concluding that he was obliged to inform the owners as to the possibility of extending the terms of the cross lease, as he had not been instructed by the owners to address the issue. In any event he argues that it would not have been possible to extend the cross-leases as it required the consent of all the owners, which had not been forthcoming.

[20] By way of remedy, Mr EQ made request for the unsatisfactory conduct finding to be set aside or, alternatively, for the matter to be referred to a Standards Committee outside of the [Area A] for further consideration

[21] Ms XD was invited to comment on Mr EQ's review application.

¹ Mr EQ's supporting reasons to application attached to his Application for Review (5 August 2019) at [15].

[22] She submits that:

- (a) all submissions required to be filed with the Complaints Service had been filed by her in time; and
- (b) Mr EQ had failed to communicate effectively with her; and
- (c) she considered the Committee's failure to compensate her for losses suffered was unsatisfactory.

Hearing

[23] An applicant only hearing proceeded on 21 May 2021.

[24] Ms XD was given an opportunity to attend the hearing. She advised that she did not wish to attend.

[25] Mr EQ was represented by Mr LA.

Nature and scope of review

[26] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[27] More recently, the High Court has described a review by this Office in the following way:³

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

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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.

[28] 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:

- (a) consider all of the available material afresh, including the Committee's decision; and
- (b) provide an independent opinion based on those materials.

Discussion

[29] The issues to be addressed on review are:

- (a) Were there procedural irregularities in the manner in which the Committee proceeded its investigation?
- (b) Did Mr EQ breach his duty to engage courteously with Ms XD, and fail to expeditiously attend to the work involved in freeholding the properties?
- (c) Did Mr EQ's failure to address cross lease issues with the owners present as a failure on Mr EQ's part to act competently such as to fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer?

Were there procedural irregularities in the manner in which the Committee proceeded its investigation?

[30] The Standards Committee overlooked providing Mr EQ with a copy Ms XD's final submissions. It is axiomatic that parties be provided with a copy of the other's submissions.

[31] It was regrettable that a copy of Ms XD's final submission was not provided to Mr EQ.

[32] The Committee has jurisdiction to control its own procedure and it may have been the case that the Committee would not have considered it necessary to seek a further response from Mr EQ. The process of exchanging submissions is not intended to engage a process of continual "toing and froing," but Mr EQ should have been provided with a copy of all submissions filed. I accept that Mr EQ considered that there were

matters raised in the final submission filed by Ms XD that he believed were important for him to respond to.

[33] That oversight is however clearly capable of cure on review. Mr EQ has had the opportunity to fully respond to all submissions filed.

[34] Mr EQ, when advancing his review application, raised concern that a member of the [Area] Standards Committee [X] which had conducted investigation into the complaints was a lawyer (I will refer to the lawyer as Mr A) well known to both himself and to Mr FT.

[35] Subsequent to Mr EQ filing his review application, the [Area] Standards Committee [X], at a meeting convened on 6 August 2019, considered the concerns raised that Mr A had been conflicted and should not have participated in the investigation of the complaint filed by Ms XD.

[36] Presumably in response to a request from the Standards Committee, Mr A provided a memorandum to the Standards Committee on 7 August 2019.

[37] The Standards Committee file forwarded to the LCRO included the memorandum prepared for the [Area] Standards Committee [X] by Mr A.

[38] Both the minutes of the Committee meeting of 6 August 2019, and Mr A's memorandum were included in the Standards Committee file provided to the LCRO. There is no indication from the material filed that the Committee considered, when forwarding that material, that its expectation was other than that the LCRO would consider the minute and memorandum as part of the Standards Committee's record of its investigation.

[39] That information did not come to my attention until after the review hearing.

[40] The memorandum was dated 7 August 2019.

[41] The memorandum prepared by Mr A records that:

- (a) when the matter first came before the Committee on 8 November 2018, he felt discomfited about hearing the complaint as Mr FT was a friend of his; and
- (b) these concerns had been raised with the Committee convenor who had indicated a view that there were no issues of potential conflict as the

Committee members “all knew most of the practitioners we were required to deal with”; and

- (c) the convenor did not consider that his friendship with Mr FT was a disqualifying interest; and
- (d) when the parties to the complaint were identified at the initial meeting of the Standards Committee, the Committee had no notice of the nature of the complaint as evidenced by the Committee minutes which record that the complaint was not ready for discussion; and
- (e) he had decided to see what the nature of the complaint was, and determine at that point as to whether it was necessary to recuse himself; and
- (f) at the next meeting of the Committee 6 December 2018, the Committee resolved to take steps to seek more information; and
- (g) as that meeting did not involve any deliberation or determination of issues, he considered that he remained essentially in the same position as he was on 8 November 2018; and
- (h) he had attended meetings on 14 February 2019, 14 March 2019 and 11 April 2019 during which there were various decisions made “inquiring, obtaining further information and setting the matter down for a hearing”; and
- (i) the matter was set down for a hearing on 8 May 2019;
- (j) he was not present for the 8 May hearing; and
- (k) he played no part in the deliberation on or determination of the issues; and
- (l) he was not present at the subsequent meeting on 13 June 2019 when parts of the earlier determination were reconsidered; and
- (m) given his discomfort in being part of the Committee’s deliberations, he had refrained from reading any of the material relating to the complaint and had decided to reserve his position until the final report had been prepared; and

- (n) he had not read any of the information provided and other than being aware that the complaint related to a cross lease issue, had no knowledge of the nature of the complaint; and
- (o) the first he became aware of the nature of the complaint was when he was approached by Mr FT in August 2019 who was very apologetic on learning that an application for review had been filed which had pleaded as a ground for review that Mr A had been conflicted; and
- (p) he acknowledged that he was an attorney for Mr FT's trust account but had never been called on to exercise powers under that attorney; and
- (q) he also knew Mr EQ "quite well" but had not had a lot to do with either Mr FT or Mr EQ in a professional context as they worked in different fields.

[42] In summary, the Committee member noted that he had raised the issue of potential conflict with the convenor and the Committee, and neither had considered that he was conflicted. In adopting a "wait and see" approach, he considered he was reserving his position. He had played no active part in the process of determining the complaint.

[43] In my view, the Committee member was starkly conflicted at the outset and should immediately have excused himself from having any involvement into complaint made against a lawyer with whom he had a close friendship and with whom he had a close professional relationship, as evidenced by the fact that he was the appointed attorney for the lawyer.

[44] The Committee's minutes indicate that another Committee member had immediately declared a conflict when Ms XD's complaint was first raised (although not discussed) at the meeting of 8 November 2018. That Committee member quite properly elected to take no further part in any consideration of Ms XD's complaint.

[45] I cannot see how a Committee member's indication that he had a friendship with a lawyer who was one of the subjects of the disciplinary inquiry would not be immediately disqualifying. The potential for conflict is stark and obvious.

[46] Whilst it is Mr EQ who raises objection, I think it likely that Ms XD would have been concerned if she had been aware that a member of the Committee charged with completing investigation into her complaint enjoyed a friendship with a subject of her complaint, and that concern further heightened by knowledge that a member of the Committee held the role as Mr FT's attorney.

[47] It is the common experience of Review Officers, that lay applicants frequently express concern when advancing their reviews that they consider that the scales are tipped against. They are apprehensive that a Committee primarily comprised of lawyers investigating complaints against lawyers does not present as a level playing field.

[48] Nor do I think that Ms XD's concerns would be allayed by explanation that the Mr A had adopted a "wait and see" approach. In situations where a Committee member declares at commencement a friendship with a lawyer who is one of the subjects of the complaint, the only option is immediate recusal.

[49] It is also concerning that neither the Committee convenor nor members of the Committee appear to have considered that a Committee member's declaration of a friendship with the lawyer complained about, was not immediately disqualifying.

[50] In fairness to the convenor, he has not had opportunity to put his or his fellow Committee member's position forward, but I must assume that the Committee's minute of 6 August 2019 and the memorandum provided to the LCRO provide accurate account of the stance adopted by the Committee members.

[51] Standards Committees play a pivotal role in the complaints process. Membership of a Committee imposes considerable demands on those members of the profession who are prepared and willing to give their time and experience.

[52] But the memorandum that has accompanied the Standards Committee file puts into sharp focus the difficulties that Standards Committees encounter when their members are called on to consider complaints against practitioners in circumstances where the lawyer complained of is personally known to some of the Committee members.

[53] The problem may be particularly acute in those areas where the number of lawyers practising is relatively small, and the complaint is referred to a local Committee for consideration.

[54] The potential for difficulty is starkly illustrated by the Convenor's comment that Committee members "all knew most of the practitioners we are required to deal with". That is not surprising in an area such as the [Area A], where it would be expected that the relatively modest number of lawyers practising would result in it being relatively commonplace for lawyers' paths to cross.

[55] I do not suggest that the fact that a Committee member knows the lawyer about whom complaint is being made is automatically disqualifying, but the need for particular care when the relationship is one which falls under the embracing description of a

personal friendship, or the more distant but nevertheless frequently closely engaging interaction which falls under the umbrella of a history of a professional interaction, is obvious.

[56] In circumstances where a Committee considers that the subject of the complaint is, in broad terms, well known to Committee members, there is merit in the Committee making request of the Complaints Service to have the complaint managed by a Committee that is based in a different locality.

[57] Mr A enjoyed a friendship with Mr FT, but the complaint was advanced against both Mr FT and Mr EQ, and the dynamics of Mr A's relationship with Mr FT would inevitably have consequences for totality of the conduct investigation.

[58] I hasten to emphasise, that it is clear that Mr A identified potential for problems at commencement, and I have no doubt that his attempt to put distance between himself and the investigation by adopting a "wait-and-see approach" was a genuine attempt on his part to avoid potential conflict.

[59] But adopting the approach of waiting to see what the nature of the complaint was, with intention to ascertain at that point as Mr A describes it if he should remain involved, was not an approach which would satisfy the *Saxmere* test.⁴ In that case, the observation was made that:⁵

[There] is now a generally accepted standard for disqualification on account of bias. A judge should not sit if a fair-minded and informed lay observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[60] The minutes of a meeting of the [Area A] Standards Committee held on 6 December 2018 with Mr A in attendance, record that the Committee, at that meeting, considered Ms XD's complaint, the lawyers' responses and explanation, and the complainant's further comments. Having done so, the Committee resolved to pursue an investigation into the complaint and to seek further information from both Mr EQ and Mr FT.

[61] The minutes of a meeting of the [Area] Standards Committee [X] held on 14 February 2019 (Mr A again in attendance) record that the inquiry into Ms XD's complaint was ongoing.

⁴ *Saxmere Co Ltd v New Zealand Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

⁵ At [89].

[62] The minutes of a meeting of the [Area] Standards Committee [X] (Mr A in attendance) held on Thursday, 14 March 2019, record the Committee's decision that "issues identified other than the complaint of a conflict of interest be set down for hearing on the papers".

[63] The last Committee meeting attended by Mr A proceeded on 11 April 2019. At this meeting, it was noted that a decision had been made to issue a notice of hearing of Ms XD's complaint on 9 April 2019.

[64] Whilst Mr A had no further involvement in the matter following his attendance at the 11 April 2019 meeting, his involvement to that point appears to have been more than that of a disinterested or distanced observer. Mr A says that given his discomfort he had not read any of the material relating to the complaint, but he was in attendance at meetings where the Committee had considered both the complaint and responses to the complaint, had determined to proceed its investigation, and made decisions to solicit further information from the parties.

[65] At hearing, Mr EQ's counsel made forceful submission that the complaint should, if not dismissed, be returned to a different Standards Committee for further deliberation.

[66] I indicated at hearing that it was my preference to deal with the matter as I was mindful of the considerable delay that had occurred in advancing the complaint to resolution. I was also concerned that it was quite apparent that the process of advancing the complaint had clearly been stressful for Ms XD. My sense was that by the time the matter had progressed to the review stage, Ms XD had tired of the process.

[67] However, having subsequent to the hearing had opportunity to peruse the Committee minutes and Mr A's memorandum, I consider that I am left with no alternative but to direct that the complaint be considered by a fresh Committee.

[68] Ms XD raised conduct issues. She is entitled to have those concerns addressed by a new Committee, and Mr EQ, as argued for by his counsel, is entitled to have the complaint considered by a Committee comprised of members who had no close association with the lawyers who were the subject of the complaint.

[69] I consider that the matters can be promptly addressed by a new Committee. There is, in my view, sufficient information on the Standards Committee file to enable a fresh Committee to complete an investigation without need for further information from either of the parties. That said, it is of course for the Committee to determine how to progress its investigation.

Anonymised publication

[70] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

- (1) Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006 a Standards Committee is directed to reconsider and determine the whole of the complaint to which the application for review relates.
- (2) A Standards Committee other than the [Area] Standards Committee [X] is to undertake the task of reconsidering and determining the complaint (s 209(1)(b)(ii) of the Lawyers and Conveyancers Act 2006).

DATED this 30th day of July 2021

R Maidment
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 EQ as the Applicant
Mr LA as Appellant's representative
Ms XD as the Respondent
Mr FT as the Related Person
[Area] Standards Committee [X]
New Zealand Law Society