

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

[2022] NZLCRO 092

Ref: LCRO 121/2021

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

RF

Applicant

AND

**DE LAW on behalf of
ABC SERVICES LIMITED**

Respondent

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

Introduction

[1] Mr RF has applied for a review of the determination by [Area] Standards Committee [X] in which the Committee made two findings of unsatisfactory conduct against him.

Background

[2] In 2017, JKL Limited (JKL) was instructed to collect debts owing to ABC Services (ABC) and the MNO Partnership (MNO) from PQR Limited (PQR). JKL, in turn, instructed Mr RF to institute legal proceedings to recover the debts. At that time, Mr RF was employed by FG Law Limited (FG Law).

[3] Whilst employed by FG Law, Mr RF/FG Law rendered two accounts:¹

Invoice No.	Date	Fees	Office Costs & Disbursements	GST	Total
111-810-672	31 Aug 2017	6,977.70	40.00	1,046.66	8,064.36
111-810-672	29 Sep 2017	2,500.00	40.00	375.00	2,915.00
Total		9,477.70	80.00	1,421.66	10,979.36

[4] Mr RF resigned from FG Law on 13 October 2017 and commenced employment with HI Law. As part of a settlement of an employment dispute with FG Law, the firm assigned all fees owed by JKL to FG Law, to Mr RF.

[5] JKL continued to retain Mr RF for all matters, including the debt recovery for ABC and MNO.

[6] The director of JKL (Mr XK) uplifted all of the firm's files from FG Law. The director of FG Law (Ms OA) has advised² that Mr XK demanded credit notes for invoices which had previously been issued to his company,³ and she provided these.

[7] Ms OA also provided the Complaints Service with copies of the firm's trust account ledgers recording the write-off of fees owed.

[8] Mr RF commenced proceedings against PQR. To avoid liquidation, PQR negotiated to a Deed of Arrangement with ABC and MNO.

[9] PQR also agreed⁴ "to pay any reasonable legal costs and disbursements incurred on a solicitor and own client basis ... by either the first or second creditor in enforcing any breach of performance of this Deed by the debtor".

[10] PQR's obligations were guaranteed by two directors of the company.

[11] PQR did not make payment in terms of the Deed.

[12] Mr RF then began proceedings on behalf of both ABC and MNO against the guarantors.

[13] The guarantors defended the proceedings, alleging that MNO had breached the confidentiality terms of the Deed and that, as a result, neither plaintiff could succeed.

¹ Standards Committee determination (4 August 2021) at [4].

² Letter FG Law to Lawyers Complaints Service (29 October 2019).

³ Ms OA also says that she had become aware that although other invoices were prepared, they were not sent to JKL.

⁴ Deed of Arrangement at cl 11.

[14] The proceedings were called before Judge HW on 2 April 2019. Mr RF appeared for both plaintiffs. Part way through the giving of evidence and cross-examination of one of the directors, the Judge intervened, advising that she considered Mr RF was conflicted and that ABC and MNO should be separately represented.

[15] The hearing was adjourned part heard by consent, and Mr RF given leave to withdraw.

[16] During the time, Mr RF acted on these matters whilst employed by HI Law. Mr RF/HI Law rendered three invoices:⁵

Invoice No.	Date	Fees	Office Costs & Disbursements (excl.)	GST	Total
025-CIV16-0118	29 March 2019	0.00	1,623.91	176.09	1,800.00
012-CIV0118	21 June 2019	5,245.29	0.00	786.79	6,032.08
013-CIV0118	8 July 2019	7,740.00	6,049.50	2,068.43	15,857.93
Total		12,985.29	7,673.41	3,031.31	23,690.01

[17] On 23 May 2019, Ms MB (DE Law) wrote to Mr RF advising that she had been instructed by ABC. She expressed 'grave concerns' that Mr RF had not recognised the conflict of interests which resulted in the court hearing being adjourned, as a result of which her client had incurred additional costs.

[18] Ms MB considered this to be 'a serious breach of [Mr RF's] professional obligations ...'.

[19] Ms MB also advised Mr RF that she had advised her client that it should not pay the outstanding accounts.

[20] Mr RF responded on 27 May, noting that HI Law was still instructed and that from thenceforth, the principal of HI Law (Mr PV) would act for MNO.

[21] After further correspondence between DE Law and HI Law, matters were not resolved, with HI Law maintaining that the outstanding fees should be paid.

[22] The resumed hearing came before Judge HW again in March 2020. Mr EU appeared for ABC. Mr RF gave evidence by way of an affidavit and judgment was entered against the two guarantors.

⁵ Above n 1, at [11].

The complaints

[23] Ms MB lodged complaints on behalf of ABC on 30 September 2019. In a letter to the Lawyers Complaints Service,⁶ Ms MB summarised the complaints:⁷

- (a) Mr RF has claimed that JKL is his client. It must therefore follow that he cannot issue invoices to [ABC].
- (b) The level of fees issued to [ABC] is excessively high, given the three matters that were required to be done and, given that part of them, if not most of the matters, were done in conjunction with the other creditor of PQR Ltd.
- (c) The hearing at the [City] District Court was aborted part way through because Mr RF was found to be in a conflict of interest situation, which meant that he had to withdraw as counsel for [ABC] and the matter then went to the waiting list for more hearing time.
- (d) We cannot understand how FG Law Ltd writes off/credits fees and yet HI Law adds them into (or at least one of them) its bill of costs.
- (e) The fees rendered by HI Law Ltd are excessively high, given that it appears from the work in progress report that the work that was undertaken was unnecessary, involved the counsel at the time in a conflict of interest and has caused extra cost to [ABC].

Mr RF's response

[24] Mr RF emphasised that work involved in drafting the Deed of Arrangement was in addition to the work encompassed in the fixed fee quoted to JKL. He says that "the final amount for the entire file, across two clients, was \$12,064.16 which was divided equally between the two clients".

[25] Mr RF referred to cl 11 of the Deed of Arrangement in which PQR agreed to pay reasonable costs and disbursements incurred by ABC and MNO in enforcing any breach of performance of the Deed by PQR, and that ABC would not then be required to pay anything if PQR had met its obligations.

[26] Mr RF advises that he had requested Ms OA to forward him the invoices that he says should have been issued but she had declined to do so.

The Standards Committee determination

[27] The Committee made two findings of unsatisfactory conduct against Mr RF:

⁶ 18 November 2019.

⁷ Ibid [5].

*Fees*⁸

Overall, the Committee did not consider that the two fees were fair and reasonable. It was of the view that Mr RF was not able to bill for time that another firm had spent on the matter some two [years] earlier. Furthermore, it considered that Mr RF's creation of a disbursement for an [FG Law] invoice that did not exist, and which was not a cost incurred by HI Law on behalf of [ABC], was an inappropriate attempt at recovering the fees and was not a valid disbursement.

[28] The finding of unsatisfactory conduct was made pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 by reason of the breach of r 9 of the Conduct and Client Care Rules.⁹

*Conflicts of interests*¹⁰

The Committee considered that Mr RF had failed to identify the potential conflict of interest and taken steps to address it and was satisfied that Mr RF's conduct by doing so amounted to a breach of Rule 6.1 of the Rules. The Committee also observed that HI Law' invoices of 21 June and 6 July 2019 were rendered to [ABC] even though it appears that a letter of engagement was never issued to [ABC]. The Committee considered that the absence of a letter of engagement reflects the apparent confusion by Mr RF as to who his client was (i.e. whether it was [ABC] or JKL).

[29] The second finding of unsatisfactory conduct was made pursuant to s 12(b)(i) of the Lawyers and Conveyancers Act and 12(c) by reason of the breach of r 6.1.

Orders

[30] The Committee:

- (a) imposed a fine of \$5,000;
- (b) ordered Mr RF to pay costs in the sum of \$500;
- (c) ordered Mr RF to cancel the two invoices rendered to ABC; and
- (d) to take advice about billing practices.

Mr RF's application for review

[31] The following paragraphs from Mr RF's submissions in support of his application for review reflect the matters of concern:¹¹

⁸ Above n 1, at [21].

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

¹⁰ Above n 1, at [27].

¹¹ Submissions of the applicant (16 August 2021). Throughout these submissions Mr RF refers to ABC Services Ltd as "[ABC]."

Fees

- ...
11. The Committee erred in holding the Applicant accountable for raising a tax invoice in an attempt to work around [FG Law] refusing to provide a GST invoice on request, and should have instead commenced an Own Motion inquiry into why [FG Law] would not issue GST invoices for work completed, and assigned to the Applicant.
- ...
- 13 The time recorded for the second stage in proceeding (“Second Stage”), from the default of the Deed of Arrangement, preparation and filing of SOC instructed to be under urgency of \$5,573.91 + GST (Exhibit “D”) is reasonable. The disbursements of the filing fee and service are expenses incurred by JKL that are due to be paid to JKL upon receipt of the payment.
- 14 [FG Law] should have provided an invoice in the amount of \$6,782.50 and the Committee erred in not requiring them to provide that invoice.
- ...
- 17 The time recorded for the third stage in proceeding (“Third Stage”), being multiple interlocutory, Court appearances and trial preparation, as per the WIP provided (Exhibit “D”) is reasonable.
- ...
- 21 The Committee failed to hold [FG Law] to account for the failure to issue proper invoices on request for work done, or to make any inquiry as to what invoices were assigned to the Applicant under the Deed of Assignment.
- ...
- 23 The time spent on this matter was reasonable and competently done (as the client has now obtained judgment on the core debt) so [ABC] should be required to pay the invoiced amount.

Conflict

- 24 There was no conflict of interest in the First Stage of proceedings. A lawyer is able to act for 2 creditors against a common debtor without conflict.
- 25 As soon as the debtors alleged MNO had breached confidentiality, that might have made the Deed of Arrangement unenforceable by [ABC], [ABC] had a claim against MNO and a conflict of interest arose at that time.
- 26 This conflict was immediately identified and when raised with the agent of ABC the Applicant was advised:
- a) MNO denies breaching confidentiality (ie it did not happen); and
 - b) Even if it did happen, [ABC] is in an ongoing commercial relationship with MNO and will never issue proceedings against MNO (as they provide [Profession] services to all the horses and foals being agisted on the MNO); and

- c) [ABC] were going to “rise and fall” with MNO – ie they would either both succeed or both fail in their attempts to recover from this debtor.

...

- 31 On top of this at the defended hearing the breach of confidentiality was not proven (supporting the MNO position they did not breach confidentiality).

...

- 35 The Committee held (para 30) that the conflict led to [ABC] incurring further cost and time.

- 36 This is incorrect as the barrister did not duplicate any of the work done by the Applicant and all work done by the barrister would have been necessary had the barrister stepped in the moment the debtors raised this defence (later on in the piece after releasing previous counsel, representing themselves, then appointing new counsel under legal aid).

...

- 40 The Decision of the Committee should be overturned as it lacks close factual and legal analysis, and on the proven facts there has not been sufficient misconduct as to warrant an adverse finding.

...

Outcome

- [32] The outcomes sought by Mr RF are:

- 42 A finding that while there was a potential conflict of interest, the Complainant made an informed decision to continue with RF representation, and ultimately the conflict was not found to exist (as the alleged breach was never proven).

- 43 A finding the value of invoices issued were reasonable and that as [FG Law] had assigned their interests in these invoices to the Applicant they were appropriate disbursements for [HI Law] to issue to [ABC].

Response from ABC

- [33] Ms MB advises that her client relies on the material provided to the Standards Committee.

Process

- [34] The review proceeded by way of an audio-visual hearing with Mr RF on 2 August 2022.

Nature and scope of review

[35] The High Court has described a review by this Office in the following way:¹²

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.

Review

[37] The Standards Committee made two findings of unsatisfactory conduct against Mr RF:

1. Mr RF had breached r 9 when issuing the two invoices to ABC.
2. Mr RF had breached r 6.1 in failing to recognise the conflict of interests.

[38] The Committee also determined that Mr RF's conduct amounted to conduct unbecoming, pursuant to s 12(b)(i) of the Lawyers and Conveyancers Act 2006.

Is ABC the 'party chargeable'?

[39] Section 132(2) of the Lawyers and Conveyancers Act provides:

Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).

[40] Ms MB says that ABC is not liable for the fees, as ABC was not Mr RF's client. If that is the case, then ABC can not complain about the fees. Nor is it liable to pay them.

[41] The answer to the question as to who is liable to pay Mr RF's fees, lies in the terms of the contract between JKL and ABC. Matters of contractual liability are matters for the Court to decide. Mr RF will have to pursue payment of the invoices through that avenue.

¹² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[42] If ABC is not contractually bound to pay Mr RF fees, then his option would be to invoice JKL, and that company will then look to ABC for reimbursement to the extent that the contract between those two parties provides.

If the decision is that ABC is contractually bound to pay Mr RF's fees, and therefore able to complain, then it would be helpful to the parties, if this decision moves on to consider other issues.

Including FG Law fees in invoices issued by HI Law

[43] The employment dispute with FG Law was resolved on the basis that there would be "an assignment of the interest of the assignor in the sums invoiced in aggregate to JKL on the terms and conditions contained in [the] Deed of Assignment".

[44] Clause 1 of the Deed of Assignment reads:

The Assignor hereby assigns to the Assignee its interests in the [fees invoices] issued to JKL in aggregate value of not less than \$43,292.20.

[45] The invoices were not attached to the Deed, nor a schedule of invoices issued. Mr RF subsequently requested Ms OA to provide the invoices, but these were not forthcoming.¹³

[46] Mr RF attempted to recover the value of the debts assigned to him by including the value of the work carried out by him when employed by FG Law in the invoice from HI Law. In another instance, he included in an invoice from HI Law, a disbursement referred to as:

FG Law invoice to 24/8/17

[47] A disbursement is an amount payable to a third party. When questioned at the review hearing, Mr RF said that if the bill had been paid, he would then have passed that payment on to FG Law. That defies logic as Mr RF would not then be recovering part of the debts assigned to him by FG Law.

[48] Both of these attempts to recover fees purportedly assigned to Mr RF, can be viewed as misleading conduct leading to a breach of r 11.1. However, no finding on that basis can be made as it is not a complaint that has been put to Mr RF to answer and, at this point in time, there has been no adverse consequences for ABC. In addition, there is no matter of public interest involved.

¹³ Ms OA has advised that the fees have been written off and produced her trust account records evidencing this.

[49] I have expressed above, some doubt that ABC is not the party chargeable with Mr RF's fees, but that is not an issue for me to decide. To recover his fees, Mr RF will be obliged to pursue recovery through the Court. If he does not succeed, the invoiced fees will not be payable by ABC.

[50] If Mr RF succeeds, then ABC will be the 'party chargeable' in terms of s 132(2), and able to complain about the quantum of the fee. Notwithstanding that the invoices will then be more than two years old,¹⁴ I venture to suggest that the circumstances surrounding this matter, will constitute 'special circumstances', to enable the complaint to proceed.

[51] At the review hearing, I requested Mr RF to provide me with detail of the work done, and to correlate that to the invoices rendered. Nothing further has been received from Mr RF and I am not therefore in a position at this time to make a decision as to what a reasonable fee would be for the work he carried out whilst employed by HI Law.

[52] The fee invoices, as they stand, are not fair and reasonable. If they are not legally payable, that is the end of the matter. If they are, then ABC can pursue its remedies at that stage.

The conflict of interests

[53] Rule 6.1 of the Conduct and Client Care Rules provides:

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.

[54] The test imposed in r 6.1 is whether or not there is a 'more than negligible risk' that a conflict may arise. The authors of *Ethics, Professional Responsibility and the Lawyer*¹⁵ say:

In general, the law has taken a prophylactic approach and prohibits not only actual conflicts of interest, but potential conflicts. When the parties' interests coincide but at a later date may diverge, a lawyer should be cautious in acting for both of them simultaneously.

[55] In *AC v BT*,¹⁶ the Review Officer said:

[62] The threshold "a more than negligible risk" is very low. A negligible risk has been described in a decision of this Office as circumstances where there is

¹⁴ Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

¹⁵ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at ch. 7.1.

¹⁶ LCRO 143/2017.

“no meaningful risk that the obligations to the parties would not be able to be fulfilled”. Conversely, “a more than negligible risk” is “a real risk of an actual conflict of interest”.¹¹

¹¹ *Sandy v Kahn* LCRO 181/2009 (25 December 2009) at [27], [36]. In this context, the word “negligible”, which is not defined in either the Act or the conduct rules means, “unworthy of notice or regard; so small or insignificant as to be ignorable”: Oxford English Dictionary <www.oed.com>.

[56] It is not difficult to contemplate that the interests of ABC and MNO may have quickly diverged. For example, PQR may have disputed the debt owed to one party but not the other. In addition, it may have offered payment (or part payment) of one debt, not the other.

[57] Given that the debtors and the creditor were all engaged in the same industry,¹⁷ it is distinctly possible that Mr RF may have become privileged to information that would not have affected the recovery of the debt for one party but affected the ability to recover from the other.

[58] There was a ‘more than negligible risk’ that a conflict would arise from the outset. Mr RF should not have accepted instructions to act for both creditors.

[59] Mr RF became more conflicted when he did not decline to discuss matters directly with the guarantors when they called his office. Indeed, Mr RF says that he knew one of the guarantors personally from prior dealings on a matter.¹⁸ It is not clear if Mr RF disclosed this to either Mr XK or either of the creditors.¹⁹

[60] Mr RF had become aware of the fact prior to the hearing that the guarantors had adopted the view that the Deed of Arrangement was unenforceable because MNO had breached the clause requiring matters to be kept confidential. This immediately set up the scenario where it became necessary to argue that the Deed remained enforceable by ABC as the alleged breach had been committed by MNO. There was clearly a conflict of interests at that stage and Mr RF acknowledged that in his letter to ABC²⁰ following the hearing.

[61] Mr RF was only able to continue to act if he had obtained informed consent from each plaintiff.²¹

¹⁷ All parties were involved in the raising and care of [REDACT].

¹⁸ RF affidavit (8 July 2019).

¹⁹ In cross-examination, Mr ZG says he was not aware that the guarantors had visited Mr RF.

²⁰ Letter RF to [ABC] (2 April 2019) for attention of Mr JD.

²¹ As provided in r 6.1.1

Informed consent?

[62] Mr RF wrote to ABC on the same day as the Judge adjourned the hearing part heard and asked Mr JD whether he “perceived a conflict of interest” between ABC and MNO. In the letter, he seemed to hold to the view that he could continue to act, notwithstanding his acknowledgement that he may be required to give evidence.

[63] In a subsequent letter,²² Mr RF requested Mr JD “to please come back to us with your thoughts when you are ready so the entire situation can be resolved by informed consent”.

[64] Neither letter nor any other correspondence provided in the course of the complaint and review begins to approach the level of explanation required to enable ABC to provide informed consent for Mr RF to continue to act.

[65] The finding of the Committee that Mr RF has breached r 6.1 is confirmed.

Decision

[66] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

1. The finding of unsatisfactory conduct pursuant to s 12(c) by reason of a breach of r 9 is confirmed
2. The finding of unsatisfactory conduct pursuant to s 12(c) by reason of the breach of r 6.1, is confirmed.
3. The Committee did not give reasons for including s 12(b)(i) when finding unsatisfactory conduct for breach of r 6.1. The determination of the Committee is modified to remove the reference to s 12(b)(i).

Orders

[67] The orders imposed in [31]a, b, d and e of the Standards Committee decision by the Committee are confirmed.

²² (12 April 2019).

Costs

[68] The Committee's decision has been confirmed. In accordance with the Costs Orders Guidelines issued by this Office, Mr RF is ordered to pay the sum the \$2,400 to the New Zealand Law Society towards the costs of this review.

Anonymised publication

[69] 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 17TH day of AUGUST 2022

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 RF as the Applicant
DE Law obo ABC Services Limited as the Respondent
Mr PV and Mrs PV as related persons
[Area] Standards Committee [X]
New Zealand Law Society