LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 25

Ref: LCRO 28/2021

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	**RW** Applicant
AND	**BD and [LAW FIRM A]** Respondent

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

Introduction

[1] Mr RW has applied for a review of the determination by [Area] Standards Committee X to take no further action on his complaints about Mr BD and [Law Firm A].

Background

[2] In July 2014 Mr RW and his partner, Ms SL, made contact with [Law Firm A] with a view to instructing the firm to act for them on the purchase of a property. They were referred to Mr BD, a legal executive in the firm.

[3] Mr RW and Ms SL were negotiating privately with the vendor and left after preliminary discussions with Mr BD in which he discussed options around the ownership structure and matters to be aware of insofar as conditions to insert in the contract.

[4] Mr RW and Ms SL met with Mr BD again in August with the proposed agreement, which was signed and dated 26 August 2014. The agreed purchase price was $320,000. Mr RW was contributing the sum of $67,200 towards the purchase with the balance to be met by borrowings. Ms SL was not contributing any funds towards the purchase.

[5] Settlement of the purchase took place on 29 September. In the intervening period, further discussions had taken place between Mr BD and his clients during which the ownership structure was again discussed, with the final decision being that the couple would own the property as joint tenants.

[6] In conjunction with that, Mr BD prepared a Property Sharing Agreement in which Mr RW's contribution towards the purchase was recorded. In the event of sale of the property, that amount was to be repaid to him and the balance then shared equally between Mr RW and Ms SL.

[7] The agreement was signed by both parties on 17 October 2014. Mr BD witnessed the signatures of both.

[8] As part of the service provided by Mr BD, he prepared draft wills in which Mr RW and Ms SL provided that the whole of their estate would pass to the survivor. These wills were not executed.

[9] In June 2018, Mr RW and Ms SL again made contact with Mr BD seeking advice as to whether they should invest further funds which Mr RW had to contribute, in an investment property, or reduce borrowings on the existing property.

[10] The couple eventually decided to reduce existing borrowings and at that time Mr BD prepared a variation of the Property Sharing Agreement, which recorded Mr RW's further contribution of $72,150.53.

[11] In November 2018, the couple separated, and each of them instructed separate lawyers. Ms SL's lawyer advised her that the Property Sharing Agreement was not enforceable and negotiations proceeded on that basis. At the review hearing, Mr RW advised that he and Ms SL had agreed on the terms of settlement.

Mr RW's complaints

[12] Mr RW lodged his complaint soon after he and Ms SL separated. The correspondence between Mr RW's lawyer and Ms SL's lawyer provides the essence of Mr RW's complaint.

[13] Ms SL's lawyer wrote:

> [We are] of the view that the property Sharing Agreement dated 17 October 2014…and the Deed of Variation of Property Sharing Agreement dated 27 July 2018 ….are void. Ms SL did not receive independent advice before signing the Property Sharing Agreement or the Deed of Variation , the parties' signatures are not witnessed by a lawyer and there is no certification regarding the effects and implications of the Property Sharing Agreement and the Deed of Variation.. With this in mind, we have discussed settlement options with Ms SL and propose that all relationship property is divided equally between the parties.

[14] Mr RW's lawyer replied:

> Ms SL and Mr RW wanted something to protect financial input into the property, and thought that [Law Firm A] had provided them with a document which would allow that to occur.

[15] Mr RW says that he had made it clear to Mr BD that he wanted to protect his cash contribution to the purchase and that he placed his trust in Mr BD that the Property Sharing Agreement would meet that objective. He says:[1]

> … the full extent of a Contracting Out Agreement was not clearly or concisely explained. I received conflicting views and advice from Mr BD.

[16] He continues:[2]

> It was made apparent to Mr BD that it was Ms SL's and my intention, that in the event of us separating, or if one party died, I would have my contribution protected and I thought it was. Hence my decision to go back to [Law Firm A] to do another agreement protecting the second contribution of mine.

[17] Mr RW notes that Mr BD did not at any stage suggest or advise him and Ms SL that they should take separate advice, and/or that separate advice was necessary to enter into a Relationship Property Agreement,[3] which must be certified by independent lawyers. Mr RW understood that his contributions were protected at all times, and says that he would not have proceeded with the purchase if he knew that was not the case.

[18] Another issue raised by Mr RW is that he was not aware that Mr BD was a legal executive, particularly as the firm was called [Law Firm A]. He says led to him to believe that he was being fully and competently advised.

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[1] Mr RW, supporting reasons for complaint (21 January 2019).
[2] Ibid.
[3] Pursuant to the Property (Relationships) Act 1976.

Mr BD's response

[19] The director of [Law Firm A] (Ms EC) responded to the complaint on Mr BD's behalf.[4] She says:[5]

1. At the initial meeting with Mr RW and Ms SL in July 2014,[6] *"the ownership structure was discussed in light of the fact that Mr RW had funds for the deposit. … the impression gained from Mr BD at that time was that Mr RW and Ms SL were a defacto couple who had been living together for quite some time prior to wanting to purchase a home".*

2. Mr RW and Ms SL were negotiating directly with the vendor, and in August 2014 they instructed Mr BD to prepare an Agreement for sale and purchase. When they attended to review and discuss the proposed purchase, and the Agreement drafted by Mr BD, "*there was also a discussion in regard [to] the ownership structure being the difference between a joint tenancy and tenants in common. Following that discussion the clients jointly instructed that they wished to be registered on the title as tenants in common based on the cash contributions but jointly liable for the bank loan".*

3. Subsequently, Mr RW and Ms SL instructed Mr BD that they wished to purchase the property as joint tenants. At that time (15 September): "… *Mr BD raised the issue of a Contracting Out Agreement pursuant to the Property (Relationships) Act 1976 (PRA) to protect what was essentially just Mr RW's separate property. Mr RW and Ms SL were both adamant that they did not want to undertake that process and the Contracting Out Agreement was not required. Mr BD then suggested that Mr RW's cash contribution could be <u>recorded</u> in a Property Agreement between the parties, the basis of which was the integrity of the parties as to its application. That was acceptable to them."*

4. *"Mr RW and Ms SL met with Mr BD on three further occasions in regard to completing the property purchase, completing the Property Agreement, preparing Wills for both of them and varying the Agreement. At each appointment it was reiterated that the Agreement was an arrangement between themselves and was never intended to be a Contracting Out Agreement pursuant to the PRA."*

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[4] Ms EC, letter to Lawyers Complaints Service (18 March 2019).
[5] Paragraph numbers used here for quotations are those from Ms EC's letter.
[6] Ms EC interpreting Mr BD's handwriting as being 15 January 2014

5. Ms EC advises that at the meeting on 19 August *"Mr RW did not raise at that meeting that he wished to protect his deposit as "separate property" from Ms SL. The purpose of the meeting was to review and sign the Agreement for Sale and Purchase for the property".*

6. At the meeting on 15 September: *"… Mr BD tabled the option of the parties entering into a Contracting Out Agreement pursuant to the PRA as the only option to legally bind Ms SL into conceding any interest in Mr RW's deposit towards the purchase of the property. Mr BD explained that our firm could not act in this regard and both Ms SL and Mr RW would require independent solicitors to advise them on this matter and have input of the terms of the Agreement. He also quoted possible costs to each of them of $650.00 plus GST being incurred. Both Ms SL and Mr RW were adamant that at the stage they were regarding their relationship, that a Contracting Out Agreement was not required. Due to the trust that they had for each other, a Property Agreement referred to previously in paragraph 3 above would be sufficient. Accordingly Mr BD proceeded on that basis."*

[20] Ms EC then refers to Mr BD's file notes, discussed at paras [62]–[80] in this decision.

[21] Ms EC advises that "*at the meeting of 27th July 2018 where the Deed of Variation of the Property Sharing Agreement was signed by both parties, the issue of the difference between the Contracting Out Agreement pursuant to the RPA and the Property Sharing Agreement was raised by Mr BD and rejected again with an acknowledgment from both parties in that regard".*[7]

[22] Ms EC's further responses are:

i. Mr BD disputes that Mr RW instructed him that he wanted to protect his contribution to the purchase in the event that he and Ms SL separated. Ms EC says that this is supported by the fact that Mr RW signed the Authority and Instruction form to register the transfer of the property, which records that he and Ms SL would be registered as joint tenants.

ii. Draft wills were prepared and sent to Mr RW and Ms SL in which they appointed each other as executor of their wills and bequeathed the whole of their estates to each other.

[7] Above n 4 at [8].

iii. She suggests that Mr RW's recall of his instructions is incorrect and concludes that this idea has been subsequently suggested to Mr RW.

iv. Mr BD completely refutes Mr RW's claim that he and Ms SL were never advised by Mr BD to take independent legal advice.

v. The advice required by Mr RW and Ms SL regarding the decision as to whether "*to enter into the Contracting Out Agreement or not would entail issues of the length of the relationship, whether or not Mr RW's deposit was earned or received during their relationship, where his funds came from, the division of tasks within the relationship and so on. None of that advice could be provided to Ms SL at that time or the conflicting advice that Mr RW may have received as both parties were present at all times in the meetings with Mr BD and both were represented by him".*[8]

vi. Ms EC counters Mr RW's complaint, that he was not aware that Mr BD was a legal executive and not a solicitor who could advise and certify a relationship property agreement, with evidence showing that Mr BD was, in fact, a legal executive.

The Standards Committee determination

[23] The Standards Committee identified four issues arising from Mr RW's complaint:[9]

a. Whether Mr BD and/or [Law Firm A] failed to provide in advance and in writing the necessary client care information and information on the principal aspects of client service for the work completed in relation to the purchase of the Property (r 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules"));

b. Whether, in providing regulated services to Mr RW for the purchase of the Property, Mr BD and/or [Law Firm A] failed to act in a competent and timely manner consistent with the terms of the retainer and the duty to take reasonable care (r 3 of the Rules);

c. Whether, by having Mr BD advise Mr RW on the purchase of the Property transaction, Mr BD and/or [Law Firm A] engaged in conduct that was misleading or deceptive or likely to mislead or deceive Mr RW on any aspect of their practice (r 11.1 of the Rules); and

d. Whether Mr BD and/or [Law Firm A] failed to charge a fee that was fair and reasonable for the services provided in accordance with rule 9 of the Rules (r 9 of the Rules).

[8] At [12].
[9] Standards Committee determination (19 February 2021) at [10].

Client Care Information

[24] The Committee noted that it had received copies of the Letters of Engagement for both the purchase of the property and the variation of the Property Sharing Agreement.

[25] The Committee said it "was satisfied that [Law Firm A]'s terms of engagement document had been attached to the letter of engagement document sent to Mr RW and Ms SL."[10]

[26] Although the Letter of Engagement had been provided after Mr BD had been instructed, "by a slim margin" the Committee was satisfied that Mr BD had complied with the requirements of rr 3.4 and 3.5 of the Conduct and Client Care Rules.[11]

Did Mr BD act in a competent and timely manner?

[27] "The Committee noted that this issue centred around Mr RW's complaints that [Law Firm A] and/or Mr BD had failed to advise him what was required to protect his contributions from becoming relationship property."[12]

Mr RW asserted that he believed the Property Sharing Agreement was sufficient to do so.

[28] "…the Committee could find no evidence to suggest that Mr RW had instructed [Law Firm A] and/or Mr BD to assist him with entering into a formal contracting out agreement with Ms SL to protect his contributions becoming relationship property if he and Ms SL were to separate."[13]

[29] "The Committee considered that although [the] file notes were rather vague and brief, they did provide contemporaneous evidence that a contracting out agreement had been discussed with Mr RW. The second file note recorded that Mr BD advised Mr RW that the PSA might be unenforceable and the Committee considered that this should have put Mr RW on notice if he wished to ensure the enforceability of the arrangement. Aside from the file notes, there was no other correspondence or evidence on the file confirming that [Law Firm A] and/or Mr BD had in fact given advice about contracting out agreements to Mr RW."[14]

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[10] At [12].
[11] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[12] Standards Committee determination, above n 9 at [16].
[13] At [18].
[14] At [21].

[30] However, there was no correspondence confirming Mr BD's advice and, in the circumstances, "the Committee placed particular weight on the file notes included on the file".[15]

[31] "On the basis of the evidence provided, the Committee did not consider that [Law Firm A] and/or Mr BD had breached rule 3 of the Rules."[16]

Did Mr BD engage in misleading or deceptive conduct?

[32] "The Committee noted that this issue related to Mr RW's allegation that he was misled to believe that Mr BD was a lawyer."[17]

[33] Mr BD was described as a 'business partner' on the firm's website and his name was included in the name of the firm. The Committee noted that this was likely to cause confusion, but "had minimal consequences for Mr RW in terms of the advice provided, because as per above there was no evidence to suggest that incorrect or incompetent advice had been given".[18]

[34] The Committee also noted that Mr BD was described as a legal executive in the Letters of Engagement.

[35] The Committee exercised its discretion to take no further action on this issue.

Fees

[36] Mr BD issued two invoices to Mr RW and Ms SL:

Date	**Total**
29 Sep 2014	$1,668.30
27 Jul 2018	$461.50

[37] "In this matter, the Committee observed that nearly four years had passed between the rendering of the first and second invoice. Furthermore, the first invoice was related to the purchase of the Property whilst the second was for work completed for the variation to the PSA. The Committee was of the view that the invoices could not be considered to relate to a single legal service and that there were no special circumstances that justified it considering the reasonableness of the fees rendered by [Law Firm A] and/or Mr BD. It followed that, in the

[15] At [22].
[16] At [23].
[17] At [24].
[18] At [25].

absence of special circumstances, the Committee had no choice but to take no further action on this issue."[19]

Determination

[38] Having addressed the issues, the Committee formally determined to take no further action on Mr RW's complaints.

Mr RW's application for review

[39] Mr RW referred to five matters which he considered required to be addressed on review of the Committee's determination. They are:[20]

a) Reliance on the file notes of Mr BD.

b) Lack of documentary evidence recording the discussions and advice received by Mr BD.

c) Negligence with advice received from Mr BD and [Law Firm A].

d) Enforceability of the property sharing agreement and variation agreement.

e) The difference between what services I thought I was getting from Mr BD and [Law Firm A] and what I actually received.

f) Conflicting advice received from Mr BD.

File notes

[40] Mr RW says:

> "The file notes are a misrepresentation of the discussion and are not a true and accurate recording of the advice that was received by Mr BD."[21]
>
> Mr "BD never conveyed the lack of enforceability around either of the agreements".[22]

[41] Mr RW says further that "it was only at the time after separation, where my ex-partner sought legal advice from a separate law firm independent of Mr BD and [Law Firm A] regarding the division of relationship property, that the credibility and lack of enforceability of both agreements was identified".[23]

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[19] At [31].
[20] Mr RW, Notice of Appeal to LCRO (8 March 2021) at [1.1].
[21] At [2.2].
[22] At [2.3].
[23] At [2.5].

No documentary evidence

[42] Mr RW draws attention to the fact that there was "never any formal recordings in the form of a draft letter or notice regarding the discussion and the advice received by Mr BD",[24] and consequently neither he nor Ms SL ever acknowledged the state of the agreement prepared by Mr BD.

Negligent advice

[43] With regard to this issue, Mr RW refers to the fact that Mr BD is not a lawyer, and therefore, Mr RW reasons, was "not qualified to provide client advice and guidance (and the later drafting of the agreements) regarding the options to protect the different levels of capital contribution between myself and my partner with the property".[25] He says that "at no point was it noted by either Mr BD and/or [Law Firm A] that independent legal advice was required by both myself and my ex-partner".[26]

Lack of enforceability of the agreement

[44] With regard to this issue, Mr RW poses two questions:[27]

a) Why would I have signed an agreement that is not legally binding and enforceable?

b) Why would I have re-engaged Mr BD and [Law Firm A] and arranged for a variation agreement to be drafted with my second capital contribution to the property?

[45] He says that he would not have proceeded with the purchase if he was aware that his contributions were not protected by the agreements prepared by Mr BD. He says:[28]

> The services I was led to believe that I was receiving from Mr BD and [Law Firm A] with the protection of my two capital contributions was much different to the services which I actually did receive.

Conflicting advice

[46] Mr RW says that Mr BD's file note of the discussion on 15 September 2014 contains conflicting statements, in that while Mr BD refers to the possibility of a Contracting Out Agreement, his file note records: "Do not require this".

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[24] At [3.1].
[25] At [4.2].
[26] At [4.9].
[27] At [5.2].
[28] At [6.5].

Concluding statements

[47] Mr RW asserts that at all times, he wished to ensure that his contributions to the purchase and reduction of borrowing remained his separate property and that he relied on the agreements prepared by Mr BD to achieve that.

[48] He says:

> "With the inadequacies and failures demonstrated by [Law Firm A] and Mr BD I have consequently suffered significant monetary loss where I have financially and emotionally suffered".[29]

Mr BD's response

[49] On receipt of Mr RW's application for review, Ms EC advised that "as Mr RW has raised the same or similar issues in his application to those previously made to the Standards Committee and to which [they had] already made full submissions in reply, [they did] not see any need to add anything further in response".[30]

[50] Ms EC indicated that she and Mr BD would respond to any matters raised in the course of this review.

Scope of review

[51] The High Court has described a review by this Office in the following way:[31]

> 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.

This review has been conducted in accordance with those comments.

Process

[52] On 6 May 2021, I issued a Minute in which I invited the parties to provide submissions on the following issues:

(a) The conflict of interests which arose when Mr BD acted for both Mr RW and Ms SL and whether Mr BD obtained informed consent from each of them as required by r 6.1.1 of the Conduct and Client Care Rules.

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[29] At [8.4].
[30] Ms EC, email to LCRO (23 March 2021).
[31] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(b) Mr RW's understanding that Mr BD was a legal executive in the firm. Regard is to be had to the firm's website and related entries. A matter of relevance is that Mr BD could not provide the necessary certificate as required by the Property (Relationships) Act 1976.

(c) The advice provided to Mr RW as to the effectiveness of the Property Sharing Agreement, in particular, when the parties elected to take title as joint tenants, and when it did not comply with the provisions of the Act.

The parties' responses are addressed in the review section of this decision.

[53] An audio-visual hearing, attended by Mr RW, Mr BD and Ms EC, and counsel for Mr BD, Mr GM, was conducted on 2 March 2022.

Review

Jurisdiction

[54] On receipt of Mr RW's complaint, the Standards Committee raised a preliminary matter with Mr BD enquiring about his status within the firm and whether or not the complaint should also be processed as a complaint against [Law Firm A]. Ms EC responded, arguing that Mr BD was not an employee of the firm, and that the Committee lacked jurisdiction to consider the complaint.

[55] At the review hearing I enquired whether Mr BD/Ms EC held to that view, and wished to pursue it. Following the hearing, Mr GM confirmed that submission would not be advanced. Consequently, it is not addressed in this decision.

Application of the Act to employees

[56] Section 14 of the Lawyers and Conveyancers Act 2006 provides:

> In this Act, **unsatisfactory conduct,** in relation to a person who is not a practitioner but who is an employee of a practitioner or an incorporated firm,—
>
> (a) means conduct of the person in the course of his or her employment by the practitioner or incorporated firm that would, if it were conduct of a practitioner, be unsatisfactory conduct under section 12 or section 13; and
>
> (b) includes conduct consisting of a contravention of this Act, or any regulations or practice rules made under this Act that apply to the person, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 11).

[57] Consequently, where in this decision, reference is made to the duties and obligations of a practitioner, or lawyer, Mr BD is obliged to meet the standards required of those duties and obligations.

[58] Although the Committee's determination identifies the parties complained about as "Mr BD and [Law Firm A]" the determination addresses the complaint as being against Mr BD only and I have proceeded on the same basis. However, Ms EC, as the director of [Law Firm A], may wish to review her supervisory obligations as provided in r 11.3 of the Conduct and Client Care Rules.[32]

General comments

[59] A common factor which arises when considering all of the issues involved in this review is that it would appear Mr BD confined his attention to the straightforward conveyancing, without turning his mind to, or being alert to, other matters which needed to be addressed. This is best evidenced by the fact that the Letter of Engagement issued by Mr BD on 18 September 2014, being 11 days prior to settlement and approximately one month after being instructed, refers only to "conveyancing for the purchase of the property…".

The file notes

[60] Mr BD asserts that he did advise Mr RW that a Contracting Out Agreement was necessary to ensure that his contributions to the purchase remained separate property in the event of he and Ms SL separating.

[61] When considering this issue, the Standards Committee "placed particular weight on the file notes included on the file".[33] This became necessary because there is no corroborating evidence in the nature of follow-up letters to Mr RW and/or Ms SL in which Mr BD confirms advice which he says he provided to them.

17 July 2014

[62] This was the first meeting between Mr BD and his clients. Mr BD writes:

> O/ship structure. Explained differences between Tenancy In Common & Joint Tenancy with Mr RW providing deposit, agreed T in C suits to look after that. Explained how suggested %'s would be calculated.

[32] Rule 11.3 was replaced by r 11.1 on 1 July 2021.
[33] Standards Committee determination, above n 9 at [22].

[63] The file note goes on to record discussions about the form of the Agreement to purchase the property and "emphasised the need to ask questions".

[64] At the review hearing, Mr BD advised that the discussion about whether to take title as tenants in common or joint owners related to estate planning issues. There is no mention of a discussion about what was required to protect Mr RW's contribution in the event that he and Ms SL separated.

[65] Mr RW was contributing the whole of the cash contribution towards the purchase – $67,200. This was a significant amount without which the couple would not have been able to buy a property. Mr BD says that he was not instructed to ensure that this contribution remained Mr RW's separate property in the event of the couple separating.

[66] Mr RW and Ms SL were a young couple, no doubt having a degree of anticipation at the prospect of being able to buy their first property. It would have been difficult for Mr RW to raise this requirement in the presence of Ms SL if he had even been aware of the legal requirements to do so.

[67] It is evident from Mr BD's file note that the discussion about ownership as tenants in common would have led Mr RW to believe that his funds were protected.

9 August 2014

[68] On this day, Mr RW and Ms SL met with Mr BD to sign the Agreement to purchase the property. Mr BD's file note records:

> Brief discussion on o/ship structure.
>
> Concluded they'll run to T in C based on % personal contribution and then 50:50 bank debt.

[69] The focus at this time was on the Agreement for Sale and Purchase.

19 August, 5 September, 11 September

[70] There is no record in these file notes of any discussion about the ownership structure of the property, or, specifically, about the individual contributions of Mr RW and Ms SL.

15 September

[71] This meeting took place two weeks prior to settlement. Mr BD's file note reads:

> O'ship – Ts in C or Joint T.
>
> Concluded to be J.T. – fully aware of result.
>
> Supported by Prop Sharing Agreement not Contracting Out Agreement. Do not require this. [34]

[72] There are no detailed notes of the advice provided to the clients, and no written record of any such advice, or what a Property Sharing Agreement or a Contracting Out Agreement would achieve.

17 October

[73] This meeting took place some two and a half weeks after settlement. Mr BD had sent drafts of the Property Sharing Agreement and wills to Mr RW and Ms SL on 30 September. Mr BD records:

> Ms SL and Mr RW @ 8.00am
>
> Went over & signed Agreement.
>
> Reiterated that an arrangement between themselves – unsure as to enforceability under Law.
>
> OK with this. Fully aware of their position/s.
>
> No questions.
>
> Brief discussion on wills.
>
> They will sort and get back to me.

[74] There is no indication that Mr BD suggested that either, or both, of his clients, should take independent advice. He witnessed both signatures to the Property Sharing Agreement.

13 June 2018

[75] Some four years after completing the purchase, Mr RW and Ms SL met with Mr BD again. Mr RW had accumulated a further $72,150.53 and the couple sought advice from Mr BD as to the best use of those funds.

18 June

[76] Mr RW rang Mr BD on this day, advising him that the funds were going to be applied to reduce the existing mortgage. Mr BD records:

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[34] The words "do not require" are a record of instructions given to Mr BD and not advice provided by him.

> They've decided to pay off debt.
>
> Discussion on revising property sharing agreement as he'd be contributing more than SL ($$$ coming from him).

[77] There is no indication that any discussion took place other than the need to vary the Property Sharing Agreement. A reasonable inference to draw from this file note is that Mr RW continued to rely on the Agreement to protect his interests.

27 July 2018

[78] At this meeting the variation to the Property Sharing Agreement was signed by both Mr RW and Ms SL. Mr BD's file note reads:

> Variation of Prop. Sharing Agreement in accordance with email. Aware that strength of agreement only as good as their intent – Contracting Out Agreement required otherwise. Both acknowledged. This Agreement fine. No further advice required.

[79] Ms EC says:[35]

> At this time Mr BD tabled the option of the parties entering into a Contracting Out Agreement pursuant to the PRA as the only option to legally bind Ms SL into conceding any interest in Mr RW's deposit towards the purchase of the property.
> …….
> [Mr BD] quoted possible costs to each of them of $650 plus GST being incurred."

[80] Ms EC's response is somewhat more detailed than is evidenced by the file note. The suggestion that Mr BD mentioned the cost of getting independent advice, would have acted more as a disincentive to adopting that approach, rather than emphatic advice that the parties should be adopting that course of action.

[81] In addition, neither client would have wished to openly discuss in the presence of the other, any difficulties in their relationship or, even if there were none, to discuss what would happen in the event of their separating. That is a possibility that arises in any relationship but particularly in this case, where Mr RW had contributed $139,350.53, the issue needed to be addressed.

Conclusion

[82] In my view, Mr BD's file notes do not provide any measure of evidence that he had provided his clients with the depth of advice necessary for them to have a fully informed understanding of the issues, and the options available to address those.

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[35] Ms EC, letter to Lawyers Complaints Service (18 March 2019) at [6]

The need to be proactive

[83] The question to be asked is, to what extent is a lawyer obliged to advise a client that his or her instructions are unwise and could have detrimental consequences. There are a number of judicial and academic comments, that support the principle that a lawyer must be proactive in tendering advice.

J v Auckland Standards Committee 1[36]

[84] This judgment followed an appeal by *J* against a decision of the Lawyers and Conveyancers Disciplinary Tribunal. It involved a lawyer complying with instructions to remit funds that had been received by the lawyer following a mediation, that exceeded the amount the other party had agreed to pay. The payment had been made in error.

[85] The lawyer did not advise the client what the consequences could be when he [the lawyer] complied with the client's instructions. It is appropriate to record some of the comments made by the Tribunal referred to in the judgment.

> [26] In considering the misconduct charge brought against Mr J, the Tribunal identified:
>
> > The central issue to be decided is what responsibility [Mr J] had to his client in respect of advice about the consequence of retaining the additional payment where he, [Mr J], was concerned about why the payment was made.
> >
> > …
> >
> > The question then becomes what level of seriousness is to be attributed to [Mr J's] failure to advise his client.
>
> [27] After listing particular facts it found "relevant to an assessment of [Mr J]'s conduct", the Tribunal found:
>
> > [Mr J]'s failure to advise his client of the risks of retaining the additional payment without further enquiry and his action of subsequently applying the funds to his client's outstanding legal costs was serious to the degree that it is disgraceful and dishonourable.

[86] The Tribunal found a charge of misconduct proved.

[87] The ground of appeal was that the Tribunal had not provided any reason to support the finding. The Court referred to the appeal as a "general appeal … conducted by way of a rehearing".[37]

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[36] [2018] NZHC 2706.
[37] At [30].

[88] Quotes from the judgment are particularly relevant to this Review:[38]

> [40] On the other hand, Mr J is not to be a 'nodding automaton' at the client's volition. …
>
> …
>
> [42] Mr J's hindsight concession he ought to have been more proactive in providing the advice is not a counsel of perfection; it was the bare minimum demanded in circumstances of a lawyer's receipt, in conjunction with an expected extraordinary compensatory payment on the client's account, of an unexpected contended ordinary transactional payment also on the client's account. … I am clear Mr J's failure to advise the client of the risks presented by receipt of unexpected funds fell well short of the expected standard of competence and diligence, and would be regarded by lawyers of good standing as unacceptable.
>
> …

Woods v Legal Complaints Review Officer[39]

[89] In this case, a lawyer took instructions from a client to make a will. The client believed that she and her husband owned a property as joint tenants and did not want the lawyer to obtain a title search as she was unwilling to pay for it. It was clear however that the client expected that her interest in the property would pass to her husband by survivorship. Complying with the client's instructions, the lawyer did not obtain a title search.

[90] After the client died, it was ascertained that the title was held by the client and her husband as tenants in common. Consequently, the client's interest in the property fell into the residue of her estate, passing to the residuary beneficiary.

[91] The Court referred, with approval, the following statement in the LCRO's decision:

> (e) Mrs Pearce's unwillingness to pay for a title search did not absolve Ms Woods from obtaining "sufficient information to enable proper and thorough advice to have been given to her client". It was not an answer for a lawyer to say he or she was following the client's instructions when those instructions prevented a full consideration of the factors relevant to the retainer. The failure to undertake a "basic inquiry, to form the basis of sound legal advice, meant that Ms Woods was unable to act in Mrs Pearce's best interests concerning her testamentary wishes".

[92] The LCRO went on to say:

> (f) If Mrs Pearce had insisted that Ms Woods take shortcuts "in terms of basic research", and she nevertheless proceeded to act in such circumstances (which the LCRO said must be considered risky), then Ms Woods should have made a clear record of her instructions, informed Mrs Pearce of the

[38] At [40] and [42].
[39] [2013] NZHC 674.

> risks, and included a disclaimer making it "abundantly clear that the risks of incomplete or incorrect advice lay with the client".

[93] Ms Woods applied for judicial review of the LCRO decision and in his judgment dismissing the application, his Honour had this to say:

> [48] …against these points it is notable that Ms Woods did not make any record of such instructions. If, having been advised on the matter, Mrs Pearce was indifferent to the distinct effect of the property instead being held in common, that is the very thing a capable solicitor would provide expressly for, or at the very least record.

[94] His Honour also referred to *Gilbert v Shanahan* where Tipping J said:[40]

> [While] solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming under the scope of the retainer.

YR v OS[41]

[95] This decision by this Office, includes the following comments:

> [47] A lawyer must be proactive in offering advice. In this regard the courts have made a number of comments, some of which I include here:
>
> …
>
> "[While] solicitors' duties are governed by the scope of their retainer, … it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming under the scope of the retainer."[42]
>
> "Mr J's hindsight concession he ought to have been more proactive in providing the advice is not a counsel of perfection; it was the bare minimum demanded in circumstances …"[43]
>
> [48] In his email to AF (14 July 2015) advising of her removal as a Trustee, Mr OS says he "was always available" to her to provide advice about how Trusts operate. However, when asking a client or any other person, to sign a document whereby they assume significant responsibilities, it falls to a lawyer to volunteer advice and information or to ensure that person acquires advice and information independently.

[96] These comments make it clear, beyond any doubt, that a lawyer must be proactive in offering advice outside of the specific terms of his or her retainer. They also make clear that a lawyer must provide written confirmation of advice given when discussing important issues on which a client needs to make a decision.

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[40] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at p 537.
[41] *YR v OS* LCRO 3/2019 (20 July 2020) at [47]–[48].
[42] *Gilbert v Shanahan*, above n 40, at p 537.
[43] *J v Auckland Standards Committee 1*, above n 36, at [42].

[97] Applying the comments above to the facts of this review, it follows that Mr BD had a duty to look beyond the limits of his instructions/retainer, and advise his clients accordingly.

The n*eed for independent advice*

[98] From the time Mr BD was instructed in July 2014 Mr BD should have turned his mind to the question as to whether or not he should advise either, or both, of his clients to take independent advice. He could then have continued to act for them together for the purchase of the property, freed from any of these concerns.

[99] The impression I have is that Mr BD focused on the conveyancing aspect of his instructions, without giving sufficient attention to the fact that Mr RW was providing the whole of the cash contribution towards the purchase, and what should be done to ensure that both parties received separate, and independent, advice, about ownership of the property, and, in Mr RW's case, how his funds could be protected. This did not necessarily need to be by way of a Property Relationship agreement – it may, for example, have been addressed by Mr RW establishing a Trust, and advancing the funds toward the purchase through the Trust, or the Trust becoming a registered proprietor of the property.

These are not matters that could have been discussed openly in the presence of both Mr RW and Ms SL.

[100] Section 12(a) of the Lawyers and Conveyancers Act 2006 defines unsatisfactory conduct as being:

> (a) 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 falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; …

[101] Rule 6.1 of the Conduct and Client Care Rules 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.

This rule is mandatory, subject to the provisions of r 6.1.1, which provides:

> 6.1.1 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 concerned is obtained

[102] In his submissions for the review hearing,[44] Mr GM says:

> Mr BD was aware of the potential conflict between Mr RW and Ms SL. He accepts the risk of this conflict was more than negligible.

Mr GM argues however, that Mr RW and Ms SL gave 'informed consent' to Mr BD to act for both of them.

[103] The term 'informed consent' is defined in r 1.2 of the Conduct and Client Care Rules as being:

> **informed consent** means consent 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

[104] I include here an extensive quotation from the text *Ethics, Professional Responsibility and the Lawyer*:[45]

> The Courts have always taken the view that whenever a lawyer relies on a limitation of the fiduciary obligations owed to the client, it is incumbent on the lawyer to prove that the client understood the nature of the waiver and freely consented to it. However, it must also be noted that obtaining a client's informed consent to a transaction is not a mere formality. This is demonstrated by *Taylor v Schofield Peterson*,[17] where a lawyer was held to be in breach of her fiduciary duties in acting for both parties in the dissolution of a partnership. While the dissolution agreement itself contained a clause that "the parties acknowledge that before signing this agreement they were advised to and given the opportunity to seek advice as to the terms of the agreement and the dissolution of their partnership", it was held that this was inadequate. In particular, the solicitor had failed in her obligations to fully inform the clients of the nature and implications of the conflict. Hammond J set out the requirements which must be met for a solicitor to be entitled to continue to act in a conflict situation:[18]
>
> (1) recognise a conflict of interest, or a real possibility of one;
>
> (2) explain to the client what that conflict is;
>
> (3) further explain to the client the ramifications of that conflict (for instance, it may be that she could not give advice which ordinarily she would have given);
>
> (4) ensure that the client has a proper appreciation of the conflict, and its implications, and
>
> (5) obtain the informed consent of that client.
>
> This approach is reflected in the definition of "informed consent" found in r 2.1 of the rules, …
>
> [17] [1999] 3 NZLR 434.
> [18] *Taylor v Schofield Peterson* [1999] 3 NZLR 434, 440.

[44] Mr GM, letter to LCRO (23 June 2021) at [5].
[45] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at p 215.

[105] There is no indication in any of Mr BD's file notes that he spent any time explaining the conflict, much less obtaining informed consent from his clients. As noted previously, there is no written record of any such advice.

Mr BD's position in the firm

[106] Mr RW complained that he did not know Mr BD was a legal executive, not a lawyer. This misunderstanding, would, no doubt, be reinforced by the fact that the name of the firm includes Mr BD's surname.

[107] Mr RW's understanding, that Mr BD was a lawyer, would have added to his belief that the documentation prepared by him was sufficient to protect his interests.

[108] Ms EC points to the fact that the Letter of Engagement issued in 2014, identifies Mr BD as a Legal Executive, and that the version of the letterhead used by the firm at that time also identified Mr BD as a Legal Executive. However, the letter of Engagement was issued on 18 September, some 9 weeks after Mr BD had been instructed and I have not been able to find any correspondence on Mr BD's file sent on the firm's letterhead.

[109] It is also relevant to refer here to an English judgment, *Pearless De Rougemont & Co v Pilbrow*, where the Court was not so dismissive of the need to ensure that clients were aware of the qualifications of the person with whom they are dealing.[46]

[110] The Court said:

> The defendant gave evidence that he had telephoned a firm of solicitors. He asked for an appointment to see a solicitor about a family matter. The person at the other end (who it appears was a receptionist) told him that she would arrange an appointment with Miss Lee-Haswell. At that time Miss Lee-Haswell was not a solicitor, nor had she been admitted as a member of the Institute of Legal Executives.

The Court referred to rule 15(2)(a) of the Solicitors Practice Rules 1990, which provided:

> Every solicitor in private practice shall, unless it is inappropriate in the circumstances, ensure that clients know the name and status of the person responsible for the day to day conduct of the matter and the principal responsible for its overall supervision.
>
> …
>
> [When telephoning the firm and asking to see a solicitor, what the client] is making clear is that he wishes to talk to someone who is a solicitor as opposed to someone not qualified as a solicitor. He may, in the context of the particular firm, be making an unjustified assumption that a solicitor will give him better advice than the unqualified person. If that is so then this should be made clear by someone authorised to speak for the firm.

[46] *Pearless De Rougemont & Co v Pilbrow* [1999] 3 All ER 355 (EWCA).

[111] There is no rule in the same terms as the English rule in the Conduct and Client Care Rules. However, r 11.1 does provide that "a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice."

[112] Mr BD did not refer Mr RW to another member of the firm for advice about relationship property issues and did not suggest he take independent advice. It was therefore reasonable for Mr RW to assume that Mr BD had the appropriate expertise to properly advise him.

[113] I do not intend to make any different finding than the Standards Committee in respect of this issue, but it should not be treated lightly, and I reinforce the recommendation by the Committee that both Mr BD, and Ms EC as the firm's director, ensure that the qualifications of each staff member are clearly identified to clients.

Conclusion

[114] Section 12(a) of the Lawyers and Conveyancers Act defines unsatisfactory conduct as:

> 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 falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; …

[115] Mr BD was not proactive in advising his clients in depth about the consequences of taking title as joint tenants, in the circumstances where Mr RW was providing the whole cash contribution to the property. Mr BD's conduct falls short of the standard set by s 12(a), and therefore of s 14(a) for employees who are not lawyers.

[116] Mr BD has breached r 6.1 of the Conduct and Client Care Rules. This constitutes unsatisfactory conduct pursuant to s 14(b) of the Act.

Orders

[117] Having made two findings of unsatisfactory conduct against Mr BD, it is now necessary to consider what Orders should be made against him.

[118] In his complaint, and application for review, Mr RW has sought compensation for legal fees and losses. I have no evidence before me of what these are. If Mr RW wishes to pursue compensation, I request these be provided.

[119] There is a considerable degree of crossover between a finding of unsatisfactory conduct pursuant to s 12(a) of the Act (as here) and the tort of negligence.

Section 156(1)(d) of the Lawyers and Conveyancers Act provides that compensation for any loss must be "by reason of any act or omission of a practitioner". The maximum amount that may be awarded is $25,000.[47]

[120] Many decisions of Standards Committees, and this Office,[48] have definitively stated that the complaints process is not a substitute for civil court proceedings. I ask Mr RW to bear these comments in mind when responding to my request in [122] following.

[121] Other than compensation, the orders that can be made following a finding of unsatisfactory conduct are set out in s 156 of the Act, and in [49] of the Guidelines for Parties on Review.[49]

[122] Both parties are requested to provide submissions as to penalties to be imposed following the findings in this decision of unsatisfactory conduct. I request these submissions be provided by no later than 5 pm on Friday 8 April 2022.

DATED this 25TH day of MARCH 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 RW as the Applicant
Mr BD as the Respondent
Ms EC as a Related Person
Mr GM as a Related Person
[Area] Standards Committee X
New Zealand Law Society

[47] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.
[48] One of the grounds for taking no further action on a complaint is "there is in all the circumstances an adequate remedy or right of appeal, ….that it would be reasonable for the person aggrieved to exercise" – Lawyers and Conveyancers Act 2006, s 138(1)(f).
[49] If Mr RW has misplaced these, he may contact the case manager for a further copy.

LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 038

Ref: LCRO 28/2021

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	**RW** Applicant
AND	**BD and [LAW FIRM A]** Respondent

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

DECISION AS TO PENALTY

Findings

[123] In the decision dated 25 March 2022, I made two findings of unsatisfactory conduct against Mr BD, the first pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006[50] and the second pursuant to s 12(c) for breach of r 6.1 of the Conduct and Client Care Rules.[51]

[124] The parties were invited to provide submissions as to the appropriate orders to be made.

[50] Lack of competence and diligence.
[51] Conflict of interests – Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Mr RW's submissions

[125] Mr RW submits that the orders against Mr BD should include:[52]

(a) A written apology by Mr BD and [Law Firm A]

(b) Compensation

(c) Reimbursement of fees associated with the drafting of both agreements by Mr BD

(d) Fine[53]

[126] Mr RW has provided a table of his total losses, made up of his contribution towards the purchase, and reduction of borrowing, as well as costs relating to matters arising in relation to the challenge to the validity of the Property Sharing Agreements.

[127] Mr RW also refers to the emotional stress and toll on his personal wellbeing over a period of three and a half years.

Mr GM's submissions

[128] Mr GM advises that Mr BD accepts the finding of unsatisfactory conduct and that "the complaint process; the review hearing; and the disciplinary finding has delivered a significant penalty in and of itself".[54]

[129] He submits "that the appropriate penalty to mark the finding is a fine of $1,500; an order to pay compensation of $461.50 (refunding the fees paid for the variation of the Property Sharing Agreement); and an order to pay costs".[55]

[130] He submits that "no further order to pay compensation is appropriate because the claims made by Mr RW involve relatively complex issues of causation and quantum" and says that "it is not possible to resolve these issues within the context of this disciplinary jurisdiction".[56]

[131] Mr GM traverses the principles applying to penalties in the context of the complaints and disciplinary process and refers to decisions of this Office. He submits that "the setting of the fine is a matter of discretion but is to be guided by principle based

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[52] Mr RW's submissions (8 April 2022) at [3.6].
[53] Mr RW refers to fines against Mr BD and [Law Firm A]. The findings of unsatisfactory conduct were against Mr BD, and consequently orders may only be made against him.
[54] Mr GM's penalty submissions (8 April 2022) at [2].
[55] At [3].
[56] At [4].

on the culpability of the conduct and then by reference to comparative cases to ensure some level of consistency",[57] and that a fine of $1,500 is sufficient in this instance.

[132] In summary, Mr GM submits that the appropriate penalties to be imposed are "a fine of $1,500; an order for compensation of $461.50; and an order for costs of $800".[58]

Penalty in a disciplinary context

[133] Section 3(1) of the Lawyers and Conveyancers Act 2006 sets out the purposes of the Act. They are:

> (a) to maintain public confidence in the provision of legal services and conveyancing services:
>
> (b) to protect the consumers of legal services and conveyancing services:
>
> (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

[134] In *Wellington Standards Committee 2 v Harper*,[59] the Lawyers and Conveyancers Disciplinary Tribunal identified factors to be considered when determining the appropriate penalty to be imposed. Although the facts of that case differ from those arising in this matter, the summary by the Tribunal is helpful when considering what orders should be made in this instance.

[135] The Tribunal summarised the factors in the following way:[60]

> (a) The primary purpose is not punishment, although orders inevitably will have some such effect; the predominant purpose, as set out in s 3 of the LCA5 is to protect not only the interests of consumers of legal services, but also public confidence in the provision of legal services;
>
> (b) To maintain professional standards. Not only is this an important purpose (and end) of itself, it also connects with the purpose of maintaining public confidence in the profession. Many cases have referred to reputation as the most valuable asset of the legal profession;
>
> (c) To impose sanctions on a practitioner for breach of his or her duties. Again, this factor is grounded in the public interest in maintenance of confidence in lawyers' professional standards. A number of decisions have referred to the need for the public to be able to observe a strong and proportionate response by the profession's disciplinary bodies;
>
> (d) To provide scope for rehabilitation in appropriate cases;

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[57] At [12].
[58] At [17].
[59] *Wellington Standards Committee 2 v Harper* [2020] NZLCDT 29.
[60] At [24].

[136] I add to that, the consequences of the unsatisfactory conduct and the impact of that conduct on the client.

[137] Section 156(1) of the Act provides the orders that may be made by a Standards Committee or by this Office. These are set out in [49] of the Guidelines for Parties to Review, a copy of which has been provided to the parties. The maximum amount that may be ordered by way of compensation is $25,000[61] and the maximum fine that may be imposed pursuant to s 156(1)(i) of the Act is $15,000.

Discussion

Apology

[138] Mr RW asks that Mr BD formally apologise to him. Although this is an order which may be made,[62] Mr BD has acknowledged that the service and advice provided to Mr RW fell short of what Mr RW was entitled to expect.[63]

[139] Little more would be achieved by ordering Mr BD to make a formal apology to Mr RW.

Compensation

[140] At [118] of the findings decision, I requested Mr RW to provide evidence of his losses if he wished to pursue his claim for compensation. Mr RW has advised that his losses have totalled $155,437.48, made up of the loss in full, of his contributions to the property, and Mr BD's fees for preparing the Property Sharing Agreement and variation.

[141] Mr RW has not provided any evidence of these losses other than Mr BD's invoices. Without detailed evidence it is not possible to determine what loss can be attributed to the defects in the agreements, and I accept Mr GM's submission when he says: [64]

> The claims made by Mr RW involve relatively complex issues of causation and quantum. It is not possible to resolve these issues within the context of this disciplinary jurisdiction.

[142] The complaints process is no substitute for a claim in negligence to be pursued through the courts. That is the proper forum in which Mr RW's claims for compensation to the extent claimed, should be pursued.

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[61] Reg 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
[62] Section 156(1)(c) of the Act.
[63] Mr GM's penalty submissions at [2] & [9].
[64] At [4].

Stress and anxiety

[143] Mr RW has referred to emotional stress and the toll on his personal wellbeing over a period of three and a half years. Much of this would have been as a result of his breakup with Ms SL.

[144] Compensation for stress and anxiety may be addressed in the context of the complaints process, and comments made by the Review Officer in *EW v YL*[65] are pertinent. In that decision the Review Officer said:

> [83] Emotional stress has been recognised by this Office as a compensable form of loss.[66]
>
> [84] The ability to compensate for anguish and distress in the lawyer/client relationship has been recognised in a number of cases[67] and given the purpose of the Act (which in section 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown.
>
> [85] There is no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory. Orders for compensation "should also be modest (though not grudging) in nature".[68]

[145] That case involved a situation where a lawyer had acted for both a mother and her daughter in which the mother was to transfer her home to her daughter, retaining the right to live in the property for her lifetime. It transpired that the daughter had forged her mother's signature to the agreement effecting that transaction.

[146] The Review Officer increased the amount awarded by the Standards Committee by way of compensation for stress and anxiety, from $1,700 to $3,000.

[147] Compensation for distress and anxiety was also addressed by the High Court in *Hong v Auckland Standards Committee No.5* [69] where Gordon J said:

> [205] ... The plain meaning of loss, adapted from the *Shorter Oxford English Dictionary*, is diminution of possessions or advantages or, alternatively, detriment or disadvantage arising from deprivation or a change of conditions. Loss arising from emotional harm caused by breaches of duties by a legal practitioner in whom a client has trust and confidence on matters going to something as fundamental as a home for his or her family, and the financial arrangements which go with that, would easily come within the scope of this definition of loss.
>
> [206] In my view, the plain meaning of loss is consistent with the purpose of the provision and the Act. First, 156(1)(d) specifically provides for the payment of the amount as compensation, not damages. Damages generally are not usually considered compensation because they simply put the wronged party in the

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[65] *EW v YL* LCRO 58/2021 (29 October 2021).
[66] See e.g. *Hartlepool v Basildon* LCRO 79/2009.
[67] See e.g. *Heslop v Cousins* [2007] 3 NZLR 679 (HC).
[68] *Sandy v Khan* LCRO 181/2009 (25 February 2010) [orders decision] at [29].
[69] *Hong v Auckland Standards Committee No.5* [2020] NZHC 1599.

> position they would have been in had the party at fault performed his or her bargain or duty.[50] Second, the people to whom compensation can be awarded is likewise general. It is not just the client who has retained the practitioner but "any person" who has suffered loss. This would include, for example, the former employer in J. The provision confers a broad power on the Tribunal, within the scope of the maximum amount.
>
> [207] Third, s 3 of the Act provides that the purposes are to maintain public confidence in the provision of legal services and to protect consumers of legal services. Practitioners occupy a privileged and important place in our legal system and society. Clients and the public are entitled to expect they will discharge their duties and adhere to the rules which come with membership of the profession. Where there is a failure to do so, a complaints process exists to identify and address it. That process includes, and should include, a power to award compensation to those who suffer loss arising from such failure. Whatever form that loss may take, the award of compensation is essential to maintain public confidence in the integrity of the profession and to ensure clients are properly protected where they suffer at the hands of their lawyer.
>
> [208] As to quantum, in the absence of further direction in the statute, I am of the view that an analogy with an award of general damages can be drawn. That is, the amount is a matter of personal judgement. I consider this is a case where compensation for loss is due to Mr K and that the Tribunal's award of $8,000 is reasonable and appropriate in the circumstances.
>
> [50] See *Premium Real Estate Ltd v Steven* [2009] NZSC 15, [2009] 2 NZLR 384 at [99]. I acknowledge that Tipping J specifically excluded "sums payable pursuant to statute" from his discussion, as is the situation in this case, but the Judge's analysis is still relevant for the purposes of construing this provision

[148] In that case, Mr Hong had contributed funds to enable his client to complete the purchase of a property and eventually "gained title to a property which his clients had contracted to buy. He was later able to use the property as security for personal borrowings".[70]

[149] Mr Hong's conduct involved [inter alia] a breach of r 6.1 of the Conduct and Client Care Rules, which is the rule on which one of the findings of unsatisfactory conduct against Mr BD is founded.

[150] The case involved however, particularly egregious conduct for which Mr Hong was struck off the roll of barristers and solicitors. It also involved a situation where the complainant "had been living with an unresolved situation for 12 years, causing him stress and anxiety, including that caused by Mr Hong's unsuccessful attempt to have him evicted from the property".[71]

[151] In that case, the Court confirmed the Tribunal's award of $8,000 by way of compensation for stress and anxiety.

[152] There can be no doubt that the letter from Ms SL's lawyers to Mr RW's lawyer, expressing the view that the Property Sharing Agreements were void, would have come

[70] At [92].
[71] At [175].

as a surprise to Mr RW and significantly affected the strength of his negotiations with Ms SL.

[153] Stress and anxiety is subjective, and different people will be affected differently by the same set of circumstances. As noted by Gordon J,[72] the amount awarded is a matter of personal judgement.

[154] Exercising that personal judgement, I order Mr BD to pay the sum of $2,000 to Mr RW by way of compensation pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act 2006.

Fees

[155] It is clear that the agreements prepared by Mr BD were ineffective to protect Mr RW's contributions to the property.

[156] Mr GM advises that the fee charged for the original drafting of the agreement was included in the conveyancing cost for the purchase of the property – $1,100 plus GST. However, some of that fee must have related to preparation of the Agreement, and the only reference point available, is the fee for the variation to the Agreement.

[157] Mr BD is ordered (pursuant to s 156(1)(e) of the Act), to reduce the fee charged in invoice dated 24 September 2014 by $400 plus GST.

[158] The fee for the amendment to the agreement was $461.45 (invoice 27 July 2018). Mr BD is ordered, pursuant to s 156(1)(f) of the Act, to cancel that fee.

Fine

[159] It is appropriate that the penalties imposed on Mr BD should include a fine, if for no other reason than to further impress on Mr BD the need to be more alert to the need to refer clients for independent advice when the situation arises, and if the clients decline to do so, that the clients are fully advised of the conflict, such advice to be confirmed in writing.

[160] In one of the earliest decisions of this Office,[73] the Review Officer said:

> [9] In cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, regulations or the Act) and a fine is appropriate, a fine of $1000 would be a proper starting place in the absence of other factors. I note that by definition such a breach is not wilful or reckless.

[72] At [208].
[73] *T v G* [2009] NZLCRO 12.

[161] Mr BD's conduct cannot be described a wilful or reckless, or intentional. Even though the comment made in *T v G* was made in 2009, there has been no adjustment in the legislation to the maximum fine which may be imposed. Whilst there may be an argument that the starting figure of $1,000 should be adjusted upwards, I see no purpose to pursue that issue in this instance, given my comment above that the fine imposed is to serve as a reminder to Mr BD.

[162] Accordingly, pursuant to s 156(1)(i) of the Act, Mr BD is ordered to pay the sum of $1,000 to the New Zealand Law Society by way of a fine.

Rehabilitation

[163] In *Wellington Standards Committee 2 v Harper*, the Tribunal referred to rehabilitation in this instance better referred to as education. Mr GM has advised that Mr BD has learned "the lessons which are present in this case"[74] and has worked with Ms EC to better deal with similar situations in the future. The findings of unsatisfactory conduct will also serve to put Mr BD on alert when similar situations arise in the future.

[164] There is no need for any orders that Mr BD undergo education or training.

Costs

[165] Pursuant to the Costs Guidelines issued by this Office, Mr BD is to pay the sum of $1,600 to the New Zealand Law Society, being the costs attributable to a hearing in person for a review of average complexity.

Orders

[166] The following orders are made:[75]

(a) Mr BD is to pay Mr RW the sum of $2,000 by way of compensation – s 156(1)(d).

(b) Mr BD is to reduce his fee in the invoice dated 24 September 2014 by $460 and refund that amount to Mr RW – s156(1)(e).

(c) Mr BD is to cancel invoice dated 27 July 2018 and refund $461.50 to Mr RW – s 156(1)(f).

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[74] Above n 5 at [10].
[75] References to sections of the Lawyers and Conveyancers Act 2006.

(d) Mr BD is to pay a fine of $1,000 to the New Zealand Law Society – s 156(1)(i).

(e) Mr BD is to pay the New Zealand Law Society the sum of $1,600 as a contribution towards the costs of this review – s 210.

[167] To facilitate the payments to be made by Mr BD to Mr RW, Mr RW is to advise Mr GM of the account number into which payments are to be made. The payments ordered are then to be paid within two weeks of the date on which Mr RW provides that information to Mr GM.

Enforcement of costs order

[168] 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.

Publication

[169] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, this decision and the findings decision dated 25 March 2022 will be published in anonymised format.

DATED this 3RD day of MAY 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 RW as the Applicant
Mr BD as the Respondent
Ms EC as a Related Person
Mr GM as a Related Person
[Area] Standards Committee X
New Zealand Law Society