LCRO 111/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**AN** **on behalf of AAK** of Auckland Applicant
AND	**ZL** of Auckland Respondent

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

DECISION

Background

[1] The Applicant is one of five shareholders in, and directors of, AAL (AAL).

[2] He is also one of four shareholders in, and directors of, AAK (AAK).

[3] The Managing Director of AAL is AO (AO) the Applicant's brother.

[4] AO was neither a shareholder in, or director of, AAK. That company was regarded as the Applicant's company.

[5] The other shareholders and directors of the two companies were the parents of the Applicant and AO, and their uncle. These persons did not play a large part in the management of the two companies.

[6] The Respondent was introduced to AO some time in 2008, by the accountant for AAL. He was subsequently visited by AO who introduced himself as the Managing Director of AAL.

[7] Up until the events giving rise to this complaint, the Respondent had only ever communicated with, and been instructed by, AO, on behalf of AAL. His client in each case had been AAL.

[8] In January 2010, the Respondent was contacted by AO, who advised him that his brother, the Applicant, wished to sell the supermarket operated by AAK, and wanted to have a supply agreement between AAL and the purchaser put in place.

[9] At the request of AO, the Respondent arranged for a copy of an existing supply agreement that had previously been prepared by the Respondent for AAL in respect of another outlet, to be forwarded to the Applicant.

[10] On 18 January 2010, the Respondent received further instructions from AO as to the terms of the proposed agreement.

[11] These amendments were made by the Respondent and emailed to AO.

[12] On 20 January 2010, the Respondent received a telephone call from the Applicant requesting him to make some amendments to the draft agreement.

[13] The Respondent's time sheets show further attendances on AO with regard to the proposed agreement, on 26 and 27 January.

[14] On 27 January, AO advised the Respondent that he was going to be overseas for the next week, and instructed him to deal directly with the Applicant. He also instructed that if there were to be major changes to the document, then the costs relating to those should be borne by AAK as any attendances relating to those changes were for the benefit of AAK.

[15] The Respondent met with the Applicant on 28 January. The business card provided by the Applicant at that meeting referred to the Applicant as a director of AAL.

[16] At that meeting the terms of the agreement were reviewed in detail. Although the Respondent was shown a copy of the Agreement for the sale of the business, he was not provided with a copy, nor instructed to act generally in respect of the sale. He noted that another firm was recorded as being the vendor's solicitor.

[17] The Applicant states that he was unaware of the previous communications between the Respondent and AO in respect of this matter, and that on 28 January, he met with the Respondent for the purpose of introducing himself and instructing the Respondent to act for AAK to complete the supply agreement.

[18] He states that the Respondent was happy to assist in the matter and at no time advised the Applicant that he was acting for AAL. He says he left the meeting under the impression that the Respondent was acting for AAK and would act in the company's best interests.

[19] In the week that followed the Applicant requested a number of material changes to the form of the agreement, which the Respondent knew were in conflict with what was required by AO. He was concerned that concessions were being made to the form of the agreement which were not in the interests of AAL. He copied AO into the various emails between the Applicant and himself, in which he recorded his view to this effect.

[20] AO shared the Respondent's concerns and instructed the Respondent to cease action pending his return from overseas.

[21] The Applicant objected to the steps taken by the Respondent and insisted that the Respondent should act on his instructions.

[22] Ultimately, the Respondent advised the Applicant that he needed an appropriate resolution to be passed by the company to authorise him to act on the instructions of the Applicant alone.

[23] The Applicant then produced a letter signed by three directors of AAL (which did not include AO) by which the Applicant was authorised to provide instructions on behalf of AAL in respect of the proposed supply agreement.

[24] The Respondent formed the view, that although this was not strictly in accordance with the requirements of the company's constitution, he would nevertheless proceed on this basis, but continued to keep AO advised of his instructions.

[25] The precautionary steps taken by the Respondent in the face of the conflicting instructions from AO and the Applicant, inevitably caused some delays to the completion of the agreement, to the extent that the Applicant alleges that such delays presented the purchaser with an opportunity to terminate the agreement.

[26] It is not evident from the material in my possession whether the agreement proceeded to settlement or was indeed terminated. Nevertheless, I do note that as at 20 January 2010, the agreement remained conditional on matters other than finalisation of the supply agreement.

[27] On 28 February 2010 the Respondent rendered his account to AAK for $6,120.00. The Applicant has requested this account to be reviewed.

[28] The Applicant lodged his complaint with the Complaints Service of the New Zealand Law Society on 22 February 2010. The matters complained of are summarised in the submissions from the Respondent as follows:-

(a) The Applicant alleges that the Respondent failed to disclose that he was acting for [AAL] when undertaking work for [AAK].

(b) He alleges that the Respondent acted in a conflict of interest situation.

(c) He alleges that the conflict of interest caused delay in the finalisation of the supply agreement to the detriment of AAK.

(d) He alleges that the sale of the business was jeopardised by the conduct of the Respondent.

(e) The alleged conflict of interest resulted in additional cost to AAK.

Standards Committee Decision

[29] In its decision of 16 June 2010, the Committee resolved, pursuant to s152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action in connection with the complaint.

[30] The Committee formed the view that at all times the Respondent was acting for AAL, and that consequently no conflict of interest arose.

[31] Although there had been some delays, these were caused by the fact that the Respondent was receiving conflicting instructions from the Applicant and AO, and that the delays that did occur arose out of the need for the Respondent to satisfy himself as to what course of action he should take.

[32] Other than the delays which arose for this reason, the Committee considered that the Applicant had acted promptly and reasonably in attempting to find a solution.

[33] The Committee also considered that the fees charged by the Respondent were neither unfair or unreasonable.

Application for Review

[34] The Applicant has applied for a review of the Committee's decision.

[35] He reiterates the argument he put before the Committee, and takes issue with the Committee's determination that the Respondent was acting for AAL. He remains of the view that the Respondent was acting for AAK

[36] He repeats the complaint that the Respondent did not advise him that he was acting for AAL and would continue to take instructions from AO.

[37] As a result, he asserts that the Respondent misrepresented the position to him, and has a conflict of interest in that he acted for the two companies.

[38] The outcome of the review that he seeks, is a reduction of the fees charged by the Respondent.

Review

[39] In conducting this review I have considered the Standards Committee file and the correspondence and material provided by the parties to this Office.

[40] The view was formed that the review could be carried out without an appearance from either party and each party consented to the matter proceeding on that basis pursuant to s206(2)(b) of the Act.

Who was the Respondent acting for?

[41] Essential to this review is a determination as to who the Respondent was acting for.

[42] The Applicant states that from his point of view the Respondent was instructed by him on behalf of AAK to complete the terms of the supply agreement and that all instructions were to come from him.

[43] The Agreement for the sale of the business had been entered into by AAK on 17 December 2009.

[44] A condition of that agreement had been inserted in handwriting and reads:

> "Conditional upon the purchaser executing a franchise agreement with [AAL] (XX) prior to settlement on terms acceptable to XX."

[45] A variation of that agreement was entered into on 28 January 2010. Clause b of that variation provided: "That the date for satisfaction of Clause 17 (Franchise Agreement) is 5th February 2010". The date "5th" is crossed through with two parallel lines, but nothing has apparently been inserted in its place, and this accords with the statement of the Applicant that the date for satisfaction of this condition was the 5th February.

[46] The Applicant has provided only two pages of the Agreement for Sale and Purchase, being the front page and the page headed "Further Terms of Sale". However, the General Terms of Sale that form part of the 4th Edition 2008 Agreement

for Sale and Purchase of a Business form provide that all conditions must be satisfied by notice in writing, and until such notice is provided, the Agreement will be voidable and able to be terminated by either party. The Applicant on a number of occasions, stated that if the condition was not satisfied, then the Agreement would become void. This is not in itself critical to the complaint or this review, but it does indicate that the Applicant had not instructed a solicitor to act for AAK in connection with the sale, and did not fully appreciate the various terms. It may also have helped to explain why the Applicant considered that the Respondent was acting on behalf of AAK.

[47] However, having entered into this Agreement, a vendor would generally appoint a solicitor to act on its behalf to attend to all the matters that need to be attended to on behalf of the vendor arising out of the agreement.

[48] The agreement contained a number of conditions, including the condition relating to the franchise agreement.

[49] None of the other matters requiring to be addressed were discussed between the Applicant and the Respondent, and the Respondent noted that another law firm was recorded on the agreement as acting for the vendor in connection with the sale.

[50] There was no reason for him to consider that he was being instructed by AAK to act on its behalf in connection with the sale, but instead, was being instructed by the Applicant in the absence of AO on behalf of AAL. Those instructions had already been instituted by AO prior to his departure. He did not know that the Applicant was unaware of this.

[51] An option that needs to be considered, is whether the Respondent was instructed by the Applicant on behalf of AAK on a “limited retainer” basis, whereby the Respondent was engaged by AAK to act only in respect of the condition relating to the franchise agreement. However, this is not an option that the Respondent would have considered without specific instructions.

[52] When meeting with the Applicant, the Respondent would naturally have formed the view that he was acting for AAL, as it was that company that undertook certain obligations under the document. It would be extremely unusual for a third party (AAK) to negotiate the terms of an agreement, which would be binding on the parties to the agreement, neither of which was AAK.

[53] The concept of a “limited retainer” would not only be unusual, but when considered against the factual matrix surrounding this matter, is not one which the Respondent would have considered to be an option.

[54] There were a number of factors which would have reinforced the Respondent's belief that he was acting for AAL, whose instructions were to be provided by that company's Managing Director, AO. These facts include:-

(a) The Respondent had been approached to act for AAL in 2008.

(b) He was subsequently visited by AO, who introduced himself as the company's managing director.

(c) He subsequently acted for AAL in connection with four matters.

(d) He had never acted previously for AAK or met the Applicant.

(e) He had already been contacted by AO in January 2010, who advised him of the proposed sale by AAK and the need for a franchise agreement.

(f) The business card presented by the Applicant to him was a card which referred to him as a director of AAL.

(g) He was not instructed to act on behalf of AAL in connection with the sale generally.

(h) It would be extremely unusual for him to be instructed by AAK on a limited retainer basis.

(i) AAK was not a party to the proposed franchise agreement – that was to be entered into between AAL and the purchaser.

(j) The letter of authority produced by the Applicant was a letter of authority given on the letterhead of AAL, and was a resolution or letter of authority provided by that company, not AAK.

[55] Overall, I am more than satisfied, that the assertion by the Applicant that the Respondent was engaged to act for AAK and was to take instructions only from the Applicant, is untenable.

[56] This may have been a genuinely held understanding by the Applicant, but it would not be reasonable to expect the Respondent to recognise this as an option.

Liability for costs

[57] A matter that needs to be specifically considered, is the question of liability for costs. The Applicant points to the fact that AAK was meeting the costs of the Respondent as an indicator that the Respondent was acting for AAK.

[58] At the end of January 2010, the Respondent had rendered an account to AAL. He was instructed by AO that as the agreement needed significant amendments which were for the benefit of enabling the sale of AAK's business, that the bill of costs should be redirected to AAK.

[59] Because the Applicant held the view that the Respondent was acting on his behalf, he presumably did not object to this.

[60] However, the fact that AAK was meeting the costs of the Respondent, is not a factor which, taken on its own, is determinative of a solicitor/client relationship. In the present circumstances, all of the other factors referred to above, together with the reasons given by AO, as to why AAK was required to meet the costs, outweigh this factor.

Other matters

[61] Having come to this conclusion, most, if not all of the other aspects of the complaint, fall away.

[62] If the Respondent was not acting for AAK, there can be no conflict of interest. In addition, it follows that there was no duty of care owed to AAK such that even if there had been undue delay (which there was not) there are no professional standards consequences arising out of that. Similarly, the Respondent was consequently justified in seeking instructions from AO and, because AAL was the Respondent's client, it cannot be said that additional costs were incurred as a result of that.

[63] The final allegation made by the Applicant is one of misrepresentation by the Respondent, for failing to disclose the fact that he was acting for AAL when undertaking work for AAK. If the Respondent was not acting for AAK, then there was nothing to disclose.

[64] The residual element of this allegation, is that the Respondent failed to confirm or clarify with the Applicant who indeed he was acting for. In the light of the factors referred to above, it would have seemed superfluous for the Respondent to have raised this matter with the Applicant, and whilst it would have been helpful in highlighting the misapprehension that the Applicant was labouring under, it cannot in any way be considered that the Respondent has been in breach of any of the standards required by the Act.

The Respondent's costs

[65] The final matter to be considered is the request for a review of the Respondent's costs.

[66] The question as to whether the Committee or the LCRO have jurisdiction in this regard needs to be considered first.

[67] Section 132(2) of the Act provides that: "Any person chargeable with a bill of costs" may lodge a complaint about the bill of costs.

[68] Having determined that AAK was not the Respondent's client, it would normally follow that it is not the party chargeable with the account.

[69] Merely because the Applicant (or more precisely, AAK) had agreed with AAL to pay the Respondent's costs, does not place that company in the position of being the party chargeable by the Respondent.

[70] The bill of account was initially rendered to AAL and that company is the Respondent's client. Consequently, I do not think that the Applicant is the "party chargeable" with payment of the account, and therefore the Applicant lacks standing to request a review of the account.

[71] However, if the Respondent can point to sufficient evidence to enable him to pursue recovery against AAK, then this will make AAK the "party chargeable" with payment of the account, with the consequence that AAK does have standing to complaint about the quantum of the account.

[72] Fees rendered by a lawyer must be fair and reasonable (Rule 9, Lawyers and Conveyancers Act 2006 (Lawyers: Conduct and Client Care Rules) 2008.

[73] The account by the Respondent has been rendered on the basis of the time expended by him on the matter, charging out at the rate of $400 per hour.

[74] The composition of the Standards Committee is not evident from the file, but would usually comprise five members, three of whom are practising solicitors. The Committee made no comment about the Respondent's hourly rate, and there is no reason to consider that it does not represent a "fair and reasonable" rate to be applied by the Respondent, given his seniority in the profession and his experience.

[75] In addition, there are a number of factors to be taken into account in addition to the time expended. Such factors include:

- The skill and specialised knowledge required to perform the services properly.
- The importance of the matter to the client and the results achieved.
- The urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client.
- The complexity of the matter.

- The degree of risk assumed by the lawyer in undertaking the services including the amount or value of any property involved.(In this regard it has been pointed out by the Respondent, that it is probable that the agreement would control transactions to the value of between $50,000 and $150.000 per week over a twelve year term.)

[76] Notwithstanding these factors, the Respondent has chosen to render his account based on the time expended only. In all of the circumstances, I concur with the Committee's decision that the bill was neither unfair nor unreasonable.

Conclusion

[77] Having formed the view that the Respondent was acting for AAL, and that the costs charged by him were fair and reasonable, I concur with the decision of the Standards Committee to take no further action with regard to the complaint.

Decision

[78] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 17th day of February 2011

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Owen 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:

AN on behalf of AAK as the Applicant
ZL as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society