LCRO 113 /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	**AX** of [Overseas] Applicant
AND	**ZA** of Auckland Respondent

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

DECISION

Background

[1] In 2005 the Applicant, who resides in the [overseas], entered into a business relationship with YZ (YZ) who resides in New Zealand.

[2] A partnership was established which involved the acquisition of motor vehicles in the [overseas] to be exported to New Zealand for re-sale.

[3] A document which the Respondent subsequently referred to as a "partnership agreement" was entered into by the parties on 23 March 2005. This document was not prepared by the Respondent.

[4] On 8 June 2005, the Respondent wrote to the Applicant recording in the first instance that he acted for YZ, and then recording "for good order's sake, the present state of affairs of the partnership". He then included a summary as to the various vehicles which had been purchased, their location, the payments which had been made, and the nature of the relationship with a dealer in the [overseas].

[5] Prior to this, the Applicant had visited New Zealand in May 2005, when he had been introduced by YZ to the Respondent. The Applicant alleges that as a result of statements made at that meeting, he had formed the view that the Respondent was to provide oversight for the operation and represent the mutual interests of the two partners.

[6] That view was reinforced by subsequent correspondence dated 31 May 2005 from YZ to the Applicant that "I've got [the Respondent], the solicitor whom you met here doing all the books and reconciling all the money and payments. He will be doing this on a weekly basis and he started yesterday. I feel it is better also for our working relationship plus the agreement between us because he puts his name to paper for the whole deal".

[7] However, that view was contradicted by the letter written by the Respondent on 8 June 2005, referred to in paragraph [4] above.

[8] At all times the Applicant was represented by a law firm in the [overseas], which corresponded with the Respondent on a number of occasions. On each occasion it confirmed that it was acting for the Applicant.

[9] On 6 June 2006 that firm wrote to the Respondent alleging that YZ had sold the assets of the partnership and failed to account for the sale proceeds.

[10] On 28 August 2006 the law firm wrote again to the Respondent to terminate the agreement and demanding an accounting for the assets of the partnership.

[11] Proceedings have been instituted in the [overseas] against YZ.

The complaint

[12] A complaint was lodged by the Applicant with the Complaints Service of the New Zealand Law Society on 30 October 2009, alleging that the Respondent knew that YZ was defrauding people by using him (the Respondent) to legitimise the operation.

[13] He also alleged that the Respondent was representing his (the Applicant's) interests and thereby acting on behalf of both partners.

[14] He alleges that he was misled by what he considered were assurances from the Respondent that the partnership was running as planned and that as a result he had lost his investment by reason of the fraud perpetrated by YZ. He calculates that loss as being at least $[overseas]135,172.89.

[15] The outcome sought from the Standards Committee was that "the firm needs to be accountable for the fraud they helped [YZ] perpetrate" losses incurred largely because the Respondent failed to represent the Applicant's interests as well as YZ's.

The Standards Committee decision

[16] The Standards Committee considered all of the material available to it and provided its decision on 26 May 2010.

[17] It noted that the Applicant's fundamental issue was against the Respondent's client and that the Applicant could exercise or could have exercised civil remedies. It further noted that the Respondent had not at any stage represented the Applicant and there was no evidence that the Respondent had any knowledge of any fraudulent conduct on the part of his client. In correspondence (for example the letter dated 8 June 2005) the Respondent made it clear that he was acting on instructions from YZ.

[18] Accordingly, the Committee resolved to take no further action in the matter pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

The application for review

[19] The Applicant has sought a review of that decision.

[20] In the letter accompanying the application, the Applicant acknowledges that the Respondent was not acting for him.

[21] However, he emphasises his view that the Respondent knew that YZ was defrauding people and that he therefore had a duty to alert the Applicant to this and protect him from the activities of his client.

[22] The outcome sought is to "stop [the Respondent] from hiding behind the law, and recover some of his money." He again lays the blame for his losses on the Respondent.

Review

[23] In conducting this review, I have had recourse to the full Standards Committee file and the correspondence with this office from both parties.

[24] Both parties have consented to the review being determined without a hearing pursuant to section 206(2) of the Act, and the review has therefore been conducted on the basis of the information, records, reports and documents available to me.

The Respondent's client

[25] In the application for review, the Applicant states that "the LCS points out that a lawyer / client relationship did not exist between myself and [the Respondent], despite what at that time was represented verbally and inferred by [the Respondent] and his client. **This I can accept.**"

[26] Consequently, for the purposes of this review, it is accepted that there was no solicitor / client relationship between the parties, and none of the fiduciary duties that are owed by a lawyer to his client existed as between the Respondent and the Applicant. The Respondent's duties were owed to his client, YZ.

Confidentiality

[27] One of the prime duties of a lawyer to his client, is the duty of confidentiality, and this is reflected in Rule 1.08 of the Rules of Professional Conduct for Barristers and Solicitors in force at the time. Rule 1.08 provided that *"A practitioner has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information except where...(iv) the information relates to the anticipated or proposed commission of a crime (and where the anticipated crime is one involving the possibility of physical injury to another person, disclosure is mandatory)".*

[28] The Rules therefore makes it mandatory to breach the duty of confidentiality where the possibility of physical injury exists, but it is not mandatory where the potential crime will not result in physical injury to any person. This would be the case where fraud was involved.

Was there fraud?

[29] Fraud is a term that is used broadly and generically and the Applicant has not specified the nature of what he considers to be the fraud which has been perpetrated by YZ. He entered into a business relationship with YZ and contributed funds to enable motor vehicles to be purchased and other costs paid. Presumably, it was anticipated, that YZ would provide funding also. It seems that not only has this not occurred, but in addition, YZ has failed to account for partnership assets and funds. Civil proceedings have been instituted.

[30] It is not the function of the Standards Committee or the LCRO to determine whether or not the crime of fraud has been perpetrated – that is properly the function of the criminal law. In the course of that investigation, any role the Respondent played in that would no

doubt be revealed, and professional standards consequences would follow. That is the proper course for any investigation of allegations of fraud to take.

[31] Nevertheless, it does seem that the Applicants remedies lie with the civil law in an action against YZ.

The Respondent's obligations

[32] The Applicant considers that there were sufficient indicators in the past of YZ, that it behoved the Respondent to make investigations to establish the bona fides of his client. He also considers that the Respondent had a duty to advise him of anything revealed in his client's past that could have a bearing on him entering into a business relationship with his client.

[33] It has been accepted that there was no solicitor / client relationship between the parties. Consequently, the Respondent had no duty of care towards the Applicant. The Applicant had as much opportunity as the Respondent would have had to investigate the background of his potential business partner, and the Applicant himself has indicated that information concerning YZ was information that was publicly available. It seems to me that someone in the Applicants position would have prudently undertaken those investigations himself, before making funds available to YZ.

The obligation to disclose

[34] There are only limited circumstances, where a lawyer possessed of certain information about his client, is obliged to disclose that to a third party. The most common of these is the Financial Transactions Reporting Act 1996, which requires financial institutions (which includes lawyers) to report transactions involving cash to the Police. The Respondent had no involvement with cash transactions on behalf of the partnership – indeed had no involvement with the running of the business, notwithstanding the claims made by YZ.

[35] For the Respondent to have any duty of disclosure to the Applicant it must be shown that the Respondent had a greater duty to third parties (i.e the Applicant)

[36] It is useful to note the comments made by Duncan Webb in his text entitled "Ethics, Professional Responsibility and the Lawyer". At paragraph 8.7.5, Dr Webb states:

> "A lawyer can never be compelled to be a party to a wrong. It is established that a lawyer may disclose an 'iniquity'[1]. When the client is engaged in some

[1] *Gartside v Outram* (1856) 26 LJ Ch 113; *Annesley v Earl of Anglesea* (1743) 17 State Tr 11339; LR 5 QB 317N; *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209; *Finers v Miro* [1991] 1 All ER 183 (CA)

> wrongdoing[2] particularly when the client is using the lawyer's services to affect a wrong[3] the lawyer may disclose it to the relevant authorities or the victim of the wrong. Lord Denning stated that the liberty to disclose[4]
>
> > 'should extend to crimes, frauds, and misdeeds, both for those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest.'

Dr Webb continues:-

> "It is not necessary to establish that the wrong intended or committed is criminal. It is enough that the information in question has been used to perpetrate a fraudulent scheme in a general sense.[5]
>
> It does however appear that the wrong must have a dishonest element or be otherwise morally blameworthy such as breach of fiduciary duty.[6] Mere breaches of contract or torts which, although intentional, are not coloured by dishonesty will not defeat the confidence.[7]
>
> It must simply be shown that the interest in disclosure outweighs that of the protection of the confidence.[8]"

[37] These comments are reflected in Rule 3.05 of the Rules of Professional Conduct of Barristers and Solicitors which were in force at the time. This Rule states that: *"If a practitioner has reasonable grounds to doubt the bona fides of a client, then the practitioner is entitled to make enquiries, the form and extent of which would be a matter for the professional judgment of the practitioner in the circumstances of the case."* This Rule is expressed in the manner of an entitlement to investigate in a manner which does not breach the Privacy Act. It does not create an obligation, and indeed it would be taking a step too far to suggest that where a practitioner has reasonable grounds to doubt the bona fides of a client, that he has an obligation to investigate further for the protection of a third party in all cases. Each case must be taken on its own and must depend on the nature and extent of the suspected wrong that the crime was intending to commit.

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[2] Though it is not necessary for the lawyer to be implicated in the fraud or wrongdoing for the confidence or privilege to be lost: *Dubai Aluminium Co Ltd v Al Alawai* [1999] 1 All ER 703. See also para 1(b)(2) of the commentary to the proposed r 8.01A.

[3] See *R v Cox and Railton* (1884) 14 QBD 153; *Re Golightly* [1974] 2 NZLR 297, 304 per Mahon J; *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209_(which relate to privlidge, but applying identical principals). See also r 16.02(1) in the English *Guide.*

[4] *Initial Services Ltd v Putterill* [1968] 1 QB 396, 405. See also *British Steel Corp v Granada Television* [1981] 1 All ER 417, 455 per Lord Wilberforce, 480 per Lord Fraser.

[5] An example of a duty of confidence being set aside due to apparent fraud is to in *Official Assignee v Brodie* (2000) 15 PRNZ 89.

[6] *Gemini Personnel Ltd v Morgan & Banks Ltd* [2001] 1 NZLR 14 and [2001] 1 NZLR 672 (CA); *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650, 653-654; *O'Rourke v Darbishire* [1920] AC 581, 604 per Viscount Finlay.

[7] *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553.

[8] *ISTIL Group Inc v Zahoor* [2003] 2 All 252 where a third party delivered documents which would be privileged to the opposing side. It was held that the Court had discretion to uphold the privilege in light of the disclosure. Because the documents were tainted by fraud the Court did not uphold the privilege.

[38] At paragraph 8.8.5 Dr Webb notes that disclosure of confidential information is not compulsory every time it is clear that a client intends to commit a crime or harm a third party.

[39] Rule 1.08 imposes a mandatory obligation to disclose only where the "anticipated crime is one involving the possibility of physical injury to a third person.

[40] In summary, the conduct of YZ can not necessarily be categorised as fraud, and it is not the role of the disciplinary process to consider that issue. In addition, the involvement of the Respondent in the activities of his client was misrepresented by his client. Finally, I note that the Applicant has instituted civil proceedings against YZ, and in the circumstances, that is the proper course of action.

The motor vehicle

[41] It is necessary to address the comments made by the Applicant with regard to a motor vehicle acquired by the Respondent. In the application for review, the Applicant makes the suggestion that this motor vehicle was received by the Respondent in payment (or part-payment) of his fees. The suggestion is made by the Applicant that the vehicle was obtained in circumstances which were not entirely legitimate.

[42] The allegations or suggestions that are being made are not clear, but the Applicant suggests that the circumstances relating to this vehicle should be investigated, and if satisfactory answers cannot be provided, then an investigation should be undertaken by the New Zealand Police.

[43] It seems to me, that the nature of the inquiry and the investigation which the Applicant suggests should take place, would be more appropriately undertaken, in the first instance, by the Police, and if the Applicant wishes to pursue that aspect of his complaint, then this is an option available to him.

Decision

For all the reasons set out above, the decision of the Standards Committee is confirmed pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006.

DATED this 18th day of February 2011

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:

AX as the Applicant
ZA as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society