LCRO 129/2009

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 No 2
BETWEEN	**R CAMPBELTOWN**
	Applicant
AND	**P DUNOON**
	Respondent

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

DECISION

Background

[1] Mr Campbeltown complained about the conduct of Mr Dunoon in respect of work Mr Dunoon did for him when he purchased a unit in the Swansea retirement village in 2006. Mr Dunoon is a consultant at the firm XX. The purchase was from a third party (which appears to be the estate of a former resident). In particular Mr Campbeltown complains that it was never explained to him that he was not purchasing any estate in land or property in the transaction but only a personal right to occupy. He also complained that another lawyer in the firm of XX acted for Swansea in respect of the licence to occupy agreement. Aspects of the complaint also related to work undertaken by XX for Swansea some time later in respect of issues that the residents had with registration of the village under the Retirement Villages Act 2003.

Standard

[2] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In

general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service which occurred since that date may be the basis for a regulatory response by the professional body.

[3] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[4] For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that:

> the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[5] The Auckland Standards Committee 2 considered the matter and concluded that these standards had not been breached and as such, pursuant to s 351 of the Lawyers and Conveyancers Act 2006, it had no jurisdiction to consider the matter. Mr Campbeltown sought a review of that decision.

[6] A case to answer hearing was conducted by telephone conference on 15 October 2009. Mr Campbeltown attended from the United Kingdom. Mr Dunoon was not required to attend and did not attend. On the conclusion of that hearing I considered that there was a case for Mr Dunoon to answer, particularly in respect of the issue of whether a conflict of interest existed. Accordingly a further hearing was conducted by telephone on 4 November 2009 at which Mr Dunoon attended with his counsel Mr Y, as did Mr Campbeltown.

Background

[7] Mr Campbeltown entered into the contract in question on 27 August 2006. The agreement is in a standard form for the sale and purchase of real estate. On its face it does not show that it relates only to a licence to occupy. One section on the face of the agreement provides the nature of the estate (fee simple, leasehold, crosslease, unit title) and it is expected that the inapplicable estates will be deleted. The agreement notes "if none is deleted fee simple". None of the estates were deleted. However clause 15 of the further terms of sale (inserted at the time the agreement signed) provided that the agreement was conditional on Mr Campbeltown being accepted for a licence to occupy by Swansea.

[8] I observe that Mr Campbeltown provided to the Standards Committee an email from the real estate agent in this matter dated 20 July 2006 in which she stated "You don't own the section you only own the property". This appears to be at variance with the actual legal position and is provided by Mr Campbeltown as supporting evidence of his belief that he was taking an interest in the building itself.

[9] It appears that all of the dealings with Mr Dunoon in respect of the purchase occurred with Mr Campbeltown being at the time in the United Kingdom and were conducted by email. They did not meet in person.

[10] Mr Campbeltown had been referred to Mr Dunoon by the real estate agent on the basis that Mr Dunoon had acted for purchasers of Swansea before. He asked Mr Dunoon to estimate his fees "regarding the purchase of a property at Swansea which also include the Licence to Occupy Agreements" on 13 August 2006. That estimate was duly provided.

[11] It is also the case that Mr Dunoon' firm, XX, acted more generally for Swansea (including more recently in respect of disputes with residents). A consultant at the firm, Mr A, routinely acted for Swansea when units were sold and new licence to occupy agreements were required.

[12] On 29 August Mr Dunoon sought a copy of the agreement from Mr Campbeltown. It appears one was in fact obtained from the real estate agent on 31 August.

[13] On 31 August Mr Campbeltown responded stating that he did not have a readable copy of the agreement (it having been entered into by exchange of facsimiles). He also sought a copy of the proposed licence to occupy. Reference was also made to the need for a building report/inspection to be obtained.

Various correspondence ensued in respect of the transaction including correspondence in respect of the need to obtain approval from Swansea and to execute a licence to occupy.

[14] Particular mention should be made of an email from Mr Campbeltown to Mr Dunoon of 4 September 2006 in which he stated that he had spoken to the secretary of Swansea. He stated that the secretary had informed him that "the Consultant, who is Mr A, will raise the necessary licence to occupy". Mr A was a consultant with XX. Mr Campbeltown maintains that he never knew this at the time. On 5 September 2006 Mr Dunoon wrote to Mr Campbeltown stating " We have asked Mr A to produce the necessary Licence to Occupy Agreement…". On 7 September the licence to occupy agreement was forwarded (from within the firm) to Mr Dunoon who in turn forwarded it to Mr Campbeltown.

[15] Settlement of the transaction occurred on 29 September 2006.

Complaint and response

[16] Mr Campbeltown complains that Mr Dunoon failed to advise him that he was not going to own the building (he accepts that the land was held by Swansea). He points out that his view is consistent with the licence to occupy agreement which refers to "own your own" arrangements. He states that he was at all times of the firm view that he would be the owner of the building he was to occupy. He said that he thought that the licence to occupy referred to the land that the building occupied. He also states that he did not realise that Mr A was a member of the same firm of XX as Mr Dunoon. He is of the view that this relationship compounds the failure by Mr Dunoon to clearly explain the nature of the transaction.

[17] Mr Dunoon in response to the complaint states that his did not fail in any duty in not explaining the matters to Mr Campbeltown. He observes that the agreement was signed without recourse to him and it "specifically set out" that it was only for a licence to occupy (in that it was conditional on acceptance by Swansea for a licence to occupy). It was also argued for Mr Dunoon that in light of all of the surrounding circumstances it was not tenable for Mr Campbeltown to suggest that he did not realise that he was to obtain a bare licence to occupy. He also stated that it was his firm belief that Mr Campbeltown was aware of the fact that Mr A was a consultant with XX. In this he refers to the email of Mr Campbeltown in which he refers to Mr A as a consultant.

Negligence

[18] I am not convinced that it is clear from the face of the agreement (particularly from the perspective of a lay person) that it was only for a licence to occupy and would not confer some other interest such as ownership of the building. The contract was completed on a standard form for the sale and purchase of real estate which was arguably inappropriate. It was also ambiguous at best on its face as to the nature of the estate being acquired by virtue of the failure of the parties to delete the inappropriate estates and insert "licence to occupy" or similar. It was accepted by Mr Dunoon that the agreement was deficient in this respect (although he stated that the lack of clarity was cured by the tenor of the agreement as a whole including the special condition relating to the licence to occupy). It also appears that erroneous advice had been given by the real estate agent in this matter. Had Mr Dunoon explained the true nature of the transaction to Mr Campbeltown he may have objected to this. Given the unsatisfactory state of the agreement (and the fact that in the absence of a deletion a freehold interest is presumed) this might conceivably have enabled Mr Campbeltown to terminate the agreement. It is at least arguable that these matters should have been traversed by Mr Dunoon between when the agreement was signed and when it became unconditional.

[19] However, I do not consider it necessary to decide whether Mr Dunoon was negligent. I am satisfied that even if Mr Dunoon was in breach of a duty to explain it did not amount to negligence of the kind for which it would be appropriate to impose a disciplinary sanction. I observe that this matter was conducted with Mr Campbeltown in the United Kingdom and most or all communications were by email. There was no obvious opportunity to discuss the nature of the transaction. I also observe that the transaction of itself (and the nature of the interest transferred) is not uncommon in New Zealand in respect of retirement villages.

[20] If there was a failure of Mr Dunoon which amounts to negligence it is not "of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute" as required by the provisions of the Law Practitioners Act 1982. Accordingly in this regard the Standards Committee was correct to conclude that it had no jurisdiction to consider the complaint pursuant to s 351 of the Lawyers and Conveyancers Act 2006.

[21] Mr Campbeltown referred me to s 27 of the Retirement Villages Act 2003 and in particular the obligation that independent legal advice be provided to parties entering into occupation agreements. That does not alter matters a great deal. If there has been a breach by Mr Dunoon it has occurred independently of that provision. In any event, that provision came into force on 1 May 2007, pursuant to cl 2 of the Retirement Villages Act Commencement Order (No 2) 2006 (SR 2006/296). These matters all occurred in 2006.

Conflict of Interest

[22] Mr Campbeltown complains that another practitioner in the firm (Mr A) acted for Swansea in the transaction and that this amounted to a conflict of interest. Mr Dunoon responds that Mr Campbeltown knew that Mr A was a member of XX and that the work was non-contentious because the licence to occupy prepared by Mr A was a standard document. On this basis he was of the view that there was no conflict of interest.

[23] It is accurate to say that the main part of this transaction was between Mr Campbeltown and the vendor of the interest with whom he reached the contract for sale and purchase. However, it is also the case that there was a transaction of importance with Swansea in respect of the granting of a new licence to occupy. The concern of Mr Campbeltown appears to be that Mr Dunoon did not give full advice about the transaction as a whole because of the connections of his firm to Swansea.

[24] It may well be that that concern is misplaced and that matters would have progressed exactly as they did had Swansea been represented by another firm. However that does not allay Mr Campbeltown. I observe that where a lawyer is in breach of the duty of loyalty the onus will fall on him or her to show that the loss claimed did not flow from the breach: *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465; [1934] 2 WWR 545 (PC); *Everist v McEvedy* [1996] 3 NZLR 348, 355.

[25] Mr Dunoon has maintained that Mr Campbeltown was aware of the fact that XX also represented Swansea. Mr Campbeltown has consistently denied this. He also stated in his original complaint that he was not aware of the connection of Mr A to XX. While it is clear from his email of 4 September that he knew that a Mr Mr A who was a “consultant” was involved there is no indication that he knew that he was a member of XX. While Mr A’s name was on the letterhead, this does not

change matters. Mr Campbeltown has said that he did not read the letterhead. This is not unreasonable and he could not be expected to do so.

[26] Mr Dunoon has said that he was of the firm belief that Mr Campbeltown knew of the connection of Mr A with the firm. Mr Dunoon was asked why he did not disclose overtly the connection. In response he stated that he did not consider he needed to because Mr Campbeltown had volunteered that information to him before that point had been reached. In saying this he was referring to the email of 4 September from Mr Campbeltown which he considered to be a very clear indication that he knew of the connection. In particular he noted that Mr Campbeltown referred to Mr A as a "consultant" (which was the position he held within the firm). He considered that email to amount to knowledge of Mr Campbeltown of the relationship and consent to it. He stated that it would be an insult to Mr Campbeltown's intelligence to go back to Mr Campbeltown and seek consent to the arrangement.

[27] Mr Campbeltown was not explicitly informed that XX was acting for both licensor and licensee in respect of the licence to occupy part of the transaction, nor of the connection of Mr A to the firm. Given that all of the dealings on this file appear to have been conducted by email and his assertion that he was unaware of the connection is at the least a tenable one.

[28] Rule 1.04 of the then applicable Rules of Professional Conduct for Barristers and Solicitors state that "a practitioner shall not act for more than one party in the same transaction without the prior informed consent of both or all parties". Rule 1.07 of the rules also provides that where there is a conflict of interest or likely conflict of interest a lawyer must inform the clients, advise them that they should take independent advice, and decline to act further if to do so would be to disadvantage any client. That rule also states that it is not acceptable for different practitioners in the same firm to act in such a situation.

[29] In the present case it was the firm rather than a single practitioner who acted for both parties and as such on a strict interpretation that r 1.04 was not breached. However the commentary to that rule sets out in para 3 that "it is difficult to guard against conflicts of interest through clients being represented by different practitioners in the same firm…."

[30] I observe that the Rules of Conduct and Client Care for Lawyers (which came into force on 1 August 2008) provide that:

> 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.

[31] The rule proceeds to state that "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". That rule also provides in para 6.2 that it "applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party". In the present case there is no evidence of any informed consent to XX acting for more than one party to the transaction.

[32] While the rule in that form was not in force at the time that the conduct in this matter occurred it is indicative of the pre-existing applicable professional standards. In particular, that rule recognises that a lawyer or firm should not act for two parties in one transaction. It also recognises that there will be circumstances where the risk of being unable to discharge the duties owed to one client is negligible and that in such a case it is permissible for a lawyer to act for two parties.

[33] I record the argument for Mr Dunoon that there was no conflict of interest between Swansea and Mr Campbeltown. It was suggested that Mr Dunoon at all times acted in Mr Campbeltown's best interests and that the fact that Mr A acted for Swansea did not fetter or dilute the loyalty of Mr Dunoon to Mr Campbeltown. It was emphasised that Mr Dunoon has never acted for Swansea. I observe that the difficulty for Mr Dunoon is that a heavy onus falls on him to establish that he had adhered to the fiduciary obligations that he owed to Mr Campbeltown. He argued that the legal obligations of Mr Campbeltown were more or less fixed when he signed the agreement for sale and purchase prior to Mr Dunoon' involvement. In this he is suggesting that his role was therefore entirely transactional and there was no scope for him to provide advice on the merits of the transaction. This is not obviously the case. The agreement for sale and purchase was "sloppy" in the way it was drafted and did not make clear the fact that only a licence to occupy was being sold. The agreement also provided for solicitor's approval of "added" (i.e. non-standard) clauses. That would have enabled Mr Dunoon to seek amendment of the clause which required Stonhaven to approve Mr Campbeltown for a licence, but not Mr Campbeltown to accept the suitability of the licence.

[34] In this context is not accurate to say that there was no conflict between the interests of Swansea and the interests of Mr Campbeltown. They were parties on opposite sides of a transaction concerning an interest touching on land and were at arms length. This is distinct from those transactions where related parties are transferring interests between themselves, or where two or more people are acting jointly. While there is no evidence of a stark conflict of interest, the interests were in opposition rather than congruence. There was at least a possibility of a genuine conflict between the interests of Mr Campbeltown and Swansea. Where interests are in opposition it is a breach of duty for a lawyer (or firm) to act for more than one party without the proper and informed consent of both parties*: Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 92 per Richardson J (CA).

[35] In *Clark Boyce v Mouat* [1993] 3 NZLR 641, 646 Lord Jauncey stated that it was permissible for a solicitor to act for more than one party to a transaction:

> provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act.

The claim that Mr Campbeltown consented in the present case falls well short of the kind of disclosure contemplated here.

[36] In *Clark Boyce v Mouat* Mrs Mouat required of Mr Boyce only that he should carry out the necessary conveyancing on her behalf and explain to her the legal ramifications of the transaction. It was self-evident that Ms Mouat was aware of the fact that Mr Boyce was acting for both her and her son. It is also the case that Mr Boyce set out this fact in an authority to act and declinature of independent advice which Ms Mouat signed.

[37] Mr Campbeltown is concerned that the wider relationship of the firm with Swansea may have played a part in Mr Dunoon giving less than robust and frank advice about the merits and nature of the transaction he was entering into. It may be that a lawyer in a firm with no relationship with Swansea would have acted just as Mr Dunoon did. Conversely, such a lawyer may have taken issue with the term in the contract which did not require Mr Campbeltown's lawyer to approve

the licence to occupy, or with the form of the agreement, or with the terms of the licence to occupy itself. While Mr Dunoon may be of the view that had full disclosure occurred Mr Campbeltown would still have acted as he did "speculation as to what course the aggrieved party, on disclosure, would have taken is not relevant" (*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 99 citing *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, 469). While those words were spoken in the context of a civil claim for breach of fiduciary duty, the same can be said in respect of a professional failure to disclose the existence of a potential conflict of interest.

[38] Mr Dunoon' arguments have proceeded largely on the basis that certain knowledge (of Mr A's status in the firm and the nature of the interest to be obtained) ought in all of the circumstances be inferred despite Mr Campbeltown's statement that he did not have the relevant knowledge. It is not appropriate for me to make inferences as regards Mr Campbeltown's state of knowledge in the present case. The onus of establishing that informed consent has been given lies on the lawyer and not on the client and the onus has been called "a heavy one": *Taylor v Schofield Peterson* [1999] 3 NZLR 434 per Hammond J at 440). The onus of disclosure lay on Mr Dunoon and in this regard he failed.

[39] While the Committee made a clear finding in relation to the allegation of negligence, it did not make a clear finding in respect of the allegation of a conflict of interest. I also observe that the Committee did not make clear the findings of fact which it relied on in making the decision (such as whether it preferred Mr Dunoon' assertion or Mr Campbeltown's assertion in respect of the knowledge of Mr A's connection with XX).

[40] In the present case I consider that Mr Dunoon failed to properly disclose to Mr Campbeltown the fact that Swansea was also represented by XX and to obtain informed consent to the continuance of the retainer. This was a failure to adhere to rr 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors.

[41] It does not follow automatically that a breach of a professional rule amounts to conduct unbecoming or professional misconduct*: Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452. Mr Dunoon has stated that he was of the firm belief that Mr Campbeltown was aware of the fact that Mr A was a member of the firm and acted for Swansea. This is a relevant consideration when considering whether or not the conduct of Mr Dunoon fell short of professional standards.

This question is distinct from the issue of whether any fiduciary or other legal duties owed to Mr Campbeltown were breached. The professional conduct question is whether, in all of the circumstances the conduct of Mr Dunoon was misconduct ('reprehensible' or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or conduct unbecoming (whether the conduct is acceptable according to the standards of competent, ethical, and responsible practitioners).

[42] I have considered this matter carefully, particularly in light of the fact that I have concluded that Mr Dunoon has not adhered to the applicable professional rules. I observe however that this transaction would not have presented itself as unusual at the time and matters were made more difficult by the fact that all communications were conducted by email. It is clear that in this case Mr Dunoon' conduct could not be said to be 'reprehensible' or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable' in a professional sense. Whether it was conduct which would not be acceptable according to the standards of competent, ethical, and responsible practitioners is more difficult. This is a matter which I consider to be best decided by a Standards Committee which has lawyer membership with specialist knowledge of proper practice in such a situation. That Committee is also informed by lay membership.

Subsequent Conduct

[43] The original complaint also raised a number of matters in respect of the conduct of XX in relation to disputes that have arisen at Swansea. They were not focussed on before the Committee nor in this review. Mr Dunoon has stated that he has never acted for Swansea. I have considered this aspect of the original complaint in light of all of the information to hand. I do not consider that there is any evidence of a professional breach by Mr Dunoon in this regard.

Costs

[44] Although I have not made an adverse professional finding against Mr Dunoon, I have found that he failed to comply with the applicable professional rules. In this circumstance it is appropriate that he contribute to the costs of conducting this review. In reaching this conclusion I have taken account of the Costs Guidelines of this office and in particular paragraph 4 of those guidelines which state:

> Costs orders may be made against practitioners in favour of the Society even where no finding of unsatisfactory conduct is made. Such orders may be made where the LCRO considers "the proceedings were justified

> and it is just to do so". Such orders will usually only be made where the conduct of the practitioner, while not attracting a finding of unsatisfactory conduct, is nevertheless subject to criticism.

[45] I observe that had a finding of unsatisfactory conduct been made an order in the vicinity of $1200 would have been made against Mr Dunoon. I also take into account the fact that this matter has not been finally disposed of and is to be reconsidered by the Standards Committee. In all of the circumstances I consider an order of $600 to be appropriate.

Decision

[46] The application for review is upheld. Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act I direct:

> that the Auckland Standards Committee 2 consider the specific question of whether the conduct of Mr Dunoon in this matter in failing to obtain the informed consent of Mr Campbeltown to the firm of XX acting for both Mr Campbeltown and for Swansea in this matter amounted to conduct unbecoming on his part.

[47] I request that the Auckland Standards Committee 4 provide a follow up report to this office when it has complied with this direction pursuant to s 209(1)(c) of the Lawyers and Conveyancers Act.

Order

[48] The following order is made:

> Mr Dunoon is to pay $600.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 11th day of November 2009

_____

Duncan Webb

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 Campbeltown as applicant

Ms Dunoon as respondent

XX Lawyers as a related party

The Auckland Standards Committee 2

The New Zealand Law Society