LCRO 146 /2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the North Island Standards Committee
BETWEEN	**UW** Applicant
AND	**EP** Respondent

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

DECISION

Introduction

[1] Mr UW has applied for a review of the decision of the North Island Standards Committee to decline to uphold a complaint lodged by Mr UW against Mr EP.

Background

[2] In February 2007, Mr UW instructed [Law Firm] to act for him in respect to an employment dispute with his then employer, [Company].

[3] Mr EP assumed responsibility for managing the employment file.

[4] The dispute escalated, and progressed to litigation.

[5] The employment contract Mr UW had with his employer dictated that any dispute arising from the contract had to be litigated in [US State].

[6] On 31 March 2008, [Company] was placed into receivership. [Accounting Firm] was appointed as a receiver. Shortly after, [Law Firm] was instructed by [Accounting Firm] as lawyers for the receivers.

The Complaint and the Standards Committee Decision

[7] Mr UW lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) against Mr EP on 4 November 2010.

[8] The main thrust of Mr UW's complaint was accusation that [Law Firm] had a conflict of interest when they agreed to act for the receivers. Subsidiary issues which arose from that complaint were allegations that:

(a) [Law Firm] had improperly terminated their retainer with Mr UW, on receipt of instructions from the receiver.

(b) [Law Firm] should not have agreed to act for the receivers in the face of Mr UW's objection.

(c) [Law Firm] may have disclosed confidential information to the receivers.

[9] In addressing the complaint, the Committee noted that the conduct complained of, occurred prior to the introduction of the Lawyers and Conveyancers Act 2006 (the Act) and therefore fell to be determined by reference to the disciplinary provisions of the Law Practitioners Act 1982 (LPA). The Committee noted that the threshold for disciplinary intervention under the LPA was relatively high, and could include findings of misconduct or conduct unbecoming.

[10] In a decision delivered on 24 May 2011, the Committee concluded that [Law Firm] did not have a conflict of interest when it agreed to act for [Accounting Firm], and declined jurisdiction to deal with all elements of the complaint, pursuant to s 351 of the Act. Declining jurisdiction under this section of the Act reflected the Committee's views that the conduct complained of, if established, would not have reached the threshold for disciplinary intervention under the LPA.

Application for Review

[11] Mr UW filed an application to review the Committee's decision on 1 July 2011.

[12] He sought review of the decision on grounds that the Committee had erred in concluding that:

(a) [Law Firm] had never acted for Mr UW in respect to his employment dispute.

(b) [Law Firm] was not in possession of confidential information which may, if disclosed to the receivers, have been prejudicial to Mr UW.

(c) [Law Firm] was not acting for the company, but for the receivers.

(d) The work undertaken by [Law Firm] on behalf of the receivers was sufficiently remote to the work undertaken for Mr UW such that no concern could be raised that Mr UW's interests were prejudiced.

(e) At the time [Law Firm] was instructed to act for the receivers, the only instruction it held from the complainant was to facilitate the service of documents.

[13] At hearing Mr UW expanded on his written submissions. He emphasised that he had felt let down by his lawyers. His expectation was that his lawyers would focus on protecting his interests, and not accept instructions to act for a third party whose interests were, he maintained, potentially at odds with his own.

[14] In response, Mr EP submitted that:

(a) His firm was not conflicted in accepting instructions from the receivers.

(b) [Law Firm] could not continue to act for him in the face of his request of them to cease acting for the receivers.

(c) [Law Firm] conveyed that advice to Mr UW and advised that the only capacity in which they could agree to continue acting was to assist with facilitating service of documents.

(d) No significant work was completed for Mr UW between December 2007 and March 2008.

(e) He was advised by Mr UW in January 2008 that Mr UW's New Zealand legal issues were coming to an end.

(f) [Law Firm] was not instructed to act by [Company], but by the company's receivers.

(g) The firm did not refuse to complete any ongoing instructions or retainer.

(h) [Law Firm]'s ethics committee had given careful consideration to the issue of potential conflict, and concluded that there was no impediment to the firm acting for the receivers.

(i) [Law Firm] did not have good cause to refuse the receivers' instructions.

(j) Mr UW had suffered no loss or prejudice as a result of [Law Firm] acting for the receivers.

(k) [Law Firm] had no active engagement in the [US State] proceedings.

(l) Receivership work was managed out of the [NZ City A] office.

(m) Mr EP had no involvement or engagement with the receivers.

(n) Work completed by Mr EP and his [NZ City B] team for Mr UW had no connection to the receivership work carried out by [Law Firm]'s [NZ City A] office.

Role of the Legal Complaints Review Officer on review

[15] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

[16] In *Deliu v Hong* it was noted that a review is:[1]

> … much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her.

Analysis

[17] At the nub of Mr UW's complaint is accusation that [Law Firm], whilst acting for him, accepted instructions to act for the receivers of the company he was in dispute with.

[18] This exposed him to risk, he contends, of his lawyers disclosing information to the receivers that they had acquired while acting under his instructions.

[19] The salient issues to address on this review are:

(a) Was [Law Firm] acting for Mr UW at the time they accepted instructions to act for the receiver?

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

(b) If so, did the decision to act for the receiver compromise their ability to represent Mr UW and thereby create a conflict of interest?

(c) Did [Law Firm] improperly terminate its retainer with Mr UW?

(d) If a breach of conduct is established, is the breach of sufficient magnitude to meet the threshold for disciplinary intervention under the Law Practitioners Act 1982?

Was [Law Firm] acting for Mr UW at the time it accepted instructions to act for the receiver?

[20] The Standards Committee is in error when it suggests that [Law Firm] had never acted for Mr UW in regard to his employment dispute. Mr EP conceded that was inaccurate.

[21] Mr UW first instructed [Law Firm] in June 1996. Further instructions followed in February 1998.

[22] In February 2007, Mr UW sought advice from [Law Firm]'s [NZ City A] office on employment matters. In May 2007 Mr UW's employer placed him under suspension. Mr UW sought advice from Mr EP.

[23] It is not contested that Mr UW's contract of employment directed that the contract was governed by [US State] law.

[24] Mr UW engaged attorneys in [US City]. Proceedings were subsequently issued. [Law Firm] played no part in the conduct of those proceedings.

[25] Mr EP contends that his most intense period of engagement in the employment dispute was between May and August 2007. Examination of his time records would confirm that to be the case.

[26] [Law Firm]'s instructions were not limited to the employment matter. Advice was, over a period of time, tendered on other matters.

[27] After October 2007, [Law Firm] rendered four further invoices, the last being 8 August 2008. Examination of those invoices indicate that most of the work completed for that period of time related to serving of documents, though there is reference to providing advice pertaining to enforcement of a foreign judgment.

[28] Mr EP argues that the scope of his instructions were focused for a brief period of time, on managing issues arising from Mr UW's suspension, and that with the passage

of time, the work became less focused on providing advice and more administrative in nature. It is an argument that seeks to infer that there was a degree of distilling of the instructions. He notes that he had recorded in a file note dated 22 January 2008, that Mr UW had advised that his New Zealand issues were coming to an end.

[29] Whilst I accept that [Law Firm] had minimal engagement in Mr UW's employment matters after October 2007, I do not agree that [Law Firm]'s involvement in the employment matter had diminished to such an extent that it could be argued that [Law Firm] had no employment related instructions at the time it agreed to act for [Accounting Firm]. There is no evidence from the file that Mr UW terminated those instructions, and the significant work completed in respect to serving of documents, as evidenced by the accounts, was assisting with the litigation that was progressing in [US State].

[30] It is clear that the thrust of the litigation was being conducted in [US State], and quite independently of [Law Firm], but Mr UW, in my view, continued to engage [Law Firm] as his New Zealand based lawyers with an ongoing brief for them to assist him with any aspects of the dispute which required attention in New Zealand. [Law Firm]'s final invoice forwarded to Mr UW on the 30 April 2008, is rendered under the title of "Employment Advice".

[31] Mr UW says that he was surprised when he learnt that [Law Firm] had agreed to act for [Accounting Firm]. He was immediately concerned that a potential conflict situation could arise. He did not consider that his instructions on employment matters, or matters relating to the company, had come to an end.

Did the decision to act for the receiver compromise [Law Firm]'s ability to represent Mr UW and create a conflict of interest?

[32] Consideration of this question is assisted by an examination of relevant principle and case law.

[33] A lawyer's duty of loyalty to his or her client lasts for as long as the client retains the lawyer. However, once the retainer has been terminated the lawyer is no longer under a duty to act in the client's best interests, to disclose information to them, or to advise them.[2] However the solicitor has a continuing obligation to protect the former client's confidential information.[3]

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[2] Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at [5.10.3].
[3] *Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [19].

[34] A number of judicial decisions have considered whether a lawyer should be precluded from representing a client against a former client, or from representing a client against an existing client.[4]

[35] Whilst a number of those decisions focused primarily on the question as to the appropriateness of a lawyer representing a client in court proceedings against a former client, the discussion in those cases, in as much as it expands into discussion concerning general issues of conflict, has relevance to professional disciplinary cases, when the centrepiece of complaint is allegation that the complainant's position has been materially prejudiced by his lawyer's decision to represent another client in proceedings or commercial transactions in which the complainant is engaged.

[36] In cases where attention has been centred on the propriety of a lawyer representing a client in proceedings against a former client, attention has focused on the question of legal obligations and the inherent jurisdiction of the court to ensure that the integrity of the judicial process is not impaired. It has been noted that the lawyers rules of professional conduct which are engaged by discussion of conflict issues, are broadly the same as the legal obligations which the court will enforce against lawyers by ordering a disqualification.[5]

[37] In *Mike Pero Mortgages Limited v Pero*,[6] Matthews AJ discussed the UK case and stated the Court affirmed the proposition that in commercial matters a firm may act against the interests of an existing client but not where there is a reasonable relationship between the matters on which it seeks to do so.

[38] The cases make it clear that a lawyer may act in a matter in which a former client is an opposing party.

[39] However, loyalty to clients has been described as the hallmark of the legal profession.[7] The idea that a lawyer will work to protect and promote the interests of his or her client to the exclusion of all others is at the root of the lawyer-client relationship.

[40] Equally as important, is a lawyer's obligation to ensure that a client's confidences are securely kept. Information secured by a lawyer in the course of their engagement with their client must be kept confidential, nor can that information be used to benefit any third party.

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[4] *Russell McVeagh McKenzie Bartlett & Co* [1998] 3 NZLR 641 (CA); *Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd* above n 3; *Mike Pero Mortgages Limited v Pero* [2014] NZHC 2798, [2014] NZAR 1459.
[5] *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation* above n 4 at 677.
[6] *Mike Pero Mortgages Limited v Pero* above n 4 at [40].
[7] Lindsay Lloyd and Duncan Webb "Ethics for Solicitors – what's relevant in 2010?" (New Zealand Law Society Seminar, November 2010).

[41] It is Mr UW's position that information obtained by [Law Firm] in the course of acting for him, could, and perhaps may, have been used by [Law Firm] to his detriment when [Law Firm] was providing advice to the receivers.

[42] Mr UW is not persuaded by argument that [Law Firm] in agreeing to act for the receivers of the company put sufficient distance between his affairs and the business of the company. He argues that [Law Firm] was compromised and at minimum exposed itself to the risk of perception of a conflict.

[43] Mr UW advances argument that the receivers were, in essence, agents of the company, and hence [Law Firm] was providing advice directly to the company that Mr UW was in dispute with.

[44] I do not agree with Mr UW's argument that receivers act in the role of agents for the company they have been appointed as receivers for.

[45] The receivers were appointed by the company's bank, who held a first ranking security over the company assets.

[46] Section 6(3) of the Receiverships Act 1993 provides that a receiver appointed by, or under power conferred by a deed or agreement (which I presume to be the case in this instance) is the agent of the grantor unless it is expressly provided otherwise in the deed or agreement or the instrument by or under which the receiver was appointed.

[47] I accept that Mr UW felt disquieted by [Law Firm]'s decision to accept instructions from the receivers, and was perturbed at the possibility that his confidences could be breached.

[48] Whilst [Law Firm] did not accept instructions directly from the company, the question is whether Mr UW's position was compromised in any way by [Law Firm] agreeing to act for the receivers.

[49] Whilst it may be argued that [Law Firm]'s decision to act for the firm of accountants appointed as receivers puts some distance between Mr UW's affairs and the affairs of the company, I am not satisfied that merely acting for a different legal entity in itself removes risk of potential for conflict.

[50] But when [Law Firm] agreed to act for [Accounting Firm], the question arises as to whether there was potential for actual conflict. Not every potential conflict becomes an actual conflict.

[51] The manner in which a potential conflict situation is managed may determine whether professional standards issues are engaged.

[52] It is to be noted that the receivers took no stance in respect to the [US State] proceedings. Mr UW advanced those proceedings to a default judgment.

[53] What is clear is that in cases involving commercial transactions, the courts have concluded that, in certain circumstances, lawyers may act for more than one party, and sometimes contradict the interests of former clients. [8] There is a recognised range of factors to be considered.

[54] In the leading decision of *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation*,[9] the Court of Appeal, when considering an appeal from a decision to disqualify a law firm from acting against a former client, addressed the balancing exercise to be undertaken when assessing competing interests. The Court considered the several stages of enquiry to be undertaken when considering whether a firm ought to be disqualified from acting where a former client's confidences are at risk.

[55] In *Tower*, the Court considered that it should disqualify a lawyer from representing a party when:

- the lawyer or a member of the firm holds confidential information; and
- the information is sensitive, that is, of the nature such that its disclosure would adversely affect the client; and
- the lawyer or a member of the firm continues to act for the client with whom the conflict exists and a real or appreciable risk exists that the information would be disclosed.

[56] In considering whether to disqualify, the Court considered that it should take into account the following considerations:[10]

- The value of litigants being able to avail themselves of their counsel of first choice.
- The "right of the solicitor to offer his or her services to the public generally".
- The ability of lawyers holding confidential information to move between firms.

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[8] *Mike Pero Mortgages Limited v Mike Pero* above n 4 at [62].
[9] *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation* above n 4.
[10] Above n 9 at 651.

- The value of competition within the profession and access to specialist advice.

[57] Applying this test, the Court held that Russell McVeagh was not disqualified from continuing to act.

[58] Mr UW's concerns focus on the information that [Law Firm] acquired whilst acting for him on his employment matter, although he does submit that there was possibility that information acquired by the firm when acting for him on other matters may also have had potential to jeopardise his position.

[59] The majority of work undertaken by Mr EP was in relation to Mr UW's suspension from his employment, and was completed during the period May to October 2007.

[60] In January 2008, Mr UW advised Mr EP that his legal matters in New Zealand were drawing to a close. Mr UW disputes that he gave such indication, but the file note completed by Mr EP would support conclusion that by the end of January 2008, Mr UW was not anticipating providing any further instructions to [Law Firm].

[61] The [US State] litigation was conducted quite independently of the offices of [Law Firm]. Mr EP's office provided no advice in respect to that litigation, and provided no assistance with the proceedings.

[62] I am unable to identify any information disclosed to the receivers which could support contention that [Law Firm]'s decision to represent the receivers caused prejudice to Mr UW.

[63] Whilst I did not have benefit of access to the receivership file, Mr EP advises that the scope of [Law Firm]'s instructions was confined to advising the receivers of their obligations under the Receivership Act and issues relating to the realisation of company assets.

[64] This is not a case where an assessment of potential opportunity for an adverse outcome is speculative. The litigation which Mr UW submits had potential to be compromised by [Law Firm]'s involvement in the receivership matters has been satisfactorily concluded for Mr UW.

[65] Nor is there any evidence to support conclusion that [Law Firm]'s involvement with the receivership has compromised any of Mr UW's other transactions.

[66] In fairness to Mr UW, he emphasised that his role with the company was not confined to that of an employee, and that he had advanced funds to the company. His

status as a creditor would necessarily have been scrutinised by the receivers, and he expresses concern that [Law Firm], in fulfilling its role in providing advice to the receivers, may have been put in the position where they were providing advice adverse to his interests.

[67] Mr EP submits that a significant amount of the documentation supplied by Mr UW in support of his review application comprises information which was in the public domain.

[68] Further, Mr EP emphasises that the only area of significant work that he was engaged in for Mr UW related to the relatively brief period between May and July 2007, when he was dealing with matters arising from Mr UW's suspension. He submits that he had no involvement in advising the receivers. That work was managed from [Law Firm]'s [NZ City A] office.

[69] After giving careful consideration to all matters, I conclude that Mr EP was not conflicted by [Law Firm]'s decision to represent the company receivers.

[70] In arriving at that conclusion, I am mindful that the principles expressed in cases such as *Tower* do not provide absolute rules to determine whether a client's confidences have been placed at risk, but rather provide guidance as to factors to consider in the balancing exercise.

[71] I am also mindful that it is important not to conflate the principles which must be considered when practitioners act on commercial transactions in circumstances where the interests of one client for which they act might be contrary to the interest of another, with the principles which apply to practitioners conducting litigation before the court.[11]

[72] But there is assistance to be gleaned from those cases when considering the facts of this particular case, and, as noted at [36], the courts have observed that the rules of professional conduct which are engaged by discussion of conflict issues, are analogous to the legal obligations which the court will enforce against lawyers, by ordering a lawyer to be prohibited from representing a party in circumstances where there is apprehension that the lawyer has acquired information in the course of acting for the other party which is compromising .

Did [Law Firm] improperly terminate its retainer with Mr UW?

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[11] *Mike Pero Mortgages Ltd v Pero* above n 4 at [48].

[73] On receiving advice that [Law Firm] was providing advice to the company receivers, Mr UW immediately advised Mr EP that he was concerned that a potential for conflict existed.

[74] Mr EP took Mr UW's concerns to his firm's ethics committee. That committee was comprised of senior practitioners, including a partner who had experience serving on Law Society bodies concerned with the disciplining of practitioners.

[75] It was the ethics committee's view that no potential for conflict existed. That view was conveyed to Mr UW. He responded by advising Mr EP that he did not agree with the committee's decision. Mr UW put Mr EP on notice that he would seek compensation from [Law Firm], if he suffered loss as a consequence of the firm continuing to act for the company receivers.

[76] [Law Firm] decided to cease acting for Mr UW.

[77] It was appropriate for the firm to terminate its retainer, once Mr UW had put the firm on notice that he would hold it accountable for any losses he considered were attributable to the firm's conduct.

[78] That in essence amounted to an expression of a lack of confidence in the firm, and it is difficult to see how the retainer could continue.

[79] Whilst I do not consider that the retainer was improperly terminated, it would in my view have been preferable for [Law Firm] to have advised Mr UW that it proposed to accept instructions from the receiver, and to traverse in general terms the scope of those instructions, before commencing work for the receiver.

If a breach of conduct is established, is the breach of sufficient magnitude to meet the threshold for disciplinary intervention under the Law Practitioners Act 1982?

[80] Whilst I have concluded that [Law Firm]'s decision to represent the company's receivers did not result in a situation where Mr EP had breached his professional obligations, if I had found otherwise, the time at which the conduct occurred assumes significance.

[81] Section 351(1) of the Act precludes inquiry being pursued into complaints about conduct that occurred prior to 1 August 2008, unless the conduct was of a nature that disciplinary proceedings could have been commenced under the LPA.

[82] Mr UW's complaint relates to conduct that occurred prior to 1 August 2008, the date at which the LPA was replaced by the Act.

[83] This complaint is to be measured by reference to the disciplinary standards that applied under the relevant provisions of the LPA.

[84] The pre-1 August 2008 standards are found in ss 106 and 112 of the LPA.

[85] The threshold for disciplinary intervention was, as noted in the Standards Committee decision, relatively high and could include findings of misconduct or conduct unbecoming.

[86] Misconduct was generally considered to be conduct of sufficient gravity to be determined "reprehensible" or "inexcusable", "disgraceful" or "deplorable" or "dishonourable".

[87] If the fault was alleged to have arisen from negligence (not applicable in this case) the severity of the negligence had to be such that it could properly be described as reprehensible, or of such a degree or so frequent as to reflect on a practitioner's fitness to practice.[12]

[88] Conduct unbecoming, if established, could relate to conduct both in a private and professional capacity. The relevant test is whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners".[13]

[89] Clearly, in respect of the present complaints, the previous professional conduct rules apply (those under the LPA now repealed), which set a higher threshold before any adverse finding can be made against a lawyer.

[90] I do not consider that the circumstances of this case would support conclusion that if it was established that Mr EP had a conflict of interest, and had improperly terminated his relationship with Mr UW, it would be reasonable to conclude that the conduct approached the level of misconduct or conduct unbecoming.

[91] In reaching that conclusion, I give consideration to the following factors:

- Mr EP's involvement with Mr UW's employment matter was for a brief period of time, and confined to matters arising from Mr UW's suspension (not termination) from his employment.

- Mr UW's employment contract was governed by [US State] law.

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[12] *Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of Auckland District Law Society v C* [2008] 3 NZLR 105 (HC).
[13] *B v Medical Council of New Zealand* [2005] 3 NZLR 810 (HC) at 811.

- Mr EP specifically advised Mr UW that [Law Firm] would not be able to act on the [US State] proceedings.
- Mr EP's file note confirms that Mr UW was advised that [Law Firm] had concluded that its instructions were drawing to an end.
- Acting for the receiver is a step removed from acting for the company.
- There was no evidence adduced at hearing to support argument that Mr UW's employment case had been jeopardised or prejudiced by [Law Firm] acting for the receivers.
- There was no evidence that [Law Firm] had material information relating to Mr UW's affairs which could have impacted adversely on his [US State] litigation.
- The [US State] litigation was conducted independently of [Law Firm].
- Mr UW was successful with his litigation.
- Immediately on receiving advice from Mr UW that he had concerns regarding a potential conflict of interest, [Law Firm] referred the matter to its internal ethics committee and the decision of that committee (although only material in its reflection of the committee's views) could reasonably be expected to have been relied on by Mr EP in good faith.

[92] I see no basis to interfere with the Committee's decision.

Decision

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

DATED this 31st day of March 2015

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R Maidment
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 UW as the Applicant
Mr EP as the Respondent
Mr CB as a Related Person under s 213
North Island Standards Committee
The New Zealand Law Society