LCRO 17/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [an Auckland Standards Committee]
BETWEEN	**MR UY** Applicant
AND	**DR J BUNBURY** Respondent

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

DECISION

Introduction

[1] Mr UY has applied for a review of the determination by [an Auckland] Standards Committee to take no further action in respect of his complaint concerning Dr Bunbury's conduct in connection with the affairs of the companies in which Mr UY was the sole shareholder and director.

[2] Mr UY accepts that he was gullible and naïve in accepting and signing without question all documents put before him by Dr Bunbury prepared on instructions from Mr UY's confidant, Mr UZ, but Mr UY contends that Dr Bunbury failed to meet his professional obligations to him and his companies.

Background

[3] In 1996 Mr UY became the sole shareholder and director of [Company A], a company which had been founded by [a family member], and which traded as the

[manufacturer and retailer- Company Z]. In [early 2000's] the company undertook all production for [franchised stores] in New Zealand and six in Australia.

[4] In addition, there were two non trading companies, [Company Za] which held the intellectual property for the trading name, and [Company Zb].

[5] Mr UY's speciality was production and design, and he acknowledges that he relied heavily on senior staff for general and financial administration of the company.

[6] In [the 1980s], the company had formed a working relationship with Mr UZ, whose wife operated [a North Island] store. Mr UZ held himself out as [a professional] with considerable business experience, and Mr UY and Mr UZ formed a friendship which developed from the advice and mentoring that Mr UZ provided to Mr UY.

[7] In the early 2000's the company began to experience financial difficulties and Mr UY came to rely more and more on Mr UZ. In [the 2000's] Mr UZ suggested that the company should instruct Dr Bunbury who had acted for Mr UZ and his clients[1] to attend to the company's legal work. Mr UY agreed with this suggestion as well as with Mr UZ's proposal that he (Mr UZ) and the firm's financial and administration manager (Mr VA) would provide any necessary instructions to Dr Bunbury.

[8] Mr UY advises that he then saw the firm's legal work being undertaken by Dr Bunbury on instructions from Mr UZ and Mr VA and has provided an email dated [May] 2005 from Mr UZ to Dr Bunbury confirming telephone instructions in connection with a dispute with the firm's contract designer.

[9] There is some dispute between Mr UY and Dr Bunbury as to when they first met. Dr Bunbury says they met in [2005] while Mr UY says it was not until [2006]. Whilst the date of the meeting is not necessarily crucial, the nature of the meeting and the authority ostensibly provided by Mr UY for Dr Bunbury to act is of some importance (see section headed "The authority to act").

[10] Thereafter, Dr Bunbury acted on several transactions involving the company. Each of these will be dealt with under a separate heading in this review. I shall also deal with the proposal for Mr UZ to become a shareholder in the company under a separate heading.

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[1] In his letter of 5 October 2012 to the LCRO Dr Bunbury advises that Mr UZ "operated a [firm of professionals]".

[11] Mr UZ and his [relation] Mr VB were directors of a finance company known as [Finance B] and Mr UZ facilitated several advances to the company, which ultimately totalled $1,235,471. In addition, Mr UZ was [an agent] for [Company C] and facilitated numerous loans by [Company C] to the company. Mr UY signed all documents that were presented to him by Mr UZ for these advances (but Dr Bunbury was not involved with these).

[12] By September 2008 the company was having difficulty paying its debts and Mr UY suggested that the company should be placed into liquidation. Mr UZ then introduced Mr VC as an investor who wished to acquire shares in the company and who would provide funding for the company. [In] September 2008 Mr VC was nominated as chairman of the board.

[13] Despite this, Mr UY advises that he had become "so disillusioned about the company and [his] role in it, [he] proposed to [Messrs] UZ and VC that [he] would transfer all [his] shareholding in the companies to them" in return for being relieved of all personal liabilities.

[14] [In] November 2008, Mr UY was presented with various documents to sign, including a share sale and purchase agreement together with his resignation as a director and other incidental documents. All documents had been prepared by Dr Bunbury. Mr UY did not sign these as he was concerned that they did not adequately protect his position or provide appropriate indemnities from Messrs VC and UZ.

[15] Early in the new year, Mr VC withdrew from negotiations and Mr UZ proposed that Mr VB would then take over the company. By that stage, Mr UZ had informed Mr UY that the company and he were indebted for a sum in excess of $3,000,000. Mr UY was concerned that matters were not progressing and consulted Mr VE, [a barrister from a different city], for separate advice. Mr VE communicated with Dr Bunbury and ascertained that Dr Bunbury had retained instructions from Messrs UZ and VB, having previously advised Mr UY that he was acting for all parties.

[16] Negotiations continued but were unsuccessful and Mr UY asserts that Dr Bunbury actively stalled progress. For his part, Dr Bunbury advises that he did not receive instructions from Messrs UZ and VB and was therefore unable to progress matters.

[17] In [2009] Messrs UZ and VB instructed a [firm of lawyers] to continue acting for them and Dr Bunbury's involvement ceased. It is useful however to complete the sequence of events to provide the background to this complaint.

[18] On instructions from Mr VB, the [firm of lawyers] incorporated a company [Company D] to acquire securities held by one of the company's financiers, [Company E]. They then served the company with a Notice of Default under the security. The default identified in the Notice was not a default in payment but rather in respect of reporting requirements which Mr UZ was responsible for.

[19] Mr UY did not challenge the exercise of the default procedures, and [Company D] exercised the power of sale to sell the assets of [Company A] to another company incorporated by Mr VB [Company F].

[20] Having been stripped of their assets, Mr UY's companies were unable to meet their debts and went into liquation.

The complaints and the Standards Committee determination

[21] In his complaint to the Complaints Service, Mr UY has identified five issues of concern.

1) A failure by Dr Bunbury to make direct contact with him regarding the "nature and extent" of his retainer. He alleges that Dr Bunbury knew or ought to have known that Messrs UZ and VA were compromised and not working in the best interests of his company.

2) A failure by Dr Bunbury to facilitate the proposed agreement with Mr UZ in January 2009 referred to by Mr UY as a "partnership agreement".

3) Dr Bunbury's role in the buy back of a [North Island] franchise and subsequent sale to [Company G}.

4) Dr Bunbury's role in the sale of [Business A's} part of the business in September - November 2008.

5) Dr Bunbury's role in the proposed exit of Mr UY from the company during the period from [2008 to 2009].

[22] Each of these matters is discussed in this review, and I will not expand on the complaints here.

[23] Notwithstanding that some of the conduct complained of took place prior to the commencement of the Lawyers and Conveyancers Act 2006 (and the Conduct and Client Care Rules)[2] the Committee distilled the complaints into conduct which breached the Conduct and Client Care Rules as follows (with the exception to the reference to Rule 1.04 of the Rules of Professional Conduct):

- a failure to provide terms of engagement (RCCC Rule 3.4; not applicable at commencement of retainer in May 2005);
- incompetence (RCCC Rule 3);
- failure to follow instructions relating to a partnership agreement (RCCC Rule 5.2);
- conflict of interest (Rules of Professional Conduct 1.04; RCCC Rules 6, 6.1, 6.2 and 6.3);
- use of legal processes for improper purposes (Rules of Professional Conduct 7.04; RCCC Rule 2.34);
- misleading and deceptive conduct (RCCC Rule 11.1);
- termination of retainer without good cause and without reasonable notice or grounds (RCCC Rule 4.2).

[24] Having considered all of the material the Committee recorded its determination in the following way:

> [17] The Committee noted the involvement in Mr UY's business activities of Mr UZ who was paid a consultancy fee and a wage. The Committee noted that Mr UY had also increased the salary of Mr VA. The Committee noted that Mr UY had allowed Mr UZ to set up business arrangements for himself and Mr VA and that when Mr UY had met with Dr Bunbury and Mr AA [Dr Bunbury's law partner], Mr UY had authorised those two company employees to instruct Dr Bunbury in matters concerning [Company A].
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> [18] The Committee noted the records showing that unaccounted moneys had been flowing in and out of the companies' operating accounts and that financial management of the companies was the ultimate responsibility of Mr UY.

[2] Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008.

> [19] The Committee also noted that all trust and company incorporation documents that had been prepared by Dr Bunbury on instructions from Mr UZ and Mr VA were signed by Mr UY, who had not specifically contacted Dr Bunbury or Mr AA to express his misgivings.
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> [20] The Committee considered that Dr Bunbury and Mr AA and their firm, [Firm A], were legitimately under the clear impression that they were being legitimately instructed by Mr UZ and Mr VA; the Committee did not consider the grievances of Mr UY to be appropriately the subject matter of a complaint about the conduct of the solicitors who had acted on the instruction of nominated officers of his company.
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> [21] Also, the Committee did not consider that there was anything clear in the way of correspondence from Mr UY that would have given Dr Bunbury any reason to believe that Mr UZ and Mr VA were not appropriately authorised to instruct him."

[25] It then determined to take no further action in respect of the complaints.

Review

[26] In completing this review, a hearing was held [in February 2013] attended by Mr UY and his support person, and Dr Bunbury.

[27] Before proceeding to discuss the specific matters complained of, it is pertinent to make some general comment here about the fact that Mr UY signed all documents prepared by Dr Bunbury without question, as well as the observation by the Standards Committee that Mr UY did not communicate with Dr Bunbury in a way that would have lead him to believe that Messrs UZ and VA were not acting in accordance with an appropriate authority.

[28] This approach discounts the fact that even if Messrs UZ and VA had ostensible authority from Mr UY to provide instructions on behalf of the company (and that is discussed later in this decision) it does not relieve Dr Bunbury of his obligation to advise, protect and report to his client. In some instances, it does not seem that Dr Bunbury has clearly identified who his client was, or (in the case of the transaction with Mr VC) he has adopted the view that he was merely implementing common instructions received from three parties and assumed a duty to none of them.

[29] In other cases, such as the [Company G] transaction, he was seemingly oblivious to his conflicted position when he undertook to act for that company.

[30] That said, it cannot be said with any certainty, that Mr UY would have acted any differently from the manner in which he did. However, that is largely irrelevant. What is relevant is whether Dr Bunbury has fulfilled his obligations to his client.

The authority to act

[31] The circumstances in which Mr UZ's authority to instruct Dr Bunbury on behalf of [Company A] and Mr UY are vague. Mr UY acknowledges that he agreed that Dr Bunbury should become the company's lawyer at the suggestion of Mr UZ. There is evidence that Dr Bunbury acted for the company on the instructions of Mr UZ in May 2005.[3]

[32] Dr Bunbury submits that there is no reason why lawyers should not accept instructions on behalf of a company from the company's managers/employees, and that therefore it was in order to act on the instructions of Messrs UZ and VA. Whilst that submission may be correct with regard to what could be described as general day to day matters, it is not necessarily correct with regard to significant transactions, such as the sale of part of the company's business.

[33] There was never any formal appointment of Mr UZ as agent for the company or for Mr UY. Whenever the meeting between Dr Bunbury and Mr UY took place, it was described at the review hearing as a meeting where Mr UZ did all the talking and Mr UY nodded his assent. No documentation was prepared or signed by Mr UY to establish the extent of Mr UZ's authority. Dr Bunbury cannot even produce a file note to record the substance of his first meeting with Mr UY.

[34] I have formed the view that although Mr UY accepted it was in order for Mr UZ to instruct Dr Bunbury, he did not ever contemplate that Dr Bunbury was thereby relieved of his obligations to Mr UY as his client. In fact, it seems to me that he relied heavily on Dr Bunbury to advise him and to protect his interests.

[35] Mr UZ was not at any time a shareholder or director of the company, or even an employee. The closest he came to any formal position was as a consultant to the company but that did not carry with it any authority to formally bind the company. That authority always remained with Mr UY.

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[3] As evidenced by email dated [May] 2005 from Mr UZ to Dr Bunbury.

[36] Dr Bunbury argues that because Mr UY signed the various documents which he prepared pursuant to Mr UZ's instructions he was justified in thinking that Mr UY thereby ratified those instructions. This ignores completely Dr Bunbury's duties to his client to advise as to the content of documents or to comment in circumstances where the proposed course of action may not have been in the best interests of his client (whoever that may have been). It is in this regard that Dr Bunbury failed to meet his professional obligations in respect of some of the issues complained of.

[37] Having considered all of these factors, I have reached the view that Dr Bunbury did not breach professional obligations by merely accepting instructions from Messrs UZ and VA, but failed in some instances in his obligations to properly advise and report to his client about the transactions on which he had received those instructions. As such, there will be no separate finding in respect of Dr Bunbury's conduct with regard to accepting instructions from Messrs UZ and VA and the issue will be dealt with when addressing each separate transaction.

The proposed partnership with Mr UZ

[38] Mr UY advises that towards the end of 2005 Mr UZ told him that he was intending to sell [his business] and had suggested that he buy into [Company Z] as an equal partner. The proposed sale terms were that Mr UZ would pay the sum of $800,000 into the company and incorporate a business known as [Business A] into [Company Z]. In return, Mr UZ would become an equal shareholder and director of the [Company Z] companies.

[39] Mr UY advises that Mr UZ was to arrange for Dr Bunbury to prepare an agreement which reflected and implemented this transaction. In the letter of complaint Mr UY states: -

> UZ made much of Bunbury drafting the Agreement, his view was the draft would entirely reflect our discussions to-date and therefore getting an external review of the Agreement would not be necessary but it was an option open to me if I wanted; he did tell me that I would need to have it reviewed independently by another lawyer. In view of the company's commercial relationship with Bunbury, it now appears to me that UZ seems to be suggesting that Bunbury would be acting solely for UZ in this process, though this was not my sense at the time.

[40] Mr UY also advises that the terms of the agreement were discussed at the meeting in February 2006 which Dr Bunbury denies took place. However, Dr Bunbury

does agree that he was aware of the proposed buy-in but did not receive formal instructions to prepare any documentation. He says that he may have mentioned it from time to time to Mr UZ but he was always advised that Mr UZ would get around to it.

[41] Mr UY himself advises that although he too mentioned it to Mr UZ from time to time, no documentation was ever provided. He advises also that he has ascertained since that Mr UZ never sold [his business] and did not have an interest in [Business A]. This conflicts with the statement from Dr Bunbury that he was aware that Mr UZ had sold [his practice]. For the purposes of this decision it is not necessary to reconcile the conflicting evidence.

[42] Mr UY acknowledges that he did not communicate directly with Dr Bunbury about the proposed agreement other than in a general way at the disputed meeting. Consequently, Dr Bunbury did not ever have any formal instructions from either Mr UZ or Mr UY and it cannot be suggested that he had any duty to pursue Mr UZ for instructions. Without instructions, Dr Bunbury assumed no professional obligations.

[43] I do not therefore consider that Dr Bunbury has breached any professional duties in connection with this matter.

The [Company Ea]

[44] In [2006] Dr Bunbury was instructed to act for [Company A] in connection with an advance from [Company E] which was to refinance an existing Westpac facility. The security documentation was sent to Dr Bunbury by [Firm B], the firm instructed by [Company E] and comprised a General Security Agreement over the company's assets and a personal guarantee from Mr UY.

[45] Mr UY advises that [Company E] proceeded on the understanding that [Business A] formed part of the security on which it was relying and Mr UY has suggested that Dr Bunbury would have been aware that [Business A's] assets had not been incorporated into the [Company Z] business. However, it would not be usual for the borrower's lawyer to sight any of the documents provided to the lender in support of a loan application and Dr Bunbury assumed no duties towards the lender or its solicitors in this regard. It was up to the lender to make such enquiries as it considered necessary, and it may well be that the financial statements provided sufficient evidence for the lender to rely on.

[46] It is beyond question that in connection with this facility, Dr Bunbury was acting for [Company A] and Mr UY as guarantor. On the information before me, Dr Bunbury had only met Mr UY once and would have had a limited knowledge of Mr UY's understanding about such documentation. It could therefore be expected that Dr Bunbury would either offer an explanation of the documents or at least ensure that Mr UY was familiar with such documentation.

[47] Instead Dr Bunbury sent the securities to Mr UY by courier and in the covering letter merely referred to the documents and requested they be signed and returned. There was no explanation of the content of the documents, even in a limited way of identifying the purpose of each document. Mr UY did what was asked of him, signed the documents and returned them to Dr Bunbury the following day.

[48] Mr UY's complaint in general terms is that Dr Bunbury has not protected his interests. To fulfil that duty, Dr Bunbury was required to ensure that Mr UY was properly advised in respect of all documentation that Dr Bunbury put before him to sign. The importance of this obligation to advise is reflected in the certificate that he was required to provide to [Firm B] before [Company Ea] was made available to the company.

[49] The certificate required by [Firm B] and provided by Dr Bunbury takes the form of a solicitors' undertaking in which Dr Bunbury certifies and undertakes that he has positively identified the borrower and the guarantor and has exercised the appropriate standard of care and skill having regard to the size and nature of the transaction. More importantly, Dr Bunbury certifies that Mr UY has been advised by him to obtain independent advice as to his obligations and liabilities under the guarantee prior to signing the securities, but that Mr UY had declined to take such advice.

[50] There was no such advice in Dr Bunbury's letter. At the review hearing, Dr Bunbury advised that it was his practice when sending documents out of the office to be signed, to request the client to telephone him to discuss their content. There was no such request in the covering letter with these documents and from the evidence available to me I am certain that no such conversation took place.

[51] Dr Bunbury also advised that he could not produce any file note recording any such conversation. He made the surprising statement that he does not keep file notes. That is an extraordinary statement for any lawyer to make. File notes are crucial records of events and telephone conversations which it is necessary for a number of

reasons that a lawyer should make and retain. However, the lack of a file note reinforces my belief that there was no communication with Mr UY about these documents.

[52] The fact that Mr UY signed and returned the documents without question is no answer to a charge that Dr Bunbury did not fulfil his obligations to his client. A client relies on his or her lawyer to offer such advice and comment as is necessary and does not necessarily know what issues exist until explanations are provided.

[53] It is irrelevant to this discussion as to what Mr UY would have done if Dr Bunbury had provided such an explanation and advice. The issue to consider in this review is what Dr Bunbury's obligations to Mr UY were.

[54] This conduct took place in 2006 when a lawyer's conduct was governed by the Law Practitioners Act 1982. For a Standards Committee to accept a complaint about such conduct, it must have been such that disciplinary proceedings could have been commenced in respect of that conduct.[4] The relevant standards are set out in sections 106 and 112 of the Law Practitioners Act. Those sections provide that disciplinary sanctions may be imposed where a practitioner is found guilty of misconduct in his or her professional capacity, or engages in conduct unbecoming a barrister or solicitor. There are further provisions relating to negligence and to criminal convictions that are not relevant here.

[55] Misconduct is generally considered to be conduct of sufficient gravity to be termed reprehensible, inexcusable, disgraceful, deplorable or dishonourable. 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 a practitioner's fitness to practice.[5] The test for conduct unbecoming is whether the conduct is acceptable according to the standards of "competent, ethical and responsible practitioners".[6]

[56] I consider that Dr Bunbury's conduct was not acceptable according to the standards of "competent, ethical and responsible practitioners". He failed in his duty to Mr UY and then provided an untrue certificate to [Firm B]. His conduct therefore constituted conduct unbecoming in terms of the Law Practitioners Act. The

[4] Section 351(1) Lawyers and Conveyancers Act 2006.
[5] *Atkinson v Auckland District Law Society* NZLPDT 15 August 1990.
[6] *B v Medical Council* [2005] 3 NZLR 810 at page 811.

consequence of this is that the complaint in this regard may be considered by the Standards Committee.[7]

[57] Section 352(1) of the Lawyers and Conveyancers Act provides:

> If a complaint is made under this Act about conduct that occurred before the commencement of this section, any penalty imposed in respect of that conduct must be a penalty that could have been imposed in respect of that conduct at the time when that conduct occurred.

[58] Section 106(4) of the Law Practitioners Act sets out the penalties which could have been imposed in respect of Dr Bunbury's conduct. They include a censure and a fine not exceeding $2000. I consider that these penalties represent the appropriate consequences of Dr Bunbury's conduct.

[59] The emphasis in determining the level of the fine to be imposed must be on the failure to properly advise Mr UY as that is the issue which is the focus of this complaint. However, it is not possible to ignore completely the fact that Dr Bunbury had provided an untrue certificate and undertaking to [Firm B].

[60] Dr Bunbury was obliged to advise Mr UY to take independent advice as to the terms of the guarantee that he was required to provide to [Company E]. He neither did that, nor did he provide any advice himself. All he requested was for Mr UY to execute the document and return it to Dr Bunbury. In short, he failed absolutely to recognise or fulfil his obligations to Mr UY.

[61] Such a failure is a serious abrogation by Dr Bunbury of his duty to Mr UY, and the amount of the fine must reflect that. That failure was compounded of course by the untrue certificate then provided by Dr Bunbury.

[62] In all of the circumstances I consider a fine of $1,500, being 75% of the maximum fine that could be imposed, reflects the appropriate level of response for these failures.

The [North Island] franchise and [Company G]

[63] In [2006] the [North Island] franchisee was experiencing difficulties and had failed to meet her obligations in terms of the franchise agreement. Messrs UZ and VA negotiated with her to buy back the business. As part of that process, Dr Bunbury prepared an Agreement for sale and purchase of the business whereby Company A

[7] Section 351(1) Lawyers and Conveyancers Act.

purchased the business for $55,509 from the franchisee. The terms of the Agreement included a provision to either negotiate a new lease or take an assignment of the existing lease. The assignment of lease that was ultimately signed included a personal guarantee from Mr UY.

[64] All communications and instructions were provided by Mr UZ, and Mr UY advises that he was asked by Mr UZ to sign the Agreement as a matter of urgency. He obliged.

[65] Again, Dr Bunbury had not communicated directly with Mr UY. As noted earlier, it was reasonable for Dr Bunbury to have acted on the instructions of Mr UZ in preparing the agreement. However, again, he did not provide any advice directly to Mr UY as to the content of the documents which he prepared, including the guarantee of the lease. Although it may have been reasonable for Dr Bunbury to assume that Mr UY had been informed and/or was aware of the transaction, he should have made some sort of direct contact with Mr UY to advise (even in a general sense) of the content of the documents which he had prepared. This duty can be considered to be somewhat modified in the present instance however, as the document is clearly referred to as an Agreement for sale and purchase of a business, it stretches credibility to accept that Mr UY would not have been aware of the nature of the document.

[66] Dr Bunbury should have recognised however that his client was [Company A]. This is significant with regard to the events that followed. Contemporaneously with the purchase from the franchisee, Mr UZ instructed Dr Bunbury to incorporate a company to be known as [Company F] of which Mr VA was to be the sole director, and a trust which Dr Bunbury was also asked to establish, was to be the sole shareholder.

[67] Mr VA requested Mr UY to be a trustee of that Trust and consequently the shares would have been held by Messrs VA and UY. It is apparent from an email dated [October] 2006 from Dr Bunbury to Mr VA that Dr Bunbury was aware that [Company F] was to purchase the [North Island] business, as he sets out the prices to be paid for stock, fittings, the franchise fee and good will. He then noted that the premises were to be sublet, and the business sub-franchised back to [Company A]. This was a relatively involved transaction which required detailed drafting.

[68] Dr Bunbury was then instructed to incorporate a company known as [Company G], followed by instructions to incorporate a company to be known as [Company G]. This latter company recorded only Mr VA as the sole director and shareholder.

[69] Dr Bunbury then prepared, on instructions from Mr UZ, an agreement for [Company G] to purchase the [North Island] business for a total sum of $250,000, a franchise Agreement, and a management Agreement pursuant to which the business would be managed by [Company A]. These documents were all provided by Dr Bunbury following the review hearing. The structure was not straight forward and the documents contained significant obligations for [Company A]. Included in these obligations was a requirement for [Company A] to pay [Company G] the sum of $52,500 per annum for the management contract, and it is Mr UY's contention that this payment was in effect the payments due to [Finance B]for the loan referred to subsequently in this decision. The documentation also contained an option for [Company A] to purchase the business back from [Company G].

[70] To enable it to complete the purchase, [Company G] (or more correctly, Mr UZ on behalf of [Company G]) arranged a loan of $250,000 from [Finance B], a company of which Mr UZ was a director. The firm of [Firm C] was instructed to act for that company in connection with this advance.

[71] Dr Bunbury acted for [Company G]/Mr VA in connection with the purchase from [Company A], and also in respect of the loan from [Finance B]. [Firm C] forwarded the loan documents to Dr Bunbury specifically referring to him as the solicitor for the borrower, and in addition, Dr Bunbury rendered his accounts for all of this work to Mr VA at an address in [a North Island city] which would appear to be a private address. Dr Bunbury did not appear to turn his mind as to who was representing [Company A] in these transactions, or alternatively, considered that he was acting for both parties.

[72] The transactions took place virtually simultaneously with the re-purchase of the franchise, in which he had acted for [Company A]. In addition Mr UY advises that these transactions all took place less than ten days after [Company Za] had sourced a loan of $500,000 from [Finance B], and [Company A] had sourced an advance of $150,000. One can only speculate as to the reason why the purchase was structured as it was, but what is important for the purposes of this review, is that, having acted for [Company A] in repurchasing the [North Island] franchise, Dr Bunbury then acted Mr VA and his company [Company G], without giving any thought as to who was protecting the interests of [Company A], and without any form of reporting or communication to Mr UY.

[73] Again, I have come to the view that this represented 'conduct unbecoming' by reason of the fact that it is conduct which is not acceptable according to the standards of competent, ethical and responsible practitioners. Consequently, this conduct again represents unsatisfactory conduct in terms of section 12(b) of the Lawyers and Conveyancers Act.

[74] As before, penalties that can be imposed are limited to those penalties which could have been imposed under the Law Practitioners Act.

[75] I have given considerable thought as to whether or not this matter (and others referred to in this decision) should be the subject of charges before the Lawyers and Conveyancers Disciplinary Tribunal. However, I have determined in this case that the maximum fine permitted by the Law Practitioners Act 1982 should be imposed as Dr Bunbury's failure to consider his obligations to [Company A] and Mr UY in these matters is serious.

[76] In addition, Dr Bunbury is censured in relation to this conduct.

The sale [Business A]

[77] In November 2008 Dr Bunbury received instructions from [Finance A] for an advance to a company known as [Business A]. This company was owned by Mr UZ's daughter and son in law. Dr Bunbury advises that when he enquired about the assets that were to be secured to [Finance A], he was instructed that [Business A] had purchased the [business] from [Company A] in early 2008. In his response to the Law Society following receipt of the complaint by Mr UY, Dr Bunbury states that he advised (his clients presumably, or [Finance A]:

> that it would be sensible to document the transaction to provide some certainty in terms of what assets had been purchased. I prepared a sale and purchase agreement on instructions from Mr UZ. We did not act on the settlement of the transaction.

[78] The vendor in this agreement was [Company A]. If Dr Bunbury turned his mind to the question, he was acting in these transactions for [Business A] and again, [Company A] for whom he had acted previously, was unrepresented.

[79] The sale price recorded in the agreement was $220,000 plus stock, which at the time of the agreement was $380,000. The agreement provided for a stocktake to be

carried out at the time of settlement, and I understand that as a result of this the price increased to some $770,000.

[80] Clause 19 of the agreement drafted by Dr Bunbury provided as follows:

> The Total Purchase Price shall be paid by way of the Purchaser taking over the Vendor's indebtedness in relation to debts as nominated by the Purchaser being indebtedness that relates to the Business, and not to any other part of the Vendor's Business unless necessary; including the debts set out in the attached list of accounts payable unless paid, and also the employee relates debts set out in clause 21 below ("the Debts"). The Purchaser agrees to indemnify the Vendor in relation to any loss, costs or expenses the Vendor may incur by reason of the Purchaser failing to pay or otherwise honour the Debts on the due date for payment.

[81] The arrangement contemplated by this clause is not straight forward as it requires creditors to consent to any such assignment. Notwithstanding this, Dr Bunbury simply states in his response to the Law Society: "[w]e did not act on settlement of the transaction." By this statement, it is apparent that Dr Bunbury had absolutely no regard for the fact that [Company A] may not have received any consideration at all for the purported sale of its business. This is an extremely irresponsible approach to take in respect of his obligations to [Company A].

[82] The question to be addressed is whether Dr Bunbury had a duty to [Company A]. From the evidence provided by both Mr UY and Dr Bunbury, the retainer provided in 2005 (or 2006) was a general retainer to act for the company in all matters. This was Mr UY's understanding, even if it was not specifically recorded. Rule 6 of the Conduct and Client Care Rules provides:

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[83] As the retainer from [Company A] was a continuing retainer, Dr Bunbury had a duty to protect the company's interests, an obligation which he failed to meet in connection with this matter.

[84] I suspect that Dr Bunbury did not stop to clearly consider who or which company he was acting for in any given transaction. All of his instructions came from Mr UZ and it would seem that he has conflated these instructions as coming from a single client.

[85] The failure by a lawyer to identify his or her client was commented on by Hammond J in *Eksteen v White:*[8]

> I have sometimes thought - given the depressing incidence of cases of this kind - that there should be a tortious duty of care on solicitors to positively identify and convey to parties known to be involved at the outset of a transaction just who they are acting for.

[86] Again, I have given serious thought as to whether or not this matter should be referred to the Tribunal. I have drawn back from this option for the reason that Dr Bunbury himself stated at the review hearing, that in suggesting the Agreement for sale and purchase should be prepared, he thereby inadvertently put himself in a position where he was acting for [Business A] in a purchase from his client [Company A]. If he had not taken that step, he would otherwise have been acting only for [Business A] in documenting the advance from [Finance A]. In addition, I discern that the failure to recognise his obligations arises from a lack of clear thinking and a conflation of instructions from Mr UZ rather than any dishonest or fraudulent conduct by Dr Bunbury.

[87] It will be evident from these comments however that I consider a significant fine should be imposed for this conduct together with a further censure. In this regard, I consider that a fine close to the maximum is appropriate.

The proposed sale to Mr VC (and then to Mr VB)

[88] There are several aspects of Dr Bunbury's role in the negotiations which took place towards the end of 2008 and early 2009. The first is that Dr Bunbury prepared documents to effect the sale of shares by Mr UY to Mr VC.

[89] Dr Bunbury says that these documents were prepared by him as lawyer for all three parties. His instructions came from Mr UZ. He did not make contact with either Mr UY or Mr VC. Applying the reasoning that Dr Bunbury had an ongoing and general retainer from [Company A] and Mr UY, it follows that Dr Bunbury had a duty to consult with and advise Mr UY. I do not think it is a tenable proposition for Dr Bunbury to argue that he was acting for all three parties.

[90] Rule 6.1 of the Conduct and Client Care Rules deals with conflicts of interest but allows for a lawyer to act for more than one party in certain circumstances. Rule 6.1.1 provides:

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[8] *Eksteen v White* HC Auckland CP 169/96, 11 June 1999 at [123].

> Subject to the above, a lawyer may act for more than one party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

[91] Dr Bunbury did not seek informed consent in terms of rule 6.1.1. I have some doubt as to whether or not this was a situation where he could in any event have relied on this exception, particularly between Mr UY and the purchasers, as there was such a divergence of interests between the parties.

[92] Shortly thereafter, Mr UY instructed Mr VE, and Dr Bunbury continued to act for Mr VB. If it were not for the fact that Mr VE did not object, and for the fact that Mr UZ in any event had full knowledge of all matters, I would be inclined to consider that Dr Bunbury was conflicted in continuing to act for Mr VB. However, I have concluded that Dr Bunbury was not in breach of his professional obligations in this regard.

[93] Mr UY alleges that Dr Bunbury actively sought to delay progress in concluding an agreement with Mr VB. This is not an allegation which is supported by the evidence. Dr Bunbury's instructions came from Mr VB (or Mr UZ) and as with the complaint relating to the proposed purchase in 2006, Dr Bunbury cannot be held responsible for a failure by his client to provide instructions. To some extent, I suspect that the real author of any duplicity such as is alleged by Mr UY, lay with Mr UZ and Mr VB. However, Dr Bunbury cannot be considered to have breached any professional obligations in this regard.

[94] Having considered this aspect of the complaint, I consider that an appropriate response is to reprimand Dr Bunbury for his conduct in considering that it was open to him to act for all parties during the initial stages of these negotiations.

Summary

[95] Throughout the period when Dr Bunbury was in receipt of instructions from Mr UZ he failed to determine which company or for whom he was acting. The nature of the instructions were that he had an ongoing and general retainer from [Company A] and Mr UY's interests were inextricably intertwined with those of the company, to the extent that Dr Bunbury assumed a duty to Mr UY also. Dr Bunbury then failed in his obligations to advise, report to, and protect the interests of his client. As a result of this failure he was conflicted on a number of occasions when acting on instructions from Mr UZ and failed again to protect the interests of his client. The penalties in respect of each matter are reflected in the orders below.

[96] However, I do not think that Dr Bunbury's conduct has contributed to any significant degree to what Mr UY says was the "cumulative effect of events which robbed [him] of his company." Mr UY's abrogation of responsibility for the financial affairs of the company and unquestioning compliance with Mr UZ's requests for signatures to various documents resulted in the company being administered at the direction of Mr UZ. Mr UY cannot excuse his role in this regard.

[97] In addition, at the time the action was taken to acquire the [Company E] securities, Dr Bunbury was not acting for Mr UY. Any question marks about the process by which the securities were acquired, and the power of sale exercised, required to be pursued through the Courts. Mr UY did not do this.

[98] All of these factors are relevant when determining the outcome of this review, and the penalties to be imposed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed.

Orders

1) In respect of the failure in his duties to Mr UY relating to [Company Ea], Dr Bunbury is censured (s 156(1)(b)) and fined the sum of $1,500 (s 156(1)(i)).

2) In respect of the purchase of the [North Island] business by [Company G], Dr Bunbury is censured (s 156(1)(b)) and fined the sum of $2,000 (s 156(1)(i)).

3) In respect of the purchase by [Business A] Dr Bunbury is censured (s 156(1)(b)) and fined the sum of $13,000 (s 156(1)(i)).

4) In respect of the proposed sale to Mr VC Dr Bunbury is reprimanded (s 56(1)(b)).

The fines imposed by these Orders are to be paid to the New Zealand Law Society by no later than 4 April 2013.

Costs

1) In accordance with the Costs Orders Guidelines provided by this Office, where a finding is made against a lawyer, the lawyer will be expected to bear approximately one half of the costs of the review. In accordance with the

Guidelines therefore Dr Bunbury is ordered to pay the sum of $2,400 by way of costs to the New Zealand Law Society, such payment to be made by no later than 4 April 2013.

2) Mr UY has applied for costs to be awarded to him. The Costs Orders Guidelines note that where the parties have acted appropriately during the course of the review, parties will generally be expected to bear their own costs. Dr Bunbury has co-operated with this review throughout, and I see no reason to depart from the Guidelines in this regard.

Publication

1) Section 206(1) of the Lawyers and Conveyancers Act 2006 provides that "[e]very review conducted by the Legal Complaints Review Officer under this Act must be conducted in private." Section 206(4) then provides that "[t]he Legal Complaints Review Officer may, subject to sub section (3), direct such publication of his or her decisions as he or she considers necessary or desirable in the public interest." Public interest is therefore the predominant factor in determining whether or not there should be publication of this decision and Dr Bunbury's name.

2) In addition to the statutory direction as to public interest, other factors to be taken into account when considering whether to publish the decision and the name of the lawyer are set out in the LCRO Publication Guidelines. These are:

a) the extent to which publication would provide protection to the public including consumers of legal and conveyancing services;

b) the extent to which publication will enhance public confidence in the provision of legal and conveyancing services;

c) the impact of publication on the interests and privacy of -

i. the Complainant;

ii. the Practitioner;

iii. any other person;

d) the seriousness of any professional breaches; and

e) whether the Practitioner has previously been found to have breached professional standards.

3) In considering whether or not to publish the facts of this decision and Dr Bunbury's name, it must be borne in mind that the presumption in these proceedings is that they are to be private unless publication orders are made. This is a subtle but important difference in considering decisions of the Lawyers and Conveyancers Disciplinary Tribunal and the Courts with regard to suppression, where the presumption is to publish.

4) It is the accepted practice of this Office that before any orders as to publication are made, the parties are invited to provide submissions. In the circumstances, I invite the parties to provide any submissions which they wish to make with regard to publication, such submissions to be received by no later than 4 April 2013. When providing submissions, I request that Mr UY in particular provide his submissions with regard to publication of the facts of this decision which, even if anonymised, may be readily be identified as relating to him and the [Company Z] companies.

DATED this 4th day of March 2013

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O W J Vaughan
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr UY as the Applicant
Ms [XX] as the Representative for the Applicant
Dr J Bunbury as the Respondent
Mr [XXX] as a related person or entity as required under s213 of the Act
The [North Island Standards Committee]
The New Zealand Law Society