LCRO 170 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3 of the New Zealand Law Society
BETWEEN	**Mr Penzance** of Auckland Applicant
AND	**Ms Runcorn** of Auckland Respondent

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

DECISION

[1] Mr Penzance complained that the firm of XX and Co acted on his behalf in respect of paternity matters between July and August 2008 and that in January 2009 Ms Runcorn of that firm was acting against him in respect of certain parenting issues before the Court. The Auckland Standards Committee 3 considered that complaint and decided that no further action would be taken on it. Mr Penzance sought a review of that decision.

[2] The matter was heard in person. A hearing was scheduled for 1 December 2009. Ms Runcorn attended that hearing with the principal of her firm Mr XX. Mr Penzance failed to attend (for reasons that it is not important to record). While initially I was of the view that that hearing could not proceed, Ms Runcorn and Ms XX indicated that they wished to proceed. In the event the hearing did proceed in the absence of Mr Penzance. I indicated that it would still be necessary to determine whether Mr Penzance ought to be given a further opportunity to be heard. At the conclusion of that hearing Ms Runcorn and Mr XX indicated that they were happy for me to hear from Mr Penzance and did not intend to attend further.

[3] A further hearing was scheduled for 10 December 2009. A notice of that hearing was provided to Ms Runcorn and Mr Penzance. That notice indicated that Ms Runcorn was not obliged to attend the hearing but was entitled to do so. Mr Penzance attended that hearing and I heard from him. Neither Ms Runcorn nor Mr XX attended that hearing.

Background

[4] Mr Penzance sought to have a paternity order made against him overturned. He used XX and Co to assist him in the matter. Legal Aid was applied for on 11 July 2008. The matter did not proceed to a hearing due to the fact that DNA tests were obtained which proved more or less conclusively that Mr Penzance was the father of the child. Mr Penzance ceased instructing XX and Co in the matter on 7 August 2008. The Legal Services Agency was provided with a final invoice for the relevant work on 18 August 2008.

[5] It appears that Mr Penzance dealt almost exclusively with Ms YY an employee of the firm who held the position of litigation manager. She was not a lawyer. Her work was supervised by Ms ZZ who is a lawyer. Mr Penzance states that he disclosed sensitive personal information to Ms YY in the course of the retainer relating to time he spent at the AA Hospital.

[6] On 22 April 2009 Mr Penzance received a letter from Ms Runcorn of XX and Co indicating that they acted for a Ms BB in respect of certain matters before the Family Court relating to children of Ms BB and Mr Penzance. Ms BB is a former partner of Mr Penzance, but not the person involved in the paternity proceedings. It is not clear when Ms Runcorn and XX and Co first started advising Ms BB, but it would appear to be some time before 22 April 2009. Mr Penzance raised the issue by telephone with Ms Runcorn. Ms Runcorn indicated she would raise the issue with Mr XX and call him back. She did so shortly thereafter and stated that she proposed to continue acting against him and for Ms BB in the proceedings. Mr Penzance raised the matter by way of complaint with the New Zealand Law Society.

[7] The response of Ms Runcorn was to state that she had no knowledge of those matters complained about by Mr Penzance and that no information of the nature raised was recorded on the file. It was stated that Ms YY had since left the firm (prior to Ms Runcorn commencing work with XX and Co). It was also stated that even if the knowledge did exist it was irrelevant to the matters now before the Court. It was stated that no prejudice would befall Mr Penzance if Ms Runcorn were to continue to act, but considerable prejudice would befall Ms BB if she had to instruct new counsel.

[8] I observe that Ms Runcorn and Mr XX helpfully provided Mr Penzance's file in the paternity matter. It does not contain any reference to events at the AA Hospital. It does contain various other information including:

[a] a legal aid application contain Mr Penzance's financial details;

[b] correspondence and results relating to DNA testing;

[c] Mr Penzance's application to discharge the parenting order and accompanying affidavit which outlined his relationship with his former partner including various intimate details.

[d] An affidavit of the mother of the child in the parenting order (with Mr Penzance's handwritten notes) outlining the nature of the relationship with Mr Penzance and various intimate details.

[9] At the hearing Mr Penzance referred to the applicable legislation and professional rules. In particular he referred to r 8.7 of the Rules of Conduct and Client Care which prohibit the use of confidential information. The rule states:

> 8.7 A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.
>
> 8.7.1 A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's practice where
>
> (a) the practice or a lawyer in the practice holds information confidential to the former client; and
>
> (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
>
> (c) there is a more than negligible risk of disclosure of the confidential information; and
>
> (d) the fiduciary obligation owed to the former client would be undermined.

[10] This rule is the successor to r 1.05 of the Rules of Professional Conduct for Barristers and Solicitors which provided that a lawyer could not act against a former client where due to knowledge held "to so act would be or would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client". It should be noted that the new rule is different in some significant respects. It does not include any reference to the general objectionability of a lawyer acting against a former client. Rather it focuses on the

possibility of actual harm in stating that the lawyer may not act where "disclosure of the confidential information would be likely to affect the interests of the former client adversely".

[11] However, the new rule explicitly refers to information held by the entire practice and not just one lawyer. It also recognises that remote or fanciful risks of the use of information may be discounted in requiring that there be "a more than negligible risk of disclosure of the confidential information" for the lawyer to be prohibited from acting.

Consideration

[12] It is clear that XX and Co hold information that is confidential to Mr Penzance. While the parties have focussed on an alleged disclosure of information about the AA Hospital incident (which Ms Runcorn denies knowing about) the fact is that the firm holds extensive information of a sensitive nature about Mr Penzance.

[13] It was argued by Ms Runcorn and Mr XX that the information was wholly irrelevant to the parenting matters now before the courts and that there was no crossover whatsoever. In this they can be taken to be arguing that disclosure of the information would not be likely to affect the interests of the former client adversely. I am not convinced that this is the case. The information relates to Mr Penzance's relationship with a child of another union and events surrounding the conception of that child. While the information may not be of a kind which would find its way into sworn evidence before the Court, it is not clear to me that this evidence could not be used in a way which was detrimental to Mr Penzance's interests. I also take into account that XX and Co ceased acting for Mr Penzance in August 2008 and commenced acting against him no later than April 2009 (and possibly considerably earlier). This is a relatively brief period of time. It could not be said that the information from the prior retainer was stale or it had ceased being sensitive due to the passage of time.

[14] I also note that this is not a case where the new retainer is nothing to do with the other one. For example if the earlier matter had been routine conveyancing and then it would probably be unobjectionable to act against Mr Penzance in parenting matters. However, the matters both related to family law issues and concern children. The information held in respect of the earlier retainer is of a sensitive and highly personal nature.

[15] As regards the information relating to Mr Penzance's time at AA Hospital, Ms Runcorn denies any knowledge of the matter. However, neither Ms Runcorn nor Mr XX could say that information of the kind referred to had not been disclosed to Ms YY at an

earlier time. Mr Penzance viewed with scepticism the statements that the information had not been passed on in the wider firm.

[16] Where a lawyer is arguing that there is no real risk that information will be disclosed the onus falls on the lawyer to establish that there are systems in place which show that that is the case. In particular rules 8.7.2 and 8.7.3 provide as follows:

> 8.7.2 Rule 8.7.1 is not breached where there is an effective information barrier between the lawyer who holds the confidential information of the former client and the lawyer who proposes to act for the new client.
>
> 8.7.3 An information barrier is effective when, in all the circumstances, there is a negligible risk that the confidential information in respect of the former client will be or has been disclosed to the new client or to any lawyer acting for the new client.

[17] At the hearing I made enquiries of Mr XX and Ms Runcorn as regards what processes were in place in the firm to protect confidential information. It appears that there are no such systems and that no checking was carried out to determine whether the firm had previously acted for Mr Penzance. Ms Runcorn was only alerted to the fact that the firm had acted for him when he contacted her to object. This is clearly too late. In the past there has been a readiness to require clients to simply accept a lawyer's assurance that information has not been and will not be disclosed. The new Rules change this by requiring a lawyer to be able to demonstrate that systems are in place which restrict and manage the flow of information within the firm. Thus where confidential information is held in respect of a former client against whom the firm proposes to act, r 8.7.4 provides that to be able to rely on the isolation of the information:

> particulars of any information barrier must be disclosed to the former client prior to the lawyer commencing to act for the new client.

[18] In light of this I conclude that there is a more than negligible risk of disclosure of the confidential information within the firm.

[19] Rule 8.7.1 also states that for a lawyer to be prohibited from acting for a former client it must be that if they were to so act "the fiduciary obligation owed to the former client would be undermined". The nature of the fiduciary obligations of lawyers in such a situation was examined by the New Zealand Court of Appeal in *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* - [1998] 3 NZLR 641. In that case it was considered that a lawyer must not act where the lawyer holds confidential information; the information is sensitive, i.e., of a nature such that its disclosure would adversely

affect the client; and if the lawyer continues to act for the client with whom a conflict exists, there is a real or appreciable risk that the information would be disclosed. It was observed by Henry J that "where there is possession of relevant information, in the absence of negating evidence of protection the court will readily infer there is a risk of disclosure" (p 652).

[20] In this regard the fiduciary obligation of confidence owed by a lawyer tracks very close the obligation of confidence under the Rules of Conduct and Client Care for Lawyers. I conclude that there is a breach of fiduciary obligation in this case in Ms Runcorn continuing to act against Mr Penzance in this matter.

[21] At the hearing Ms Runcorn raised the fact that she sought guidance from Mr XX (her employer) as to whether she should act in this matter and that she followed Mr XX' guidance. Ms Runcorn was only admitted in 2008 and acted appropriately in seeking guidance from a more senior practitioner. However, each practitioner is individually and personally responsible for his or her own professional conduct. In so far as Ms Runcorn acted against Mr Penzance when the firm held confidential information in respect of Mr Penzance it is her conduct that is under scrutiny.

[22] I have found that the Standards Committee erred in its determination of this matter. I observe that the Committee did not make any inquiry into the matter nor did it convene a hearing (which would have been on the papers) on the matter. Rather it disposed of it under its summary powers and resolved to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006.

[23] I have had made available to me the file of the Standards Committee. That file includes a report (headed "agenda note" by the member of the Complaints Service Secretariat. I consider it appropriate to comment on that report. The tone of the report is dismissive of Mr Penzance's complaint using such words as Mr Penzance "seems to think" or he "claimed" there was a conflict of interest, and part of his response was "nonsensical". On the other hand Ms Runcorn was said to be "quite clear" in her response and that the firm had "given some considerable thought" to the matter.

[24] The report concluded that "Mr Penzance is crediting Ms Runcorn and XX & Co with much more knowledge than they actually had and the complaint is therefore difficult to substantiate" and recommended that no further action be taken.

[25] I consider that the report lacked objectivity and made judgements which ought to have been left to the Committee. There are considerable dangers in members of the Complaints Service making recommendations as regards what decisions should be made by Standards Committees. There is a risk that it will appear that the Standards

Committee has not undertaken its deliberative task carefully and fully if those recommendations are adopted.

[26] In the present case this certainly appears to be the case. The decision of the Standards Committee adopts the recommendation of the Secretariat and largely tracks the content of the agenda note. The reasons given are very brief indeed and do not refer to the relevant professional rules.

Further Submissions

[27] I have made a number of findings of fact and law. However, I consider that before a decision is made it is appropriate to seek further submissions from the parties. In light of my findings it is to be expected that XX and Co will cease acting for Ms BB. Under s 211 of the Lawyers and Conveyancers Act I can make any determination or order that a Standards Committee could have made. Those determinations and orders are found in ss 152 and 156 of the Lawyers and Conveyancers Act 2006.

[28] I invite Mr Penzance to indicate whether, given the findings made in this decision (and any subsequent conduct of Ms Runcorn and XX and Co) he desires further action to be taken in the making of other orders by 18 January 2010;

[29] I invite Ms Runcorn to provide submissions on whether a finding pursuant to s12(c) of the Lawyers and Conveyancers Act 2006 should be made against her and if so what orders are appropriate. Ms Runcorn should also address the issues of the costs of this review. In that regard she is referred to the Costs Orders Guidelines of this office. Any submissions that Ms Runcorn wishes to be taken into account in the making of orders should be provided to this office by 18 January 2010.

DATED this 16th day of December 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 Penzance as Applicant
Ms Runcorn as Respondent
Mr XX / XX and Co as a related party
The Auckland Standards Committee 3
The New Zealand Law Society