

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 2 of the New Zealand Law Society

BETWEEN

MS SANDY
of Auckland
Applicant

AND

FAIYAM KHAN
of Auckland
Respondent

The names and identifying details of Applicant and any third parties in this decision have been changed. The Respondent's name has not been amended.

Decision on orders

[1] In a decision of 9 December 2009 it was found that certain conduct of Mr Khan contravened r 6.1 (including its sub rules) of the Rules of Conduct and Client Care and is therefore unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006. It is not necessary to traverse the incidents of that breach which are set out in my earlier decision.

[2] Ms Sandy was invited to provide submissions in writing in respect of: any loss that she claims was suffered by reason of the conduct of Mr Khan; and in respect of the reduction or cancellation the fees of Mr Khan. Mr Khan was invited to provide submissions in writing in reply to the submissions of Ms Sandy, and in respect of any other orders that may be made. Those submissions have now been received.

[3] Ms Sandy claims compensation under s 156(1)(d)(f) and (o) of the Lawyers and Conveyancers Act which relate to loss suffered by reason of any act or omission of Mr Khan, cancellation of fees, and costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Standards Committee.

[4] Mr Khan has, through counsel, responded to those submissions and also made submissions in respect of any other orders (and in particular any penalty and costs) that should be made.

Compensation

[5] Section 156(1)(d) provides:

Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner or former practitioner or an incorporated firm or former incorporated firm or an employee or former employee of a practitioner or an incorporated firm, order the practitioner or former practitioner or incorporated firm or former incorporated firm, or employee or former employee of a practitioner or an incorporated firm, to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding, as the case may require, the amount that is from time to time prescribed for the purposes of this paragraph by rules made under this Act by the New Zealand Law Society or the New Zealand Society of Conveyancers:

[6] The causative link between the conduct of the lawyer and the loss is expressed somewhat loosely in terms of the loss being suffered “by reason of any act or omission” of the lawyer. In this case Mr Khan has been found to have breached his obligation of undivided loyalty to Ms Sandy. This amounts to a fiduciary breach. In light of this it is appropriate to interpret the words of the Act consistently with the principles of causation that the Court would apply in such a case. In particular, there is a strong presumption that where a fiduciary breach has occurred, that breach led to any loss shown to be suffered by the client. Ms Sandy must show a rational causal connection between the losses claimed and the conduct of Mr Khan. It is not open for Ms Sandy to claim every expense that arose out of the transaction. It must be shown that the losses claimed arose from the breach by Mr Khan of his obligations. Once that threshold is passed the onus will fall on the lawyer to show that the loss complained of would have been suffered despite the breach. A lawyer who breaches his or her fiduciary duty may not speculate that the wronged client would have acted as he or she did and incurred the loss in any event (*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83; *Sims v Craig Bell & Bond* [1991] 3 NZLR 535). I observe that the same presumption against a fiduciary is made when quantifying a loss: *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384 (SC).

[7] Ms Sandy claims compensation in respect of:

[a] The costs incurred in renewing the business lease;

- [b] The costs of taking out a loan to finance the business being sold;
- [c] Obtaining financial statement from her accountant;
- [d] Lost opportunity (of the sale of the business or pursuing the proposed purchaser);
- [e] The costs of instructing new counsel in an effort to enforce settlement;
- [f] Damages for inconvenience and stress;
- [g] Exemplary damages.

[8] It is acknowledged for Ms Sandy that the jurisdiction to award compensation in favour of Ms Sandy is capped at \$25 000.

[9] Although it is not explicitly stated some aspects of Ms Sandy's submissions (and her claim for losses of re-establishing the business etc) proceed on the basis that, correctly advised she would not have proceeded with the transaction at all (in particular her claims for the costs relating to the reestablishment of the business). I observe that there is some inconsistency with those aspects of the claim and the claim for lost opportunity and/or lost ability to pursue the purchaser who did not complete the contract (mentioned in para 37 and 38). Obviously Ms Sandy cannot both claim that properly advised she would not have entered into the contract and also that properly advised she would have entered into a contract that enabled her to pursue the purchaser. The claims actually quantified in schedule 1 of Ms Sandy's submissions relate largely to the cost of re-establishing the business. I conclude that it is appropriate to proceed on the basis that Ms Sandy maintains that had she been independently advised she would not have entered into the contract she did. I consider this to be a tenable position and one which Mr Khan has not displaced. In light of this I turn to consider the separate claims.

The costs incurred in renewing the business lease

[10] Ms Sandy states that due to the fact that she was selling the business it was necessary to renew the lease. This incurred legal costs of \$720. It appears from the statement provided to evidence this claim that the work was invoiced on 30 April 2009. Mr Khan submits that this shows that the renewal occurred after Mr Khan had ceased acting and was not caused by the conduct of Mr Khan. This is not the case. Mr Khan himself noted that the new lease had been entered into in reliance on the purchaser's assurances in his letter to Mr YY of 14 October 2008. It is disingenuous of Mr Khan to suggest otherwise.

[11] Clearly the lease was renewed as a result of the existence of the contract of sale and at a time when Mr Khan was acting. This claim of \$720 is allowed.

The costs of taking out a loan to finance the business being sold

[12] Ms Sandy states that it was necessary for her to take out an overdraft to finance the business (and in particular the TAANZ bond) while it was being sold. Mr Khan argues that while it was necessary to borrow the funds this was only for the limited period while the potential sale was on foot. He argues that when it became clear that the sale would not proceed the business could have been closed down and the debt repaid.

[13] Ms Sandy states that it was not feasible or economical to simply close down the business again. I observe that the fact that a lease agreement had been entered into would be a relevant factor in reaching such a decision. I observe that so long as Ms Sandy acted reasonably it was largely up to her to determine how to mitigate her loss. In the circumstances the continuation of the business was not unreasonable. However, the fact is that Mr Khan ought not to be liable for an unlimited period of time for a cost which was at least in part simply an overhead of the business. Ms Sandy maintains that the appropriate time to cease claiming interest is February 2010 when she was advised that there was little prospect of success in a claim against the purchaser. Schedule 1 of Ms Sandy's submissions puts the claim of interest at \$3 232.29. It is unclear why the March date would be relevant to the interest claim. On the other hand if the shorter period (of when Mr Khan was retained) is taken it appears that the interest claim would be \$1577.25.

[14] I do not propose to undertake a detailed analysis of what interest claim is appropriate. It is clear that a greater claim than simply the period in which Mr Khan was retained is appropriate, but less than the full claim. I also take account of the fact that interest rates fell in the relevant period and the amount of debt was reducing.

[15] In all of the circumstances an award in respect of interest costs of financing the recommencement of the business is made in the sum of \$2000.00.

Obtaining financial statement from accountant

[16] Ms Sandy claims \$1800.00 in respect of the costs of preparing financial statements. That claim is supported by an invoice from an accountant which narrates that the work was "Preparation of part year financial statements for the 5 month period ended 7 August 2008". Possession date under the contract was 8 August.

[17] Mr Khan objects that amount is unusually high and also that there is no explanation as to why the invoice was not rendered until October 2009.

[18] Given the nature of the work undertaken and the date of possession the work clearly related to the proposed sale. This is supported by an email from Mr Khan to Ms Sandy of October 3 2008 in which he indicates the need to provide financial statements in respect of the company. The allegation that the amount is “unusually high” is unsupported and on their face the amount does not appear an unreasonable professional fee.

[19] This claim is allowed.

Lost opportunity of the sale of the business or pursuing the proposed purchaser

[20] This aspect of the claim was not clearly made or strongly pressed by Ms Sandy. Rather it was framed as a matter I ought to take into account in determining overall quantum. As I have noted the claim is inconsistent with the assertion that properly advised Ms Sandy would not have entered into the contract. No award or allowance is made in respect of it.

The costs of instructing new counsel in an effort to enforce settlement

[21] Ms Sandy claims legal fees of \$1566.25 of AA incurred after Mr Khan was discharged. Those legal fees relate to work undertaken in appraising the materials and issuing settlement notices. The claim is supported by an invoice dated 13 February 2009.

[22] Mr Khan says that some fees would have been incurred in respect of the transaction in any event and therefore the claim should not be allowed.

[23] The work undertaken by AA was directly caused by the transaction which I have found Ms Sandy would not have entered into had she been properly advised. While it is correct to say that that “proper advice” would have incurred a cost, I do not consider that that of itself disentitles Ms Sandy to compensation for the costs of taking advice on the legal situation created by Mr Khan.

[24] This claim is allowed.

Damages for inconvenience and stress

[25] Ms Sandy claims \$10 000 for inconvenience and stress. I observe that at the hearing I was informed that Ms Sandy was in poor health. Ms Sandy’s submissions also note that this was the reason for seeking to exit the business. This was acknowledged by Mr Khan in an email from him to Ms Sandy of October 14 2008.

[26] Mr Khan responds by stating that there is no jurisdiction to award general damages under the Act.

[27] Section 156(1)(d) provides that an order for compensation may be made where it appears that any person has *suffered loss* by reason of any act or omission of a lawyer. This issue therefore is whether general damages represent compensation for loss or not. The Court of Appeal has recognised that such distress damages are compensatory in nature: *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at para 171. One commentator has noted “it is now more widely accepted that, where significant mental distress is caused by a breach of contract, the promisee has suffered real damage which is deserving of compensation” (D McLauchlan, “Mental Distress Damages for Breach of Commercial Contracts” (1997) 3 NZBLQ 130). Accordingly I conclude that jurisdiction exists to make an award of general damages to compensate for the loss of peace of mind and the consequent distress and anxiety.

[28] I note that the ability to compensate for anguish and distress in the lawyer client relationship has been recognised in a number of cases, most recently *Heslop v Cousins* [2007] 3 NZLR 679 (where \$50 000 was awarded to each client). Given the purposes of the Lawyers and Conveyancers Act (which in s 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown to have occurred. Such an order will be particularly appropriate where the client is not a sophisticated person and looks to the lawyer to relieve the stresses that might accompany legal matters. In this case the legal work involved was the conduct of an appeal hearing. I am satisfied that the conduct of Mr Khan caused Ms Sandy anxiety and distress. However, I also observe further that Mr Khan is not to blame for all of the distress or anxiety suffered by Ms Sandy. Involvement in business and any consequent sale of a business is by its very nature stressful. However, accepting that had Ms Sandy been properly advised she would not have entered into the contract, and that the consequences of entering to the contract led to something of a debacle, it is clear that considerable stress and anxiety was caused by the conduct of Mr Khan.

[29] There is of course no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory: *Air NZ Ltd v Johnston* [1992] 1 ERNZ 700; [1992] 1 NZLR 159 (CA). It is accepted that such orders should also be modest (though not grudging) in nature.

[30] I have not had the benefit of submissions as to why an award of general damages should be made at any particular level. Where such awards have been made

against lawyers they have varied in amount significantly. As noted in *Heslop* two awards of \$50 000 were made, whereas in older case of *McKaskell v Benseman* [1989] 3 NZLR 75 a much lesser award of \$1000 was made. I observe that limited guidance is to be obtained from employment cases in which substantial awards are made relatively frequently. In those cases a recurrent factor is humiliation which is not the case here.

[31] In all of the circumstances I consider that an award of \$2 500.00 is appropriate.

Exemplary damages

[32] Exemplary damages are punitive and not compensatory in nature. It is clear that no jurisdiction to make such an award exists under s 156.

Refund of legal Fees

[33] Ms Sandy claims for cancellation of legal fees in the sum of \$1 993.00. This is accepted by Mr Khan and will be ordered accordingly.

Claim for costs of this proceeding

[34] Ms Sandy claims the costs relating to the conduct of the review and the preparation of submissions in respect of this decision and the proceedings before the Standards Committee. The power to award costs in respect of the Standards Committee proceeding is found in s 156(1)(o). The power to award costs in this proceeding is found in s 210. I observe that I must also take account of the Costs Orders Guidelines of this office in considering any award of costs in respect of the review. In those guidelines there is a strong presumption against costs between the parties.

[35] I observe that the submissions of counsel in respect of the making of orders has been of some assistance, though as I have noted above there are important aspects of the claim which were omitted.

[36] In all of the circumstances I decline to exercise my discretion to award costs in respect of the application for review in favour of Ms Sandy. Ms Sandy has also claimed disbursements being transport and photocopying costs. I do not propose to award those disbursements. As a matter of principle this is an informal forum which is readily accessible and in which legal counsel are the exception rather than the rule. The award of costs and disbursements between parties would be an impediment to the informality and accessibility of this jurisdiction.

Interest

[37] Ms Sandy also claimed interest on any sum awarded. There is no reference to interest in s 156. The power to make orders is restricted to those orders set out in the Act and accordingly I do not consider I have the power to award interest on any amount.

Costs of review

[38] The Costs Orders Guidelines of this office provide that where an adverse finding is made against a practitioner in general a costs order will follow. Mr Khan submits that this matter was of average complexity. That submission is accepted. Where the matter is heard in person and is of average complexity that order will generally be in the sum of \$1 600. An order will be made accordingly.

Penalty

[39] Mr Khan submitted that this was not a case where punitive orders were appropriate. He submitted that he had not preferred his own interest over that of his client but rather foolishly acceded to a request that his firm act for both parties. He suggested that even had independent counsel been obtained for Ms Sandy the outcome would not have been greatly different.

[40] Mr Khan notes that the Standards Committee did not see that there had been a professional breach and this is suggestive that the departure from professional standards was not great.

[41] In the earlier decision of this office it was observed that the breach was considered a serious one. That is reiterated here. It is apparent from the earlier decision that I consider the Standards Committee to have erred in a significant way. It can be noted that the Standards Committee resolved not to inquire into the claim pursuant to s 138(2) of the Lawyers and Conveyancers Act. Had the Committee enquired further it is likely that it would have become apparent to it that a serious conflict of interest existed.

[42] I observe as follows:

- [a] When Ms Sandy came to Mr Khan the terms of the agreement were not settled and his assistance was required.
- [b] This was a matter in which Mr Khan had a general and not limited retainer.
- [c] The parties had directly conflicting interests from the outset.

- [d] When it became clear that settlement could not be achieved in accordance with the terms of the agreement these problems intensified. Letters of termination and demand were exchanged and litigation was threatened. It is inconceivable that a single firm could act for two parties who are in such clear dispute with each other.
- [e] Mr Khan did not properly explain the conflict of interest or obtain informed consent to continuing to act.
- [f] Mr Khan has not, at any time, demonstrated that he understands his professional obligations.

[43] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- [a] to punish the practitioner;
- [b] as a deterrent to other practitioners; and
- [c] to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[44] All of these matters are relevant in the present case. I am aware that there are obvious financial benefits for a lawyer or firm who acts for different clients at the same time. It is important that professional sanctions are sufficiently serious to ensure that there is no temptation to breach professional obligations motivated by financial gain. It is also the case that Mr Khan has seriously breached his professional obligations. As time progressed in this matter the conflict became more serious and more glaringly obvious. It is appropriate that there be a punishment competent in any orders made. It is also important to set apart Mr Khan's conduct as entirely unacceptable.

[45] The conduct of Mr Khan was wholly at odds with the professional obligations he owed Ms Sandy. Had there been any element of dishonesty or self interest it is a matter which would have risen above the level of unsatisfactory conduct and been a question of misconduct to be considered by the Disciplinary Tribunal. Even if the conduct was simply an error of judgement it was a very serious one.

[46] I observe that my jurisdiction to impose a fine is limited to \$15 000. Obviously only the most serious possible finding of unsatisfactory conduct would incur a fine at that level. I take into account that in this case I am considering a single wrongdoing and not a series of infringements; that the breach, while serious, appears to have been an error; that there was no apparent self interest motivating the conduct, and that the consequences, while regrettable, have not been catastrophic for Ms Sandy.

[47] In light of these factors I consider that a fine of \$7000.00 is appropriate.

Publication

[48] Mr Khan was advised to make submissions on publication.

[49] Mr Khan opposed publication of his details and in effect sought that the details of my findings be suppressed. He observed that Ms Sandy expressed no particular desire that the matter be published and stated that there was no public protection interest at stake and it would not enhance confidence in the provision of legal services. He also noted that while a finding of unsatisfactory conduct had been made, this was the first time he had been found guilty of a professional breach.

[50] The question of publication of professional disciplinary proceedings has been considered by the courts on a number of occasions. In *S v Wellington District Law Society* [2001] NZAR 465 (which concerned an appeal from a decision of the Disciplinary Tribunal not to suppress a name) it was noted that the question of publication:

requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication.

[51] The Committee also referred to *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 in which the High Court was considering the basis upon which presumptively private proceedings against a nurse should be open to the public. It was observed in that case (at p 383 / 384) that public accountability was an important consideration which must be taken into account when considering such matters. Baragwanath J in that case also identified that values of public education and alerting to risk are related and also of significance. His honour also recognised the privacy interests of the practitioner complained against.

[52] I am also guided by *Dean v Wellington District Law Society* (High Court Wellington, 26 July 2007, Randerson, Ronald Young, Simon France JJ CIV-2006-485-2961) where the court overturned an order suppressing the name of the practitioner. That decision was made even though the offending was not at the highest end. A compelling factor was the public interest in potential clients knowing of the disciplinary charge having been established against the practitioner.

[53] There is a strong public interest in consumers of professional services knowing not only that a practitioner has fallen short of the expected professional standard, but also who that practitioner is: *Zimmerman v Director of Proceedings* (High Court Wellington, 29 May 2007 Clifford J CIV-2006-485-761 para [13]. In this regard the Committee also referred to *Gill v Wellington District Law Society* (High Court Wellington, 7 December 1993, Barker, Ellis, and Doogue JJ, AP120/93) where the Court stated “We consider that the public has a right to know what practitioners have infringed the standards in the profession”.

[54] This office has issued guidelines on publication. Those guidelines were referred to by counsel for Mr Khan and note that in considering whether or not details identifying the parties will be published the following factors will be relevant:

- [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 the complainant the practitioner or any other person;
- [d] the seriousness of any professional breaches; and
- [e] whether the practitioner has previously been found to have breached professional standards.

[55] I consider that publication of details in this case would impact positively on the protection of the public. As noted above, there is a consumer protection interest in members of the public knowing which practitioners have fallen short of professional standards. I am also of the view that where an adverse finding has been made against a lawyer publication enhances confidence in the legal profession generally. In particular it reduces the impression of the profession “looking after its own”. While the publication of the details of this decision will obviously adversely affect the privacy interests of Mr Khan I do not consider that those interests should prevail in this instance. I also take note of the fact that the professional breach here was a serious one (albeit an isolated one). I also note that my own earlier decision in *Austell v Somerset* LCRO 76 / 2009 concerned a fiduciary breach by a lawyer which was of similar magnitude to that presently under consideration. In that decision I upheld the decision of the Standards Committee to publish the name of the practitioner.

[56] There is no evidence before me of any particular detrimental impact that an order of publication would have on Mr Khan. In light of this I infer that there would be no exceptional or unexpected affects of an order of publication. Given the fact that no particular submissions were directed to the question of the impact of publication I have difficulty in accepting the submission that the distress of publication would outweigh the public interest.

[57] The decision will be made available to the public in the normal way through the website of this office. Whether the matter should be published in Lawtalk or other professional publication is a matter best left to the Law Society.

Orders

[58] The following orders are made:

- [a] Mr Khan is to pay to Ms Sandy the sum of \$8586.25 in compensation pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act 2006.
- [b] Mr Khan is to cancel and refund to Ms Sandy legal fees in the sum of \$1 993.00 pursuant to s 156(1)(f) and (g) of the Lawyers and Conveyancers Act 2006.
- [c] Mr Khan is fined \$7000.00 pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- [d] Mr Khan is to pay \$1600.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- [e] This decision is to be published with the identifying details relating to the applicant and other third parties removed.

DATED this 25th day of February 2010

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:

Ms Sandy as Applicant
Faiyum Khan as Respondent
The Auckland Standards Committee 2
The New Zealand Law Society