LCRO 181 /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 2 of the New Zealand Law Society
BETWEEN	**MS SANDY** of Auckland Applicant
AND	**FAIYUM KHAN** of Auckland Respondent

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

DECISION

[1] Ms Sandy, through her son, complained to the New Zealand Law Society on 5 May 2009 about the conduct of Mr Khan in respect of the sale of a travel agency business in August 2008. The sale did not proceed and Ms Sandy maintains that she has suffered various losses as a consequence. She complains that the conduct of Mr Khan was causative of those losses.

[2] In particular, she states that Mr Khan acted for her at the same time as another lawyer in the same firm acted for the purchaser.

[3] This matter was considered by the Auckland Standards Committee 2 of the New Zealand Law Society and on 14 October 2009 the Committee resolved to take no further action on the complaint. The reason it gave for that conclusion was that the Committee considered the material before it and was satisfied that Mr Khan had acted appropriately.

[4] The decision of the Standards Committee was based on s 138(2) which empowers the Committee to resolve to take no further action at any time and without

conducting an inquiry into a complaint or conducting a hearing of the matter. The decision recited some of the facts put before it and stated its conclusion. I observe that it did not direct itself as to what the obligations of Mr Khan were or what the applicable rules were. The Standards Committee is a tribunal of effectively summary jurisdiction and has an obligation to dispose of matters expeditiously; however, in this case it appears that the Committee failed to properly and carefully consider the complaint, its surrounding circumstances, and the applicable rules.

[5] Ms Sandy seeks a review of that decision. A hearing of this matter was conducted on 1 December 2009 at which Mr Khan, Mr Sandy, and her son Mr S (R) Sandy were present. Mr Khan helpfully provided a large part of the documentation from his file.

Background

[6] On 4 August 2009 Ms Sandy sought a meeting with Mr Khan to discuss a proposed sale of her travel agency business to Mr XX. The intention was that a contract for sale and purchase be drafted. Mr XX was to attend. Mr Khan says in his letter to the Society of 4 September 2009 that at that initial meeting Ms Sandy, Mr Sandy and Mr XX attended (as well as himself). At the hearing it was stated that at some point Mr YY, another lawyer in Mr Khan's practice also attended the meeting.

[7] The exact proceedings of that meeting are in dispute. However, the result was that a contract for sale and purchase of the business was drafted and executed, and it was resolved that Mr Khan would act for Ms Sandy as vendor, and Mr YY would act for Mr XX as purchaser. A deposit of $15 000.00 was paid by Mr XX. That deposit is still held by Mr Khan as stakeholder in his trust account. Ms Sandy says that she understood that if Mr XX did not complete the transaction she would be entitled to the deposit.

[8] Mr Khan took notes at that meeting at it is clear from those notes that substantive issues were negotiated between the parties and arrangements in respect of the transfer of leases and the TAANZ bond were discussed. It appears that Mr Khan spoke to a representative of IATA during the course of the meeting and noted that certain payments were in default. It is clear that substantive negotiations occurred in that meeting in which matters central to the structure of the transaction were discussed. This was not a situation in which two parties attended on Mr Khan with all meaningful terms of the agreement settled.

[9] Mr Khan states that Ms Sandy and Mr XX "implored" him to act for Mr XX as well. He states that he acceded to the request provided that it was another lawyer in his firm

(Mr YY) who acted and that if there were any disputes then they would need to arrange separate lawyers.

[10] Ms Sandy states that it was Mr Khan's idea for his firm to handle all of the work and that he never explained the implications of that to her. She states that there was some mention of a "China wall" but she did not understand exactly what this was about and left it all in the hands of Mr Khan.

[11] Mr Khan produced the notes the relevant parts of which he says he made after the meeting. That part states:

> Informed both parties that I have represented M [Ms Sandy] and M is my client. Both M and T [Mr XX] said they wanted me to act for both of them. I said if there was dispute both will have to go elsewhere. They agreed and I said I would act for M and Y [Mr YY] can act for T. I had called Y earlier in the boardroom.

[12] The parties also disagreed about how the transaction proceeded. Mr Khan suggested that the difficulties were due at least in part to the fact that certain defaults on payments to IATA had to be remedied and that he was not informed of this at the outset. He states that he undertook substantial work in assisting Ms Sandy in remedying this default. Ms Sandy states that this was not a material matter and the agency had been being wound up and the outstanding amounts were to be set off against a bond held by IATA. Considerable time was spent by the parties at the hearing seeking to clarify various details of the transaction. I note, however, that most of the matters were not material to the central issue in this review.

[13] The agreement that was drafted and signed on 4 August was conditional on "the Purchaser obtaining a registration of TAANZ bonding and staffing confirmation by 8 August 2008". Ms Sandy says that she thought that this meant simply a transfer of her bond in due course. This, however is not what the clause states. It is clear that the time frame provided for in that clause was far too short and that (regardless of the default issues) there was no realistic possibility of that being effected in four days. It is on the basis of the failure of this condition that Mr XX withdrew from the contract.

[14] When 8 August passed and there was no confirmation of the contract Mr Khan and Mr YY engaged in negotiations for their respective clients. Mr Khan's stance was that the matter could most effectively be progressed if the sale was structured as a sale of shares rather than the assets of the business as a going concern. A meeting was held with the parties and their advisors on 14 August 2008 at which proposals for progressing the matter were made, however it appears that no substantial progress

was in fact made. Throughout this time Mr Khan was pressing for the transaction to be restructured as a sale of shares rather than a sale as a going concern.

[15] A further meeting was held on 12 September 2008 with all parties present at which it appears Mr XX stated that he would settle the agreement in the next few days. This did not occur. Mr Khan observes that by this stage the agreement of 4 August had "totally lapsed". He argued, however, that there was an oral agreement from the meeting of 12 September which was enforceable. On 18 September Mr YY purported to bring the agreement to an end on the basis that clause 15 of the agreement relating to the obtaining of registration with TAANZ had not been fulfilled.

[16] By 19 September 2008 it was becoming clear that serious issues had arisen. Mr Khan wrote to Mr YY noting that Mr XX now stated that he did not wish to proceed with the transaction. He also observed that Mr YY considered the contract at an end through the failure of the condition relating to the obtaining of registration with TAANZ. Mr Khan stated that in his view the condition had been waived and Mr XX was bound to complete the purchase and was not entitled to cancel.

[17] On 3 October Mr Khan wrote to Mr YY noting that court proceedings may be initiated in which case their respective clients would have to get new solicitors and the respective lawyers may be called as witnesses. On the same day Mr Khan emailed Mr Sandy stating that he had "endeavoured extremely hard" to put pressure on Mr YY and thereby Mr XX and indicating that if the matter was not resolved separate independent advice would be necessary.

[18] On 14 October Mr Khan wrote to Mr YY putting him on notice that Ms Sandy was claiming against Mr XX in contract and in tort and proposing mediation. He indicated that if the dispute was not settled he would advise Ms Sandy to obtain independent legal advice and it would be more than likely that proceedings would be filed. This was communicated by email to Mr Sandy on the same day.

[19] It appears that at this time Ms and Mr Sandy obtained independent advice. On 15 October 2008 their new advisor sought to uplift their files. At the hearing Mr Khan stated that the advice to retain a new advisor was given by telephone at about this time.

[20] The new advisors of Mr and Ms Sandy advised them that the TAANZ has certain formal requirements for a change of ownership of a travel agency. In particular it requires a vendor to seek approval of a change of ownership well before any proposed settlement date. The advice questioned whether under the original agreement it was possible to obtain the TAANZ approval of change of ownership. The advisor also noted

that a transfer of shares in a business also required approval by TAANZ. In light of this the advisors considered that it would not be possible to complete the agreement.

[21] This advice was provided to Mr Khan on 3 February 2009 for his comment. On April 7 2009 Mr Sandy sought the release of the deposit from Mr Khan. On the same day Mr Khan declined to release the deposit on the basis that the matter was in dispute. The complaint was made on 5 May 2009.

Consideration

[22] The central issue is whether, in acting as he did, Mr Khan acted in a conflict of interest situation. Rule 6 of the Rules of Conduct and Client Care for Lawyers 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.*

[23] That core obligation is further particularised in rr 6.1-6.3 which provide as follows:

> *6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.*
>
> > *6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.*
> >
> > *6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.*
> >
> > *6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.*
>
> *6.2 Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party.*
>
> *6.3 An information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2.*

[24] These rules are the successor to previously applicable r 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors. They came into force on 1 August 2008.

[25] I observe at the outset that if a conflict of interest existed it was not cured by Mr YY acting for Mr XX and Mr Khan acting for Ms Sandy. Rule 6.2 makes it clear that the rules apply with the same force whenever lawyers who are members of the same practice act for more than 1 party. Mr Khan and Mr YY may have had systems in place (although I was not referred to them) to ensure that the confidential information of one party was not seen by the advisor of the other party. However r 6.3 makes it clear that the existence of an information barrier does not affect the obligation to comply with the rules.

[26] The question therefore is whether in all of the circumstances there was a risk which was more than negligible risk that the firm would be unable to discharge the obligations owed to Ms Sandy and Mr XX simultaneously.

[27] I consider that in a situation such as the present where a lawyer or firm elects to act for two parties it is incumbent on the lawyer to demonstrate that there was no meaningful risk that the obligations owed to the parties would not be able to be discharged.

[28] In the present case Mr Khan met with Ms Sandy, Mr Sandy and Mr XX at the initial meeting on 4 August. At some later stage Mr YY was called into the meeting and it was agreed that he would act for Mr XX. The agreement for the sale of the business was signed at that meeting. Some aspects of that arrangement (such as the fact that the deposit was to be held by the firm as stakeholder and the fact that it was conditional on TAANZ bonding within four days) were objected to by Ms Sandy as disadvantageous and at variance with her understanding of the arrangements she thought she was entering into. In this regard the interests of Mr XX and Ms Sandy were in direct conflict with each other.

[29] This was not mere transactional matter where all of the terms had been agreed. The firm was obliged to promote the interests of Ms Sandy at the same time as being obliged to promote the interests of Mr XX. Rule 6.1 makes it clear that in such a situation the fact that different lawyers are acting for different clients does not alter this. This is quite distinct from a situation in which an agreement has been concluded between the parties and the lawyers are merely formalising and settling it. This is akin to the situation that arose in *Taylor v Schofield Peterson* [1999] 3 NZLR 434 where

important elements of the transaction remained to be settled and it was considered to be a real and actual conflict of interest.

[30] This is entirely different from the situation in *Kendal v Sherbourne* LCRO 69 / 2009 where a lawyer acted for both vendor and purchaser in a property conveyance. There the interests of the parties were congruent as the sale was from the family trust of an adult son to his aged mother, the transaction was manifestly beneficial to the mother and the terms of the agreement were settled before the lawyer became involved. It is also of note that in that case the lawyer spoke to the client alone and informed her of the fact that she was acting for both parties and obtained her written consent to so acting.

[31] This was a matter in which Mr Khan had a general and not limited retainer. His obligation was to provide general assistance in completing the sale of the business. As such this is quite distinct from those cases where, although the clients interests might be in opposition, the role of the lawyer is limited by the terms of the retainer so that it is possible to undertake the work in a way which is consistent with the duties owed to the respective clients: *Clark Boyce v Mouat* [1994] 1 AC 428 (PC); *Hilton v Barker, Booth & Eastwood* [2005] 1 WLR 567 (HL), para 30.

[32] The most obvious risk inherent in this transaction was that the firm would look to protect Mr XX's interest at the expense of Ms Sandy's. There is also a risk that Mr Khan would lose sight of the need to vigorously protect the interests of Ms Sandy and be more focussed on reaching some settlement between the parties so that both of the firm's clients would be satisfied. A further risk was that information sensitive to one of the parties could find its way into the hand (whether intentionally or not) of the lawyer for the other party. In respect of the concern relating to the security of confidential information it should also be noted that even if Mr Khan had systems in place to protect the respective client's information (which there is no evidence of) r 6.3 provides that "an information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2.".

[33] Where two clients are represented by a single firm r 6.2 makes it clear that the fact that the clients are represented by different lawyers does not change matters. The duty of loyalty owed to a client is owed by the firm and all its members jointly. In this case it was not possible for Mr Khan to act for Ms Sandy while at the same time he was acting against Mr XX. A lawyer can never act against the interests of an existing client of the firm. In this regard the firm's conflicting duties to its respective clients meant that Mr Khan could not act in this matter from the outset.

[34] When it became clear that settlement could not be achieved in accordance with the terms of the agreement these problems intensified. Mr XX at some stage resolved to try to "get out" of the agreement. Ms Sandy wanted to hold him to it. Letters of termination and demand were exchanged and litigation was threatened. It is unacceptable for a single firm to act for two parties who are in dispute with each other. Other than when proceedings are actually filed there can be no clearer conflict of interest.

[35] Even had Mr Khan been able to properly act for Ms Sandy at the commencement of the matter, when it became clear that serious problems existed with the transaction and the parties did not agree as to how matters should proceed it should have been abundantly clear to Mr Khan that this was a serious conflict of interest. This became apparent when the contract was not confirmed and settlement did not proceed on the agreed date of 8 August. While Mr Khan did eventually withdraw he did so only after all negotiations had failed and litigation had been threatened. This was far too late. Moreover, there is no record of the withdrawal which appears to have occurred by a telephone call. While not a professional breach of itself I observe that a diligent and competent lawyer would set out the reasons for the termination in writing and clearly inform the client what steps he or she ought to take to secure further professional assistance. In this vein it can be observed that r 4.2.4 provides that where a lawyer terminates a retainer he or she must give the former client reasonable assistance to find a new lawyer.

[36] Rule 6.1 is expressed in mandatory terms. Where there is real risk of an actual conflict of interest (that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients) the lawyer or firm may not act.

[37] Rule 6.1.1 provides that *subject to* rule 6.1 a lawyer may act for more than one client where the prior informed consent of all parties concerned is obtained. In light of the fact that I have found that the circumstances in this case meant that there was a real risk that the obligations owed to the clients could not be discharged by the lawyers involved it is arguably unnecessary for me to consider whether adequate disclosure occurred here. However, in all of the circumstances I consider it appropriate to make a finding in respect of Mr Khan's disclosure and Ms Sandy's consent in respect of the conflict.

[38] I was not referred to any letter of engagement or other client care statement from Mr Khan to Ms Sandy. There was no evidence that Mr Khan explained to Ms Sandy the principal aspects of client service as required by r 3.4 of the Rules of Conduct and Client Care. However, this was not part of the complaint or the decision of the

Standards Committee and therefore it would not be appropriate to make an adverse finding against Mr Khan in this regard. It does, however, suggest that information relating to the nature of the retainer was not given to Ms Sandy in a clear and comprehensible manner which was available for deliberation and future reference. I observe that r 1.6 of the Rules of Conduct and Client Care state that where a lawyer is obliged to provide information it:

> must be provided in a manner that is clear and not misleading given the identity and capabilities of the client and the nature of the information.

[39] The disclosure or explanation which Mr Khan says he made to Ms Sandy occurred at the meeting of 4 August. That was made at a meeting at which Mr XX was present throughout. The only record of that meeting is Mr Khan's recollection as recorded in the notes. He stated that the relevant part of the note was written after the meeting. Those notes do not accord with Ms Sandy's recollection of what occurred, nor with Mr Sandy's recollection of what occurred. I identify the fact that the notes are self serving and may reflect Mr Khan's subsequent understanding of what he said.

[40] Rule 6.1.1 provides that a lawyer may act for more than one party (subject to r 6.1) where the prior informed consent of all parties concerned is obtained. Informed consent is defined in r 1.2 to mean:

> consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[41] There is no evidence that any explanation of the risks involved was made (other than Mr Khan's note that if a dispute emerged another lawyer would have to be retained). In a case such as this it would be usual to write to the client outlining the situation and in most cases to obtain a written acknowledgement of the explanation and the continued instructions. While the rule does not require this, in the absence of such evidence a heavy onus falls on the lawyer to establish that such an explanation was made and that the consent to act was given freely and with a proper understanding. In this case that onus has not been discharged.

[42] It is also unlikely that informed consent to act can be given if that consent is given in the presence of the other party. In such an instance there is a real risk that the consent will not be given freely and questions may not be asked or issues may not be raised which, had the other party not been present, would have been asked or raised.

[43] In the present case Ms Sandy did not give informed consent to Mr Khan acting at the same time as Mr YY acted for Mr XX.

[44] I had the opportunity of hearing from Mr Khan at the hearing of this review. I observe that at the outset I put to Mr Khan the rules and the obligations which I considered needed to be addressed. Mr Khan's submissions focussed largely on the detail of the transaction involved, why it went wrong for Ms Sandy and why in his view he was not responsible for any loss suffered. He did not meaningfully address, or appear to have a proper appreciation of, his obligations and the nature and importance of the professional rules which were applicable in the circumstances which he faced.

[45] The 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.

[46] In light of this finding a number of orders may be made pursuant to s 156 of the Lawyers and Conveyancers Act 2006. They include orders compensating Ms Sandy if it can be established that she suffered loss by reason of the conduct of Mr Khan and reducing or cancelling the fees of Mr Khan. This was not a matter which was focussed on at the hearing.

[47] It may also be appropriate to impose other orders on Mr Khan of a punitive nature in light of this breach, which is a serious one. I also note that in light of the apparent lack of sensitivity of Mr Khan to the conflict of interest which existed in this case it may be appropriate for Mr Khan to undertake further practical training or education.

[48] Whether or not the details of this decision should be published should also be considered and in this regard the parties are referred to the Publication Guidelines of this office.

[49] Section 210 of the Lawyers and Conveyancers Act provides that costs orders may be made against practitioners in favour of the Law Society in such cases. Mr Khan is referred to the Costs Orders Guidelines of this office in that regard.

[50] These are matters in respect of which it is appropriate that the parties have an opportunity to make submissions on. In light of this the following decision and orders are made.

Recommendation

[51] I observe that Mr YY acted for Mr XX in this matter. Mr YY has not been a party to this review or the examination of the matter before the Standards Committee. Accordingly it would be inappropriate to make any adverse findings against him.

However, in light of the finding against Mr Khan I recommend that the Standards Committee exercise its power under s 130(c) of the Lawyers and Conveyancers Act to inquire into the conduct of Mr YY in this matter. In light of this I exercise my discretion under s206(4) and provide a copy of this decision to Mr YY.

Decision

[52] The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Auckland Standards Committee 2 is reversed.

[53] Ms Sandy is 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 by 21 December 2009. Those submissions should address both the amount of the loss and how it is argued they were caused by reason of the conduct of Mr Khan.

[54] Mr Khan is to provide submissions in writing in reply to the submissions of Ms Sandy, and in respect of any other orders that may be made, by 22 January 2010.

DATED this 9th day of December 2009

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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