LCRO 242/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Nelson Standards Committee
BETWEEN	**Ms IB** Of [South Island] Applicant
AND	**Mr QY and the partners of AEH** of [South Island] Respondent

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

DECISION

[1] The review Applicant is Ms IB who, via her counsel Mr MB, sought a review of the decision of the Nelson Standards Committee declining to uphold her complaint against Mr QY (the Practitioner) and the partners of the AEH law partnership.

Background

[2] In 2007 a lawyer in the Practitioner's firm had given advice to X Veterinary Group Limited (the company) in relation to a Shareholder Agreement that had been drafted by members of the company with the assistance of the AEP and its legal counsel. One of the partners, Mr AZ, acted in that matter, and suggested a few minor changes, but neither he nor anyone else in the firm was involved in the final form of agreement or its signing.

[3] The Agreement provided for the eventuality of a member leaving the company either voluntarily or compulsorily (due to default by the Shareholder), or by death. By clause 17, the Agreement provided for the valuation, acquisition

and transfer of the share of the departing partner. The Agreement also provided that the value of the shares of a member who left the partnership due to a default event should be discounted by 20%. Clause 19 of the Shareholder Agreement set out various default events that could lead to the compulsory acquisition of shares by the remaining members.

[4] The Applicant was one of three members of the company. When she lost her practising certificate in 2010 she could no longer work in the company. The circumstances surrounding the loss of the practising certificate led the other two shareholders (majority shareholders) to serve Notice of Default on her, intended to remove her as a director and shareholder of the company and to compulsorily acquire her shares.

[5] This gave rise to a number of disputes between the Applicant and the majority shareholders. These included a disagreement about the basis of the Default Notice, as the Applicant disputed that there was a default event. The Applicant eventually served a Notice of Default on her former colleagues.

[6] There was also dispute involving the valuation of the shares of a defaulting member. The majority members sought to acquire the Applicant's at a 20% discount as provided for in the Shareholder Agreement. The Applicant disputed the interpretation of the Agreement concerning valuation of the shares purchased from a defaulting member. Clauses 17 and 19 which governed these matters were perceived to be inconsistent.

[7] Although the dispute has since been settled, the Applicant filed conduct related complaints against the Practitioner who had acted for the majority shareholders of the company in relation to that dispute.

[8] One complaint was that the Practitioner's firm had been negligent in the professional advice given to the shareholders, in particular failing to have alerted them to the inconsistency between clauses 17 and 19.

[9] There were also two complaints of conflict. The first alleged that, having acted for all three shareholders and their company, the Practitioner was now prevented from acting for two of them, and against the Applicant.

[10] The second alleged that the Practitioner not to have acted for the majority shareholders since his firm was subject to an allegation of negligence, and the advice given by the Practitioner may have been affected or influenced by that

allegation. It was said that the Practitioner 'took a position' in relation to the advice he gave, and that his representation of his clients was, or could have been, affected by concerns to protect the interests of the firm.

Standards Committee enquiry

[11] The New Zealand Law Society investigated the complaints and its decision sets out the background in some detail which I have considered necessary to restate here. It is clear from the Standards Committee file that all parties had a full opportunity to present their views and comments on the views of the opposing party.

[12] On the matter of negligence, the Standards Committee noted that no-one in the Practitioner's law firm had drafted the Shareholder Agreement. Concerning the advice given by the firm, the Committee concluded that it was difficult to see there had been any negligence. The complaint had focused on what the Applicant had perceived as a conflict between two clauses in the Shareholder Agreement. The Committee offered comments in relation to the interpretation of these disputed clauses, and concluded in its "Discussion", that *"There does not appear to be any negligence that would cause any conflict of interest or cause an already existing conflict to be exacerbated.*" Having reached this conclusion the Standards Committee did not consider it necessary to address the allegation of conflict as between the Practitioner and his clients.

[13] The Committee went on to consider whether, apart from the alleged negligence, there was any conflict of interest at all. The Committee discussed Rule 8.7 of the Rules of Conduct and Client Care which prohibits a lawyer from using information confidential to a client (including a former client) for the benefit of any other person or the lawyer. The Committee noted that a lawyer must not use information that is confidential to a client, or former client, for the benefit of another person or the lawyer.

[14] The Committee concluded that there was no evidence that the Practitioner (or the firm) held any confidential information personal to the Complainant in relation to the matter, its only involvement having been to give advice on the Shareholding Agreement. The Standards Committee could find no conflict that ought to have precluded the Practitioner from representing the majority shareholders.

[15] The Committee also noted that a lawyer cannot claim for himself (or herself) the privilege that properly belongs to a client. This comment concerned the Practitioner's objections to the disclosure of a particular document on the grounds of privilege.

Review Application

[16] The Applicant's review application was filed via her Counsel. The grounds for review largely focused on that aspect of the complaint claiming that the Practitioner was conflicted by reason of the negligence allegation against his firm, which the Applicant considered ought to have disqualified him from representing the majority shareholders. She disagreed with the Standards Committee's conclusion that there was no negligence on the part of the firm in relation to advice given to the shareholders.

[17] Reference was made to the document that the Practitioner had sought to have withheld from the Standards Committee. This was a Settlement Agreement reached by the parties after a lengthy dispute. A clause included in that Agreement required the Applicant to not make any civil claims or demands against the professional advisers of the Company or the other shareholders. The Applicant saw this as evidence of the firm's acknowledgement of negligence.

[18] The Applicant perceived that the clause was intended to protect the legal advisers, and perceived this to support the alleged conflict between the Practitioner and those he represented.

[19] It was contended that the Applicant had incurred unnecessary additional legal costs due to the advice given by the Practitioner which was allegedly affected by protecting the position of the Practitioner's firm.

Considerations

[20] There is a professional obligation on lawyers to act independently and to refrain from acting where there is a conflict. A conflict may arise where a lawyer (or his firm) has an interest to protect in connection with a matter for whom the Practitioner (or the firm) is acting, which may impact on the lawyer's ability to give advice solely for the client's benefit. Where such circumstances the lawyer may be seen not able to discharge his obligation to act solely for the benefit of the client, and should refrain from acting in the matter.

[21] In this case the underlying essence of the complaint is that the advice given by the Practitioner was affected by the law practice seeking to conceal its own act of negligence.

[22] The Applicant and the majority shareholders eventually signed a Settlement Agreement. It is a private agreement only between the parties, and it is therefore somewhat surprising to find a clause included in that Agreement that is clearly intended to give protection to the Practitioner and others who have given legal advice to the shareholders or the company. Clause 5 of the Settlement Agreement reads as follows:

> "(The Applicant) will not make any civil claims or demands against the professional advisors of the company, (or the majority shareholders)".

[23] Whether such a clause would be upheld in the event of a civil claim against the lawyers is another question, but the Applicant points to this clause as evidence of the Practitioner's acknowledgement that the firm is at risk, and thus conflicted. The Practitioner sought to withhold this information from the Standards Committee on the grounds of privilege. The Standards Committee properly rejected this claim, explaining that a lawyer cannot claim for himself the privilege belonging to the client.

[24] The Practitioner has not explained the reason for the inclusion of the clause but it is unlikely to be sufficient as an admission of wrongdoing. It is not clear that the present complaint alleging conflict can be resolved by reference to that clause. I note that no civil proceeding was filed against the Practitioner or the law firm at the time that negotiations were ongoing.

[25] The Practitioner disputed that the firm had been negligent in the advice that had been given to the shareholders. In this regard he could see no barrier to himself, or the firm, representing the majority shareholders. On the other hand the Applicant's perceived that there was such a "*clear conflict*" between the two clauses (clauses 17 and 19 referred to above) that it should have been apparent to any lawyer that advice should have been provided.

[26] I have considered these clauses in a disciplinary context, and in relation to contention that the advice was negligent such as would or could have affected or influenced, for reasons of protecting the firm, the advice given by the Practitioner to his clients subsequently.

[27] It might be argued that clauses 17 and 19 of the Shareholder Agreement could have been drafted with greater clarity, but it is agreed that the drafting was not by the Practitioner or his firm who only provided independent advice on the document. Clauses governing the valuation of the share of an exiting shareholder are pivotal in any agreement of this kind and demand close scrutiny. A legal adviser would be expected to identify ambiguities in an agreement. However, when the document is read as a whole, I cannot agree that there exists 'a clear conflict' between the clauses to a degree suggested by the Applicant. The approach taken by the Practitioner's clients, regardless of any advice he gave them, was supported by the tenor of the document which clearly intends that the shares of a defaulting member may be purchased by the remaining members at a discount.

[28] Whether this view would be proved correct or not in a different judicial forum is not a matter that I am required to consider. In a disciplinary context the issue is whether there was any proper basis on which the Practitioner ought to have declined to act for the remaining shareholders. The Practitioner did not agree that the two clauses were in conflict, and represented his clients with regard to the valuation and purchasing of the Applicants shares. It is clear that he saw no impediment to acting for his clients.

[29] Having considered the evidence and the submissions, I can find no basis on which it would have been, or ought to have been, clear to the Practitioner that continuing to act for the remaining shareholders placed him in a conflict situation, as between the interests of his clients and those of the firm.

[30] Furthermore, I note that the "position" alleged to have been taken by the Practitioner in relation to his advice to his clients did not concern the disputed clauses (which are the subject of the negligence allegation), but concerned the overriding dispute about whether there had been a 'default' event. The Applicant who disputed that she was in default, rejected the legitimacy of the Default Notice. In turn she served a Default Notice on the other shareholders, which they rejected. The larger dispute surrounded what constituted a default event.

[31] The Applicant's counsel considered that ultimately the impasse could only be resolved by resolving which notice was valid against the other. The Applicant's view was that the 'position' taken by the Practitioner as to the matter of which of the two Notices was valid and enforceable prevented the resolution of the disagreement between the parties, which would "inevitably result in litigation".

[32] I make the following observations on the basis of the evidence.

(a) To the extent that the parties disagreed with the interpretation of the clauses (in the Shareholder Agreement) governing purchase of the shares of a defaulting member, it is not obvious that the majority shareholders' approach to the two clauses in the Agreement (perhaps on the advice of the Practitioner), could have benefitted the Practitioner or his firm. The Practitioner was an advocate for the majority shareholders, who sought to act on their concerns about the conduct of the Applicant.

(b) The Shareholder Agreement contained dispute resolution provisions. These are contained in clause 15.0 and apply to disputes concerning the deed, the rights and obligations of the parties. This is wide enough to have covered the areas of dispute.

(c) As matters proceeded a principal area of dispute between the parties concerned was whether there had been a 'default' event. This resulted in an impasse between the opposing parties as to whose Default Notice was valid. The Practitioner's approach to dealing with the Applicant's Notice was characterised by the Applicant as the Practitioner taking 'a position', the implication being that the interest of the Practitioner's firm affected the advice he gave.

(d) In respect of the dispute, the Practitioner did not act for the Applicant who was represented by another lawyer. The Practitioner's clients were the remaining shareholders and they do not appear to have any complaint against the Practitioner.

[33] It is clear from the above that any question about the validity of a Notice of Default was not part of the allegation of negligence. There is nothing to indicate that the Practitioner, or his firm, had a stake in the outcome of this dispute, or that any considerations other than the interests of his clients influenced the advice given to them by the Practitioner.

[34] There is no evidence that the Practitioner (or his firm) had anything to gain by the advice given to his clients, or in any event no evidence that the advice compromised the clients or benefitted the Practitioner or his firm.

[35] The Standards Committee decided to take no further action pursuant to section 138(2) of Lawyers and Conveyancers Act. There is no basis for taking a different view to that of the Committee. The review application is declined.

Decision

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

DATED this 10th day of February 2012

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Hanneke Bouchier
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:

IB as the Applicant
QY as the Respondent
The [South Island] Standards Committee
The New Zealand Law Society