LCRO 243/2013

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| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of the [City] Standards Committee [X] |
| **BETWEEN** | **ZAA**<br>Applicant |
| **AND** | **YBC**<br>Respondent |

## DECISION

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

### Introduction

[1] Mr ZAA has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr YBC.

[2] Mr ZAA and Mr UEF had been business partners since 2002. They and their respective family interests each held equal shares in two companies, WCD New Zealand Limited (WCD) and VDE Limited (VDE). Mr YBC had acted for them, their respective family interests and the two companies since 2002. He had extensive knowledge of them and their business affairs.

[3] Over time the relationship between Mr ZAA and Mr UEF deteriorated. They looked at ways of separating their respective business interests. From June 2011 Mr YBC acted for them both on the separation of their respective interests.

[4] The key issue in this review is whether, by acting for both Mr ZAA and Mr UEF, that Mr YBC was conflicted and, if so, whether he should have acted for them both and whether he complied with the relevant rules of professional conduct.

*Background*

[5] Towards the end of January 2011, Mr ZAA requested a meeting with Mr YBC. He wanted Mr YBC to prepare an agreement to acquire the business in one of the companies.[1] Mr YBC advised Mr ZAA that, if he acted for both Mr ZAA and Mr UEF, he may have a conflict.[2] He obtained their consent to act for them both on that matter[3] and sent them a letter of engagement.[4] However, on reflection, he wrote to them a week later and told them that because their "interests as vendor and purchaser may give rise to a conflict" he could not act for them both after all. He told them that they must each obtain independent advice and recommended two law firms.[5]

[6] During the next four months, Mr ZAA and Mr UEF endeavoured to separate their respective business interests in a way which was fair to them both. A business broker assisted them in their discussions.

[7] In mid-June 2011, the business broker put a proposal to them whereby, in broad terms, each of them would submit an offer to purchase the businesses. The party who submitted the highest offer would be the successful purchaser. Mr ZAA contacted Mr YBC. He suggested that they meet to discuss the broker's proposal.

[8] A meeting with Mr YBC attended by Mr ZAA, Mr UEF, their accountant[6] and the business broker took place on 22 June 2011. At the meeting Mr YBC suggested that each party bid for the other party's shares in each of the two companies. Mr YBC's proposal was that each party's bids were to total $380,000, the agreed "indicative goodwill figure" for both businesses. This "would be used as a base for determining the sale price, factored against the goodwill figure shown in the books as $119,216".[7]

[9] Mindful of the potential risk of a conflict of interest if he was to act for them both on this transaction, Mr YBC says that following the meeting both Mr ZAA and Mr

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[1] Email from ZAA to YBC (26 January 2011).
[2] Email from YBC to ZAA (26 January 2011).
[3] Emails from ZAA to YBC (26 January 2011); from YBC to ZAA (26 January 2011); from ZAA to YBC (27 January 2011); from YBC to ZAA (27 January 2011).
[4] Letter from YBC to WCD (28 January 2011).
[5] Letter from YBC to ZAA and UEF (3 February 2011) at 1.
[6] Mr UEF is the accountant's brother-in-law; the accountant is also Mr YBC's nephew.
[7] Letter from YBC to Lawyers Complaints Service (1 May 2013) at [1.6]-[1.8]; Letter from YBC to LCRO (13 September 2013) at 3.

UEF were sent away to get independent advice.[8] He and the accountant were to devise a formula to determine the purchase prices for the shares in each company that "apportioned the book goodwill between the two companies". [9] He was to prepare a draft agreement that incorporated his suggestion.

[10] Mr ZAA says that he spoke to Mr YBC on the telephone on 4 July 2011. Mr YBC sent a synopsis of the proposed goodwill formula to Mr ZAA, Mr UEF and the accountant that day. [10]

[11] Four days later on 8 July, he forwarded them a draft Deed of Agreement which documented his proposal, and included the goodwill formula which he and the accountant had devised. He again referred to the risks of him acting for both parties. He advised them that they "may each want to obtain independent legal advice".[11] The parties signed the Deed of Agreement and exchanged bids that day.

[12] Four days later on 12 July, Mr YBC sent Mr ZAA and Mr UEF a letter of engagement. The letter was headed "Shareholding Restructure of [the two companies] – New Legal Instructions". Although addressed to the directors of WCD, the "Instructing person" was described as Mr ZAA and Mr UEF. Mr YBC would "have overall responsibility for … [the] file" and "ha[d] been assisted … by [his] Associate, [Mr] TFG". The legal services were described as:

> Initial consideration of proposal for [Mr ZAA] to acquire UEF family shareholding in companies (detailed in our letter of engagement of 28 January 2011), and subsequent discussions for initial buy-outs by both of you in separate companies.

[13] Mr YBC described the legal work undertaken to that date. He stated that "we are progressing the completion of negotiations between each of you", referred to the discussions in January 2011, and noted that since then "each obtained independent legal advice and embarked on lengthy negotiations" through the business broker. He recorded that:

> When we resumed discussions it was on the basis that we would look at a way in which you could either formalise an offer by one of you to buy out the other from both companies, or alternatively where you would each have an opportunity to bid for the different sectors of the business.
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> We have therefore prepared an agreement based on equalising your investment in the combined venture and then off-setting those respective values in the purchase in a blind bid arrangement…. The combined interest in the businesses is to be based on a factor of $380,000.

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[8] At [21].
[9] At [22]-[23].
[10] Email from YBC to ZAA (4 July 2011).
[11] Email from YBC to ZAA (8 July 2011).

Concerning "the steps to completion, with settlement on 31 August 2011" he advised:

> You are both, as ... discussed on various occasions, entitled to independent advice at any stage … In the event of any dispute on matters that materially affect either of your positions we will require you each to take such advice.

[14] On 26 August the parties met at Mr YBC's office and signed the Share Sale Agreements. Pending the completion of final accounts, they effected an interim settlement as at 31 August.

[15] On 22 November the accountant provided settlement calculations as at 31 August 2011. Greater drawings from the companies, less profit and more stock held by one of the companies resulted in a lower settlement figure.

[16] Mr ZAA disputed the settlement figures and "sought independent legal and accounting advice".[12] Mr YBC ceased acting for the parties in December 2011. The dispute was settled at a meeting on 26 June 2012, attended by Mr ZAA, Mr UEF and their respective advisers. Mr YBC attended to answer any questions.[13]

**Complaint**

[17] Mr ZAA lodged a complaint with the New Zealand Law Society Complaints Service (the Complaints Service) on 28 February 2013.

[18] The substance of Mr ZAA's complaint was that:

(a) Mr YBC did not follow Mr ZAA's instructions, and that he provided services that were not in accordance with those instructions.

He contends that the goodwill figure of $380,000 for both companies was an expression in "dollar terms" and not an "indicative" value. The intention was that the party who purchased VDE, which did not have a goodwill value recorded in its accounts, would receive a fair share of the $380,000 goodwill figure.[14] He claims that neither he nor Mr UEF would have sold their respective interests for the goodwill figure of $119,216 which was included in the formula devised by Mr YBC and the accountant.

[12] Letter from YBC to Lawyers Complaints Service (1 May 2013) at [2.6].
[13] At [1.12].
[14] Letter from ZAA to Lawyers Complaints Service (9 May 2013) at [1.7]-[1.8].

(b) By acting for him and Mr UEF that Mr YBC was conflicted. Mr YBC was also conflicted because he was related to the accountant who provided financial advice to Mr ZAA and Mr UEF on this transaction.

(c) Mr YBC's fees were not fair and reasonable because the agreement Mr YBC prepared was not in accordance with Mr ZAA's instructions.

(d) Mr YBC did not respond in a timely manner to Mr ZAA's complaint made to Mr YBC's firm.

**Standards Committee decision**

[19] The Standards Committee delivered its decision on 17 July 2013. The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[20] In reaching that decision the Committee determined that:

(a) Mr YBC's letter of engagement dated 12 July 2011 clearly described the documents that Mr YBC was required to prepare.

The figure of $380,000 was not, as Mr ZAA contends, a reference to the money that one of the parties might expect to receive from the transaction. That figure was "incorporated into the methodology in the Deed of Agreement where the under bidder of the [parties' respective interests] would be required to sell the shareholding to the other".

(b) Taking into account "the extensive negotiations … prior to completion of the Deed of Agreement in July 2011 … Mr ZAA would have been well aware of the issues and the opportunity to be independently advised where he was uncertain or unclear regarding his rights and obligations arising from the Agreement that [Mr YBC] prepared."

Mr YBC had been alive to a potential conflict of interest throughout and "where recognised [had] required the parties to be independently advised."

When Mr YBC had suggested his proposal to the parties they had been provided with "the option, opportunity and if necessary requirement … to be independently advised."

Mr ZAA "would have been well aware of the issues and the opportunity to be independently advised where he was uncertain or unclear regarding his rights and obligations under the Agreement".

The Agreement had been prepared by Mr YBC in accordance with the letter of engagement of 12 July 2011. Mr ZAA could have taken independent legal and accounting advice before he signed the Agreement, but that he elected not to do so until the settlement accounts had been prepared following interim settlement as at 31 August 2011.

(c) The fact that the accountant was Mr YBC's nephew "had no bearing in the matter. [Both] had acted for the company for some time and Mr ZAA would have been aware of the relationship".

The "tax issue was properly brought to the attention of the parties and the documentation was structured in a way that did not bring a potential tax liability into play".

(d) Mr ZAA's complaint about costs concerned the costs he incurred in obtaining independent legal and accounting advice following completion of the settlement accounts. Because he had the opportunity throughout to take independent advice but elected not to, there should be no expectation by him to recover those costs.

**Application for review**

[21] Mr ZAA filed an application for review on 9 August 2013.[15] He seeks an apology from Mr YBC, and reimbursement of the costs he incurred in obtaining independent advice following completion of the transaction and his objection to the settlement accounts.

[22] He submits that:

(a) Whilst he considers that Mr YBC was conflicted by acting for him and Mr UEF in June 2011, at the outset he did not consider that he and Mr UEF had opposing interests because they were "working towards a parting of the ways". He and Mr UEF gave permission to Mr YBC to act for them both. He had "faith and trust" in Mr YBC.

[15] ZAA Application for Review (9 August 2013).

(b) He and Mr UEF instructed Mr YBC "to work a fair contract based on $380,000 goodwill". Mr YBC had misunderstood these instructions which, he says, is illustrated in Mr YBC's email of 4 July 2011. He says that Mr YBC's synopsis of the formula in that email is a "pre sale" explanation. Mr YBC's "statement post sale seems to change … to cover up what has happened … [to] justify the $119,216 goodwill."

"There was no tax issue to the sale and purchase" of the shares. Mr YBC and the accountant explained that "the $380,000 goodwill would be sorted out in the wash up of accounts" following settlement, which never happened.

[23] To the extent that Mr ZAA raised new issues not addressed in his submissions to the Complaints Service, he stated that Mr YBC did not provide him with "all files and emails" he had requested after he had received the accountant's settlement accounts.[16]

**Mr YBC's response**

[24] In his response Mr YBC largely goes over much of his submissions to the Complaints Service. [17] He submits that:

(a) The accountant had early on in the negotiations identified a tax issue concerning the value of goodwill.[18] He says that tax advice from the accountant and his tax partner was that if the businesses were sold then there was a potential liability for tax on $260,784.[19]

To overcome this, the parties agreed that the combined goodwill value of $380,000 in respect of both businesses would be applied in the formula as a factor with WCD's goodwill of $119,216.[20]

In applying the formula to determine the acquisition prices, Mr ZAA was to receive $72,435 for the sale of his family's shares in WCD; Mr UEF was to receive $46,780 for the sale of his family's shares in VDE.[21] He referred to the accountant's settlement figures as at 31 August 2011 which showed that Mr ZAA would receive a reduced figure of $10,009.[22]

[16] Email from ZAA to YBC (12 June 2013).
[17] Letter from YBC to LCRO (13 September 2013).
[18] At [42].
[19] At [43].
[20] At [44]-[45].
[21] At [29].
[22] Letter from accountant to WCD and VDE (22 November 2011).

(b) Since February 2011, when he declined to act for the parties, nothing had progressed or changed. However, he does acknowledge that the parties' relationship had "regressed to [the] point where, in the absence of a resolution the companies were deadlocked".[23]

He did not consider that there was a more than negligible risk that he may be unable to discharge the obligations owed to Mr ZAA and Mr UEF.[24]

The parties had "a common purpose to resolve the impasse". He says that there was nothing which gave him cause "to tell one of them to get independent advice". This, he says, would have been dealt with at the meeting on 22 June 2011.[25]

(c) The fees Mr ZAA incurred in obtaining independent legal and accounting advice would have been incurred had Mr ZAA taken independent advice at the outset.

**The role of the LCRO on review**

[25] Initially set down for an applicant-only hearing, Mr YBC indicated that he and counsel assisting him would attend. The review hearing took place by teleconference on 11 May 2017. [26]

[26] I record that, as well as hearing from the parties in person, I have carefully read the complaint and response, the Committee's decision and the submissions filed in support of the application for review. There are no additional issues or questions which in my mind necessitate any further submissions from either party.

[27] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his or her own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his or her own judgement for that of the Standards Committee, without good reason.

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[23] Letter from YBC to Lawyers Complaints Service (1 May 2013) at [1.5]; Letter from YBC to LCRO (13 September 2013) at [1.5]; Letter from YBC to LCRO (12 May 2017) at [4].
[24] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 6.1.
[25] Letter from YBC to the LCRO (12 May 2017).
[26] By teleconference – Mr ZAA; Mr YBC and his lawyer, Mr [SIH]. Mr Hesketh, Legal Complaints Review Office Delegate was also in attendance.

**Nature and scope of review**

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[27]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[29] More recently, the High Court has described a review by this Office in the following way:[28]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[30] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to (a) consider all of the available material afresh, including the Committee's decision, and (b) provide an independent opinion based on those materials.

**Analysis**

*Not following instructions*

[31] Although Mr ZAA claims that Mr YBC did not follow, and had misunderstood his instructions, what Mr ZAA is really saying is that Mr YBC did not carefully take him through and explain Mr YBC's proposal, particularly the goodwill formula which was applied to calculate the purchase prices for the shares in each company.

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[27] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[28] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[32] Mr ZAA states that he expected that he would share in the agreed combined goodwill value of $380,000 for both companies, but that never happened. He claims that Mr YBC did not, as requested by him, explain how the goodwill formula, and the calculation of the share acquisition prices would work. He says that the response from Mr YBC and the accountant to this question at the meeting on 22 June 2011 was that "this would be sorted out in the wash up".[29] He refers to Mr YBC's emails of 4 July 2011, and 8 July 2011, neither of which he says answered his question.

[33] He says that upon receipt of Mr YBC's letter of engagement of 12 July 2011 he was "shocked" to see the statement that "the combined interest in the businesses is to be based on a factor of $380,000". He states that this was contrary to his understanding.

[34] At the hearing Mr YBC stated that he accepts that it was his responsibility to inform Mr ZAA and Mr UEF how the formula would work. He is "confident" that this was "talked over" and "fully discussed" before it was included in the Deed of Agreement. He claims that "the formula had been explained to Mr ZAA and Mr UEF by [Mr YBC's] email on 4 July 2011".[30] He says that he "believe(s) the Agreements reflect the negotiations between the parties".[31]

[35] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions.

[36] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[32]

[37] Where the lawyer is unsure about the client's instructions then it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action. [33]

[38] Before a finding can be made that a lawyer's conduct warrants the imposition of a disciplinary sanction, the evidence to support that finding must be sufficiently strong to meet the requisite standard of proof. In disciplinary proceedings such as this

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[29] Letter from ZAA to Lawyers Complaints Service (9 May 2013), at [1.7]–[1.8].
[30] Letter from YBC to LCRO (13 September 2013) at [24].
[31] Letter from YBC to Lawyers Complaints Service (1 May 2013) at [1.9].
[32] Rules 7, 7.1.
[33] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd edition, LexisNexis, Wellington, 2016) at 291.

the standard of proof is the balance of probabilities, which is the civil standard, and is to be applied flexibly according to the nature of the case.[34]

[39] The evidence Mr ZAA has advanced to support his allegation that Mr YBC failed to carefully take him through and explain Mr YBC's suggestion is not sufficiently conclusive for me to make a finding either way. I cannot therefore, on the evidence before me, reach the conclusion with the degree of probability necessary, that Mr YBC failed to do so.

*Conflict of interest*

[40] Mr ZAA complains that Mr YBC, by acting for both parties, was conflicted. He claims that, as a consequence, his position was not sufficiently protected.

[41] The context of Mr ZAA's and Mr UEF's request to Mr YBC that he act for them was that for more than a year they had unsuccessfully attempted to separate their respective business interests. By having acted for the parties and their respective interests over a long period, Mr YBC had detailed knowledge of them.

[42] The obligations and duties required of lawyers by the Lawyers: Conduct and Client Care Rules 2008 are to ensure that their clients' interests are not compromised.[35] By acting for more than one client a lawyer runs the risk of conflicting duties to the clients. On the one hand a lawyer has the duty to keep a client's information confidential,[36] and on the other the duty to disclose to the client all information that is relevant to the matter in respect of which the lawyer is engaged.[37]

[43] This would have been on Mr YBC's mind in January 2011 when the parties requested him to act for them. In declining to act for them because their "interests as vendor and purchaser may give rise to a conflict"[38] Mr YBC identified four issues that could arise where "[they] may have differing views and for us to act for you both could compromise each or both of your positions". These issues included "[t]he price of earnings factor in determining goodwill". It was the goodwill issue which subsequently took centre stage in the Deed of Agreement Mr YBC prepared in July 2011 and resulted in Mr ZAA disputing the settlement accounts.

[44] Despite their efforts, Mr ZAA and Mr UEF had been unable to agree how they could end their longstanding business relationship, and divide their business assets

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[34] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.
[35] Rule 6.
[36] Rules 8, 8.7.
[37] Rule 7.
[38] Letter from YBC to UEF and ZAA (3 February 2011).

between them. Their objectives were in opposition to each other. Mr ZAA had expressed a desire to purchase the business assets in both companies. Mr UEF wanted to separate the two businesses.

[45] It was this inability to resolve their differences that brought them back to Mr YBC in June 2011 to see what he could do to assist them. These were circumstances where there was considerable potential for the interests of Mr ZAA and Mr UEF to further diverge from their "deadlocked" position. By accepting their instructions in June 2011, when only four months earlier he had declined to act for them on a proposal by Mr ZAA to purchase the businesses in both companies, Mr YBC risked putting himself in the position of conflicting duties under the conduct rules.

[46] Mr YBC had clearly been sensitive to the issue for potential conflict when, in February 2011, he declined to act for both parties. Importantly, the question is what had changed since then that persuaded him that he could act for both Mr ZAA and Mr UEF. It clearly was not the case that there had been encouraging signs of progress; quite the opposite.

[47] The legislative context for the relevant professional rules is contained in the Act, which has the objectives of maintaining public confidence in the provision of legal services, protecting consumers of legal services, and to recognise the status of the legal profession.[39]

[48] Consistent with these purposes, section 4(c) requires that every lawyer who provides regulated services must comply with fundamental obligations, which include the obligation to protect, subject to his or her overriding duties as an officer of the Court, the interests of his or her clients.

[49] This obligation is carried forward into rule 6 of the Lawyers: Conduct and Client Care Rules 2008 (the rules) which requires that:

> In acting for a client, a lawyer must within the bounds of the law and [the RCCC], protect and promote the interests of the client to the exclusion of the interest of third parties.

[50] The rules which prescribe the actions or steps that a lawyer, who is requested to act or is proposing to act for more than one client on a matter, must take are based on the principle that has been described as "an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients conflict".[40]

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[39] Lawyers and Conveyancers Act 2006, s 3(1).
[40] Above n 33, at 209.

[51] Rule 6.1 prohibits a lawyer from acting for more than one client in the circumstances described in the rule, namely, "where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients".

[52] The threshold of "a more than negligible risk is very low. In a decision of this Office a negligible risk has been described as circumstances where there is "no meaningful risk that the obligations to the parties would not be able to be fulfilled", and a more than negligible risk is "a real risk of an actual conflict of interest".[41]

[53] To assist in determining whether or not a conflict of duty exists or is likely to arise in a particular situation a distinction is frequently drawn between contentious and non-contentious matters. In the latter category, where the parties "are negotiating and significant terms remain to be resolved, it would be more or less impossible for a lawyer to act for both parties … an advantage acquired by one client will often result in a detriment to the other."[42]

[54] It is important to note that the responsibility for making that determination rests with the lawyer concerned, and not with the client.[43]

[55] In June 2011, when requested by Mr ZAA to act for him and Mr UEF, Mr YBC was aware of the potential risks of having conflicting duties if he acted for both of them. He acknowledges that by then the parties' relationship had "regressed to a point where in the absence of a resolution, the companies were deadlocked".[44] He says that "unless a solution was found, the deterioration … could effectively result in the liquidation of the two companies. The positive was that they were both prepared to sit down to try to find a solution."[45]

[56] In this sense, Mr YBC says he did not consider that there was a more than negligible risk that he might be unable to discharge the obligations owed to both Mr ZAA and Mr UEF. However, following the 22 June meeting he says that he sent them away for independent advice. He commenced work on the proposed transaction from that date.

[57] By 12 July, when Mr YBC provided Mr ZAA and Mr UEF with his letter of engagement, a large part of the legal work in this transaction had already been carried

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[41] *Sandy v Kahn* LCRO 181/2009 (December 2009) at [27], [36]. In this context, the word "negligible", which is not defined in either the Act or the conduct rules means, "unworthy of notice or regard; so small or insignificant as to be ingnorable": *Shorter Oxford English Dictionary*, (5th ed, 2003, vol 2).
[42] Above n 33, at 212.
[43] *Taylor v Schofield Peterson* [1999] 3 NZLR 434, 440 (HC).
[44] Letter from YBC to LCRO (13 September 2013) at [15].
[45] Letter from YBC to LCRO (12 May 2017) at [4].

out. Mr YBC and the accountant had created the goodwill formula for determining the respective purchase prices. Mr YBC had, on 4 July, already provided the parties with a synopsis of the proposed goodwill formula, and by 8 July he had drafted the Deed of Agreement which the parties signed that day. Mr TFG, a lawyer employed by Mr YBC's firm, who assisted Mr YBC on the matter, witnessed the parties' signatures.

[58] In my view, the presence of the factors discussed below support the conclusion that, when Mr YBC commenced acting for both Mr ZAA and Mr UEF from 22 June, there was a more than negligible risk of him not being able to discharge his obligations owed to one or both of them. Mr YBC has not provided any evidence to support a contrary view.

*The parties' interests were not the same*

[59] Mr ZAA and Mr UEF had differing views on how to separate their respective interests. Whilst they had explored various ways of separating their respective interests, they had been unsuccessful in doing so. Their relationship had deteriorated. Mr YBC states that they faced financial difficulties unless a solution was found.

*Negotiations deadlocked*

[60] Mr YBC acknowledges that the parties' relationship had deteriorated and that they were "deadlocked" in their efforts to separate their business interests. If not already a contentious matter there was in my view a more than negligible risk that it could become contentious and that Mr YBC may be unable to discharge his professional obligations owed to either party. Given the inability of the parties prior to June 2011 to reach agreement on how to separate their business interests, it was therefore unsurprising that further evidence of conflict between them led to a dispute when Mr ZAA claimed that he had been unfairly treated in the settlement accounts.

[61] It is my view that before the parties signed the Deed of Agreement and became committed to the proposal they needed independent advice as to whether the proposal met their objective of a fair separation of their respective businesses interests. In such circumstances the risks that a lawyer may not be able to discharge his or her professional obligations to one or more of the clients increases significantly when the clients are unable to agree, particularly where the lawyer attempts to bring about a resolution of their differences.[46]

[46] *Sandy v Kahn* 181/2009 (December 2009) at [34]; *Austell v Somerset* LCRO 76/2009 (September 2009).

*Terms of an agreement remained to be agreed*

[62] In circumstances where there has not been agreement on all the material issues at the point at which the lawyer's services are engaged, the High Court has stated that a lawyer should not act for both parties, as there is a distinct conflict of position.[47] Previous decisions of this Office have also warned of the risks of a contravention of rule 6.1 where the terms of an agreement have not been settled.[48]

[63] Mr YBC put his proposal to Mr ZAA and Mr UEF for their consideration at the 22 June meeting. The terms of an agreement remained to be worked out. They needed time to reflect on the proposal. He started working for them from that date.

[64] Mr YBC says that he then sent them away to obtain independent legal advice. Twelve days later, on 4 July, he provided the parties with a synopsis of the goodwill formula he and the accountant had devised. Within another four days, on 8 July, he had prepared the Draft Agreement. Mr ZAA says that he did not obtain independent legal advice during that period. Mr YBC did not provide a letter of engagement to Mr ZAA and Mr UEF until 12 July, by which time the Deed of Agreement had already been signed and their respective bids exchanged.

*Risks of breach of professional duty*

[65] Mr YBC had detailed knowledge of the parties and their respective business interests. Representing both parties in such circumstances in an effort to achieve a resolution carried professional risks for Mr YBC where independent advice to each of them was crucial.

[66] Despite wanting to assist the parties to resolve their differences, it is my view that acting for them both in this context left Mr YBC open to a more than negligible risk that he would not be able to discharge his professional obligations to one or both of them. He risked a contravention of the duty to disclose,[49] and the duty of confidence.[50] The tension between those duties was later illustrated when Mr ZAA objected to the settlement accounts and requested his file from Mr YBC.[51]

*Scope of the retainer was not limited*

[67] It is clear from the description of the legal work in Mr YBC's letter of engagement of 12 July 2011, and from the legal work that he carried out, that the

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[47] *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (HC).
[48] Above n 41.
[49] Rule 7.
[50] Rules 8, 8.7.
[51] Letter from YBC to LCRO (13 September 2013)at [35]-[40].

scope of Mr YBC's retainer was not limited. Although Mr YBC's letter of engagement records that both Mr ZAA and Mr UEF provided the instructions, the LCRO has expressed "some reservations that it is sufficient for a lawyer to assert that because they were acting on instructions that they were therefore acting pursuant to a limited retainer, thereby enabling the lawyer to act for both parties".[52]

[68] The remaining question is to what degree, if any, Mr YBC's invitation to Mr ZAA and Mr UEF to obtain independent advice diminished his responsibility to fully advise them. While it is clear that Mr ZAA obtained independent legal advice in the period between 3 February and mid-June 2011, he states that he did not do so again until he later disputed the accountant's settlement accounts which became available in the latter half of November 2011.[53]

[69] Mr YBC says that at the conclusion of the 22 June meeting he "sent" the parties away to obtain independent legal advice. On 8 July when he forwarded them the draft Deed of Agreement he had prepared, he informed them that they "may each want to take independent advice before sign-off". His letter of engagement informed them that they were "entitled to independent advice at any stage". He says that this "was repeated at the commencement of each meeting held in our office".[54]

[70] Although Mr YBC invited Mr ZAA and Mr UEF to obtain independent advice he did not insist that they do so. An invitation to obtain independent advice is to be distinguished from a client being affirmatively told to seek independent advice.[55] By not insisting that they obtain independent advice, Mr YBC did not overcome the risk of being conflicted by acting for both parties. It follows that the professional duties owed by Mr YBC to the parties were not therefore diminished or limited. He was obliged to assist them both to implement the transaction.

[71] For these reasons, by acting for both Mr ZAA and Mr UEF and their respective family interests on the share acquisitions of the two companies, Mr YBC contravened rule 6 by failing to protect and promote either party's interests to the exclusion of the other party's interests, and rule 6.1.

*Prior Informed consent*

[72] Mr YBC says that he had the informed consent of both Mr ZAA and Mr UEF to act for them from 22 June 2011.

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[52] *GD, WL v RA* LCRO 290/2013 (August 2014) at [30].
[53] Email from ZAA to LCRO (6 June 2017).
[54] Letter from YBC to Lawyers Complaints Service (1 May 2013).
[55] Above n 47.

[73] In circumstances where a lawyer determines that the prohibition in rule 6.1 does not apply, then rule 6.1.1 must be complied with before the lawyer is permitted to act for the clients concerned. The important pre-requisite to the permission in that rule that a lawyer may act for more than one party in respect of the same transaction or matter is that "the prior informed consent of all parties concerned is obtained".

[74] Rule 1.2 defines "informed consent" 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.

[75] The process of obtaining informed consent under rule 1.2 requires that positive steps be taken by the lawyer who must explain to the clients the material risks to each of them if the lawyer acts for them, and the alternatives available to them such as each client instructing an independent lawyer. Having done that, a lawyer must believe, on reasonable grounds, that the clients understand these issues.

[76] Informed consent from one client must be given without influence, and independent from the other clients.[56] For evidentiary purposes it is sensible that the lawyer records the client's informed consent in writing.[57]

[77] Although Mr YBC says that he had the informed consent of both Mr ZAA and Mr UEF to act for them from 22 June 2011, that is a reference to their consent provided in January 2011 when Mr YBC declined to act for them.[58] He also says that he "ensured that they were informed of the reasons" of "the right for each … to obtain independent advice at any stage".[59]

[78] No such consent was provided or recorded in the emails Mr YBC exchanged with Mr ZAA on 4 July, or in Mr YBC's email to the parties on 8 July by which date Mr YBC had prepared the Deed of Agreement signed by the parties that day. Although Mr YBC's letter of engagement of 12 July did not record that he had obtained the parties' informed consent, it reiterated that the parties' were "entitled to independent legal advice at any stage".

[79] However, because I have found that Mr YBC was, under rule 6.1, prevented from acting for both parties, it is not necessary to make a finding on the informed consent issue.

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[56] Above n 41.
[57] At [41].
[58] Emails from ZAA to YBC (26 January 2011); YBC to ZAA (26 January 2011); ZAA to YBC (27 January 2011); YBC to ZAA (27 January 2011).
[59] Letter from YBC to LCRO (12 May 2017) at [6].

*Conflict of interest – family connection*

[80] At the meeting on 26 June 2013, when the parties' differences were resolved, Mr ZAA alleged that the accountant's figures "were influenced by a bias towards [Mr UEF] who is the accountant's brother-in-law".[60]

[81] Mr ZAA claims that Mr YBC's family connection with the accountant, who provided Mr ZAA and Mr UEF with financial advice on the transaction, resulted in Mr YBC being conflicted. Whilst Mr ZAA says that "he saw no reason to double check [Mr YBC's] work, as we have had complete faith and trust in him",[61] he contends that this family connection led to Mr UEF's interests being preferred over his interests.

[82] Apart from this family connection, no evidence has been produced that Mr YBC had any other personal or financial interest in the transaction. The acquisition of the shares in the two companies by Mr ZAA and Mr UEF were not transactions or dealings between a lawyer and his or her client where there was a risk that the lawyer may take advantage of the client's trust and confidence reposed in the lawyer, and exert influence over the client.[62]

[83] Moreover, no evidence has been produced which suggests that there was any arrangement between Mr YBC and the accountant which would or could have led to Mr UEF's interests being preferred over Mr ZAA's interests. In my view, this issue does not warrant further inquiry.

*Delay in responding to the complaint*

[84] Although this issue was noted by the Committee as a complaint, no discussion was included in the Committee's decision.

[85] The conduct rules require that lawyers must ensure their practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice.[63]

[86] In October 2012 Mr ZAA requested that Mr YBC's firm reimburse him for the cost incurred by him in obtaining independent advice following his objection to the settlement accounts.[64] Mr YBC says that he informed Mr ZAA that he would refer the

[60] Letter from YBC to Lawyers Complaints Service (1 May 2013) at [1.12].
[61] Letter from ZAA to LCRO (17 July 2013) at 1.
[62] Rule 5.1.
[63] Rule 3.8.
[64] Letter/email from YBC to ZAA (20 February 2013) at 1.

matter to his partners. He says that his firm's complaints process, whereby complaints were handled by partners other than those involved in the work, was delayed".[65]

[87] On 20 February 2013 Mr YBC provided a written response. Mr ZAA claims that Mr YBC's response time "for such an important matter … is very poor".[66]

[88] Whilst the time it took for Mr YBC to respond to Mr ZAA's complaint was not prompt, the ability to do so was not entirely in his hands. In such circumstances I do not consider that this issue warrants further consideration.

*Mr YBC did not provide all files and emails*

[89] This issue was not raised by Mr ZAA in his complaint and therefore was not considered by the Committee. It follows that this Office does not have jurisdiction to consider this issue on review.

**Decision**

[90] Pursuant to s 211(1)(a) of the Act the decision of the Standards Committee, in respect of Mr YBC not being conflicted in acting for both Mr ZAA and Mr UEF, is reversed and substituted with a finding of a contravention of rules 6 and 6.1 which constitutes unsatisfactory conduct pursuant to s 12(c) of the Act.

**Orders**

*Fees – reimbursement of costs of independent legal advice*

[91] Mr ZAA seeks reimbursement of legal fees of $3,363.40 and accounting fees of $1,207.50 incurred by him in respect of the position taken by him that the Agreement did not reflect the intention of the parties.

[92] Mr YBC contends that Mr ZAA would have incurred these costs had he taken independent advice from the outset.

[93] Section 156(1)(d) provides:[67]

> Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner …[it may] order the

[65] Letter from YBC to Lawyers Complaints Service (1 May 2013) at [4.1].
[66] Letter from ZAA to Lawyers Complaints Service (9 May 2013) at [4].
[67] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

> practitioner … to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000].

[94] The section provides that the person who seeks compensation must have "suffered loss by reason of any act or omission of [the lawyer]".

[95] Whilst these costs were incurred by Mr ZAA in obtaining independent advice after he objected to the settlement accounts, it does not necessarily follow that Mr ZAA would not have entered into the transaction had he received independent advice from the outset. In other words, there is not a clear "causative link" between Mr YBC's conduct and the loss claimed by Mr ZAA. For these reasons, I do not consider that Mr ZAA is entitled to be compensated for the costs he claims in obtaining independent legal and accounting advice in respect of Mr YBC having acted for Mr ZAA and Mr UEF on this transaction.

*Other penalty*

[96] In giving consideration as to whether it is appropriate to order a penalty, I refer to guidance provided by the Disciplinary Tribunal which has stated that the "predominant purposes [of orders] are to advance the public interest (which include 'protection of the public'), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties and to provide scope for rehabilitation in appropriate cases".[68]

[97] In my view in these particular circumstances a finding of a contravention of the rules which constitutes unsatisfactory conduct is sufficient in itself without additional penalty.

[98] My reasons for reaching this conclusion are that Mr YBC, whilst mindful of the risks of acting for Mr ZAA and Mr UEF, proceeded under what appears to have been a misunderstanding that it was open to him to act for both parties so long as he advised them of their entitlement to take independent legal advice, and that he could rely on their consent for him to act, which he had obtained in January 2011, before he declined to do so. I also take into account that although Mr ZAA had been advised by Mr YBC of the right to take independent legal advice that Mr ZAA elected not to do so until he later disputed the settlement accounts.

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[68] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC).

*Costs*

[99] Where an adverse finding is made costs will be awarded in accordance with the LCRO Costs Orders Guidelines. It follows that Mr YBC is ordered to pay costs in the sum of $1,600.00 to the New Zealand Law Society by 23 July 2017, pursuant to s 210(1) of the Act.

**DATED** this 27th day of June 2017

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**B A Galloway**
**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 ZAA as the Applicant
Mr YBC as the Respondent
Mr SIH as the Representative for the Respondent
Mr RJK as a related person
Canterbury Westland Standards Committee 1
New Zealand Law Society