LCRO 244/2010

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**FU** of [North Island] Applicant
AND	**UN** of [North Island] Respondent

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

Background

[1] FU, and FV and his wife (FW), were equal shareholders in two companies, ABZ Limited (ABZ) and ACA Limited (ACA).

[2] ABZ manufactured and sold a boat known as the ABZ 33, whilst ACA was established for the purpose of developing and manufacturing a power catamaran known as the ACC.

[3] As a result of FV's wish to terminate his involvement in the companies and relocate to America, FU, FV and FW entered into an agreement whereby the assets of the companies were shared between them. The shares in the companies were to be transferred to FU and FV was to resign as a director of the companies.

[4] Although the agreement was not signed until 21 May 2009, the terms of the agreement were effective as from 1 September 2008. From that date all profits

generated by the companies were to belong to FU. FV resigned as a director of both companies on 18 October 2009.

[5] It is not necessary to recite all of the terms of the agreement, but the relevant facts are that the mould and the manufacturing licence for the ACC remained the property of ACA, the shares in which were then fully owned by FU, and he became the sole director.

[6] A partially built ACC was to be shipped to FV and FW. It was a term of the agreement that this partially built vessel would be disassembled, and modified moulds and tooling made by FV so as to enable him to produce a vessel which was sufficiently different from the ACC so as not to be confused with, held out as, or considered to be, a copy of that vessel. FV was to negotiate directly with the licensor to resolve any issues in that regard.

[7] The agreement was dated 23 May 2009, which UN advises was the day that FV signed it. On that date, an article appeared in the paper which contained an announcement that the ACC was to be manufactured by ACB, a substantial Auckland company. UN was quoted as explaining that "[ACB] have the facilities, boat building skills and marketing resources to undertake this project successfully and take it to a new level."

[8] Given the timing of this article, it was clear that arrangements had been made with ACB during the period when the agreement was being negotiated. FV formed the view that the agreement with ACB was potentially lucrative and should have been communicated to him prior to the agreement being concluded.

[9] FU advises that there was no formal agreement with ACB and that all that had been agreed was that ACB would store the mould for the vessel at no cost to ACA.

[10] UN had previously acted for a company with which ACA and ABZ were in dispute. FU advises that these disputes have not been fully resolved.

[11] On 11 November 2009, UN received instructions from FV. His instructions were to take steps to have the agreement set aside on the basis that FU had breached a fiduciary obligation to advise FV of the agreement with ACB.

[12] On 11 January 2010, UN wrote to FU's solicitor requiring FU to disclose the terms of the arrangement with ACB and reserved all of the legal remedies available to FV. He referred to drafts of the agreement in which FV was to receive exclusive marketing rights for the ACC in North America.

[13] FU's solicitor responded on 3 February recording that the agreement did not include any exclusive marketing rights for the ACC and that in fact, FV was in breach of the terms of the agreement, in that the vessel which FV proposed to manufacture and sell in America had not been altered sufficiently from the original.

[14] On 19 March 2010, UN wrote to ACB. The full text of that letter is as follows:-

> We act for [FV] who previously carried out business with [FU] manufacturing the [ACC]. The company operated under the name "[ACA] Limited" and when [FV] ceased to be a director and shareholder of the company at the end of 2008, part of the agreement was that [FV] would have exclusive future rights to market, manufacture and sell the [ACC] in North America.
>
> We are aware that [ACB] Limited and [FU] have made some arrangements in respect of the [ACC] and without knowing the intricacies of that arrangement, we simply put you on notice that any attempts to market, manufacture or sell the [ACC] in the North American markets would be in breach of the agreement entered into between our client and [FU].

[15] On 9 April 2010, FU's lawyer wrote to UN, again pointing out that the agreement did not provide FV with any exclusive rights to manufacture or market the ACC in North America as claimed by UN. FU's lawyer pointed out that UN's letter to ACB was incorrect and misrepresented the terms of the agreement. He sought a retraction of the letter by UN.

[16] At all times thereafter UN has refused to retract the statements in the letter, and in correspondence with the Complaints Service and this Office, has deflected requests by FU that he do so, by continuing to maintain his client's assertions that the agreement was voidable at his client's option.

[17] FU advises that beyond the arrangement with ACB for them to store the mould free of charge, the only agreement is a tacit agreement that if any boats are produced, ACB will be contracted to manufacture them. To date, no boats have been produced.

[18] In addition, to date, FV has not taken any formal steps to issue proceedings to have the agreement set aside.

The complaint and the Standards Committee decision

[19] FU complained to the Complaints Service on 11 June 2010. His complaint was two-fold:-

(i) That UN had a conflict of interest in acting for FV, in that he had acted for the company with which ACA and ABZ were in dispute at a time when both FU and FV were shareholders and directors of the companies; and

(ii) that the letter of 19 March 2010 to ACB contained statements which were not true and that this letter was an attempt to persuade ACB from marketing the ACC in North America in competition with the boat that FV was producing from the ACC mould sent to him pursuant to the terms of the agreement.

[20] The Standards Committee identified the complaints by FU as being

(i) that UN had a conflict of interest and therefore was in breach of Rule 6 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008; and

(ii) UN had engaged in misleading and deceptive conduct in breach of Rule 11.1 of the Conduct and Client Care Rules.

[21] Having considered the material provided, the Committee came to the decision that it did not consider UN had overstepped the mark in representing FV's interests in outlining his claim about the timing of FU's discussions with ACB. It considered that UN was carrying out his instructions to represent his client's interests and noted that six months had elapsed after the agreement was signed before he made contact with ACB.

[22] The Committee did not consider itself to be the appropriate arbiter of issues arising from the letter from UN to ACB unless those issues indicated unsatisfactory conduct on UN's part. The Committee did not find that to be the case.

[23] In addition, the Committee did not consider that UN was unable to act for FV by virtue of his previous retainer by the company with which ABZ and ACA were in dispute.

[24] Finally, the Committee noted that the dispute relating to the North American markets accessed by FU fell to be resolved under the dispute resolution clauses of the agreement. In this regard, the Committee seems to have considered that ACA and ABZ were marketing the ACC in the North American market. There is no evidence to support this other than the article, and the evidence from FU is that no boats have been produced.

[25] The Committee therefore determined to take no further action with regard to the complaint pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006.

[26] FU has applied for a review of the Standards Committee decision. He considers the decision is inconsistent and unbalanced, failed to correctly address the issues and differentiate fact from fiction. He also notes that the Committee had not supplied any reasons for its decision other than to repeat the submissions made by UN and then used these submissions as the basis on which to come to its decision.

Review

[27] A hearing took place on 23 September 2011 attended by FU and a support person, and UN.

The conflict of interest

[28] FU did not formulate his complaint as being a conflict of interest. He complained that UN's representation of both FV and a company with which ACA and ABZ were in dispute, must surely be unethical. The Standards Committee identified this as a complaint that UN had a conflict of interest.

[29] This complaint can however be readily disposed of. Rule 6.1 of the Conduct and Client Care Rules provides that "a lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may not be able to discharge the obligations owed to one or more of the clients".

[30] In relation to the exit agreement, he was acting for FV against FU in an entirely different matter from the other matter referred to. There was no likelihood that he would be unable to discharge his obligations to his previous client by reason of him acting for FV. In any event, it was for either the previous client, or FV to raise this complaint.

[31] In the circumstances, this complaint cannot be sustained.

The letter to ACB

[32] FU's complaint centres on the letter dated 19 March 2010 which UN sent to ACB. In that letter UN states that part of the agreement between FU and FV "was that [FV] would have exclusive future rights to market, manufacture and sell the [ACC] in North America." He further states that "any attempts to market, manufacture or sell the [ACC] in the North American markets would be in breach of the agreement entered into between [FV] and [FU]".

[33] He does not record this as being anything other than fact, to the extent that the recipient of the letter would consider that UN had before him a copy of the agreement. This was not the case, and in fact, UN did not obtain a copy of the agreement until late June 2010 after FU had lodged his complaint.

[34] He was therefore initially relying on FV's advice as to the terms of the agreement and the fact that FV had approved the content of his letter before it was sent. However, by the time the letter was sent, UN had been advised by FU's solicitor that the agreement did not contain the provisions that FV was alleging.

[35] Even if he was not necessarily prepared to accept the veracity of the information from FU's solicitor, he did not express his letter in a way that indicated that he was relying on his client's advice as to the terms of the agreement. Instead, he states as a matter of fact that FV had exclusive rights to market, manufacture and sell the ACC in North America and that any attempt by ACB to market, manufacture or sell the vessel in those markets would be in breach of the agreement.

[36] Having received such a letter, it would not be unexpected for ACB to withdraw from any proposals with regard to the vessel in the North American market. It would not wish to be exposed to any claims against it and even if FU were able to provide evidence that supported his contention that there was no breach of the agreement by him, the company would be reluctant to proceed and risk becoming embroiled in a dispute between FU and his former business partner.

[37] FU advises that the letter caused initial distrust between him and ACB. It appears however that he was able to convince ACB that he was not in breach of the agreement and that FV did not have the rights that UN was claiming. This may have been as much because the company had no proposals other than to store the mould for FU, rather than an acceptance of his assurances.

[38] It is difficult to accept UN's submission that he did not send the letter with any intent to misrepresent the terms of the agreement. He says that the purpose of the letter was to put ACB on notice that the agreement it had entered into with FU was ill-conceived and that it should be reticent to spend further money until the validity of the agreement between FU and FV was determined.

[39] Intent is relevant to the question of penalty and I am prepared to accept UN's submissions. However, he was at best careless, if not grossly negligent, both in the wording of the letter and in relying on his client's advice as to the terms of the agreement.

[40] FU is sceptical and points to the continued refusal by UN to retract the letter as well as his ongoing assertions to the Standards Committee and to this Office that he was justified in sending the letter because the basis on which the agreement had been entered into was such that it could be set aside.

[41] In maintaining this position, UN not only fails to recognise that this outcome was not necessarily a foregone conclusion given FU's evidence, but even if the agreement were to be set aside, that does necessarily result in FV having sole distribution rights in North America. Even if FU were to agree, the licensor must also agree. The assertion of these rights is therefore far from certain even if the agreement were to be set aside.

[42] At the review hearing, UN accepted that the statements in the letter were not correct. He says in his defence, that the letter was sent in anticipation of proceedings being issued to have the agreement set aside. However, issuing proceedings would not validate the statements that UN made in his letter.

[43] UN's actions could be said to constitute breaches of Rules 11.1 and 12 of the Conduct and Client Care Rules. Rule 11.1 provides that "a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice." Rule 12 provides that "a lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect and courtesy." The requirement to conduct dealings with integrity is the relevant standard.

[44] Whether or not these Rules apply directly, it is certainly unprofessional conduct for UN to state something as fact without independently verifying the veracity of the statement. Without doing so, it was incumbent on him to preface the statements made in the letter to ACB that he was relying on his client's advice as to the terms of the agreement.

[45] It is difficult to discount altogether, a view that that the purpose of the letter was to dissuade ACB from proceeding with any arrangement with FU, and thereby achieve FV's objectives without the need to pursue litigation.

[46] Unprofessional conduct constitutes unsatisfactory conduct by reason of section 12(b) of the Lawyers and Conveyancers Act 2006, while a breach of the Rules constitutes unsatisfactory conduct pursuant to Section 12(c) of the Act.

Penalty

[47] The question arises as to what penalties are appropriate in these circumstances. The LCRO has all of the powers of the Standards Committee and this applies also to the Orders which may be made by way of penalty.

[48] In his complaint, FU sought the following outcomes in respect of UN's conduct with regard to the letter:-

> (i) that UN write to ACB retracting his letter stating he knew it was factually incorrect and apologising for any inconvenience or loss it may have caused;
>
> (ii) that UN be censured. FU refers to "severe" censure but there is no provision for this in the Act.

[49] In addition, at the review hearing, FU tabled an account from his lawyer and also ventured that UN's actions could have cost him a considerable sum of money in lost opportunity.

[50] He advised that retraction of the letter and an apology was something which he still sought. I indicated to the parties at the hearing that this was an order that I was likely to make, and in response to comments from UN as to the content of that letter, I indicated that I intended to be somewhat prescriptive as to what the letter should contain.

[51] This Office has subsequently received a copy of a letter dated 23 September 2011 which UN has sent to ACB. In that letter he retracts the statements made in his letter of 19 March 2010, and apologises for any embarrassment or confusion which that letter had caused. A copy of this letter was sent to FU.

[52] I was somewhat surprised that UN had taken this step. This Office has subsequently received a letter from FU. He correctly notes that I had indicated at the hearing that I intended to be prescriptive as to the content of the letter. He also notes that in the letter UN states that "we are now aware that the agreement did not afford such a right....". UN was aware at the time the letter was sent to ACB that what he was asserting was not correct. He had been advised by FU's Counsel, FX that the agreement did not contain exclusive rights, and the manner in which this had come about. There were no grounds to disbelieve FX, who was the author of the agreement and its amendments.

[53] FU also takes issue with UN referring to a "dispute" between him and FV. He says that there was no "dispute" and that the initial letter related to the agreement. FV was disputing the validity of the agreement, and to that extent UN's letter is correct.

[54] However, I am concerned at what could be viewed as an attempt by UN to pre-empt the form of the letter to be sent to ACB. I was quite specific at the hearing that I intended to be prescriptive as to the content of the letter. This is reinforced by the comments made by FU, a copy of whose letter is provided to UN with this decision. In the circumstances, I intend to require a further letter to be sent by UN to ACB, the form of which will be provided with this decision.

[55] It is unfortunate that FU has been required to go to the extent of lodging a complaint and applying for this review to achieve this result. The letter of retraction and apology is something that UN should have volunteered immediately when FU's lawyers sought the retraction in April 2010. If the letter had been retracted immediately, FU would not have incurred legal costs in respect of this matter.

[56] Section 156(1)(b) of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee (or the LCRO) may make an order censuring or reprimanding the person to whom the complaint relates. As noted by the Court in *B v The Auckland Standards Committee 1 of the New Zealand Law Society,* High Court, Auckland, CIV 2010-404-8451/38, "to censure a practitioner is to harshly criticise his or her conduct. It is the means by which the Committee can most strongly express its condemnation of what a practitioner has done, backed up, if it sees fit, with a fine and remedial orders." By contrast, a reprimand is an "official or sharp rebuke". In the circumstances, I consider that UN should be reprimanded, not only for the content of the letter in the first instance, but for failing to take the appropriate remedial steps at the first opportunity. In coming to the view that a reprimand rather than a censure is the appropriate level of criticism, I have taken note of UN's submission that the letter was written in anticipation that proceedings were about to be issued to set the agreement aside, and that ACB needed to be made aware of this to put it on notice that if it proceeded with an arrangement to enter the North American market it was exposed to potential risks.

[57] The bill produced by FU at the review hearing from his lawyer was for $4,950.00. The narration to this account is "for all attendances from November 2009 to date relating to dispute as to terms and conditions and effect of agreement regarding [ACA] and [ABZ]".

[58] The primary issue in dispute between FU and FV was the validity of the agreement, and FV considered that FU had breached a duty to advise him of the agreement with ACB prior to the agreement being concluded. The letter to ACB was a by-product of that dispute, and beyond the letter sent to UN on 9 April 2010 requiring retraction of the letter, I would expect that the attendances of FU's solicitors related to the broader issue. In the circumstances I consider that an order that UN contribute $500 towards these costs is sufficient to reimburse FU for the portion of the bill attributed to this issue. There is no evidence of any other loss suffered by FU as a result of UN's letter, and therefore no orders by way of further compensation are appropriate.

[59] Finally, given that the outcome of this review has resulted in an adverse finding against UN, there will be an order for costs in accordance with the Costs Orders Guidelines of this Office.

Decision

[60] The determination of the Standards Committee is reversed.

[61] Pursuant to section 152(2)(b) of the Lawyers and Conveyancers Act 2006 the conduct of the respondent in writing to ACB in terms of the letter dated 19 March 2010 and then subsequently failing to retract that letter constitutes unsatisfactory conduct.

Orders

1. Pursuant to sections 156(1)(c) and (h) of the Lawyers and Conveyancers Act 2006, the respondent is ordered to write to ACB in the form of the letter provided with this decision.

2. Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006, the respondent is reprimanded.

3. Pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006, the respondent is ordered to pay the sum of $500 to the applicant by way of compensation for the legal costs incurred by him as a result of the respondent's conduct, such payment to be made within 30 days of the date of this decision.

4. Pursuant to section 210 of the Lawyers and Conveyancers Act 2006 the respondent is ordered to pay the sum of $1,200 to the New Zealand Law Society, such payment to be made within 30 days of the date of this letter.

DATED this 6th day of October 2011

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Owen Vaughan
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:

FU as the Applicant
UN as the Respondent
Auckland Standards Committee 3
The New Zealand Law Society