LCRO 247/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**TL** Applicant
AND	**CS** Respondent

DECISION

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

Introduction

[1] Mr TL has applied for a review of a decision by the [Area] Standards Committee which made a finding of unsatisfactory conduct against him.

Background

[2] From early February 2014, Mr TL, who was employed by [Firm A], acted for Mr D and Mr H against Mr CS, a former client, on the recovery of a loan made by them to Mr CS.

[3] Between 2000 and 2008 Mr TL and other members of [Firm A] had acted for Mr CS and his company, CSL Limited, on a number of matters including a business matter (2000), a dispute concerning the fit out of a charter vessel (2003/4) and six proposed property transactions (2007/8).

[4] In 2008 Mr CS borrowed $60,000 from Mr D and Mr H to be applied as the deposit on the proposed purchase of apartments in [Town]. Neither Mr TL nor any

other member of [Firm A] acted for Mr CS on that matter. The transaction did not proceed and Mr CS lost the deposit.

[5] Mr D and Mr H instructed Mr TL to act for them to recover that money from Mr CS. The letter of demand for repayment of the loan was made by Mr TL's colleague who reminded Mr CS that the firm had acted for him on unrelated matters some years previously and asked him to advise if he had any objections to the firm acting against him.[1]

[6] Mr TL claims that three months later, in response to attempts to serve him with a statement of claim, Mr CS phoned him to advise that he did not object. Mr CS disputes that he made this call. On 7 November 2014 and in subsequent correspondence, Mr CS' lawyers informed Mr TL that Mr CS had not consented to Mr TL acting for Mr D and Mr H.

[7] Mr TL continued to act for Mr D and Mr H and the matter was settled following a judicial settlement conference held on 22 May 2015.

[8] The issue on this review is whether by acting for Mr D and Mr H against Mr CS Mr TL contravened the relevant rules of professional conduct which constrain a lawyer from acting against a former client.

The complaint

[9] Mr CS lodged a complaint with the New Zealand Law Society Complaints Service on 23 December 2014.

[10] The substance of Mr CS' complaint was that by having previously acted for Mr CS and his company that Mr TL was conflicted when later acting against him on the loan recovery proceedings. At the time he made his complaint the debt recovery proceedings issued by Mr TL on behalf of Mr D and Mr H had not been settled. Mr CS' concern was that "unbalanced advice may be provided on any material provided to Mr TL."[2]

[11] For the purpose of providing background, not to lay a complaint, Mr CS referred to his dissatisfaction with [Firm A]'s services concerning a property transaction in 2007/2008. He also referred to his friendship with Mr TL around that time.

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[1] Letter DN to CS (5 February 2014).
[2] Email CS to Complaints Service (23 December 2014) at 2.

The Standards Committee decision

[12] The Standards Committee, which delivered its decision on 25 November 2015, determined, pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) that by acting for Mr D and Mr H against Mr CS:

(a) Mr TL had contravened rule 8.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) which constituted unsatisfactory conduct under s 12(c) of the Act.

(b) In the alternative, Mr TL's conduct "[fell] short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer" which constitutes unsatisfactory conduct under s 12(a) of the Act.[3]

[13] The Committee did not consider that Mr CS' friendship with Mr TL, or the fact that [Firm A] had acted for Mr CS and his company in 2007/8 gave rise to any conduct issues.

Confidential information

[14] In reaching that decision the Committee determined that by having previously acted for Mr CS and his company in the litigation matter that Mr TL would have obtained:[4]

(a) Knowledge of Mr CS' "personal characteristics and general approach to litigation"; and

(b) An "insight [into his] honesty and willingness to settle in the face of proceedings" and his "fears and reactions",

which "could be regarded as confidential information" that was "relevant to the debt recovery proceeding".

[15] The Committee observed that other members of [Firm A] held confidential information concerning the 2007/2008 proposed property transactions which occurred at around the same time as the loan was made to Mr CS and would have provided:[5]

[3] Standards Committee Determination at [51].
[4] At [23].

(a) Information about "charges by finance companies and banks".

(b) A "general overview of the financial affairs and arrangements between Mr CS and [his company] which could become relevant had the debt recovery proceedings proceeded to trial", and "any subsequent issues" concerning the debt recovery.

Disclosure likely to affect Mr CS' interests adversely

[16] In the Committee's view, because Mr TL had a general duty of disclosure of all relevant information to Mr D and Mr H, the confidential information held by [Firm A] could be used to gain a "favourable settlement or unfair advantage at trial" for Mr D and Mr H.[6]

A more than negligible risk of disclosure

[17] The Committee stated that:

(a) Mr TL had taken:[7]

> … little or no steps to ascertain the information that was held by other members of [Firm A] before he accepted instructions to act ... to prevent the possible inadvertent disclosure of that information until after the complaint was received.

(b) He "sought to rely on wilful ignorance of the prior matters relating to Mr CS and [his company]".[8]

(c) It was not sufficient for Mr TL to say that he "could not recall or was unaware of the relevant information".[9]

(d) It was not:[10]

> … appropriate for him to rely on the Court and/or Mr CS to determine whether [Firm A] should be disqualified from acting, without first having taken steps to ensure compliance with the Rules.

(e) It was for Mr TL to establish whether the information held was confidential, or would have adverse consequences for Mr CS if disclosed.

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[5] At [25].
[6] At [29].
[7] At [33].
[8] At [33].
[9] At [34].
[10] At [34].

Fiduciary obligation would be undermined

[18] Because the duty of confidence survives the end of a retainer, the Committee determined that a disclosure of relevant information by Mr TL would have been a breach of fiduciary duty owed by Mr TL to Mr CS.

[19] Overall, the Committee concluded that Mr TL's professional duty to Mr CS prevailed over the principles of litigants being able to instruct counsel of first choice; a lawyer's duty to be available to the public; the ability of lawyers who hold confidential information to change firms; and competition within the profession and a client's access to specialist advice.

[20] Mr TL was censured. The Committee ordered publication of the facts of the decision without identification of the parties.

Application for review

[21] Mr TL filed an application for review on 30 November 2015. The outcome sought by him is that the Committee's decision be reversed. He states that contrary to [1] of the determination he was not, and has not been a partner in [Firm A].

[22] He submits that:

(a) Mr CS informed him on 13 May 2013 that [Mr CS] had no objection to him acting for Mr D and Mr H.

(b) Mr D's and Mr H's proceedings were well advanced by the date of Mr CS' complaint.

(c) Mr CS could have applied to the Court to disqualify Mr TL from acting.

(d) Because no conflict had been identified and none arose there was "a less than negligible risk of conflict".

(e) Any insight into Mr CS' alleged personal borrowings from individuals is not evident from the transactional work carried out by [Firm A] for Mr CS.

(f) He had not been involved in transactional work for Mr CS.

(g) He had discussed Mr D's and Mr H's matter with Mr V, the partner who had acted on the property transactions, who was aware that [Mr TL] had acted for Mr CS on the boat fit-out litigation in 2003/2004.

(h) He reviewed Mr D's and Mr H's instructions before the demand was made by an associate of the firm.

(i) The Committee's finding that he had not searched Mr CS' historical files and had not put an information barrier in place are contradictory. The notice of hearing had neither mentioned nor asked him to respond on those issues.

(j) The advantage obtained for Mr D and Mr H from Mr TL' knowledge of the property transactions was not identified. Mr CS acknowledged that he had borrowed the money from Mr D and Mr H – the issue was whether he did so "in his representative capacity."

Mr CS' response

[23] In his response to Mr TL's review application Mr CS submits that:[11]

(a) The lawyers acting for him had made several requests to Mr TL to withdraw from acting for Mr D and Mr H. Application had also been made to the Court to disqualify Mr TL.

(b) Mr TL "[knew] how [Mr CS] viewed money matters having worked for [Mr CS] and [his company]", and his "business nature and characteristics which was an advantage". He says that Mr TL and Mr H commented after the judicial hearing "how it was good to see [Mr CS] back to what they remembered".[12]

(c) The loan from Mr D and Mr H was a business loan.

Review on the papers

[24] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of

[11] Email CS to Legal Complaints Review Officer (LCRO) (17 December 2015).
[12] At [5] and [7].

all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[25] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[26] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[13]

> … 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.

[27] More recently, the High Court has described a review by this Office in the following way:[14]

> 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.

[28] 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:

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

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Issue

[29] The central issue is whether by acting for Mr D and Mr H against Mr CS that Mr TL did so in contravention of the relevant rules of professional conduct which constrain a lawyer from acting against a former client.

Professional duties - acting against a former client

[30] A lawyer's duty to protect and hold in strict confidence all information concerning the client, the retainer and the client's business and affairs acquired in the course of the professional relationship outlives the lawyer-client relationship and extends to former clients.[15]

[31] Concerning a former client's information, rule 8.7.1 provides that:

> A lawyer must not act against a former client of the lawyer or of any other member of their practice where –
> (a) the practice or a lawyer in the practice holds information confidential to the former client; and
> (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
> (c) there is more than a negligible risk of disclosure of the confidential information; and
> (d) the fiduciary obligation owed to the former client would be undermined.

[32] Rules 8.7 and 8.7.1:[16]

> … reflect the exercise by the Court of its inherent jurisdiction to control its own processes, one of the aspects of which is the power to determine which persons should be permitted to appear before it as advocates.

[33] For the prohibition in rule 8.7.1 to apply, the circumstances described in paragraphs (a) to (d) of the rule must all be present.

[34] Paragraph (a) requires that "the practice or a lawyer in the practice holds information confidential to the former client".

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[15] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 8, 8.1 and 8.7.
[16] *AD v ZX* LCRO 87/2010 at [20].

[35] In identifying a former client's confidential information the LCRO has stated that the practice or any lawyer in the practice must hold information "… that was used, or could have been used, against [the former client] such that ought to have disqualified [the lawyer] from representing [the new client] …".[17] The burden for establishing that the lawyer or practice holds confidential information of the former client which is relevant falls on the former client, but is not a heavy burden.[18]

[36] Considerations which have assisted the courts to determine relevance include whether the former client has provided instructions on "a piecemeal basis", instructs other law firms, and whether the firm was fully briefed on the former client's affairs.[19] The elapse of time "… since the earlier retainer and the narrow nature of the new retainer may make a lawyer's acceptance of a retainer less 'objectionable' to the former client.[20]

[37] A former client's disquiet about his or her former lawyer acting against the former client must be weighed against "a person's right to … solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally". Also relevant to the public interest is "mobility within the profession … [a]ccess to specialist services and market competition".[21]

[38] Illustrations of a former client's information held to have been relevant include a lawyer's knowledge about the "… personalities ... weaknesses, fears and reactions" of several members of a family gained by having acted for them over the years where the client and the former client were involved in a family dispute over a will; [22] a former client's "… honesty or lack thereof ... reaction to crisis, pressure or tension … attitude to litigation and settling cases and tactics";[23] knowledge of the former commercial client's business gained having acted for the former client for fourteen years.[24] The courts "have shown a greater sensitivity" towards the protection of confidential information in family law and criminal matters.[25]

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[17] *Mansfield v Southwell* LCRO 199/2010 at [32].
[18] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 at 527.
[19] *GBR Investment Limited v Keung* HC Christchurch CIV-2009-409-1486, 19 March 2010 at [60].
[20] *Q v I* LCRO 41/2009 at [14].
[21] *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 (CA) at 651.
[22] *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408.
[23] Above n 18, at [65].
[24] *Torchlight Fund No 1 LP (In Receivership) v NZ Credit Fund (GP)1 Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [25].
[25] Above n 18, at [68].

[39] This information has been described as the "getting to know you principle", that is, information acquired "in the lawyer-client relationship and is confidential in the sense that it was not publically available …".[26] The LCRO has explained that in a practical sense there must be "a sufficient relationship between the general matters" of the former client, and "the subsequent matters" in which the lawyer is acting against the former client.[27]

[40] The second limb of the rule is that "(b) disclosure of the confidential information would be likely to affect the interests of the former client adversely". Put another way, "whether any of the information held by [the practice or lawyer in the practice] is or may be relevant to the proceedings, …".[28] The rule "focuses on the possibility of actual harm" to the former client.[29] In doing so the rule illustrates the tension between a lawyer's duty of disclosure to a client[30] and the duty of confidence owed to a former client.[31]

[41] Paragraph (c) requires that "there is a more than negligible risk of disclosure of the confidential information".

[42] The threshold "a more than negligible risk" is very low. 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 ignorable".[32]

[43] In the context of an application to the court to restrain a lawyer from acting against a former client, the Court of Appeal has described the threshold risk of disclosure as "viewed objectively … a real or appreciable risk that the information will be disclosed".[33] However, the House of Lords subsequently took a stricter approach, namely, "… no risk of disclosure … the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial".[34]

[44] Referring to the House of Lords approach, the LCRO has stated that rule 8.7.1:[35]

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[26] Above n 18, at [67].
[27] Above n 18, at [24].
[28] Above n 24, at 1492 at [20].
[29] *Penzance v Runcorn* LCRO 170/2009 at [10].
[30] Rules 7, 7.1, 7.2.
[31] Rules 8, 8.1.
[32] *Shorter Oxford English Dictionary*, (5th ed, Oxford University Press, Oxford, 2003) at 1901.
[33] Above n 20, at 651.
[34] Above n 18, at 528.
[35] *Penzance v Runcorn* LCRO 170/2009 at [11].

> … recognises that remote or fanciful risks of the use of information may be discounted in requiring that there be "a more than negligible risk of disclosure of the confidential information" for the lawyer to be prohibited from acting.

[45] The fourth limb of the rule is that "(d) the fiduciary obligation owed to the former client would be undermined". The fiduciary obligation "tracks very close [to] the obligation of confidence under [the rules]".[36] It follows that if, in a particular case, paragraphs (a), (b), and (c) applied, then so would paragraph (d) "… provided the confidential information held by the lawyer relates to the same subject matter".[37]

[46] The exception provided to the strict application of the rule is:[38]

> … where there is an effective information barrier between the lawyer who holds the confidential information of the former client and the lawyer who proposes to act for the new client.

[47] An information barrier is described as being effective when:[39]

> … there is a negligible risk that the confidential information of the former client will be or has been disclosed to the new client or to any lawyer acting for the new client.

[48] Because a lawyer must "be able to demonstrate that systems are in place which restrict and manage the flow of information within the firm",[40] this can present a difficulty for sole practitioners, or firms having only several partners, to successfully demonstrate the effectiveness of any procedures intended to provide an effective information barrier.[41]

[49] Finally, rule 8.7.4 requires that "[u]nless the lawyer is unable to contact the former client, particulars of any information barrier must be disclosed to the former client prior to the lawyer commencing to act for the new client." The rule ensures that the former client has notice that his or her lawyer (or former lawyer) has been requested to act against the former client, and provide an opportunity for the former client to object.

Analysis

[50] Mr CS claims that by having acted for him and his company on the boat fit-out litigation matter in 2004, and the proposed property transactions in 2007/2008, that

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[36] At [20].
[37] *AD v ZX* LCRO 87/2010 at [33].
[38] Rule 8.7.2.
[39] Rule 8.7.3
[40] Above n 35, at [17].
[41] *Chui-I v Tang Shuo Development Company Ltd* HC Wellington CIV-2006-485-1824, 17 August 2007.

[Firm A] gained knowledge about him and his business affairs which was confidential information. He says that this information could have been disclosed to Mr D and Mr H and used against him in their debt recovery proceedings against him during 2014 and 2015.

[51] Mr TL acknowledges that he acted for Mr CS on the boat fit-out litigation matter during 2003/2004. He says that he was not involved on the proposed property transaction matters in 2007/2008.

[52] In support of his contention that Mr TL may have had some involvement on the proposed property transaction matters in 2007/2008 Mr CS has provided a copy of an email addressed to Mr TL "Subject: CS & M" which lists six transactions involving both property and boats. Although no evidence has been produced to enable the parties' positions to be reconciled one way or the other, I note that Mr TL' response is consistent with his stated role at [Firm A] at that time as Head of Litigation.

[53] Whilst the firm of [Firm A] holds information about Mr CS and his company from having acted for them on the boat fit-out litigation matter in 2004, and on the proposed property transactions during 2007/2008, those matters had no connection to first, the proposed purchase by Mr CS of apartments in [Town] in 2008 for which he borrowed money from Mr D and Mr H to pay the deposit on that transaction, and secondly, the recovery proceedings against Mr CS nearly six years later. Moreover, [Firm A] did not act for Mr CS on his proposed purchase of the [Town] apartments.

[54] [Firm A] ceased acting for Mr CS around 2008. From that time it appears that his financial position deteriorated. His company was liquidated in 2010.[42] By the time the demand for repayment of the loan was made by Mr D and Mr H in February 2014, any general information obtained by [Firm A] about Mr CS and his company during 2007/8 was unlikely to have been current and therefore not relevant to the demand proceedings.

[55] Mr CS states that Mr TL "knows how I viewed money matters, and "knew me and knew how I thought".[43] However, other than in this general way, Mr CS has not identified any information that was held by [Firm A] and its employees, including Mr TL, about Mr CS and his company concerning those proposed transactions or the boat fit-out litigation matter some three to four years earlier which could have been relevant to Mr D's and Mr H's matter and used against him.

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[42] File note BNM Limited, the business recovery specialists (12 August 2010).
[43] Letter CS to LCRO (17 December 2015).

[56] Whilst the "getting to know you" principles referred to earlier assist in the task of deciding whether knowledge gained about a former client's characteristics is relevant to the current matter, the view has been expressed that "[e]ach case must depend on its own facts, in particular, the nature of the litigation and of the former retainer".[44] Moreover, that the absence of discernment leaves open "… the prospect of muddying the line between "know how" derived in the course of an engagement – which the lawyer can legitimately use – and confidential information".[45] It follows from this line of argument that if the relationship between the lawyer and former client "lacks [a] closeness or the significance of the information in question is otherwise remote from the current proceeding, the position should be different."[46]

[57] The conclusion I have reached is that other than the general knowledge about Mr CS and his company gained some years previously first, by having acted for them on matters which had no connection to the later debt recovery matter, and secondly, through Mr CS' friendship with Mr TL, that there is no particular information that Mr CS has pointed to which if disclosed to Mr D and Mr H could have been used to their advantage against Mr CS. In my view there was an insufficient relationship in subject matter between Mr CS' previous matters in respect of which [Firm A] had acted, and the later loan recovery proceedings issued by Mr TL for Mr D and Mr H for the information relating to those previous matters to have been relevant to the later loan recovery proceedings.

[58] Because I have found that no confidential information of Mr CS, held by [Firm A], has been identified as relevant (rule 8.7.1(a)), disclosure of which would have been likely to have adversely affected Mr CS' interests (rule 8.7.1(b)), then it is not necessary to consider whether the circumstances in the following rules applied (rules 8.7.1(c) and (d)). It follows that on these particular facts, by acting for Mr D and Mr H on the debt recovery proceedings against Mr CS that Mr TL did not contravene rule 8.7.1.

Decision

For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed. The order of censure is also reversed.

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[44] GE Dal Pont *Lawyers' Professional Responsibility (*6th ed, Thomson Reuters, Sydney, 2017 at [8.150].
[45] At [8.150].
[46] At [8.155].

DATED this 19th day of July 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 TL as the Applicant
Mr V as a Related Party
Mr CS as the Respondent
[Area] Standards Committee
The New Zealand Law Society