LCRO 321/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [South Island] Standards Committee
BETWEEN	**[COMPANY A]** Applicant
AND	**MR ZN** Respondent

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

Introduction

[1] On 31 July 2012 the [South Island] Standards Committee issued a determination (the findings determination) in which it found that Mr ZN's conduct in acting for both [Company A] as landlord, and the accountancy firm [Accounts] as tenant to be in breach of Rule 6.1 of the Conduct and Client Care Rules[1] (the Rules) (relating to conflict of interests) and therefore constituted unsatisfactory conduct. The Committee sought submissions from the parties as to penalty. Neither party applied for a review of the findings determination.

[2] On 2 November 2012, the Standards Committee issued a further determination as to penalty (the penalty determination) in which it determined that Mr ZN's conduct was at the "lower end of the scale of culpability"[2] and made no orders pursuant to s 156 of the Lawyers and Conveyancers Act 2006 (the Act). [Company A] has applied for a review of the penalty determination.

Background

[3] [Company A] is a company which is wholly owned by Mr AX. The company owned a property in [town] which it intended to fitout for occupation as commercial premises. Around October 2008 Mr AX began negotiating with Mr JG of [Accounts]

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] Standards Committee determination dated 2 November 2012 at [17].

with respect to a proposed lease to commence once the fitout had been completed. Both parties instructed Mr ZN (who was known to both Mr AX and Mr JG) to act for them. Mr ZN prepared an Agreement to Lease and this was signed and dated 21 April 2009. The agreement included the following provision with regard to the rent to be paid:

> Annual Rent: 650 square metres at $120.00 per square metre per annum being $78,000.00 per annum (plus GST) subject however to any increases that may occur as a result of extra costs incurred by the Lessor pursuant to the fitout and as agreed to between the parties.

[4] [Company A] proceeded with the fitout and in mid to late 2009 disputes arose between [Company A] and [Accounts] with respect to the specifications and contributions to the fitout. Mr ZN continued to act for both parties.

[5] Although the parties remained in dispute, the lease of the premises was prepared and executed by both parties on 21 March 2010. The lease provided for an annual rental of $78,000. At the time the lease was entered into, [Company A] obtained a valuation for rental purposes which assessed the market rental of the property at $98,500 per annum.[3]

[6] Various matters remained unresolved between [Company A] and [Accounts] and in April 2010 Mr ZN ceased to act for either party.

[7] [Company A] lodged a complaint with the Complaints Service in June 2011 following a Disputes Tribunal hearing between [Company A] and [Accounts] with regard to the flooring, in conjunction with which Mr ZN had provided a letter in support of [Accounts]. The complaints centred on the fact that Mr ZN had acted for both parties whose interests were in conflict without explaining the implications of the conflict and without obtaining consent from [Company A].

[8] Further details of the complaints were provided by Ms AP of [Law Firm A]:[4]

1. [Mr] ZN did not:

    a) Explain to [Company A] how a conflict may arise;

    b) Recommend that [Company A] obtain independent legal advice on the Agreement to Lease;

    c) Obtain [Company A]'s express consent to [Mr] ZN acting for both parties.

[3] This figure was subject to adjustment for areas not leased to [Accounts] and did not take into account capital costs contributed by [Accounts].

> 2. [Mr] ZN drafted the Agreement to Lease. Several terms were ambiguous and were detrimental to the interests of [Company A]. In particular:
>
> a) The obligations of the parties as to the costs of the fitout were not addressed or finalised;
>
> b) [Mr] ZN did not advise [Company A] to renegotiate the appropriate rental for the premises prior to signing the Deed of Lease;
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> c) This was especially so where the Agreement to Lease specifically provided that the rental set out in that Agreement may be varied depending on the costs incurred in the fitout of the premises;
>
> d) The rent review was two yearly without a specific provision to review the rent upon completion of fitout.
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> 3. [Mr] ZN was acting against [Company A]'s interests by agreeing to costs being incurred by [Company A] without first taking instructions.
>
> 4. [Mr] ZN acted for both parties, even where it became obvious that the dispute was serious and involved a significant sum. [Mr] ZN was heavily involved in attempts to resolve the dispute and suggested variations to the Agreement to Lease that favoured [Accounts].
>
> 5. [Mr] ZN continues to act for both parties, even [when] it becomes clear [Accounts] and [Company A] dispute fitout costs.

She also referred to the fact that Mr ZN had supported [Accounts] in the Disputes Tribunal with regard to the dispute relating to the flooring costs.

[9] [Company A] claimed the difference between the market rental and the rental as included in the Deed of Lease. Ms AP calculated the difference as being $20,720 while Mr AX had calculated this as being $28,750. Mr AX also claimed the sum of $18,988 being the amount owed to the electrical company incurred as a result of variations agreed to by Mr ZN.

The application for review

[10] Mr AX sought a review of the penalty determination and summarised the reasons for the application:[5]

> [Company A] seek a review of the determination of the SC as to penalty. The SC has not properly identified the impact on [Company A] of Mr ZN acting under a conflict of interest and the losses incurred by [Company A] as a result of Mr ZN's

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[4] Letter AP to Complaints Service (1 February 2012).

[5] Letter AX to LCRO (12 December 2012) at [3].

> acts and omissions. The SC also made errors that materially affected its decision not to impose any penalty on Mr ZN, in the face of a finding of liability against him.

[11] He explained that he did not apply to have the findings decision reviewed as he:[6]

> ....understood the finding of liability from the SC to extend to include the actions by Mr ZN during his instruction by both parties that caused [Company A] loss. [Company A] expected those detailed matters to be dealt with by the decision on penalty.

[12] He also submitted that insufficient weight had been given to specific matters arising from the conflict of interests. Those matters were:[7]

Loss of Rental

> ...Mr ZN had an obligation to advise [Company A] to enter into negotiations for an increased rental to cover the increased cost of fitout at the time of drafting the Lease for execution. While acting in a conflicted situation, Mr ZN did not take those steps.

Mr AX asserts that the Committee was in error when it decided:[8]

> that the fact that the valuer revisited his opinion on the market rental following completion of the fitout was not determinative of any loss.

He says that:[9]

> If [Company A] had been advised to review and negotiate the rental, it is likely that the rental would have increased with reference to a valuation which took into account the fitout works as completed....

He disagrees with the Committee when it stated that:[10]

> ……..the approach taken by [Company A] presupposes that [Accounts] would have agreed to an open ended commitment to rental. In the view of the Standards Committee that was a highly unlikely proposition.

Mr AX disagrees with the Committee because the Agreement to Lease provided an opportunity to revisit the rental.

Loss of claim by electrical company.

The Committee noted that this matter seemed to have been resolved at the Disputes

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[6] Above n 5 at [8].
[7] Above n 5 at [15].
[8] Above n 5 at [16].
[9] Above n 8.
[10] Above n 2 at [10].

Tribunal Hearing. Mr AX advises that this is not correct. The matter before the Disputes Tribunal related to a dispute as to liability for payment of the flooring costs.

Mr AX advises that:[11]

> Mr ZN's actions in purporting to commit [Company A] to additional costs for the fitout without instructions and without properly recording which entity was liable for the costs has exposed [Company A] to a claim by [the Electrical Company].

Further actions by Mr ZN against [Company A]'s interests.[12]

a) Mr ZN acted contrary to [Company A]'s interests regarding a $40,000 deposit [Company A] believed [Accounts] was obliged to pay it on building consent being granted for commencement of works at the premises (15 July 2009). This deposit was not documented, and when [Company A] sought Mr ZN's assistance in enforcing payment. Mr ZN repeatedly told [Company A] that he (ZN) would get the money from [Accounts] and that [Company A] should commence work on the premises. The deposit was not paid by [Accounts] until December 2009, and [Company A] says this demonstrates Mr ZN should have been aware from the outset of the disparate interests of the parties;

b) The obligations of the parties in regard to the fitout works were not finalised in the Agreement to Lease. At one point, Mr ZN advised Mr AX of [Company A] that a written record of fitout costs was not required …….. this despite the clear provision in the Agreement to Lease that made such costs relevant to the rent which could be charged under the Lease;

c) Mr ZN should have recommended [Company A] negotiate the rent set by the Deed of Lease prior to execution of the Lease (pursuant to the specific terms to this effect in the Agreement to Lease) but did not;

Costs

[13] Finally, Mr AX repeated his view that Mr ZN's bill should be reduced or cancelled because Mr ZN's service had been affected by the fact that he had acted for both parties and [Company A] had incurred additional costs because of Mr ZN's conduct.

[14] In the review application Mr AX also referred to new matters arising since the Standards Committee determination which cannot be considered in the course of this review.

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[11] Above n 5 at [21].
[12] Above n 5 at [23].

Review

[15] A review hearing took place on 15 April 2014. In attendance were Mr AX and Ms AP, and Mr ZN and Mr JR. Prior to the hearing both Ms AP and Mr JR had provided written submissions.

[16] As no application to review the findings determination had been lodged, this is a review of the penalty determination only.

[17] The Standards Committee did not specifically refer to the basis for its finding of unsatisfactory conduct, but it is clear that the finding is based on a breach of Rule 6.1 relating to the conflict of interests. This results in a finding of unsatisfactory conduct pursuant to s 12(c) of the Act. It seems to me that Ms AP and Mr AX may not have appreciated that this was not a finding of unsatisfactory conduct pursuant to s 12(a) of the Act which refers to a lack of competence or diligence on the part of a lawyer.

[18] The penalties which a Standards Committee may impose are set out in s 156(1) of the Act. In this instance, any penalty to be imposed must be in respect of the finding of a breach of Rule 6.1. Each of the penalties sought by [Company A] will be considered in turn.

Loss of rental

[19] [Company A] seeks to be compensated for the rental which Mr AX asserts the company has lost by reason of the fact that the lease as drawn by Mr ZN provided for a rental of $78,000 per annum rather than the market rental. The bases on which Mr AX seeks such an order ranges from his statement that the lease (or Agreement to Lease) should have provided for an assessment of the rental at the time the lease was entered into, to assertions that Mr ZN should have advised Mr AX of the right to request a variation to the rental as provided for in the Agreement to Lease.

[20] The first observation to make in respect of these assertions, is that they are assertions of negligence, or, in terms of s 12(a) of the Act, conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[13] As noted, the Committee did not make a finding of unsatisfactory conduct against Mr ZN on the basis of the definition in s 12(a). The finding was a finding that Mr ZN had acted for more than one client in a matter in circumstances where there was a more than negligible risk that he may have been unable to discharge obligations owed by him to both clients and consequently any

[13] This is not intended to mean that 'negligence' and 'unsatisfactory conduct' in terms of s12(a) are synonomous.

claim against Mr ZN for loss of rental on the basis of alleged negligence or unsatisfactory conduct in terms of s 12(a) of the Act must fail.

[21] In addition, it cannot be concluded on a balance of probabilities that even if Mr ZN had proposed the Agreement to Lease include a provision that required the rent to be assessed at the time the lease was entered into, [Accounts] would have agreed to that.

[22] Ms AP and Mr AX also contend that Mr ZN should have advised Mr AX to seek an assessment of the rent at the time the lease was entered into pursuant to the provision in the Agreement to Lease that allowed for the rent to be varied to take account of additional capital expenditure by [Company A] on the fitout.

[23] Even if it is accepted that Mr ZN had such a duty, it cannot be concluded on a balance of probabilities that this would have resulted in the rental being increased. The rent clause included in the Agreement to Lease related to "extra costs incurred by the lessor pursuant to the fitout and as agreed to between the parties". I have seen no details or specifications which established the base costs of the fitout, and again, it cannot be said on the balance of probabilities that [Accounts] would have agreed to pay any additional rent as claimed by [Company A]. There was disagreement between [Company A] and [Accounts] as to who had paid for what, and so there would clearly have been a dispute as to what was to be included as additional costs by [Company A] on which a claim for additional rental would be based.

[24] In any event, this submission must fail because it does not allege conduct that arises because Mr ZN was acting for both parties. Even if it is accepted that Mr ZN had a duty to advise Mr AX to seek a review of the rent, the failure to do so would constitute unsatisfactory conduct by reason of s 12(a) of the Act, not s 12(c).

[25] Overall, there is no basis on which a claim for compensation for loss of rental can succeed as a result of the finding of unsatisfactory conduct by reason of the breach of Rule 6.1.

Claim by electrical company for additional costs

[26] This claim cannot succeed on the basis that Mr ZN had a conflict of interests in acting for both parties, other than to suggest that Mr ZN favoured [Accounts] over [Company A]. That is not something that is capable of proof to the requisite degree, although it might seem that way to Mr AX.

[27] The simple basis for such a claim is that Mr ZN acted without instructions when agreeing that [Company A] would be liable for additional costs and there has been no finding against Mr ZN on that basis which will support an order for compensation.

Further claims

[28] The further claims by [Company A] in the review application are that Mr ZN's conduct was deficient with regard to payment of the $40,000 deposit that Mr AX alleged was payable, and the obligations of the parties were not finalised in the Agreement to Lease.

[29] A claim with regard to the deposit is not one that was raised in the complaint before the Standards Committee and as such cannot be addressed in this review. In any event, it is again a claim based on negligence, or a lack of competence or diligence. It does not arise from the fact that Mr ZN was acting for both parties. For a claim to succeed on that basis, it would have to be shown on the balance of probabilities that Mr ZN favoured [Accounts] over [Company A], and it is not possible to make such a finding.

[30] The same comments apply to the allegation that the documentation lacked specificity. As noted above, I have not sighted any detailed agreement recording the works to be carried out, which party those works were to be done by, and who was to pay for the specified work. This would be expected in an agreement of this nature. Its omission does not however arise from the fact that Mr ZN was acting for both parties and again there cannot be any compensation ordered on this basis.

Costs

[31] The same comments apply in respect of Mr ZN's bills of costs. Any deficiencies in the work carried out by Mr ZN did not arise because he acted for both parties and he is entitled to be remunerated for the work that he did. There is no finding against Mr ZN on any other grounds which would enable the bill of costs to be adjusted.

Apology

[32] At the review hearing Mr ZN tendered a verbal apology to Mr AX which was accepted. I undertook to record that apology in this decision and now do so:[14]

> I have absolutely no difficulty in apologising to Mr AX for finding himself in the position he is in.

[14] Apology as stated verbally by Mr ZN at hearing.

> The difficulty at the outset, as you will know Sir, is that once I received a letter from Mr AX, suggesting that I was at fault, then all further communication with him must cease and that has been a regrettable aspect of my life. However what's done is done. I did what I did with the best of intentions. I'm sorry that it turned out the way it has, I'm not sure I can explain it any further.

General Comment

[33] The Standards Committee considered that Mr ZN's conduct was at the lower end of the scale of culpability. Development contracts of any sort are notorious for generating disputes between the parties, and it is arguable that Mr ZN should not even have contemplated acting for both parties, as this was a situation where there was a more than negligible risk that he would be unable to discharge his obligations to one or both clients. Having said that, it would seem that the parties had largely negotiated the terms considered necessary between themselves and jointly instructed Mr ZN. On balance, I agree with the assessment of the Standards Committee as to the degree of culpability attaching to Mr ZN's conduct in relation to the breach of Rule 6.1.

[34] The documentation does seem to be lacking in detail as to the work to be undertaken and who was to pay for that work. I am not convinced however that any deficiencies in the documentation arise from the fact that Mr ZN was acting for both parties, and as there is no other finding, no orders on any other basis can be imposed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

Comment

1. Following delivery of the findings determination, Mr AX made the content of the determination known to various parties, some of whom Mr JR advises were not persons who had any connection with the complaint. This resulted in some adverse publicity for Mr ZN. Proceedings of Standards Committees are to be conducted in private unless the Committee orders publication pursuant to s 142(2) of the Act. No publication order was made in this instance.

2. This is not the first instance where I have become aware of a party to a complaint (generally a lay complainant) making the outcome of a complaint known to third parties. I would suggest to the Complaints Service that all determinations in respect of which no publication order has been made should include advice that the content of the determination is to remain private and confidential to the parties.

DATED this 29th day of April 2014

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O W J 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:

[Company A] as the Applicant
Ms AP as counsel for the Applicant
Mr ZN as the Respondent
Mr JR as counsel for the Respondent
Mr ZP as a related person or entity
The [South Island] Standards Committee
The New Zealand Law Society