

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of Auckland Standards Committee

BETWEEN

MR OY

Applicant

AND

MR QS

Respondent

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

Introduction

[1] Mr OY has applied for a review of the determination by Auckland Standards Committee to take no further action on his complaint concerning Mr QS' conduct in relation to matters arising between Mr OY and his former business partner.

Background

[2] Mr OY and Mr QR were business partners.

[3] In July 2009 Mr OY was instrumental in instructing Mr QS to act on behalf of the group of companies in which he and Mr QR were shareholders and directors.

[4] In September 2009 Mr QS was instructed by Mr OY on behalf of the group to review the terms offered by the AES for the continuation of facilities. As noted by Mr QS in his reporting letter, they provided "for the facilities to be extended on essentially the same terms" as had previously been provided by the bank.

[5] On 23 October 2009, Mr OY signalled to his partner that he wished to largely terminate his involvement with the business at the end of March 2010. Mr OY sought the assistance of his friend Mr OZ in connection with the issues that were required to be addressed to ensure an orderly departure.

[6] Although Mr OZ's assistance was initially expressed to be "on an informal basis" the nature of his involvement was in reality no different as far as Mr QS was concerned to a normal solicitor/client relationship.

[7] Early in 2010, Mr OZ raised concerns about Mr QS possibly acting for Mr QR. On 16 February 2010 Mr QS responded to Mr OZ in the following way:

Further to our discussions on 15 February 2010 we confirm our advice that we act for various companies in the [BAM] but do not act for, and never have acted for Mr [QR].

[8] Mr OY and Mr OZ remained concerned about what they saw as a conflict of interests in Mr QS' position and on 28 May 2010 Mr OZ outlined their concerns in a letter to Mr QS. I have included a large section of that letter as it encapsulates the issues raised in this complaint. Mr OZ wrote:

As previously recorded, both the writer and our client are concerned with what we perceive to be real and ongoing conflicts of interest in relation to your firm acting for [AET], [QR] or any other entities associated with either of those parties with reference to the resolution of ongoing matters with our client.

We **attach** (*emphasis in original*) a copy of your letter dated 1 September 2009 for the attention of our client relating to the provision of facilities from the [AES] to [BAN], [AET] and [BAM].

In addition to the above, we understand that our client has email evidence that would indicate that you have on a number of occasions acted for Mr [QR] personally, rather than for the various companies in the group.

In light of the above, we are of the opinion that we have substantiated our concerns with reference to the existence of an actual conflict of interest and once again respectfully submit that you should withdraw from providing the ongoing advice to Mr [QR] personally (if it in fact can be substantiated that you have been providing advice of this nature) and/or any of the various companies comprised in the group.

In the interests of clarity, our client is of the opinion that your historic association with Mr [OY] both in a personal capacity and in his various roles comprised within the trading group place him in a disadvantageous position with reference to his ongoing negotiations with Mr [QR].

[9] Mr QS responded on 31 May and repeated his position that he had not acted for Mr QR until Mr OY had left the group and denied that he was conflicted in any way.

[10] On 2 June 2010 Mr OY complained to the New Zealand Law Society

Complaints Service. He enclosed a copy of the letter from Mr QS dated 1 September 2009 in which Mr QS reported on the proposed bank facilities. Mr OY alleged that Mr QS had a conflict of interest in continuing to act for Mr QR or any of the trading entities and sought “the assistance of the New Zealand Law Society in reviewing Mr QS’ involvement with Mr QR, myself and the entities with which we are associated, and in particular a ruling as to whether he has breached the rules of conduct and client care for lawyers.”¹

The Standards Committee determination

[11] After considering all of the material provided, the Standards Committee determined pursuant to section 138(1)(f) of the Lawyers and Conveyancers Act 2006 to take no further action on the complaint. It noted that Mr QS had

historically acted for [AET], that [BAO] were currently acting for Mr [QR] and that [BAP] acted for Mr [OY]...[It further] noted that there was no clear evidence of misuse of personal information by Mr [QS], or indeed of his holding particular personal information relating to Mr [OY].

The Committee did not consider that there was anything to indicate that Mr [QS] had ever acted for Mr [OY] in his personal capacity and noted that the correspondence regarding the [AES] refinancing was directed to him as an officer of the borrowing entity and associated companies.

[12] Mr OY has applied for a review of that determination. He summarises the issues in a letter accompanying the application in the following way:

1. When Mr OY met with Mr QS in July 2009 to instruct him on behalf of the companies, he also asked Mr QS if he would act for him in a personal capacity, which he states Mr QS agreed to.
2. He refers to the instructions in September 2009 and asserts that Mr QS was acting for him in a personal capacity by reason of the fact that the securities required by the bank included a personal guarantee.
3. He says that “I had no reason not to believe that Mr QS was not acting for me at that time and did not have any other legal counsel undertaking work for me.” He says he relied on Mr QS’ representations and legal advice.
4. He then refers to the confirmation provided by Mr QS on 16 February 2010 that he was not acting for Mr QR and “never said throughout this

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

time that he was not acting for me.”

5. He then notes that it became evident that Mr QS was acting for Mr QR and refers to correspondence with the bank in late March 2010 concerning the guarantees which he asserts resulted in actions detrimental to him.
6. He considers that Mr QR is endeavouring to leverage off Mr OY’s liability to the AES with regard to proceedings which are underway between him and Mr QR.

[13] He summarises his complaints as being that Mr QS:

- (a) Failed to disclose his conflict of interest;
- (b) Never advised [Mr OY] that he did not at any stage not act for [him] or [his] interests;
- (c) Contrary to [Mr QS’] written and oral reassurances [he acted] for Mr [QR] personally and for the Group Companies, and against [Mr OY].
- (d) [Mr QS] failed to show a duty of care towards [Mr OY] and act in good faith.
- (e) [That the emails provided confirm] an apparent collusion with Mr [QR] for the purpose of crystallising [Mr OY’s] guarantee to the [AES].

[14] He seeks “a direction be [*sic*] given that neither Mr QS nor anyone from AEQ act against [him] or [his] personal interests in regard to Mr QR, his interests and all companies in the Group, [his] interests have a shareholding in or of that [he] was previously a Director or employee in.”

Review

[15] A review hearing took place in Auckland on 21 August 2012. Mr OY was accompanied by Mr JM, a barrister acting on his behalf. The hearing was an applicant only hearing but Mr QS exercised his right to attend.

Scope of review

[16] It is important that I first comment on the submission made in correspondence by Mr QS that “the function of the Legal Complaints Review Office is to correct error”. He submits that Mr OY has not identified any error by the Standards Committee and therefore the Standards Committee determination should stand.

[17] The scope of a review by this Office has been commented on a number of

times by the LCRO² and was recently the subject of comment by the High Court. In *Deliu v Hong*³ Winkelmann J had this to say about the nature of a review by this office:

In my view the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her.⁴

[18] The question is not whether the decision of the Standards Committee was one which was open to it to make, but rather a matter of the LCRO reviewing all of the material and coming to his or her own independent view of the matter. The role of the LCRO is not therefore limited to correcting any error made by the Standards Committee.

[19] In this regard, the fact that Mr OY has not identified any error is of no moment and in essence he is seeking that I should review all of the material provided and the determination of the Standards Committee, which is the nature of a review.

[20] However, as noted in *BK v YM*⁵ it is important to recognise that the LCRO may only review matters raised in the initial complaint to the Standards Committee. No new complaints may be made at the review stage. This is of some relevance to this review.

Was Mr QS acting for Mr OY?

[21] At the heart of Mr OY's complaint is his allegation that Mr QS had acted for him in a personal capacity and that he should not then be acting against him for Mr QR. Mr OY points to the advice provided by Mr QS in September 2009 with regard to the bank facilities and argues that this provides evidence that Mr QS was acting for him.

[22] Mr QS disputes this was the case. He points to the fact that his letter was addressed to "The Manager AET". He also notes that the facilities had been in place before he commenced acting for the companies and that a personal guarantee had already been provided by Mr OY. No new guarantee was taken at that time and Mr QS' comments merely noted the terms of the guarantee as already existed.

[23] It cannot be said on the basis of this material that Mr QS provided "advice" to

² See e.g. *BK v YM* LCRO 177/2010.

³ High Court Auckland CIV 2011-404-3758 [2012] NZHC 158.

⁴ Para [41].

⁵ Para [33].

Mr OY in a personal capacity. He was only noting what already was in place.

[24] Mr OY however contends that by reason of the fact that he dealt with Mr QS frequently in relation to company matters, that Mr QS thereby acquired information about him and his personal circumstances such that he would be disadvantaged were Mr QS to make use of that information when acting for Mr QR.

[25] Rule 8.7.1 of the Conduct and Client Care Rules provides as follows:

8.7.1 A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's 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 a more than negligible risk of disclosure of the confidential information; and
- d) the fiduciary obligation owed to the former client would be undermined.

[26] The important thing to note in connection with this rule is that the information must be "confidential". Mr OY has acknowledged that all of the information which Mr QS had about him was information that would have been known to Mr QR by virtue of their close business relationship. It cannot therefore be said that Mr QS had any information which could be referred to as "confidential" in so far as Mr QR was concerned. Consequently, even if it is considered that Mr OY was a client, this rule still has no application as Mr QS was not possessed of any confidential information.

[27] Nevertheless, Mr OY contends that Mr QS has breached the provisions contained in chapters 5 and 10 of the Conduct and Client Care Rules relating to the requirement for a solicitor to be independent and professional in his dealings. Mr OY does not refer to any specific rules, but rule 5 provides that:-

a lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

and rule 5.1 provides that:-

the relationship between lawyer and client is one of confidence and trust that must never be abused;

Rule 10 provides that:-

a lawyer must promote and maintain proper standards of professionalism in the lawyers dealings.

[28] In general terms Mr OY considers that Mr QS had a duty to him and in those circumstances should not act for Mr QR.

[29] In support of this, he states in his letter of 26 July 2010 to the Complaints Service that Mr QS had on a number of occasions stated that he was not, and had not, acted for Mr QR, and had also undertaken not to work for Mr QR in the future. He says that this assurance was important to him and he relied on those statements when dealing with Mr QS and his team leading up to his departure from the company on 31 March 2010.

[30] He also complains that Mr QS did not at any time make it clear that he was not acting for Mr OY.

[31] Mr QS did not at any stage undertake not to act for Mr QR in the future. He confirmed that he had not acted for him at any time up to 16 February 2010, but in his letter of 22 April he confirmed that he had instructions to act for Mr QR. This was formal confirmation of what must have by then become apparent to Mr OY and Mr OZ as they had met and corresponded with Mr QS about the issues arising in connection with Mr OY's impending departure.

[32] Mr OY's complaint in this regard is founded on the fact that he considers that Mr QS had agreed to some sort of an implied retainer to act in Mr OY's interests. This was based on the alleged request by Mr OY in July 2009 to accept instructions on behalf of Mr OY personally. Even if Mr QS had agreed to that, such an acknowledgement does not amount to accepting that he would thereafter only act in the interests of Mr OY in the absence of any instructions on a specific matter.

[33] Mr OY did not formally instruct Mr QS in connection with the issues he was having with Mr QR. In fact, from Mr QS' perspective, it was clear that Mr OZ was acting on his behalf. In the circumstances, it is understandable that Mr QS would not consider he had any duty towards Mr OY as it would be highly unusual for a client to be actively represented by one solicitor and to retain another on exactly the same matter.

[34] Mr OY's arguments based on assertions that Mr QS was acting for him personally cannot be sustained.

Did Mr QS have a duty to Mr OY as a non client?

[35] At the review hearing, Mr OY and Mr JM advanced the proposition that Mr QS

had a duty to Mr OY as someone affected by Mr QR's proposed actions. They referred to instructions given by Mr QR to Mr QS to effect a transfer of assets from the companies to another company in which Mr QR was the sole shareholder for little or inadequate consideration. In other words, they allege that Mr QS facilitated the asset stripping of the companies by Mr QR.

[36] Neither the proposition that Mr QS owed a duty to Mr OY in these circumstances, nor the facts to which they refer, were before the Standards Committee. As noted in paragraph [20] above, a review can only consider matters which were before the Standards Committee.

[37] While the essence of the complaint was before the Standards Committee, the specific facts were not, as Mr OY only became aware of them after the complaint was lodged. Mr OY considers that chapters 5 and 10 of the Conduct and Client Care Rules impose obligations on Mr QS to protect Mr OY's position as a shareholder whether or not he was Mr QS' client. Because the facts to which Mr OY refers were not before the Committee, it would be inappropriate for me to address this proposition. Mr OY is obviously at liberty to lodge a fresh complaint with the Complaints Service with regard to this aspect of his complaint if he wishes. I appreciate that this is unhelpful to the parties, but I would be exceeding my jurisdiction were I to venture an opinion on this matter, and that would not be in the interests of the parties either.

[38] Because I have declined to consider the matters referred to in paras [35] – [37] above, my decision is therefore limited to Mr OY's complaint which was before the Committee. This was premised on the allegation that Mr OY was a client of Mr QS and that therefore Mr QS was unable to act for Mr QR in his disputes with Mr OY. In this regard, I concur with the Standards Committee. Mr QS had not acted for Mr OY in a personal capacity and had no duty to him as a client. The issue as to whether he has a duty to him as a non client remains to be determined.

[39] I note that proceedings are before the Court and if the principle to which Mr OY and Mr JM referred in the review hearing is to be considered in those proceedings, then that may be the better forum in which to pursue the matter.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 28th day of August 2012

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:

OY as the Applicant
QS as the Respondent
Auckland Standards Committee
The New Zealand Law Society