LCRO 69 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 1
BETWEEN	**Mr John Kendal** of Napier Applicant
AND	**Ms Sherbourne** of Hamilton Respondent

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

DECISION

Application for review

[1] This review raises the issue of the basis upon which it is appropriate for a lawyer to act for more than one party in a family conveyancing transaction. In this case the lawyer acted for a family trust selling land to an elderly parent as well as acting as a trustee for the trust. In such a situation the lawyer must exercise extreme caution that all of the duties owed to the respective parties are met.

[2] An application was made by Mr John Kendal (John) for a review of a decision by the Waikato Bay of Plenty Standards Committee in respect of his complaint against Ms Sherbourne. The complaint related to work done by Ms Sherbourne for John's mother, Ms Kendal. Ms Sherbourne had acted for Ms Kendal in the purchase of land from the Kendal Investment Trust (the Trust). That trust was a vehicle for the family interests of Mr Blair Kendal (Blair). Blair is brother of John and son of Ms Kendal. The land was situated at in Hamilton.

[3] Ms Sherbourne acted for both the Trust as vendor and Ms Kendal as purchaser in the transaction. She is also a trustee of the Trust. John complained that in so acting

Ms Sherbourne was in breach of her professional obligations. In making this complaint he was supported by Ms Kendal.

[4] A hearing in respect of this matter was conducted on 30 July 2009 which Ms Sherbourne and John attended with their counsel. Blair also attended and gave evidence both by affidavit and orally. Ms Kendal was unable to attend and a letter from her was provided to me. At the conclusion of the hearing I issued a minute granting leave for an affidavit of Ms Kendal confirming the contents of that letter to be filed within five working days. I also indicated that the files held by Ms Sherbourne in respect of the transactions (which she had offered to supply) should be provided to me. I have received those files and had an opportunity to examine their content. Ms Kendal also filed the affidavit confirming the contents of her letter.

[5] I observe that this review concerns a complaint by Mr John Kendal about Ms Sherbourne's conduct of his mother's (Ms Kendal's) affairs. The only information about these matters provided by Ms Kendal directly are a brief letter to the Standards Committee of 14 October 2008 and the affidavit provided subsequent to the hearing confirming the contents of the brief letter of 30 July 2009. Most of the information has been provided by John and premised on inferences drawn from documents provided (by him and by Ms Sherbourne) in relation to the various transactions. To the extent that John has made assertions about matters of fact that occurred in this transaction I have accorded them a weight that is appropriate to such indirect evidence. In reaching the conclusions I have placed greatest reliance on the contemporaneous documents provided and the direct evidence and statements of the parties involved.

[6] At the hearing Mr XX (appearing for Mr John Kendal) also sought disclosure of the trust deed of the Trust to establish whether Ms Kendal was a beneficiary of the Trust and if so to what extent. He argued that this was necessary to establish whether the interests of the Trust and Ms Kendal were congruent. Ms Sherbourne stated that Ms Kendal was a beneficiary. There is no reason to doubt that that was accurate. I do not consider it necessary to have recourse to the trust deed to determine the questions before me.

[7] I also note that after the hearing Mr YY (appearing for Ms Sherbourne) provided a further memorandum raising issues in respect of the affidavit of Ms Kendal. I do not consider that the memorandum raises any issues that require addressing in this decision.

Background

[8] Ms Kendal is a woman of advanced years. Some time ago her husband who had been a farmer died and she was interested in moving into Hamilton into a new home of her own. The Trust, had purchased three sections in a suburban subdivision and Blair had made it clear he was prepared to sell one to his mother so that she could enter into a contract to have a house built on such section.

[9] The particular section that Ms Kendal was interested in purchasing had been bought by the Trust for $88 000. The price ultimately paid for the section by Ms Kendal to the Trust was $120 000. A portion of the price was satisfied by a loan from the Trust to Ms Kendal. The latter aspect of the transaction was recorded by a deed of acknowledgement of debt which recorded an advance of $40 000 (as well as certain other indebtedness). The sums were repayable on either the death of Ms Kendal or the sale of the property. It also provided that Ms Kendal agreed to mortgage the land as security for the debt and thereby to create a caveatable interest over the land in favour of the Trust.

[10] Considerable tensions have arisen between family members since the death of Ms Kendal's husband. Particular animosity appears to exist between John and Blair. I was provided with various pieces of correspondence and other information with regards to the disputes that have arisen. I have put that information to one side as I do not consider it to have been relevant in the disposition of this application for review.

[11] The Standards Committee found that there was no conflict of interest in this matter and that the disclosure effected by Ms Sherbourne was appropriate. It was of the view that Ms Sherbourne's position as trustee was that of an independent trustee only and raised no professional issues. The Committee was of the view that Ms Sherbourne had no knowledge of the alleged agreement that the property be sold at the price Blair (or the Trust) had originally paid for it. It accepted that Ms Sherbourne had no knowledge of certain payments by Ms Kendal made in reduction of outstanding indebtedness to the Trust. The Committee was of the view that Ms Sherbourne acted correctly at all times and was not in breach of any of the Rules of Professional Conduct.

The Complaint

[12] John complains that Ms Sherbourne failed in her professional duty to Ms Kendal. In particular he complained at the hearing of this review that:

- Ms Sherbourne acted in a position where there was a conflict between her own interest (as trustee of the Trust) and her duty to Ms Kendal;

- Ms Sherbourne acted in a position where her duty as trustee of the Trust conflicted with her duty as solicitor to Ms Kendal;
- Ms Sherbourne acted in a position where her duty as solicitor to the Trust conflicted with her duty as solicitor to Ms Kendal; and
- Ms Sherbourne failed to properly advise Ms Kendal in respect of the deed of acknowledgement of debt (including when Ms Kendal made certain repayments).

[13] Underlying the complaints against Ms Sherbourne is the assertion that Blair had agreed to sell the section to Ms Kendal for what he had paid for it. John is of the view that Blair (or the Trust) inappropriately profited from the transaction in respect of the land with Ms Kendal. He is of the view that Ms Sherbourne has been complicit in this and that had she adhered to her professional duties Ms Kendal would not have been taken advantage of in the way alleged. This review is concerned solely with the conduct of Ms Sherbourne and cannot make any findings in respect of the conduct of Blair.

[14] It has been alleged that Blair had agreed to sell the land for what he had purchased it for (i.e. $88 000 as opposed to $120 000). There is no evidence that the actual sale price was more than a fair market price at the time the agreement was reached. Indeed the suggestion is that the price at which it was sold was substantially less than it would have been sold for in an arms length commercial transaction. This is supported by valuation evidence.

[15] I do not find it necessary to determine whether there was an agreement between Blair and Ms Kendal that the sale price would be what Blair had paid for it. Ms Sherbourne has stated (in her letter of 17 September 2008 to the Standards Committee) that she had no knowledge of this alleged oral understanding. This was corroborated by Blair's recollection of events. I find that Ms Sherbourne had no knowledge of the alleged understanding between Blair and Ms Kendal at the relevant times.

[16] The original complaint was made to the New Zealand Law Society on 4 August 2008.

Chronology

[17] The consideration of this matter may be assisted by a chronology of events. While the following may not be complete in every detail it outlines the main occurrences between the parties.

7 October 2003	The Trust contracts to purchase sections.
4 March 2004	The Trust settles purchase of sections
17 December 2004	Agreement in principle between Ms Kendal and the Trust that section be purchased.
December 2004	Contract drafted by Ms Sherbourne and provided to Blair Kendal.
21 February 2005	Meeting of trustees of trust resolving to sell section to Ms Kendal for $120 000
March 2005	Construction of house on land commences.
10 June 2005	Sale price confirmed by letter from Ms Sherbourne to Ms Kendal and arrangements to execute documents made.
16 June 2005	Waiver of independent advice (and other documents) signed by Trustees.
20 June 2005	Deed of acknowledgement of debt entered into between Ms Kendal and the Trust.
20 June 2005	Contract for sale and purchase of land between Ms Kendal and the Trust executed.
20 June 2005	Waiver of independent advice signed by Ms Kendal
1 July 2005	Property transaction settled
30 June 2006	Payments of $8 000 and $13 065.41 in reduction of debt made by Ms Kendal to the Trust.
9 May 2008	Ms Kendal notified that a caveat had been registered in respect of debt.
5 June 2008	Ms Sherbourne writes to Ms Kendal outlining current debt position.
22 May 2009	Funds paid to trust in full discharge of debt obligation, caveat released.

The agreement to purchase

[18] In late 2004 an agreement in principle was reached by Blair (and the Trust) to sell the section to Ms Kendal. It appears clear that Blair and Ms Kendal had agreed that the

price would be $120 000 at that time. I reach that conclusion on the basis of the evidence provided by Mr Blair Kendal which was not contradicted and is consistent with the evidence of Ms Kendal. I also observe that notes of a telephone call between Blair and Ms Sherbourne of 17 December 2005 record that the price of the proposed sale was $120 000. There is no conflict of evidence on this point.

[19] The most fundamental divergence on the evidence is whether the purchase price was agreed simply as $120 000, or whether that price was understood to be what the Trust had paid for the land. The only parties who are privy to that knowledge are Blair and his mother, Ms Kendal. His mother has stated in a letter to the Law Society of 14 October 2008 that she agreed to purchase the land on the basis that "I would be paying him the amount he had paid for it". She stated that she was surprised to discover the difference between the price that had been paid for the land and the price at which it was sold to her. Blair denies such an understanding and asserts that he was open with his mother as to the original price of the section.

[20] I do not consider that it is necessary for me to decide what the oral understanding between Blair and Ms Kendal was. The conduct of Blair is not under scrutiny. The question is whether Ms Sherbourne ought to have acted in some way other than she did in light of all of the circumstances and her professional obligations.

[21] It is clear that Ms Sherbourne was retained to assist the Trust in the transaction in December 2004. A file note records that she spoke by telephone to Blair who requested that she draft an agreement for sale and purchase at a price of $120 000. That note is relatively detailed and also indicates that there was an intention to build with Jennian Homes and the agreement would need to be conditional on that. It also recorded that the sale could not settle prior to the sale of other property.

[22] It is apparent from a file note of Ms Sherbourne of 21 February 2005 that the trustees of the Trust discussed the sale price at that time. The calculations on that note are consistent with the evidence of Ms Sherbourne that the trustees were concerned to ensure that the price was not too far below the market value so as to incur gift duty. That concern is also reflected in a special condition in the draft contract allowing for adjustment or termination in the event that the transaction was considered dutiable.

[23] It appears that for some months the contractual position remained unchanged and no signed contract existed. On 27 May 2005 Ms Sherbourne telephoned Blair to follow up on the matter. That note records Blair's intention that some money would be lent by the Trust to Ms Kendal to enable the sale. Also recorded is advice from Ms Sherbourne to Blair that it was important to sort out the fact that the section that Ms

Kendal was building on land not owned in her own name. A further file note shows that by 7 June 2005 it was agreed that an increased amount of $40 000 would be lent to Ms Kendal to facilitate the purchase. On 10 June 2005 arrangements were made for the documents (which had now been prepared) to be signed by Ms Kendal. That occurred on 20 June 2005. Settlement of the transaction occurred on 1 July 2005.

Applicable Standards

[24] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date.

[25] The relevant professional rules are the Rules of Professional Conduct for Barristers and Solicitors. A breach of those rules is indicative that some disciplinary intervention may be warranted, however it is not conclusive.

[26] Under the pre 1 August 2008 regime orders could be made against a practitioner only when the thresholds set out in ss 106 and 112 of the Law Practitioners Act 1982 were met. That was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed ‘reprehensible’ (or ‘inexcusable’, ‘disgraceful’ or ‘deplorable’ or ‘dishonourable’) or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). It is against these standards that the conduct of Ms Sherbourne is to be tested.

When did Ms Sherbourne commence acting for Ms Kendal?

[27] Mr John Kendal asserts that prior to 10 June 2005 Ms Sherbourne should have taken steps to protect the interests of Ms Kendal. He argues that it was unwise for Ms Kendal to be building on land that she did not own and also that Ms Sherbourne had an obligation to ensure that the price paid was reached by the method that Ms Kendal understood to be applicable (alleged to be what Blair paid for the section). Such duties,

if they exist at all, can exist only if Ms Sherbourne was Ms Kendal's lawyer in relation to the transaction at the time and therefore owed her professional duties of loyalty and fidelity.

[28] It was argued by Mr XX for John that Ms Sherbourne was Ms Kendal's lawyer at all times. This was asserted on the basis that Ms Kendal was using Ms Sherbourne's services on other matters (which was accepted by Ms Sherbourne) and as such Ms Kendal could reasonably expect Ms Sherbourne to be looking out for her interests when the details were being settled. It was also stated that Ms Sherbourne had a global understanding of the affairs of Ms Kendal having being involved in representing her interests in matters relating to her husband's estate. Ms Kendal has said that she did not consider that she needed "any other legal representative" because she considered Ms Sherbourne was actively attending to matters including seeking finance from the executors of Ms Kendal's husband's estate. In this regard reference was made to a letter written by Ms Sherbourne dated 15 April 2005 in respect of estate matters. That letter suggested that an interest free advance of $40 000 be made to Ms Kendal to be secured against the property being purchased (it appears that Ms Kendal had been granted a life interest under her husband's will). The suggestion was that Ms Sherbourne was generally responsible for the conduct of all of Ms Kendal's legal affairs and was obliged to proffer advice and assistance in this matter.

[29] Mr Hudson for Ms Sherbourne argued that there was no lawyer-client relationship between Ms Sherbourne and Ms Kendal in respect of this transaction until June 2005. He pointed out that there was no evidence that Ms Kendal had sought the assistance of Ms Sherbourne in the matter nor that Ms Kendal had even spoken to Ms Sherbourne about the matter. The estate issues, he argued, were quite separate. He pointed out that Ms Kendal was free to instruct another lawyer to assist her in respect of the conveyancing matters.

[30] In reality things may not have been quite so clear cut. While a lawyer may view certain matters as being quite separate the clients that they deal with are far more likely to view matters globally. It appears that at the relevant times Ms Kendal was looking to Blair to provide assistance to her in relation to the organisation of her affairs generally. Moving out of the property previously occupied with her husband, acquiring a new home, and settling any matters relating to her husbands estate were all closely related. The question is whether it would have been reasonable in the circumstances for her to expect Ms Sherbourne to be advising her on the detail of the property transaction without having been asked to do so.

[31] It is important not to impose duties on Ms Sherbourne simply because Ms Kendal chose to rely on Blair to assist her in these matters. In 2004 and 2005 the relationship between Blair and Ms Kendal appears to have been cordial. Blair gave evidence at the hearing and he appeared to be knowledgeable about property and conveyancing matters. It appears that he took it upon himself to assist his mother in purchasing the land. While Blair appears to have assisted to some degree in securing a building contract the evidence is that this was largely done by Ms Kendal herself, certainly as regards the finer details of the building.

[32] From the perspective of Ms Sherbourne Blair and Ms Kendal were organising these affairs without her assistance, as they were entitled to do. While Blair had asked for a contract to be drafted this was not invidious. Blair stated at the hearing that this was for the purpose of presenting it to the building company to demonstrate that Ms Kendal was to have an interest in the land in question.

[33] The question is whether a reasonable person observing the conduct of Ms Sherbourne and Ms Kendal would conclude that the parties intended lawyer-client relationship and consequent duties to subsist between them in respect of the Oldfield Court transaction: *Day v Mead* [1987] 2 NZLR 443, 458; *Blyth v Fladgate* [1891] 1 Ch 337. The retainer between lawyer and client is primarily contractual in nature and therefore the onus of proving that such a relationship exists at any given time rests on the party asserting it. However that needs to be tempered by a recognition that some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer: *Giffith v Evans* [1953] 1 WLR 1424, 1428.

[34] I do not consider that Ms Sherbourne had any obligation prior to June 2005 to become involved in the negotiations between Blair (for the Trust) and Ms Kendal. The transaction did not appear invidious and a lawyer is not generally required to proffer unsought advice. In the present there is no evidence that Ms Kendal had asked Ms Sherbourne to assist even in a general way with this transaction. This appeared to be a normal family transaction in which Blair and Ms Kendal were arranging between themselves the best manner in which to bestow a benefit on Ms Kendal. In short, there was nothing to suggest to Ms Sherbourne that her services were required by Ms Kendal in relation to the acquisition of the property.

[35] I do not consider the fact that an enquiry had been made to the executors of the estate of the late Mr Kendal as to whether funds could be advanced to assist in the purchase showed that Mr Sherbourne was acting for Ms Kendal in respect of the purchase in April 2005. Determining Ms Kendal's entitlements under the will was part of the ongoing work of Ms Sherbourne and in the context of that the suggestion is entirely

appropriate. There was no contract of retainer between Ms Sherbourne and Ms Kendal in respect of the property transaction until June 2005. Ms Sherbourne wrote on 10 June 2005 on a basis which presumed she was instructed (or would be instructed) on the transaction by Ms Kendal.

[36] Ms Sherbourne has breached no duties in not providing advice to Ms Kendal in respect of the transaction prior to June 2005.

Was there a conflict of interest and duty?

[37] Ms Sherbourne acted as both trustee for the Kendal Investment Trust and as solicitor for Ms Kendal. It was argued that she therefore acted in a situation where her personal interest as a trustee conflicted with her duty to Ms Kendal. It was argued that the fact that Ms Sherbourne was both solicitor for Ms Kendal and a vendor (as trustee) of the property created a conflict of interest and duty.

[38] Rule 1.03 of the Rules of Professional Conduct provide:

> A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on the one hand and an existing or prospective client on the other hand.

The rule is expanded on in the commentary which at paragraph 6 provides that:

> The rule will usually apply to any interest or dealing through the practitioner's family or relatives or any company, trust, partnership, or other body in which the practitioner has or exerts a material measure of control or influence. It will also include interests, which are not personal in the strict sense but representative in character such as directorships and trusteeships.

[39] Mr XX argued that in light of the commentary to the rule it was clear that Ms Sherbourne was in a position of conflict of interest and duty. Mr YY, on the other had, suggested that r 1.03 was directed only to those situations in which the lawyer had some personal interest in the transaction. In the present case Ms Sherbourne was acting as a trustee in a professional capacity and could benefit only to the extent of her professional fee.

[40] I take note of the fact that the dominant words must be those of the rule itself and not the commentary which is couched as guidance rather than as prescription when states that "The rule will usually apply…".

[41] The interpretation argued for by Mr XX appears to have been adopted by the new Rules of Conduct and Client Care which state:

> 5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.
>
> …
>
> 5.4.5 In this rule, a lawyer is deemed to be a party to a transaction if the transaction is between entities that are related to the lawyer by control (including a trusteeship, directorship, or the holding of a power of attorney) or ownership (including a shareholding), or between parties with whom the lawyer or client has a close personal relationship.

[42] However in both the old and the new rule the trigger for disqualification of the lawyer is whether or not there exists a conflict between the interests of the lawyer and the interests of the client. There is no blanket ban against a lawyer who is a trustee (or other office holder) acting for a third party in dealing with the trust (or other entity). Such a ban exists only where "there is a conflict or a risk of a conflict between the interests of the lawyer [in the capacity of trustee] and the interests of a client for whom the lawyer is acting or proposing to act" (adopting the language of the new rule).

[43] Notice needs to be taken of the fact that this was a transaction of a kind which is common between family members (and related entities). The evidence before me indicates that the sale was at a price that was below the market price for similar sections at the time of the sale. A third of the purchase price was also to be satisfied by an interest free loan which was not repayable until the property was sold or Ms Kendal died. Ms Sherbourne was not on notice of any dispute or misapprehension as to the price at which the section was to be sold.

[44] The Trust sought to benefit Ms Kendal by providing the section to her on very attractive terms. Ms Kendal understandably sought to take advantage of this benefit. Accordingly Ms Sherbourne's interests as a trustee of the trust were in congruence with Ms Kendal's interests as purchaser.

[45] The conflict of interest and duty necessary to trigger a disqualification of Ms Sherbourne is not present in this case.

[46] Given that I have found that the interests of the Trust and Ms Kendal were congruent it is also clear that Ms Sherbourne's duties as a trustee (of fidelity and loyalty to the Trust) were not in conflict with her obligations to Ms Kendal as her solicitor.

Disclosure of trustee status

[47] Ms Kendal has stated that she was not aware that Ms Sherbourne was a trustee of the Trust prior to the time the agreement was signed (on 20 June 2005). Blair said

that he provided the draft agreement for sale and purchase to Ms Kendal in late 2004 so that she could present it to her building company. That agreement showed Ms Sherbourne as a vendor. It also contained a special clause limiting her liability to the assets of the trust on the basis of her status as a trustee. If Ms Kendal received that document it appears that she did not read it closely. In any event the documents which were signed on 20 June 2005 referred to Ms Sherbourne as a party on a number of occasions. In her letter to this office of 17 June 2009 she stated that she explained her status as a trustee and she said "I would not gloss over those issues and I explain all documents fully to all clients at the time of signing".

[48] Guidance in respect of a lawyer's obligation of disclosure can be found in paragraph 3 of the Commentary to r 1.03 which states that the existence of a personal interest of a practitioner should be disclosed irrespective of a perceived lack of conflict. Rule 5.4.1 of the new rules provides that "Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists". Both rules refer to trusteeships as being able to amount to a personal interest.

[49] Ms Sherbourne most certainly did not conceal her status as trustee. There is only scant information from Ms Kendal on the matter and she is not clear when she became aware that Ms Sherbourne was a trustee. It may have been prudent for Ms Sherbourne to clearly disclose her status as trustee to Ms Kendal (for example by a statement to that effect on the waiver document). However, I do not consider she was in breach of any professional obligation applicable at that time in disclosing in the manner she did. Considering the applicable standards of conduct (found in s 106 and 112 of the Law Practitioners Act 1982) I conclude that she was not in breach of her professional obligations in this regard.

Was there a conflict of interest?

[50] Mr XX argued that in any event the interests of the Trust as vendor and Ms Kendal as purchaser were in conflict. He asserted that there was no concurrence of interest between the Trust and Ms Kendal. On this basis he claimed that rule 1.04 of the Rules of Professional Conduct had been breached. That rule provides:

> A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.

The commentary to that rule also observes that "A conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them".

[51] It is widely accepted that a lawyer may act where a potential conflict of interest and duty exists (but not an actual conflict) providing adequate informed consent is given. See for example *Taylor v Schofield Peterson* [1999] 3 NZLR 434 where at p 440 Hammond J observed that where there was a potential conflict of interest the lawyer must:

> (1) recognise a conflict of interest, or a real possibility of one; (2) explain to the client what that conflict is; (3) further explain to the client the ramifications of that conflict (for instance, it may be that she could not give advice which ordinarily she would have given); (4) ensure that the client has a proper appreciation of the conflict, and its implications; and (5) obtain the informed consent of that client.

[52] That case expanded on the well recognised principle that there is no absolute bar to a lawyer acting for two parties to a transaction where their interests may conflict provided informed consent has been obtained (*Clark Boyce v Mouat* [1993] 3 NZLR 641). In the present case Ms Kendal gave consent for Ms Sherbourne to act for both parties on 20 June 2005. That is recorded in a memorandum signed by Ms Kendal on that date. The memorandum itself is relatively brief simply noting that Ms Sherbourne had been asked to act for other parties, that Ms Kendal could (and was advised to) obtain independent advice, but that she wished to retain Ms Sherbourne in any event. It is not apparent from that document (nor are there any notes on file) that the wider advice of the kind contemplated by Hammond J in *Taylor* was given.

[53] Having said that I observe that the facts of this case are different to those in *Taylor.* That case concerned the dissolution of a partnership and a loan of funds between the partners to enable a buy-out. It had a commercial flavour (and a risk of insolvency) which is not present here. Where advice is to be given on the existence of a conflict it is reasonable to expect that not only will it be tailored to the needs and understanding of the particular client, but also to the reasonably perceived risks.

[54] The onus of establishing that informed consent has been given lies on the lawyer and not on the client and the onus has been called "a heavy one" (*Taylor* at p 440). I also acknowledge that *Taylor* and *Mouat* concerned whether or not there had been a breach of fiduciary duty. That is a question of civil legal obligations and not of professional responsibility.

[55] At the hearing Ms Sherbourne said she did not have an independent recollection of the meeting which took place on 20 June 2005 between herself and Ms Kendal. However she stated that her normal practice would have been to speak to Ms Kendal for around 45 minutes to 1 hour. In respect of the waiver she stated that she would have explained that the parties are each entitled to independent legal advice and that it was a requirement that independent advice be waived. That it was because she would be acting for both parties and the capacity in which she would be acting. She said she would go through the waiver document itself and explain that it was necessary that the client understood what they were doing in waiving the right to independent advice. Ms Sherbourne said that she recalled no unusual features of the meeting and if there had been any unusual matters she would have made a file note. I note that in her letter to the Standards Committee of 17 September 2008 Ms Sherbourne gives a broadly consistent account of that meeting and states that she disclosed all aspects of the transaction to Ms Kendal including the manner in which the sale price had been reached.

[56] Ms Kendal in a letter to the Standards Committee of 14 October 2008 stated that she was “taken aback” when she discovered that Ms Sherbourne was a trustee of the vendor trust. She also stated that she “relied on what I had been told, trusting what they had said and signing all the documents they put in front of me”. She also states “I now appreciate I should have been more vigilant about [these matters] and arranged for independent legal advice”. The suggestion is that she had not been previously adequately advised as to the nature of the transactions and the role of Ms Sherbourne in acting for both parties.

[57] It was also suggested by Ms Kendal that Blair was present at the time she discussed these matters with Ms Sherbourne. If this were the case there would be real difficulties with the assertion that Ms Kendal’s decision to forgo independent legal advice was given in a free and informed manner. This is clearly an important question.

[58] The assertion that Blair was present at the 20 June 2005 meeting was made in the hand written letter of Ms Kendal which was dated 30 July 2009 and provided to me at the hearing. In light of the nature of the allegation (and the fact that the assertion was contested) I gave leave for an affidavit of Ms Kendal deposing to the matters raised in the letter to be filed. Such an affidavit was filed and Ms Kendal, on oath, reaffirmed her assertion.

[59] At the hearing both Ms Sherbourne and Blair denied that Blair was present at the meeting in question. Ms Sherbourne noted that it is her invariable practice in such matters to meet with each party separately. Blair also provided diary notes indicating

that he had other engagements in Auckland on the day in question (the meeting occurred in Hamilton). This was verified by an affidavit from a Mr A stating that Blair was with him in Auckland on 20 June 2005.

[60] I also note that there is evidence that Blair attended at Ms Sherbourne's offices independently on 16 June 2005 to execute the relevant documents.

[61] I find that Blair was not present at the meeting between Ms Sherbourne and Ms Kendal on 20 June 2005 when the documents in this matter were executed and Ms Sherbourne provided advice to Ms Kendal on the conflict of interest and the nature of the transaction in his absence.

[62] I find that Ms Kendal did give her prior and informed consent to Ms Sherbourne acting for both the Trust and Ms Kendal. While the advice given by Ms Sherbourne might not have tracked exactly the guidance of Hammond J in *Taylor* I note that that case concerned a serious conflict between parties who were in dispute in respect of the dissolution of a business partnership. The waiver itself might usefully have reflected the extent of the advice given and the constraints on how she would be able to act. However having heard from Ms Sherbourne as to what her practice was I find that the advice given to Ms Kendal by Ms Sherbourne regarding the conflict of interest met the requirements imposed by the Rules of Professional Conduct. Applying the pre 1 August 2008 standard, Ms Sherbourne acted in a way which was not in breach of the relevant professional standards in this regard.

[63] There are two particular matters which it might be suggested that Ms Sherbourne had conflicting obligations. I turn to consider those now.

Failure to disclose original purchase price

[64] The difference between the original purchase price of the section and the amount paid by Ms Kendal is at the heart of this complaint. Ms Sherbourne acknowledges that the Trust paid $244 000 for the three sections on the basis of an agreement entered into by the Trust in October 2003. This information was confidential to the Trust and Ms Sherbourne was obliged to keep it confidential (unless there was consent to disclose it).

[65] The question arises whether, had Ms Sherbourne known that information independently and been acting for Ms Kendal alone would she have been obliged to disclose that information to Ms Kendal. Rule 1.09 of the Rules of Professional Conduct states:

> In most circumstances a practitioner is bound to disclose to the client all information received by the practitioner which relates to the client’s affairs.

[66] The nature of that duty was examined in *McKaskell v Benseman* [1989] 3 NZLR 75 where Jeffries J observed at p 87 that

> A primary obligation of the fiduciary is to reveal all material information that comes into his possession concerned with his client's affairs. The emphasis is on what is material, or essential. That is a matter of judgment by the solicitor on the facts of each case, for certainly he is not obliged to pass on trifling and insignificant detail.

[67] The question therefore is whether a solicitor exercising independent judgement and without recourse to the interests of the trust was obliged to disclose to Ms Kendal the purchase price of the section. I observe that the Privy Council addressed a similar question in *Clark Boyce v Mouat* [1993] 3 NZLR 641 when considering Mr Boyce's failure to disclose to Ms Mouat that the family solicitors had refused to act on the transaction at all. In finding that the information need not be disclosed Lord Jauncey stated at p 648:

> Given the information which was then available to Mr Boyce and the fact that he saw nothing sinister in [the family solicitor's] refusal to act their Lordships are satisfied that that information was not material information which should have been disclosed. It therefore follows that Mr Boyce was not in breach of any fiduciary obligation owed to Mrs Mouat.

[68] This transaction in this case presented as a normal family transaction which was conferring a considerable benefit on Ms Kendal. It was also the case that in substance the terms of the arrangement had been agreed in advance between Blair and Ms Kendal. On this basis even if Ms Sherbourne had been acting for Ms Kendal alone it would have been reasonable for Ms Sherbourne not to disclose the price originally paid for the sections by the trust. In particular there were no factors which would have signalled to Ms Sherbourne that Ms Kendal would particularly have wanted to know the information regarding the original purchase price. Because there would have been no obligation to disclose such information had Ms Sherbourne been acting for Ms Kendal alone, it cannot be a breach of obligation for her not to have disclosed it when acting for more than one party.

The agreement to mortgage

[69] The second matter which requires scrutiny is the agreement to mortgage found in the deed of acknowledgement of debt. No evidence was presented as regards the manner in which the specific terms of the deed of acknowledgement of debt were reached. I infer that the document was drafted by Ms Sherbourne. That document provides that the debt is secured by an agreement to mortgage the and recognises that

it creates a caveatable interest over the land. In 2008 a caveat was in fact registered against the land.

[70] The existence of such an agreement to mortgage in respect of a loan between family members is not unusual. However, had the document been drafted by Ms Sherbourne on Ms Kendal's instructions alone it may well not have included such a clause. It would have been in Ms Kendal's interest to have received the advance unsecured and been able to deal in her land unencumbered. On the other hand, a competent lawyer advising the Trust would advise that such security was highly advisable. The existence of a possibility of such conflicting advice is suggestive of an actual conflict of interest. Even with consent it is never open to a lawyer to act in the interests of one party and against the interests of the other.

[71] I have considered this question carefully and formed the view that the deed of acknowledgement of debt is substantially in a standard form. In the same way that the agreement for sale and purchase contained terms that favoured one party or the other but were not realistically going to be departed from, the securing of the $40 000 advance by an agreement to mortgage was on terms that were standard for such a transaction. It would have been extraordinary for any lawyer to document such an advance on an entirely unsecured basis. Moreover any competent lawyer would have advised Ms Kendal to agree to such a clause. As such I do not consider that provision of an agreement to mortgage in the deed of acknowledgement of debt was objectionable. In this sense Ms Sherbourne was not acting for two parties who were still negotiating important terms of a transaction in a way which meant that there was an actual conflict of interest which precluded her acting for both of them.

Rule 1.05: Acting against a former client

[72] It was also suggested that Ms Sherbourne should not have acted on this matter because she had previously acted for Ms Kendal and was now acting for the Trust. It was suggested that this was a breach of r 1.05 of the Rules of Professional Conduct. That rule prohibits a lawyer from acting against a former client when this would be detrimental or reasonably objectionable to the former client due to the relevance of knowledge about the client's affairs held by the lawyer.

[73] There was no evidence that information held by Ms Sherbourne could be used in a way that would be detrimental or objectionable to Ms Kendal. Rule 1.05 contemplates the situation where a former client objects to a lawyer acting against them. Ms Kendal was not a former client she was an existing client. Accordingly there was no breach of r 1.05 in this case.

Rule 1.06: Financial advice

[74] Mr XX suggested that Ms Sherbourne had breached rule 1.06 of the Rules of Professional Conduct. That rule provides that "A practitioner who advises a client on borrowing or investing must act as an independent adviser in the client's best interests". The suggestion was that Ms Sherbourne had advised Ms Kendal in respect of borrowing and had not acted in her best interests.

[75] The commentary to that rule provides in paragraph (2) that it may not apply where the client has, prior to instructing the lawyer, already made firm arrangements for the borrowing. Here that was the case. Blair had agreed with his mother to lend the necessary funds to enable her to purchase the land. In any event it is difficult to see how facilitating an interest free loan which was not repayable until Ms Kendal's death or the sale of the house was not in the interests of Ms Kendal.

[76] There has been no breach by Ms Sherbourne of r 1.06.

Did Ms Sherbourne breach duties in respect of the debt repayment?

[77] In June 2006 Ms Kendal made a payment in reduction of the debt owed by her to the Trust. This was notwithstanding that the amounts owing were interest free and not repayable until the death of Ms Kendal or the sale of the property. It was suggested by Mr XX that Ms Sherbourne ought to have advised Ms Kendal not to make the 2006 payment as it was not in her best interests to do so. Mr XX observed that in respect of a later payment (which appears to have been funded by a separate advance) Ms Sherbourne had made it clear in correspondence to Ms Kendal's new advisor that such payments were not obligatory.

[78] Both Ms Sherbourne and Blair have stated that the 2006 repayment was made by Ms Kendal direct to Blair and that Ms Sherbourne was not party to it. Ms Sherbourne has stated that she did not learn of those payments until after they had been made (for example in her letter of 17 September 2008 she states that the payment was made by Ms Kendal "totally independently of me"). I also observe that the payments were made after the conveyance of the property had been completed and the retainer of Ms Sherbourne in respect of that transaction was at an end.

[79] Blair stated that the payments were made in 2006 because $8 000 was the difference between what had been paid on settlement and the $88 000 he actually paid for the section. He further stated that the $13 065.41 was paid because it related to payments made by Blair (or the Trust) in respect of legal bills payable by Ms Kendal.

[80] I do not consider that Ms Sherbourne failed in her professional obligations in any way in this regard. The debt position between the Trust and Ms Kendal was a matter

between themselves. While Ms Sherbourne was a trustee of the Trust the reality of the situation was that it was a vehicle for the family interests of Blair. There was no reason for Ms Sherbourne to take anything other than an administrative interest in the affairs of the Trust. Ms Kendal did not request advice as to her obligation to make any repayments. Ms Sherbourne had no professional obligation to proffer advice in respect of those payments and therefore was not in breach of her professional obligations in this regard.

[81] I observe that the final amount of indebtedness owed by Ms Kendal to the Trust was repaid on 22 May 2009. It appears that this final payment discharging the entire indebtedness was made after there had been something of a falling out between Blair and Ms Kendal in this matter. In May 2008 the Trust had registered a caveat over the property in respect of the debt (although it had been in a position to do so for almost three years). It appears that this precipitated the repayment of the final sum.

[82] In a letter of 15 June 2009 John stated that his mother had come under severe pressure from Blair in this regard. He said that she made payment under the mistaken fear that she was going to be forced out of her house on the basis of the caveat put in place by Ms Sherbourne. This was clearly not going to occur. Ms Sherbourne faxed Ms Kendal's lawyer (understood to be) at that time on 19 May 2009 indicating that it was not necessary to repay the funds and that the Trust would be likely to consent to the registration of a prior mortgage. The Trust was not insisting on repayment. Also Ms Kendal was competently advised by another lawyer.

Jurisdictional issues

[83] I observe that Mr YY raised some jurisdictional points at the outset of the hearing. He did not pursue those arguments with any force. I have considered the matters he raised and have concluded that the application for review was properly made and that Ms Sherbourne has been given adequate notice of the grounds of the application.

Conclusion

[84] When Ms Sherbourne was approached to assist in this transaction she stated that it presented as a conventional family transaction. Given the terms of the sale including the price and interest free loan this was a reasonable assumption to make. There do not appear to have been any features of this transaction to put Ms Sherbourne on notice that it was likely that problems would arise from this transaction at a later date. I observe that the Standards Committee, which is comprised of lawyers and a layperson did not consider the conduct of Ms Sherbourne to be in breach of the Rules of Professional Conduct or to otherwise warrant a disciplinary response. The

judgement of such a Committee is to be accorded considerable weight on review. In any event it is a view with which I agree.

Costs

[85] Mr YY sought indemnity costs on the basis that the application was brought for ulterior purposes, that the allegations are baseless, and that Ms Sherbourne and her firm have been put to the trouble of refuting the allegations including by appointing counsel to assist.

[86] Section 210(1) of the Lawyers and Conveyancers Act 2006 states that I may make such order as to the payment of costs and expenses as I consider fit. Subsection (2) then provides a number of particular instances of such orders (though none of those instances relate to the payment of costs by lay people). I must also take into account the *Costs Orders Guidelines* which have been issued by this office. Those guidelines provide that the power to order costs between the parties will be exercised sparingly. It states that where the application for review was reasonable (whether or not the decision of the Standards Committee is modified or reversed) and the parties have acted appropriately, parties will generally be expected to bear the costs they incurred in being party to the review. It then states that:

> A costs order may be made against a party to review (whether a practitioner or a lay person) in favour of the other party where there has been some improper conduct in the course of the review. Such conduct may exist where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review. Improper conduct may also exist where a party has ignored or disobeyed an order or direction of the LCRO or breached an undertaking given to the LCRO or another party.

[87] I am aware of the fact that there have been ongoing and acrimonious disputes in the Kendal family. It is the view of Blair that the complaint in this matter was made to harass him and was essentially made for an ulterior purpose. Although I have not upheld the complaint, I do not consider that this of itself shows that the complaint was improperly motivated. Although I have made findings of fact which are adverse to the position asserted by John, I am not satisfied that this demonstrates that he brought this complaint and application for review knowing that it was not going to be upheld.

[88] It is the nature of professional practice that complaints may sometimes be made which turn out to be without foundation but must however be responded to. Any order of costs against a lay complainant must be used very sparingly and only in egregious cases. This was a case in which Ms Kendal, on more than one occasion, made clear

that she supported John in pursuing this matter. In all of the circumstances I do not consider that it would be proper to make an order of costs.

Decision

[89] The application for review is declined. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 I confirm the decision of the Standards Committee.

DATED this 19th day of August 2009

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Duncan Webb
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:

John Kendal as Applicant
Ms sherbourne as Respondent
Solicitors as a Related Party
The Waikato Bay of Plenty Standards Committee
The New Zealand Law Society