

CONCERNING

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

AND

CONCERNING

a determination of a Standards Committee

BETWEEN

RV

Applicant

AND

ZL

Respondent

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

Introduction

[1] Mr RV has applied for a review of the determination by a Standards Committee to take no further action in respect of his complaints concerning Mr ZL's conduct when acting for a company in which Mr RV was a shareholder on the sale of a property to the brother-in-law of the sole director of the company.

Background

[2] Mr RV and his family trust, and Mr HD and interests related to him, were equal shareholders in [Company A].

[3] Mr HD was the sole director of the company. The company owned several properties and Mr ZL describes Mr HD and Mr RV as having a "major falling out".¹

[4] As Mr HD was the sole director of the company it was he that instructed Mr ZL on its behalf. Mr RV however says he was "an active shareholder in the day to day

¹ Letter ZL to Lawyers Complaints Service (16 December 2010).

management of the various companies” including [Company A] and asserts he also gave instructions at times to Mr ZL on company matters.²

[5] Mr RV’s lawyer, Mr NR, was a trustee of Mr RV’s trust and Mr ZL says that Mr RV “has at all relevant times been represented by Mr ... NR ...”.³

[6] In November 2009 Mr ZL acted for [Company A] on the instructions of Mr HD in relation to the sale of a property to Mr HD’s brother-in-law. Mr RV argues the transaction was a “major transaction” as defined in the Companies Act 1993 and therefore the transaction required approval by 75 per cent of shareholders. This meant that a resolution approving the sale signed by Mr RV’s trust was required. Mr HD disputed that the sale was a major transaction.

[7] Mr RV also argued that the property had been sold at an undervalue thereby prejudicing him as a shareholder in the company.

Mr RV’s complaints

[8] The essence of Mr RV’s complaint is captured in the following sentences from the details of complaint attached to Mr RV’s complaint form dated 29 November 2010:

2. ... Mr ZL acted for [Company A] in this matter under the instruction of its sole director HD.
3. The transfer of property was carried out without the knowledge or consent of all shareholders.
4. The property was transferred from [Company A] to a new company that had just been formed and whose director and shareholder are recorded at the company’s office as HD’s brother-in-law, WS.
5. The property was transferred with a loss of some \$449,000 ...
6. ZL acted in the original purchase when [Company A] purchased the property and was aware of the original purchase price, so was aware the new sale involved a significant loss ...
- ...
8. ZL was well aware and well prior to this transaction of a dispute between the shareholders and on that basis alone should have not acted in this or any other matters involving connected or inter related parties.
9. I believe neither ZL nor his firm should have acted in this transaction (and any involving connected parties) as I believe it is a conflict of interest.

² Letter RV to LCS (17 January 2011).

³ Above n 1.

10. I believe the transaction was a major transaction and I am certain Mr ZL would have been aware of this ...
 11. ... I believe it is very possible that ZL or [Law Firm A] acted for the purchaser in this matter as well ...
- ...

The Standards Committee determination

[9] From the material provided by both parties the Standards Committee distilled the following issues to be addressed:⁴

- (a) Whether Mr ZL had a conflict of interest in acting for [Company A] when Mr RV was a former client of his; and/or
- (b) Whether it was appropriate for Mr ZL to act for both the vendor and the purchaser in a related party transaction, when the property was allegedly sold at a substantial loss and Mr ZL was aware of the original purchase price.
- (c) Whether Mr ZL breached any duty of care to Mr RV as a shareholder of [Company A].

[10] The Committee addressed each issue.

Conflict of interests

[11] The Committee noted that the issue was not so much one of a conflict of interests but whether Mr ZL potentially was in breach of the Conduct and Client Care Rules⁵ relating to the use of information confidential to Mr RV. It noted that:^{6 7}

Mr ZL had only acted for Mr RV in his capacity as a trustee some two years earlier. This particular transaction had no bearing on the current transaction between [Company A] and [Company B].

[12] With regard to this issue, the Committee determined:⁸

In the Committee's view and based on the material before it, there was no evidence to support the allegation that Mr ZL held confidential information that would be likely to affect the interests of the former client adversely, whether that client was Mr RV or his trusts.

⁴ Standards Committee determination, at [21].

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

⁶ Above n 4, at [26].

⁷ [Company B] is the abbreviation for XXXXX, the purchaser of the property.

⁸ Above n 4, at [29].

[13] The Committee then considered “whether there was any conflict in Mr ZL acting for [Company A] and [Company B] in the same transaction”.⁹ It noted that Mr ZL had acted for “[Company A] and [Company B] in relation to the mechanical aspects of a conveyancing transaction”¹⁰ and despite Mr RV’s submissions that he was a client in the transaction, the Committee did not agree. Instead, the Committee considered Mr ZL was acting for [Company A] on the instructions of Mr HD as the sole director.

[14] The Committee did not consider there was any conflict in Mr ZL acting for [Company A] and the purchaser “as there did not appear to be more than a negligible risk that he would be unable to discharge the obligations owed to one or more of his clients”.¹¹

[15] The Committee noted Mr ZL had provided evidence that “[Company B] had obtained independent legal advice as confirmed by [Law Firm B], the solicitors for [Company B], who noted they had advised the company in respect of the purchase”.¹² This had been confirmed in a separate letter to the Committee from [Law Firm B] and the Committee considered “this was sufficient to comply with the requirements of rule 6.1.1”.¹³

[16] The Committee went on to record its acceptance of the evidence provided to support the view that the property had been sold at market value.

Duty of care to Mr RV

[17] The Committee addressed this issue briefly, noting that Mr ZL’s duty was to “[Company A], not Mr RV or any other shareholder”.¹⁴

[18] The Committee also considered further issues raised by Mr RV.

The dispute between Mr RV and Mr HD

[19] This issue arises in the context of Mr RV’s submission that Mr ZL should not have acted for the company when he knew there was a dispute between Mr RV and Mr HD.¹⁵

⁹ At [30].

¹⁰ At [32].

¹¹ At [33].

¹² At [34].

¹³ At [34].

¹⁴ At [37].

¹⁵ At [39].

Mr RV submitted that Mr ZL had a duty to be independent in acting for [Company A] and that he had failed to act in an independent manner considering his fiduciary duties and duties of care owed by lawyers to their clients.

[20] The Committee went on to note Mr RV's submission that Mr ZL appeared to be a party to the transaction because he was aware that the transaction was:¹⁶

... between parties with whom the lawyer or client had a close personal relationship ... Mr RV submitted that Mr ZL had a close personal relationship with Mr HD for over 20 years. He submitted that when acting for [Company A], Mr ZL should have ensured that he was free from the compromising influences of this loyalty to Mr HD.

[21] The Committee considered this aspect of the complaint had already been dealt with in that Mr ZL's client was the company and "did not consider that the relationship between Mr HD and Mr ZL fell within the definition of a "close personal relationship".¹⁷

Mr ZL's position as trustee of Mr HD's trust

[22] Mr ZL was a trustee of Mr HD's trust. The trust was a shareholder of the company. Mr ZL was therefore named as a shareholder of the company.

[23] Mr RV's complaint in this regard was that Mr ZL should not have acted for the company when he was a shareholder and this compromised his independence and the requirement for him to act in a professional manner. The Committee determined to take no further action in relation to this complaint as he had no personal interest in the company and was acting as a professional trustee only.

Extraneous comments by Mr ZL

[24] In the course of corresponding with the Committee Mr ZL made various comments which Mr RV asserted meant Mr ZL was in breach of rule 2.7 of Conduct and Client Care Rules (threatening to make disclosure of information for an improper purpose). He also considered the Committee should investigate other issues.

[25] The statements which Mr RV took exception to and the matters he considered should be investigated further, were:

- The assertion that Mr RV's complaints were made in bad faith and were an abuse of process.

¹⁶ At [40].

¹⁷ At [40].

- The advice that Mr ZL had difficulty in collecting payment of fees where he had acted for Mr RV personally.
- Mr ZL disclosed Mr RV had been a bankrupt.
- Mr ZL claimed Mr RV was being advised by an unnamed lawyer.
- Mr ZL misled NZLS by stating he had never acted for Mr RV in relation to [Company A].
- Mr ZL misled NZLS by omitting to advise he had acted for both parties in the transaction.

[26] Finally, the Committee considered whether it should order an independent review of Mr ZL's files but reached the view it was not necessary to do so.

[27] In summary, the Committee determined to take no further action in respect of any of Mr RV's complaints.

Review

[28] The review progressed by way of a hearing in [City] on 28 April 2016. Both parties attended, with Mr RV being represented by Ms VM and Mr ZL represented by Ms DL. At the review hearing Ms DL referred to *Morris v Morris*¹⁸ to support her submissions. Ms VM was provided with the opportunity to consider that judgment and make submissions in relation to it. Comments were received from her and forwarded to Ms DL for her information only.

[29] In this decision, I have not referred to emails between counsel and this Office following the review hearing for the reason that they are contentious in nature and have no relevance to the outcome of this review.

Procedural matters

[30] In his application for review Mr RV complained he was not provided with:¹⁹

a copy of [Mr ZL's] final submission and therefore didn't have the opportunity to comment or challenge information [he considered] could easily be refuted, or provide[d] further factual information the Standards Committee could rely upon. In any system of natural justice there is always full disclosure and in this case there was not.

¹⁸ *Morris v Morris* [2015] NZHC 2315.

¹⁹ RV supporting reasons for application for review, at [2].

[31] This situation arose when the Committee noted during an initial hearing on the papers that Mr RV had raised new issues against Mr ZL in his submissions for the hearing on the papers. Having made this observation the Committee “considered it appropriate to refer those submissions to Mr ZL to enable him to respond to the new allegations raised”.²⁰

[32] At the review hearing, Ms VM agreed that this issue was not a “huge issue” and arose more from the fact that Mr RV did not understand he was not necessarily entitled to a right of reply.

[33] Subject to the requirement to “perform its duties and functions in a way that is consistent with the rules of natural justice”²¹ a Standards Committee may “regulate its procedure in such manner as it thinks fit”.²²

[34] At some point in an investigation by a Standards Committee it must reach a stage where it ceases to seek replies to submissions. Each party is invited to make final submissions in support of their positions for the Standards Committee to consider when conducting its “hearings”.²³

[35] In the present instance, Mr RV raised new issues in his final submissions. Natural justice demanded that Mr ZL should have an opportunity to respond to those new issues. Having considered Mr ZL’s response the Committee came to the view that no further response was required from Mr RV. I have reviewed Mr ZL’s response and there is nothing fundamental or contentious that demanded to be put before Mr RV. The Committee exercised the power provided to it by s 142(3) of the Lawyers and Conveyancers Act 2006 (the Act) and proceeded to consider the complaints and reach a determination. The Committee did not breach any rights of natural justice by doing so.

[36] In his review application, Mr RV submits that the Committee relied on incorrect information contained in Mr ZL’s response which he could have refuted. The information provided by Mr RV on review is presumably the information he says he was denied the opportunity of providing to the Standards Committee. I have taken this information into account in coming to the same decision as the Standards Committee to take no further action in respect of Mr RV’s complaints.

²⁰ Letter LCS to parties (18 November 2011).

²¹ Lawyers and Conveyancers Act 2006, s 142(1).

²² Section 142(3).

²³ Standards Committee “hearings” are conducted on the papers unless the Committee determines otherwise – Lawyers and Conveyancers Act, s 153(1).

[37] Consequently, this reason for the review application does not provide a reason to reverse or modify the Committee's decision.

A major transaction?

[38] Mr RV's complaints included a complaint that the sale of the property represented a "major transaction" as that term is defined in the Companies Act 1993. Mr RV asserts Mr ZL was aware of this and that Mr ZL would have provided a certificate to the company's bank to this effect.

[39] In responding to this complaint Mr ZL advised that Mr HD had obtained an opinion from a "respected commercial lawyer" that the transaction was not a major transaction.²⁴ In his review application, Mr RV says that he had pointed out to the Committee that the opinion Mr ZL refers to was a verbal opinion to Mr HD only. This complaint by Mr RV implies that it is a lawyer's role to assume the responsibility of a director to the company shareholders in this regard.

[40] Mr ZL's duty was to his client, the company. I accept that included a responsibility to ensure the sale was properly authorised. If Mr RV holds to the belief that the transaction was not properly authorised, the appropriate response would be to challenge the legitimacy of the transaction through the court. A director's duties to shareholders do not devolve on to the lawyer acting for the company. No detailed evidence has been provided about who the "respected commercial lawyer" was and the nature of his instruction or advice. It was not unreasonable for Mr ZL to rely on Mr HD's advice that he had addressed the issue as to whether or not the matter was a major transaction, and that he did not consider it was.

[41] No evidence of any certificates (that the transaction was not a major transaction) that Mr RV says Mr ZL would have been required to provide to the company's bank, has been provided. Such certificates are usually provided by the directors of a company. A lawyer can not be asked to make such an assessment and would be well advised to carefully phrase the wording of any certificate requested of him or her.

[42] The Committee accepted the property had been sold at market value which is a factor relevant to a determination as to whether or not the transaction was a major transaction. However, whether or not the sale was a major transaction is a matter to be established by evidence and where evidence is contested, it must be subject to

²⁴ Letter ZL to LCS 16 December 2010

proper scrutiny in the correct forum. In any event, a decision as to whether or not a transaction is a major transaction is a matter of law.

[43] The question as to whether or not the transaction was a major transaction is not a matter to be determined by the Standards Committee or this Office and Mr RV was not the recipient of any certificate by Mr ZL to that effect.

Mr ZL's duty to his client

[44] Mr ZL acted for [Company A]. A company gives instruction through its director(s). Mr HD was the sole director of [Company A]. Mr RV was a shareholder of [Company A]. Mr ZL had acted for Mr RV personally. That fact is of limited relevance to this decision as the issue at the heart of this matter is whether Mr ZL had a duty to Mr RV as a shareholder in the company which overrode his duty to act on behalf of [Company A] on the instructions of Mr HD.

[45] Ms VM says he did. She says there were serious red flags raised in relation to the sale which off-set Mr ZL's duty to his client. She refers to the dispute between Mr RV and Mr HD which Mr ZL knew about. She refers to the fact that the property was sold to an entity controlled by Mr HD's brother-in-law. She also refers to the allegations that the property was sold at an undervalue.

[46] The principle espoused by Ms VM and Mr RV is that Mr ZL had a duty to Mr RV as a shareholder (and client) that overrode his duty to act for the company and to carry out his instructions. In this regard, I accept the overarching submission by Ms DL, that a lawyer is not required to adjudicate on legal issues arising between members of a company including a director's duty to the company and its shareholders.

[47] In addition, there is considerable merit in Ms DL's submission that lawyers would be put in an impossible situation if it were to be accepted that a lawyer had a duty to protect the interests of a company's shareholders in the face of instructions from the directors of a company to act in a particular way. This is not a situation where a lawyer assumes obligations to third parties. To assert otherwise, builds on an argument that is presented in a different way at times, that if a lawyer has acted for a person at some stage in the past then the lawyer has an ongoing obligation to protect and promote that client's interests against clients for whom a lawyer may be presently acting. The obligation to protect and promote a client's interests is transaction specific and is not an ongoing obligation which lasts indefinitely.

[48] The only ongoing restriction affecting a lawyer's duty to clients for whom he or she has acted in the past relates to disclosure of confidential information which is dealt with by rule 8.7 and which has no application in the present circumstances.

[49] Consequently, I do not accept the major submission made by Mr RV that Mr ZL should have advised him of the proposed sale and declined to accept instructions to act for the company in respect of the sale. I acknowledge that some lawyers faced with this set of circumstances, may have felt uncomfortable in accepting instructions to act on the sale out of a sense of loyalty to Mr RV, but a sense of discomfort does not easily present a reason for Mr ZL to decline to act and to betray the confidence reposed in him by Mr HD.

[50] Ms VM submits that Mr ZL should not have acted for the company knowing what he did. That submission raises the proposition that the company (Mr HD) was not able to appoint counsel of its choice, an issue which usually arises in the context of a client's right to be represented by counsel of choice in litigation. It was in this regard that Ms DL referred to *Morris v Morris*²⁵ where, she submitted, the Court had undertaken an exercise similar to that undertaken by the Committee to determine whether or not a client should be denied the right to be represented by counsel of choice. In that case, Mr Morris sought to restrain a lawyer, Mr Walker, from acting for the defendants (Mrs Morris and her partner) in relation to a dispute between Mr Morris and the defendants arising out of a partnership between Mr Morris and his estranged wife. Mr Morris claimed that Mr Walker had confidential and privileged information about him obtained during a 45 year period when Mr Walker acted for Mr and Mrs Morris, both personally and for a partnership carried on by them.

[51] Edwards J referred to the general principle that:²⁶

The integrity of the justice system does not depend on findings of culpability against the lawyer concerned. However, the integrity of the justice system will be impaired where counsel has a conflict of interest or where there is an appearance of a conflict of interest such that justice will not be seen to be done.

[52] I do not consider it necessary to discuss the principles arising out of *Morris v Morris* in any depth. That case (and many others) deals with a situation where a lawyer is engaged to act for one party against another, where the lawyer has previously acted for both parties. Having previously acted for both parties, the argument is that the lawyer is possessed of confidential information relating to one party which would be used for the benefit of the other if the lawyer were to accept instructions from the other.

²⁵ Above n 18.

²⁶ Above n 18, at [18].

That principle is the principle addressed in rule 8.7 of the Conduct and Client Care Rules²⁷ and Ms VM agrees.²⁸

[53] Ms VM distinguishes *Morris v Morris* from the facts in this matter and says:²⁹

Mr RV was not aware Mr ZL was acting in the relevant transaction and therefore did not have the opportunity to take steps to mitigate any potential losses as was the case in *Morris v Morris*.

[54] I agree. Mr ZL was not acting for one party (Mr HD) against another party (Mr RV). He was instructed to act for [Company A] in relation to the sale of a property.

[55] Mr RV considered the sale was against his interests. He also considered Mr HD had duties to the company and to him as a shareholder which Mr HD was not fulfilling. In effect, Mr RV submits that Mr ZL should have formed a view that Mr HD was not fulfilling those duties, advised Mr RV of the proposed sale, and declined to act for the company in relation to the sale. That would have enabled Mr RV to take action to injunct the sale.

[56] If Mr ZL had acted as Mr RV submits he should have, he would have been acting against the interests of his client. He would stand accused of breaching his client's confidence. Mr ZL's duties were to the client by whom he was presently instructed.

Other issues

[57] Mr RV raised a number of other issues in his submissions to the Standards Committee which were referred to Mr ZL for comment. These are referred to in paragraph [8] above. The Committee considered each of these issues and in each case came to the view that further action was neither necessary nor appropriate.

[58] In his application for review Mr RV considers he should have been given the opportunity to respond to Mr ZL's reply as the Committee had reached an "incorrect answer due to not having the relevant facts before them".³⁰

[59] I have already disagreed with Mr RV's submission that he should have had an opportunity to reply to Mr ZL's response, but I have also considered Mr RV's response to those matters as contained in his application for review. In each case, while I

²⁷ Above n 5.

²⁸ Email VM to LCRO (29 April 2016).

²⁹ Above n 28, at [2].

³⁰ Above n19, at [1].

consider some of Mr ZL's responses were gratuitous and unnecessary, they do not in themselves amount to conduct which should attract an adverse disciplinary response.

[60] Nor is it correct to say that the Committee reached incorrect conclusions because the overall tenor of Mr ZL's response could have led the Committee to become biased against Mr RV. A Standards Committee is made up of lawyers and lay people who, by virtue of the role they undertake, have experience in considering a range of allegations against lawyers such that they do not readily form adverse views of parties to a complaint based on such things as whether or not the person had been bankrupted, or reach conclusions as to why a party may have discontinued litigation based on conjecture. There is no indication the Committee formed its views other than on an objective consideration of all of the material before it.

[61] In any event, I too have considered all of the information provided in connection with the complaint and this review which includes all of the same material as was before the Standards Committee, as well as Mr RV's submissions made in support of his review applications. I have also had the benefit of hearing from the parties and their counsel.

[62] Having considered all of the material and evidence objectively, I have reached the same conclusions as the Committee, that further action in respect of any of the complaints is neither necessary or appropriate.

[63] In this decision I have not referred specifically to each of the complaints raised by Mr RV. That does not mean I have not addressed them. In respect of the issues raised by Mr RV but not specifically referred to (for example, the complaint that Mr ZL acted for both parties in a transaction) I accept and adopt the comments of the Standards Committee.

Decision

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

DATED this 23rd day of May 2016

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:

Mr RV as the Applicant

Ms VM as the Applicant's Representative

Mr ZL as the Respondent

Ms DL as the Respondent's Representative

A Standards Committee

The New Zealand Law Society