LCRO 87/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**AD** of Auckland, Barrister Applicant
AND	**ZX** of Auckland, Solicitor Respondent

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

DECISION

Background

[1] On 17 August 2009 the receivers of AAB (AAB) dismissed a number of employees.

[2] The Applicant was engaged through an instructing solicitor by a number of employees with regard to the dismissal, and proceedings were filed on their behalf in the Employment Relations Authority.

[3] AAB had been created as a result of a merger of AAC (AAC) and AAD (AAD).

[4] The Applicant had previously acted for AAC, and he had also been consulted in respect of a distinct matter arising during the course of the merger.

[5] The Respondent lodged a complaint with the Lawyers Complaints Service alleging breaches of Rule 8, and in particular Rule 8.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Standards Committee Decision

[6] In its decision dated 22 April 2010 the Committee accepted the Respondent's submission "that when providing advice on a restructuring procedure, a lawyer will usually have some knowledge of the restructure itself. In any event, [the Applicant] has knowledge through previously acting for the AAD and AAC about redundancy procedures, which are the subject matter of the present claims."

[7] The Committee also acknowledged that AAB "is in a difficult position in terms of obtaining information (and potentially assistance on evidential issues) from [the Applicant] as the company's previous lawyer about such matters given he is acting on the present claims."

[8] The Committee found that there was a conflict of interest and determined that there had been conduct unbecoming on behalf of the Applicant pursuant to Section 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act). Section 152(2)(b) provides for a finding of unsatisfactory conduct. Section 12 of the Act defines unsatisfactory conduct, and s 12(b)(i) includes conduct unbecoming as constituting unsatisfactory conduct. The finding presumably is therefore, one of unsatisfactory conduct by virtue of s 12(b)(i) of the Act.

[9] The complaint by the Respondent alleged a breach of Rule 8.7, and in particular Rule 8.7.1. The consequence of a breach of the Rules is a finding of unsatisfactory conduct by reason of s 12(c) of the Act. The Committee's determination of conduct unbecoming is therefore confusing, but hopefully that is resolved by this decision.

[10] An Order was made by the Committee that a conflict of interest existed so that it was inappropriate for AD to continue acting for the former employees of AAB. The authority under which such Order was made is not provided, and is not an Order which it is open to the Committee to make under s 156. However, the practical consequences of a finding of conflict of interest, is that the Applicant could not continue acting for the former employees.

[11] In addition, the Applicant was ordered to pay costs to the New Zealand Law Society in the sum of $500.

Application

[12] The Applicant has applied for a review of the decision by the Standards Committee, on the grounds that the decision was based on errors of fact and law.

[13] The Applicant submits that the error of fact is that the decision to make the Applicant's clients redundant was made by the receiver. The Applicant has never acted for the receivers, and therefore there could be no argument that the Applicant was able to avail himself of institutional knowledge in bringing the proceedings against AAB (in receivership).

[14] The errors of law relate to the reference by the Committee to two decisions of the Court, one of which the Applicant submitted could be distinguished, and the other of which the Applicant submitted had been extended by a subsequent decision which refined the test as to what constitutes confidential information.

Review

[15] A review took place by way of a hearing on 8 December 2010.

[16] Mr G, QC appeared on behalf of the Applicant who was also present. ZX appeared for himself.

[17] As recorded above, this matter concerns an allegation by the Respondent that the Applicant was in breach of Rules 8.7 and 8.7.1 by accepting instructions from the previous employees of AAB, in circumstances where he had previously acted for AAC and had also given advice in respect of a distinct aspect relating to the merger.

[18] Chapter 8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 is headed "Confidential Information". The Rules relating to conflicts of interest are contained in Chapter 6 and apply to conflicts when acting concurrently for more than one party.

[19] It is appropriate to record the provisions of Rule 8.7 and 8.7.1 in full.

> 8.7 A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.
>
> 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 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.

[20] The Rules reflect the exercise by the Court of its inherent jurisdiction to control its own processes, one of the aspects of which is the power to determine which persons should be permitted to appear before it as advocates. *Hana New Zealand Ltd v Stephens* 1 NZLR 833 p.11.

[21] Nevertheless, it must be noted at this point, that the complaint and this application rest on a breach of the Rules, rather than a consideration of whether the Applicant is in a conflict of interest situation as discussed by the Courts. The distinction may be subtle, but the outcomes are quite different.

[22] The consequence of a breach of the Rules, is, as has happened in this instance, that the practitioner has a finding of conduct unbecoming recorded against his name.

[23] The consequence of the Court determining that there is a conflict of interest, is that the lawyer is unable to represent one of the parties to the proceedings.

[24] I am grateful to both counsel for providing the various authorities and articles in respect of this application.

[25] Both Mr G and the Respondent focused on the relevant test to be applied when considering whether a conflict of interest exists. The Standards Committee determined that the test was that of a reasonable bystander. The Applicant, and Mr G on his behalf, submitted that that test had been refined by *G B R v Seng Bou (Paul) Keung*, unreported, High Court, Christchurch, 19 March 2010, Associate Judge Bell, (CIV – 2009 409-1486) in which the test was considered to be what "a reasonable observer who knows and is prepared to understand the facts" would think.

[26] In considering this application, it is appropriate to focus closely on the various elements of Rule 8.7.1, as it is a breach of this Rule that the Applicant has been accused of.

[27] Applying the four elements of the Rule to the current situation, the following questions arise:

(a) Did the Applicant hold confidential information?

(b) Would disclosure of that confidential information be likely to affect the interests of AAB (in Receivership) adversely?

(c) Was there more than a negligible risk of disclosure?

(d) What was the nature of the fiduciary obligation owed to the former client?

[28] Paragraph (c) can be discounted immediately as it must be a given that there was more than a negligible risk of disclosure.

[29] The question posed in paragraph (d) can also be disposed of readily. In this regard the address given by Justice Susan Glazebrook, to the 23rd Annual Banking and Financial Services Law and Practice Conference in August 2006, headed "Conflicts of Interest : the New Zealand Perspective", is particularly helpful.

[30] When considering the fiduciary duty of lawyers to current clients, Glazebrook J observed that "in the context of lawyers' professional ethical obligations and the jurisprudence on conflicts of interest, two duties in particular are relevant – the duty of loyalty, and that of confidence."

[31] With regard to the duty of loyalty, Glazebrook J came to the conclusion that "it is usually agreed that the duty relates only to the information, skills and knowledge related to the particular matter for which the lawyer is engaged. The duty of loyalty is thus constrained by the scope of a retainer".

[32] The second element of a lawyer's fiduciary duty was one of confidence. Glazebrook J observes that in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, the House of Lords held that "general fiduciary duties do not survive the termination of the retainer and that the only duty relevant to successive representation is that of confidence. The duty of confidence is, however, coloured by the prior duty of loyalty. This means that a lawyer's duty of confidence is more stringent than in cases where the duty of confidence arises in other circumstances".

[33] It seems therefore, that if the other three elements of Rule 8.7.1 are considered to be present, that the fourth element relating to the undermining of the fiduciary

relationship, will follow, provided the confidential information held by the lawyer relates to the same subject matter.

[34] In the present circumstances, the Applicant was acting for previous employees against AAB (in receivership) having previously acted for AAC against its employees. Consequently, "the same subject matter" test is satisfied and I consider that the requirement of Rule 8.7(d) is met.

[35] This therefore reduces the consideration to two matters:

1. Did the Applicant hold information that was confidential to AAB (in receivership); and
2. If so, was disclosure of that confidential information likely to affect the interests of AAB (in receivership).

Confidential Information

[36] Counsel for the Applicant, submits that the Applicant did not hold any confidential information.

[37] He states that all information held by the Applicant is publicly available.

[38] Particular reference was made to a chart which summarised the ownership structure of the various companies within the Group. Mr G submitted that all such information is available from the Companies Office records and that the difficulty in ascertaining that information was irrelevant. I accept that view.

[39] ZX, however, makes the point that although the submission made by Mr G applies to the New Zealand company structure, it does not apply to overseas companies within the Group. That point is well made, but I am unsure just how much that is of relevance to the matters in hand, given that the Applicant was acting for New Zealand employees who presumably would have been employed by New Zealand companies.

[40] The other matter of some significance, is the fact that the Statement of Problem as amended by the Applicant, included a claim of joint employment by all of the companies within the Group, and not merely the employer named in the employment contract.

[41] The Respondent submits that this approach can only have been derived from the Applicant's knowledge gained previously where the Applicant acted for AAB against ex

employees, in which it was acknowledged that the employees were employed by the Group. Examples of this were provided.

[42] The significance of claiming against several companies on the basis of joint employment is that the employees are thereby able to claim against more than one employer, thus enabling their preferential claims to be made against several companies, and increasing the funds available to the Applicant's clients in priority to other creditors.

[43] The Applicant has provided copies to the Respondent of all files and materials which he has had in his possession, although some of that information was revealed only after further enquiries by the Respondent.

[44] Although there was no suggestion that information had been withheld intentionally, the fact that this information came to light only after further investigation by the Respondent, served to heighten his and his client's concerns.

[45] The Respondent submitted that in particular, the information provided in the Q and A sheet on which the Applicant had advised, would have assisted the Applicant in formulating claims by the employees on the basis of joint employment. However, I would observe, that any lawyer acting for the Applicant's clients, would have been provided with this information by the clients themselves, who included the former General Manager and Human Resources Manager. Consequently, the confidentiality of the information obtained by the Applicant in advising on the Q and A sheet may be more illusory than real.

[46] The Respondent refers to the comments of Asher J in *Hana New Zealand Limited v Stephens* at paragraphs 20 and 21, where he states that the plaintiff -

> "…should not have to be comforted by counsel for the plaintiff's assurances that his memories have dulled. He should not need to receive promises that the documents on the former file will not be looked at. Such concerns should not arise in a case such as this.
>
> It cannot be said with certainty that anything that counsel for the plaintiff learned, and may remember, will act to the detriment of "the defendant". However, it is possible that this could arise and it is reasonable for the client to fear that it could happen. That is enough for there to be an unacceptable conflict of interest in counsel for the plaintiff continuing to act."

[47] Referring to these statements, the Respondent submits that it is not merely a case of accepting the statements of the Applicant, however honestly given. The Respondent was at pains to make it clear that he was not in any way casting

aspersions on the honesty of the Applicant. However, he relies upon the statements of Asher J.

[48] Again, however, I make the point, that these were statements made by the Judge in the context of determining whether or not there was a conflict of interest, and whether or not the lawyer could represent a client against a previous client. The complaint by the Respondent is that the Applicant has breached the Rules which relate to the use of confidential information. It may be a consequence of such a breach, that the Applicant cannot represent the ex employees, but the primary consequence of a breach of the rules is a disciplinary record.

[49] Another matter raised by the Respondent, was the fact that the Applicant was acting for all of the aggrieved previous employees of AAB. As noted above, these included, the previous General Manager and the HR Manager. The HR Manager was the person from whom the Applicant had received instructions previously on behalf of the company.

[50] The Respondent noted that this meant that the company was thereby deprived of being able to ascertain from these people the nature of the information that the Applicant would have received from the company and thereby increasing the inability of the company to satisfy itself as to what information was in fact in the possession of the Applicant. This is a difficult matter. It is not clear-cut, and even applying the refined test as set out in *G B R v Seng Bou (Paul) Keung* it is understandable that the Respondent and his client are uncomfortable with the Applicant acting for the previous employees without being able to be absolutely certain and independently satisfied as to the extent of the Applicant's knowledge.

[51] The question, however, is whether in all of the circumstances it is appropriate that the Applicant should have a finding of conduct unbecoming, or any other finding that was open to the Committee, recorded against him.

[52] The information that the Applicant holds that can be pointed to with some certainty, i.e., the company structure and the "joint employment" claim, is information which would have been available to the Applicant independently, and indeed available to any other Counsel acting for the disaffected employees. Other than this, there is nothing that the Respondent can point to with any certainty, and this is understandable given the practical difficulties faced.

[53] However, the Applicant has provided the Respondent with all details of his state of knowledge and the Respondent has been at pains to say that he is not in any way challenging the Applicant's honesty.

[54] In all of the circumstances, I consider that a finding of conduct unbecoming is inappropriate.

[55] If the Respondent's main objective is to prevent the Applicant representing the previous employees, the Respondent's client is not without remedies. In that regard, s138(1)(f) of the Act is of relevance.

[56] It should be noted that the complaint and this review are confined to a consideration of professional ethics and obligations, and this decision should not in any way be considered to be one in support of, or in defence of, any other proceedings in a different forum that the Respondent may bring.

[57] Having come to this conclusion, it is not necessary to consider Rule 8.7.1(b).

Decision

1. Pursuant to Section 211(1)(b) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is reversed.
2. Having made that order, it is appropriate to make an order pursuant to Section 211(1)(b) that no further action in respect of the complaint should be taken, being an order pursuant to Section 152(2)(c).

Costs

The Standards Committee also made an order against the Applicant ordering him to pay costs of $500 to the New Zealand Law Society. In his application for review, the Applicant noted that should the finding be reversed, the order for costs should also be reversed.

Section 157(2) of the Act enables the Standards Committee to make an order for costs against the Practitioner, even where there is no finding of unsatisfactory conduct, "if it considers the proceedings were justified and that it is just to do so."

The LCRO has all of the same powers as the Standards Committee pursuant to Section 211(1)(b).

I consider that the investigation and proceedings by the Committee were justified given the apparent use by the Applicant of information acquired by him when previously acting for the company, and in the circumstances I consider that it is appropriate for the costs order to remain.

The order for costs as made by the Committee therefore stands, although the authority for that order is now pursuant to Section 157(2) of the Lawyers and Conveyancers Act 2006.

DATED this 14th day of December 2010

_____

Owen 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:

AD as the Applicant
Mr X QC as Counsel for the Applicant
ZX as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society