

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 056

Ref: LCRO 53/2020

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

YJ

Applicant

AND

GK

Respondent

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

Introduction

[1] Mr YJ has applied for a review of the determination by [Area] Standards Committee [X] in which the Committee made one finding of unsatisfactory conduct against Mr GK.

Background

ABCD Holdings Limited

[2] ABCD Holdings Limited (ABCD) was incorporated on 22 May 2008. The directors of the company were Mr YJ, Mr DQ, and Mr DQ's parents, FQ and VQ.

[3] The shareholders of the company were:

Mr YJ's Trust – 33 shares

Mr DQ's Trust – 33 shares

FQ and VQ's Trust – 30 shares

VQ – 3 shares

[4] Mr YJ says the company was incorporated for the purposes of property acquisition and development.

Mr YJ and Mr DQ's business relationship

[5] Prior to incorporation by ABCD, Mr YJ had been a director and shareholder of EF Holdings Limited (50%), GH Holdings Limited (33%), and IJ Holdings Limited (50%). Mr DQ was a director and shareholder of those companies as well. These companies were incorporated as property investment companies.

[6] Mr YJ describes his relationship with Mr DQ as “a successful business relationship that spanned more than ten years...”.¹

[7] Mr YJ and Mr DQ were joined in ABCD by Mr DQ's parents for the next ventures.

[8] In May 2008, ABCD purchased a property at [Z] Street.²

[9] Mr GK (or the firm in which he was then an associate, [law firm]) did not act for the company.

[10] In 2009, the [X] Street properties³ were sold and the proceeds of sale retained in ABCD to fund the purchase of a [building] in [W] Street⁴ on 9 September 2009.

[11] Mr DQ and his parents were long time clients of Mr GK and [law firm], and in December 2009, Mr DQ recommended that Mr YJ instruct the firm in relation to a dispute over the purchase of a second-hand jet ski.⁵

[12] Since that time, the firm acted for Mr YJ in relation to his business and personal affairs. Mr GK has also acted for ABCD.

¹ Mr YJ's complaint (21 July 2018), at [122].

² All properties referred to in this decision are in [city].

³ The property had been developed into five units.

⁴ Additional funds were required for this purchase which came (in part) from the sale of a property owned by [IJ] Holdings Limited.

⁵ Mr GK did not act.

The [Y] Road property

[13] Mr GK's father and his father's three siblings owned a large property at [Y] Road, which Mr GK says they had decided to sell around 2005 to 2007.⁶

[14] Mr DQ had been known to the GK family (and Mr GK himself) for many years. Mr GK says that as far as he can recall, the GK family first offered to sell the property to Mr DQ in 2009 and he contracted to purchase the property with the intention of completing a residential subdivision.

[15] MN Developments Limited (MN Limited) was incorporated on 30 April 2010. The directors of this company were Mr DQ and Mr GK. Each of them owned 50% of the shares in the company.

[16] The intention was that Mr DQ would nominate MN Limited as the purchaser of the property, which would then carry out the subdivision and sale of the resulting sections.

[17] MN Limited did not proceed with the subdivision and Mr DQ incorporated KLM Holdings Limited (KLM) in October 2010 and nominated that company as the purchaser of the property.

ABCD refinancing

[18] ABCD had borrowed from the [District] Building Society to fund its activities. Mr DQ engaged the services of a broker to put together a funding application to [bank] bank so that the company could source funding at a better rate than it was paying to [District] Building Society. Mr YJ agreed with this proposal.

[19] The company borrowings were structured on the basis that each shareholder would have access to a facility of \$200,000, and then the company itself had a table loan of \$270,000. The total facility was therefore \$870,000. Borrowings were secured by a mortgage over the [W] Street property, and a General Security Agreement over the company's assets. The advances were also supported by personal guarantees from each of the shareholders.

[20] Mr GK acted for the company and all guarantors to complete the refinancing which took place in July 2010.

⁶ Mr GK, letter to Lawyers Complaints Service (11 October 2018) at [11].

[21] At the same time as the funding application for ABCD was put to the bank, Mr YJ alleges that the broker put forward a funding application for Mr DQ which (Mr YJ surmises) was for a similar amount as he had agreed to pay to his parents to purchase their residential property in [V] Street.

[22] Mr YJ was unaware of this transaction and the borrowings incurred by Mr DQ.

The shareholders' agreement

[23] Around the same time as the purchase of the [W] Street property took place (September 2009), Mr YJ promoted the preparation of an agreement between the shareholders of the company. He says that he felt vulnerable in his position in the company and the purpose of the agreement was to remove that vulnerability.

[24] On 10 March 2010, Mr DQ sent to Mr GK, what he refers to as a 'draft' of the proposed agreement. He also requested Mr GK to "get back to [him] once ... [Mr GK had the] 'draft' guarantee".

[25] It is not clear what Mr DQ meant by this.

[26] This draft set out 10 points to be included in the agreement. The first six points established the principle that on the death or withdrawal of any shareholder, the remaining two shareholders (Mr DQ's parents being treated as one shareholder) would each have the opportunity to acquire 50% of the shares in the company.

[27] The remaining terms of the 'draft' were matters which would normally be included in a company resolution rather than a shareholders' agreement and included the structure of the borrowing⁷ to be undertaken by the company.

[28] On 18 March 2010, Mr GK emailed what he refers to as a 'first draft boiler plate agreement'⁸ to Mr DQ. Mr GK met with Mr YJ and Mr DQ later that day to discuss the draft and took notes of their instructions in handwriting on a copy of the draft. Above clause 19 of the agreement Mr GK wrote: "No ROT" and "No NC".

[29] On 3 February 2011, Mr GK emailed "an updated draft shareholders' agreement and constitution" to Mr DQ. This version of the shareholders' agreement retained the restraint of trade and non-competition clauses.

⁷ See [19].

⁸ Mr GK, reply to complaint (11 October 2018) at [39].

[30] On 12 October 2012, Mr GK sent the third draft of the agreement by email to all shareholders. This version also retained the restraint of trade and non-competition clauses.

[31] A fourth draft was sent to Mr DQ on 26 March 2013 following an email from Mr DQ which provided information requested by Mr GK to incorporate into the agreement. The fourth version similarly retained the restraint of trade and non-competition clauses.

[32] In mid-2014, Mr DQ was negotiating to purchase a property at [U] Road and instructed Mr GK to act for him. Mr GK sent an email⁹ to Mr DQ in which he noted that Mr DQ had advised him that he intended to nominate ABCD as the purchaser of the property. At paragraph 3 of his email, he says:

We note your advice that you intend to nominate ABCD Limited (ABCD) as the purchaser in the event that the acquisition proceeds. In this regard, you will need to consider how the Property purchase and funding will sit with the current Shareholders Agreement in respect of ABCD. We can address this, if and when you confirm the purchase and ABCD's nomination as purchaser

[33] On 29 July 2014, Mr GK again asked Mr DQ if he wanted him to review the shareholders' agreement to "consider how the purchase of [address] and the funding for that purchase sit with the Shareholders Agreement, as it is currently recorded?"

[34] Following a discussion with Mr DQ on 1 September 2014, the shareholders' agreement and company constitution were finalised. Mr GK met with the shareholders of the company on 8 September. He says that "each shareholder confirmed to us that they understood each document, that they agreed to same, and accordingly proceeded to sign these documents."

[35] On 23 September 2014, Mr GK reported to Mr DQ following settlement of the [U] Road property. With that email he "enclosed" a number of documents, including the signed copy of the agreement.

[36] This version of the agreement did not include the restraint of trade and non-competition clauses.

Mr YJ's complaints

[37] In his letter of complaint, Mr YJ raised the following issues:

⁹ Mr GK, email to Mr DQ (4 June 2014).

- (a) Mr GK “had knowledge of, but failed to alert ABCD that its refinancing application was put forward to [bank] in conjunction with Mr DQ’s undisclosed loan application”.
- (b) Mr GK “has collaterally benefited from the ABCD refinance and Mr DQ’s loan which were facilitated by the legal services he ... provided”.
- (c) Mr GK “knew of circumstances which rendered [Mr YJ] more vulnerable to [bank] without making this known to Mr YJ when he declined to take independent legal advice.
- (d) Mr GK had a “vested interest in the outcome of the ABCD refinance” which should have been made known to Mr YJ.
- (e) Mr YJ’s guarantee “[d]irectly enabled [Mr GK] to participate in a property development with [Mr DQ]”.
- (f) “Mr GK has breached s 240 of the Crimes Act 1961 (obtaining by deception / causing loss by deception)”.
- (g) Mr GK was involved in “undue influence” exercised by Mr DQ when persuading his parents to transfer their home to him so that he could provide security for his personal loan from the bank.
- (h) Amendments were made to the shareholders’ agreement without being disclosed to Mr YJ.
- (i) Mr GK intended to deceive Mr YJ when he made amendments to the shareholders’ agreement by deleting the restraint of trade and non-competition clauses as well as other amendments, thereby committing an offence under the Crimes Act.
- (j) In the “background” section of the shareholders’ agreement as drafted by Mr GK, information was omitted “in an effort to distance the company from recognition as a property development company”. This had enabled Mr DQ to argue that the shareholders’ agreement would not have applied in any event to the development of the [Y] Road property.
- (k) Mr GK “intentionally delayed” preparing the final version of the shareholders’ agreement to enable the refinancing and loan to Mr DQ to be effected without breaching the clause in the agreement preventing a party from obtaining a “collateral benefit”.

- (l) Mr GK changed the provisions relating to the establishment of a price for shares in the company from “fair market value” to “fair value” without discussion with Mr YJ, the amendments being “designed to weaken the value of [Mr YJ’s] shares should he be ejected from the company”. Other amendments / additions were made to the agreement without advising Mr YJ. Mr YJ says Mr GK has committed an offence under the Crimes Act by amending the agreement “with intent to deceive”.
- (m) Mr GK had “an irreconcilable conflict of interest” by drafting the shareholders’ agreement when he was “in an undisclosed existing competing business relationship with one of the shareholders of that business”.
- (n) The constitution of the company prepared by Mr GK provided that a shareholder could transfer his or her shares to a family member without engaging the pre-emptive rights provisions. This had the effect of defeating the intention that if any shareholder died or wished to surrender shares in the company, Mr DQ and Mr YJ would each have the ability to hold one half of the shares in the company.
- (o) Mr YJ did not sign the constitution.
- (p) Mr GK has not answered questions from Mr YJ about his business relationship with Mr DQ, advising that he needed Mr DQ’s consent to do so which was not forthcoming.
- (q) Mr GK is likely to be continuing to have a financial interest “in a near identical property development company”.
- (r) [law firm] was in breach of its terms of engagement by simply advising Mr YJ that the matters were in the hands of the firm’s Insurers after he had made his complaints to the firm.
- (s) Mr GK refused, as a director of EGG (trustee of the Trust which owned the property) to sign documents sent to Mr GK by the real estate agent, when Mr YJ wanted to sell his family home.
- (t) Mr GK carried out unnecessary legal work when he advised that the pre-emptive rights provisions in the shareholders’ agreement applied when Mr YJ was obliged to transfer the shares held by his Trust following resignation of EGG as a trustee. Another example was when Mr GK

carried out due diligence on a property that ABCD expressed an interest in to purchase, when he knew that the company did not have sufficient funding to do so.

Mr GK's response

[38] Mr GK responded comprehensively to all of Mr YJ's complaints. His response included:

- (a) No conflict of interests arose;
- (b) Mr YJ was asserting that Mr GK needed to disclose every development opportunity that he became aware of to ABCD, which could not be correct;
- (c) As far as he was aware, the ABCD refinance was unrelated to Mr DQ's loan application and Mr DQ himself disputed that;
- (d) The amendments to the shareholders' agreement and constitution were "all explicable as part of the usual iteration of such documents";
- (e) The firm's trustee company needed to resign as trustee of Mr YJ's trust after he had complained to the firm about Mr GK's conduct;
- (f) The complaints were based on incorrect assumptions;
- (g) Whilst he had initially considered entering in a business relationship with Mr GK to complete the subdivision, he ultimately "decided against having a personal involvement";
- (h) He did not consider he had a duty to disclose to Mr YJ that Mr DQ was undertaking the [Y] development;
- (i) The GK family would not have offered the property to ABCD or agreed to it being involved in the development, as Mr DQ's parents, as directors of the company, did not want to be involved in that type of development;
- (j) He was not involved with either ABCD or Mr DQ's loan applications;
- (k) His role with the refinancing was limited to completing the securities.

[39] Generally, Mr YJ's complaints were based on unfounded speculation and inference, and could not be taken seriously.

[40] Mr GK included a number of documents in support of his response.

The Standards Committee determination

[41] The issues addressed by the Committee were:¹⁰

- a. Did Mr GK fail to provide independent advice and/or disclose relevant information to Mr YJ, including a conflict of interest regarding a business relationship that Mr GK had with Mr DQ, being another client and a shareholder of ABCD?
- b. Did Mr GK act in a conflict of interest by acting for both ABCD as well as Mr YJ personally, while having private dealings with Mr DQ?
- c. Did Mr GK misuse Mr YJ's and/or ABCD's information for his own financial advantage to the exclusion of ABCD?
- d. Did Mr GK prepare a shareholder's agreement and the ABCD refinance while obtaining a financial advantage at the expense of ABCD and/or Mr YJ personally?
- e. Did Mr GK engage in conduct that was misleading or deceptive, or likely to mislead or deceive? Did he:
 - alter ABCD's shareholders' agreement numerous times over a 5-year period; and
 - induce Mr YJ to sign an unlimited personal guarantee (which Mr GK then used to obtain a pecuniary advantage); and
 - as a result of such actions or omissions, cause loss to ABCD and Mr YJ personally?

Independent advice / disclosure of relevant information / conflict of interests

[42] The Committee determined that Mr GK's client was ABCD, not Mr YJ, and it was the company which instructed him to prepare the shareholders' agreement. At [18] of its determination, the Committee says:

The Standards Committee concluded that at the point of his instruction by ABCD, Mr GK was at least incidentally involved with another of ABCD's shareholders in relation to the [Y] Road development. However, the Committee considered that this business involvement by Mr GK with Mr DQ had been disclosed to the client (ABCD). Disclosure had been made to one of the directors and shareholders of ABCD, Mr DQ. His personal knowledge is attributable to ABCD, even if he did not share this knowledge with Mr YJ.

[43] The Committee continued:¹¹

In the view of the Standards Committee, the fact that ABCD's lawyer, Mr GK, was already involved with Mr DQ in relation to a proposed property development was

¹⁰ Standards Committee determination (12 February 2020) at [12].

¹¹ At [20] and [23].

information that was relevant to Mr YJ (in his capacity as an ABCD shareholder), particularly as the initial meeting involved discussions of restraint of trade and non-competition. It was important that Mr YJ was fully informed of all relevant matters while providing initial instructions to Mr GK on behalf of ABCD.

...

The Standards Committee found that Mr GK's failure to disclose relevant information to a shareholder of his client (at the point of instruction) amounted to conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Accordingly, pursuant to section 12(a) of the Act the Committee determined that there had been unsatisfactory conduct on the part of Mr GK.

[44] The Committee determined that Mr GK's conduct constituted unsatisfactory conduct pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006.

[45] It further determined that Mr YJ had not provided any causal link between Mr GK's conduct and the loss claimed by Mr YJ and consequently, there was no basis for a compensation order to be made.

Conflict of interests

[46] The issue addressed by the Committee was:¹²

...that Mr GK's involvement with Mr DQ on the [Y] Road development meant that Mr GK had acted for ABCD and Mr YJ personally where there was a conflict, or risk of conflict, between his interests and those of his clients.

[47] The Committee considered whether or not there had been a breach of r 5 of the Conduct and Client Care Rules¹³ which requires a lawyer to be free of compromising loyalties or interests.

[48] The Committee noted that Mr GK was not acting for Mr YJ in his personal capacity when preparing the shareholders' agreement and the constitution for the company. It further determined that there was no conflict between Mr GK acting for Mr YJ with regard to his personal matters and acting for the company when preparing the documents.

[49] The Committee further noted that Mr GK had withdrawn from the [Y] Road project soon after being instructed by ABCD.

[50] The Committee was satisfied that:¹⁴

...the [Y] Road development was not one that would have been offered to ABCD or that ABCD would have pursued in any event...

¹² At [27].

¹³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁴ Standards Committee determination at [35]–[36].

Having considered all the circumstances of the matter and information before it, the Standards Committee was satisfied that Mr GK's limited involvement with the [Y] Road development had not compromised his ability to exercise independent judgment and to give independent advice while acting for ABCD.

[51] The Committee determined to take no further action on this complaint.

Misusing financial information

[52] This issue was addressed by the Committee in relation to Mr YJ's complaint that Mr GK knew that Mr DQ's personal loan application had been made in conjunction with the company's application, and that Mr GK had gained a financial benefit from this.

[53] The Committee "took the view that Mr YJ's claims on this matter were based on conjecture and supposition" and there was no evidence that:¹⁵

- a. the two loan applications were submitted as a package; or that
- b. [Bank] had placed any importance on ABCD's allegedly good financial position when making decisions on Mr DQ's loan application; or that
- c. Mr GK had misused Mr YJ's and/or ABCD's information; or that
- d. Mr GK had obtained any financial benefit from this alleged misuse; or that
- e. ABCD had suffered any loss or harm as a consequence of Mr DQ's alleged misuse of any information of ABCD and/or Mr YJ.

[54] The Committee determined to take no further action on this complaint.

A financial advantage?

[55] The Committee determined there was no evidence to support Mr YJ's claim that Mr GK prepared the shareholders' agreement and acted for the company's refinancing, whilst obtaining a financial benefit.

[56] The Committee determined to take no further action on this complaint.

Undue influence

[57] This issue related to Mr YJ's allegation that Mr GK had completed the transfer by Mr DQ's parents to transfer their residential property to him and that Mr DQ had pressured his parents to do so.

¹⁵ At [41].

[58] The Committee noted that Mr GK advised he did not act on this transaction and determined to take no further action on this complaint.

Misleading and deceptive conduct

[59] This issue relates to Mr YJ's allegations that Mr GK had altered the shareholders' agreement prior to, or after, it was signed.

[60] The Committee said:¹⁶

As the final shareholders' agreement reflected the intentions of the parties with regard to restraint of trade and non-competition provisions, the Standards Committee was satisfied that Mr GK had not acted in a misleading or deceptive way in his drafting of this document.

...

The Standards Committee noted that Mr GK had advised the shareholders that they should take independent legal advice to protect their personal position and further noted that Mr YJ had been free at any time to refuse to execute the shareholders' agreement until he obtained independent legal advice. He had elected not to take independent advice, and he had signed the agreement.

The Committee was unable to identify evidence that supported Mr YJ's allegations and determined to take no further action on this complaint.

The guarantees

[61] "The Standards Committee considered that this aspect of Mr YJ's complaint was based on a factual error in that the guarantee signed by Mr YJ was limited (not unlimited)."¹⁷

[62] The Committee determined that Mr YJ had waived the opportunity to take independent legal advice and there was no evidence to support Mr YJ's complaints. The Committee determined to take no further action on this complaint.

Losses as a result of Mr GK's acts or omissions

[63] The Committee considered there was no evidence to support this complaint and determined to take no further action in this regard.

¹⁶ At [55] and [58].

¹⁷ At [64].

Orders

[64] Having made one finding of unsatisfactory conduct against Mr GK, the Committee imposed a fine of \$2,500 and ordered Mr GK to pay costs in the sum of \$1,000.

Mr YJ's application for review

[65] Mr YJ considers that the Committee has largely copied Mr GK's response to his complaints into its determination. He asserts that the Committee has had little, or no, reference to his complaints and the evidence provided by him.

[66] He refers to the fact that he has identified a number of matters that the Committee had not included in its preliminary assessment of his complaints and considers that, on review, this Office will be called upon to consider a large portion of his complaint at first instance.

[67] The outcome Mr YJ seeks from this review is a further consideration of his complaints and publication of the decision.

Mr GK's response

[68] Mr GK responded briefly to Mr YJ's application for review, largely relying on his responses to the Standards Committee. He submits there is no evidence to support Mr YJ's allegations and that they represent Mr YJ's opinions, are not objective, and lack credibility. In Mr GK's view, the appropriate outcome of this review would be to confirm the Committee's determination.

Procedure / preliminary matters

[69] This review proceeded by way of a hearing in [City] on 23 March 2021. In attendance were:

Mr YJ

Mr TH (Mr YJ's support person)

Mr GK

Mr ST and Mr MH (Mr GK's counsel)

[70] At the outset of the hearing I advised the parties that the hearing and all matters related to this review were not to be disseminated to any other persons and that publication of any matter may only be made by way of an order pursuant to s 206A of the Act.

[71] When asked, Mr YJ confirmed that he was recording the hearing. He was advised that no recordings were permitted and complied with a request to deactivate the recording device.

[72] Mr YJ was accompanied by Mr TH. No prior notice of Mr TH's attendance had been provided, nor had his role been advised in advance of the hearing.

[73] Support persons do not have the right to speak at a review hearing.¹⁸ However, in this regard, Mr TH was permitted to do so as much of the submissions made, material supplied, both to the Standards Committee and on review, had been prepared by Mr TH.

[74] The parties were then advised that a review is an inquisitorial process and that there was to be no direct interplay between the parties, or direct questioning of the other parties. All submissions and comments were to be addressed to myself.

[75] I also advised that all allegations and complaints needed to be supported by evidence, and that speculation and inference did not constitute evidence.

[76] As the hearing progressed, Mr YJ frequently interjected, and when questioned by me, declined to answer correctly, endeavouring to introduce other issues.

[77] Mr YJ's responses and comments became increasingly disruptive. At approximately two-thirds of the way through the hearing, I requested Mr YJ to leave. By that stage, it had become apparent that Mr TH was fully acquainted with all matters in relation to the review and his approach was helpful in enabling the review to proceed in an orderly manner.

[78] Prior to leaving the hearing room, Mr YJ confronted Mr GK in a threatening manner, to the extent that the court clerk called for security to attend. Mr YJ then left the hearing room voluntarily.

[79] As an overall comment, Mr YJ's presence did not greatly assist the review, largely to his own detriment.

¹⁸ See Guidelines to Parties to Review at [32].

Alleged crimes

[80] In his complaint, and review material, Mr YJ has alleged that Mr GK has potentially committed a crime.¹⁹ All allegations that Mr GK has committed a crime are to be reported to the Police. Such allegations will not be addressed in this decision.

Scope of review

[81] This review will address the entire complaint as requested by Mr YJ, apart from the allegations of criminal conduct. That does not mean that every allegation made will be specifically referred to in this decision. That approach is endorsed by the Court of Appeal where in *R v Nakhla (No 2)*, it said:²⁰

The court is not obliged in giving its reasons for judgment to traverse every argument submitted to it.

Review

Mr YJ's allegations

[82] In his application for review, Mr YJ asserts that the Committee has not addressed aspects of his complaints, which results in the determination being 'fundamentally flawed'. A number of Mr YJ's complaints rest on speculation and inferences, and I set out below a number of statements made by him for which no evidence, or sufficient evidence to enable it to be relied on, has been provided.²¹

- Mr GK had a personal financial interest in the outcome of the company's refinancing and in the drafting of the shareholders' agreement (at [11]).
- Mr GK was aware that the finance application put forward by ABCD was made in conjunction with Mr DQ's personal loan application (at [13]).
- Mr GK has collaterally benefited from the ABCD refinance and Mr DQ's loan (at [22]).

¹⁹ See for example, Mr YJ's complaint (21 July 2018) at [29] – allegation of obtaining by deceit / causing loss by deception.

²⁰ *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) at p456.

²¹ All bullet points refer to paragraphs in Mr YJ's complaint to the Lawyers Complaints Service, (21 July 2018).

- Mr GK's involvement with Mr DQ's acquisition of his (Mr DQ's) parents' property, is unbecoming insofar as it enabled Mr DQ to finance the development of the [Y] Road property, from which Mr GK profited. (at [36]).
- Mr GK amended the shareholders' agreement immediately prior to, or after, it was executed (at [39]).
- The meetings to discuss the terms of the shareholders' agreement were a sham (at [44]).
- The amendment to the agreement (fair market value c/f fair value) was designed to weaken the value of Mr YJ's shares (at [61]).
- Mr GK tinkered with the agreement with intent to deceive (at [63]).
- Mr GK was creating work for himself that served no legitimate purpose (at [79]).
- Mr GK is continuing to work with Mr DQ in a near identical property development (at [86]).
- Mr GK has been profiting personally from projects undertaken by another company, being heavily involved but not recorded as either a shareholder or director (at [88]).
- Mr GK profited personally from the [Y] Road development (at [101]).
- Mr GK "allowed" Mr DQ to have the opportunity to borrow funds with the assistance of the collateral of ABCD (at [108]).
- Mr GK 'persuaded' his family to lend \$1 million to Mr DQ to pursue the [Y] Road development (at [109]).
- Mr GK has a business relationship with ABCD's accountant (at [110]).
- Mr GK undertook due diligence on a property that ABCD could potentially purchase with the knowledge that only Mr YJ had sufficient funds to pursue this opportunity (at [111]).

Who was Mr GK's client?

[83] The Committee determined that Mr GK was acting for ABCD, and not Mr YJ, when addressing the question as to whether or not there was a conflict between Mr YJ's interests and those of Mr GK.

[84] In para [29] of its determination, the Committee said:

The Committee noted that in the matter in question, Mr GK was not acting for Mr YJ in his personal capacity. He was instructed to act for one client only, ABCD. It was for that reason that, from the outset, [law firm] had advised Mr YJ to obtain independent legal advice regarding his personal position as a shareholder and director of ABCD. The fact that Mr YJ had elected not to seek independent advice did not mean that Mr GK was therefore acting for Mr YJ personally in this matter.

[85] I acknowledge that a company is a separate legal entity. However, the Courts do not invariably follow that approach. In the discussion relating to this, the author of the *Morison's Company Law* commentary²² says:

Where a question arises which concerns the identity of persons behind a company, and which is unrelated to the general purpose for which separate personality has been developed, the courts frequently look behind the corporate veil.

[86] The purpose of incorporating ABCD was unrelated to the objective of relieving Mr GK from any professional duties to its members. I consider this is a situation where it is appropriate to separate the corporate entity from its members.

[87] I therefore disagree with the Committee's view that Mr GK's client, was ABCD and that he owed no duty to Mr YJ or the other members of ABCD.

[88] Mr GK did suggest that Mr YJ should get independent advice, but that would not necessarily have meant that Mr GK's involvement with MN Limited, and the purpose for which it had been incorporated, would have become known. Mr GK was obliged to make the facts known to Mr YJ and the other members of the company.

Conflicts

[89] Two potential conflicts arose. The first is whether the proposed business of MN Limited conflicted with that of ABCD. The second potential conflict is whether Mr GK's interest in MN Limited conflicted with his duties to ABCD and Mr YJ.

²² *Morison's Company Law (NZ)* (online looseleaf ed, LexisNexis) at [3.4].

MN Limited v ABCD

[90] Mr GK argues that the business of MN Limited did not conflict with the business of ABCD, which was the purchase and development of existing properties. This was how the business of the company was recorded in the shareholders' agreement.²³ The company was not restricted in the activities it could undertake by the wording of the agreement. It could have been used as the entity to undertake the subdivision.

[91] Mr GK says that ABCD would not have been offered the opportunity to undertake the subdivision, and would not have undertaken it in any event, due to the fact that Mr DQ's parents did not want to become involved in a greenfield development. That is a somewhat spurious contention, as whether or not ABCD would have had the opportunity to carry out the subdivision, does not detract from the fact that a conflict existed. If Mr GK adopted that view, it could have led to the situation where he did not advocate for the company to enable it to acquire the property.

[92] There was a potential for conflict between MN Limited and ABCD. This then leads to a consideration of Mr GK's involvement with MN Limited.

Mr GK v ABCD and Mr YJ

[93] MN Limited was incorporated on 30 April 2010. The directors of the company were Mr GK and Mr DQ. Mr GK and Mr DQ were equal shareholders.

[94] The application for subdivision consent was lodged on 21 July 2010. The application was lodged by Mr DQ, but the fact that MN Limited had been incorporated by that date, and it was Mr GK's intention initially to participate in the development, is sufficient evidence to conclude, on a balance of probabilities, that Mr GK was aware the application had been lodged.

[95] Mr GK remained a director and shareholder in MN Limited until it was removed from the register on 26 July 2011. Mr GK knew that Mr YJ was a director and shareholder of ABCD, and [Law Firm] had acted for him personally. Mr GK had also acted for ABCD.

[96] Rule 5.5 of the Conduct and Client Care Rules provides:

A lawyer must not engage in a business or professional activity other than the practice of law where the business or professional activity would or could reasonably be expected to compromise the discharge of the lawyer's professional obligations.

²³ Background [C]

[97] The authors of *Professional Responsibility in New Zealand* express this as an “obligation of loyalty”.²⁴ Further sections of this commentary expand on this principle:²⁵

Where a lawyer has an interest that “touches” the same matter as a client or potential client, the first requirement is that the interest be disclosed. This applies regardless of whether there is any conflict between the lawyer’s and client’s interest. The principle is that the client should never be unaware of the lawyer’s interest. The use of the word “touches” emphasizes that the interest may be direct or indirect; it is necessary to err on the side of caution.

...

Rule 5.4.3 prevents a lawyer from entering into a business, financial or property transaction with a client where there is a risk of the relationship of confidence and trust between lawyer and client being compromised. Once again, the word “risk” is not qualified, so the threshold is low.

...

In this situation the touchstone is whether the professional relationship of confidence could be jeopardized. It is therefore not limited to cases where the lawyer has an interest in the transaction. The underlying concern is nevertheless the same – there may be divided loyalties and those are incompatible with the lawyer’s professional obligations.

[98] Mr GK’s interest in MN Limited created a conflict with his duties to both ABCD and Mr YJ.

[99] In the discussion above, I have discounted the notion that Mr DQ’s knowledge *qua* director of ABCD, amounted to knowledge by the ‘company’ and its members. That is applying strict legal principles to matters involving professional ethics – an approach which does not always relieve a lawyer from his or her professional obligations.

[100] Mr GK has breached r 5 and the sub rules.

The shareholders’ agreement

[101] A large part of Mr YJ’s complaint, and supporting documentation, relates to the restraint of trade and non-competition clauses in the agreement. The initial draft of the agreement included these clauses. When Mr DQ and Mr YJ met with Mr GK on 18 March 2010 to discuss the draft, Mr GK made notes that these clauses were to be removed. However, they remained in all subsequent drafts and it was not until the final form of the document was prepared that they were removed. This is the document that was executed.

²⁴ Matthew SR Palmer (ed) *Professional Responsibility in New Zealand* (online ed, LexisNexis, 2019) at [22.2].

²⁵ At [22.3] and [22.4].

[102] Mr YJ alleges that they were removed at that stage because by then Mr DQ had become involved with the [Y] Road subdivision, and the removal of the clauses enabled him to proceed without fear of being in conflict with the interests of ABCD.

[103] Mr GK has devoted some time responding to these allegations. He says:

- The business of ABCD was recorded in the agreement as being the ownership and management of commercial properties, and that therefore the greenfield subdivision of the [Y] Road property did not conflict with the business of ABCD.
- The [Y] Road development would not have been offered in any event to ABCD for a number of reasons.
- He went through the terms of the agreement with all parties in detail before it was signed by them.

[104] These comments, in themselves, do not answer the reason for the clauses being included in all versions of the document until the last, and executed, version. An argument can be made out that Mr GK ought to have insisted that the signatories to the document, other than Mr DQ, take independent advice before signing the document.

[105] In addition, it is no answer to the allegations that he went through the document in detail with the parties before it was signed. In these circumstances, it is not the content of the document only that needs to be explained – the parties' attention needs to be drawn to what is not included in the document.

[106] It is also adopting a somewhat technical approach to assert that because the business of ABCD was defined in the agreement, it therefore had no application to another form of property development. In fact, that points to a potential defect in the drafting of the agreement in that it should possibly have been somewhat broader to include whatever undertaking the company took at any time. It would be unusual for a shareholders' agreement to have effect only when the company was undertaking a specific business.

[107] Having made those comments, however, the ultimate answer to this issue is that Mr YJ does not dispute that Mr GK's instructions were to remove the restraint of trade and non-competition clauses from the agreement. The final form of the agreement did not include those clauses. Mr GK had complied with his instructions.

[108] The other, overriding factor with regard to this issue is that it was Mr DQ, as a director and shareholder for ABCD, who was potentially acting in breach of his obligations to the company by undertaking the [Y] Road development.

[109] Mr GK has not breached any duty to Mr YJ or ABCD in this context.

[110] Another issue raised by Mr YJ with regard to the shareholders' agreement is that, where included in the document, the term "fair market value" had been substituted at one stage with the term "fair value". The only issue here is whether or not Mr GK acted in accordance with instructions to make the amendment. I do not intend to pursue this issue as there is no evidence which can be relied on, and any further consideration would necessitate a decision as to whether or not there is a difference between the two terms. This is not an issue which demands to be pursued.

The borrowing from [Bank]

[111] Mr YJ alleges that Mr GK was aware that Mr DQ had lodged an application for finance for himself in conjunction with the application by ABCD, and that the strength of the ABCD application would have made Mr DQ's application more attractive to the bank.

[112] Related to this complaint, is Mr YJ's allegation that Mr GK knew Mr DQ was incurring additional liability to the bank which therefore reduced Mr DQ's own financial resources, and this had the effect of increasing Mr YJ's exposure to the bank by being called upon to meet a greater share of ABCD's borrowing should there be a default.

[113] Mr YJ alleges therefore, that Mr GK has breached his duty to Mr YJ.

[114] These allegations are somewhat tortuous and I make the following comments:

- (a) Mr GK had no personal involvement with the loan application.
- (b) There is no evidence that the two applications were in fact lodged contemporaneously and were interdependent.
- (c) Mr GK had no personal interest in any of the borrowing.
- (d) Mr DQ's personal financial situation was unknown, and it is speculation that he would be unable to meet any obligation pursuant to his guarantee.
- (e) No documentation has been produced to support Mr YJ's assumptions that all guarantors were obliged to meet an equal share of any borrowing.

- (f) Mr YJ was presumably unaware of the financial standing of other guarantors.

[115] Overall there is no foundation for this complaint.

Should Mr GK have insisted that Mr YJ take independent advice?

[116] Rule 6.1 and 6.1.1 of the Client Care Rules provide:

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligation owed to 1 or more of the clients.

6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties is obtained.

[117] As part of its security for the lending to ABCD, the bank required that all directors provide an unlimited guarantee.²⁶ This is well recognised as a situation where a lawyer is conflicted by acting on the bank's instructions, as well as for the borrower.

[118] Mr GK advises that he made Mr YJ aware of this conflict. He says he advised Mr YJ to take independent advice, but Mr YJ declined to do so.

[119] The question to be addressed, then, is whether or not Mr YJ provided "informed consent". The term "informed consent" is defined in the Rules as meaning:

....consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[120] Mr YJ was aware of Mr GK's conflict, but, by reason of his relationship with (and acting for) Mr DQ, Mr GK was unable to explain all material risks which Mr YJ faced when entering into the guarantee of the company's obligations. There was a 'more than negligible risk' that Mr GK was unable to discharge the obligation owed to Mr YJ.

[121] Mr GK should have declined to act for Mr YJ and insisted he take independent advice.

[122] Mr GK is in breach of r 6.1.

²⁶ In para 64 of its determination, the Committee "considered that this aspect of Mr YJ's complaint was based on a factual error in that the guarantee signed by Mr YJ was limited (not unlimited). Whether limited or unlimited is of little consequence, but the Loan Agreements signed by the parties on 19 July 2010 refers to an 'unlimited guarantee' and the Deed of guarantee "all obligations" guarantee.

Rule 6 Conduct and Client Care Rules

[123] Rule 6 provides:

In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[124] The commentary on this rule is simply expressed in *Professional Responsibility in New Zealand*.²⁷

The rule expresses the general duty of loyalty owed by any fiduciary. The essence of loyalty is that it cannot be demonstrated where duties are owed to two persons whose interests are not the same.

[125] Mr GK was acting for both ABCD and Mr YJ. He was also acting for Mr DQ in respect of the proposed subdivision of the [Y] Road property (or, at least aware of Mr DQ's intentions). In *Moody v Cox & Hyatt*,²⁸ the English Court of Appeal said:

a solicitor may have a duty on one side and a duty on another... if he chooses to put himself in that position it does not lie in his mouth to say to the client "I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side." The answer is that if a solicitor involves himself in that dilemma it is his own fault.

[126] This is the situation Mr GK was in. There was a conflict between Mr DQ's duties as a director of ABCD, and Mr YJ's interests. Mr GK acted for Mr DQ, ABCD and Mr YJ. The interests of the three parties diverged. It did not "lie in Mr GK's mouth" to say he could not discharge his duty to ABCD and Mr YJ, because he had discharged, or was in the course of discharging, his duties to Mr DQ.

[127] Mr GK is in breach of rule 6, in that he was not 'protecting and promoting the interests' of ABCD and Mr YJ.

Decision

[128] The Standards Committee determined that Mr GK's conduct "... [fell] short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".²⁹

[129] This amounted to unsatisfactory conduct on the part of Mr GK.

²⁷ Above n 24 at [22.10].

²⁸ [1917] 2 Ch 71 [EWCA] at p81 per Lord Cozens-Hardy MR.

²⁹ Standards Committee determination at [23].

[130] In this decision I have focused more on the conflict between Mr GK's interest in MN Limited and the conflict with Mr YJ's interests.

[131] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination that Mr GK's behaviour constituted unsatisfactory conduct pursuant to s 12(a) of the Act, is reversed. Mr GK's conduct constitutes unsatisfactory conduct pursuant to s 12(c) of the Act.

[132] This finding, however, has the same outcome as that determined by the Committee.

Orders

[133] The Standards Committee imposed a fine of \$2,500 on Mr GK and ordered him to pay costs in the sum of \$1,000.

[134] The outcome Mr YJ seeks from this review is "further disciplinary action and publication"³⁰ of the decision.

[135] Mr GK has accepted the determination of the Committee and the orders imposed.

[136] A fine is the appropriate order to be made. I may have been inclined to increase the amount of the fine imposed by the Committee following its single finding of unsatisfactory conduct, but the quantum of the fine is of limited importance. The finding of unsatisfactory conduct in itself serves to act as a reminder to Mr GK to be mindful of potential conflicts of interest that may arise.

[137] However, Mr GK was in a "double" conflict of interests. He was conflicted in that he was involved personally in the proposed development of the [Y] Road property and he was also conflicted in that he owed duties to both Mr DQ and ABCD and Mr YJ, and could not "protect and promote the interests of all clients".

[138] In addition to breach of r 5 and its subrules, he is also in breach of r 6.1.

[139] In the circumstances the fine must reflect the breaches of multiple rules. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the fine payable by Mr GK is increased to \$7,500.

³⁰ Application for review, part 8.

Publication

[140] Section 206(1) of the Lawyers and Conveyancers Act 2006 provides that:

Every review conducted by the Legal Complaints Review Officer under this Act must be conducted in private.

[141] Section 206(4) provides that:

The Legal Complaints Review Officer may, subject to subsection (3) and section 206A, direct such publication of his or her decisions as he or she considers necessary or desirable in the public interest.

[142] Section 206(3) requires the principles of natural justice to be applied when considering publication or not of this decision.

[143] The overall consideration to be addressed when determining whether or not this decision is to be published, is whether or not publication is in the interests of the public.

[144] The events Mr YJ complains about occurred in 2010 and the years before and after. It is to be expected that Mr GK will be aware (and has been aware as a result of this complaints process) of his duties to clients in similar circumstances.

[145] I am aware that Mr YJ has publicised his complaints about Mr GK in a variety of ways.

[146] In all the circumstances, publication of this decision as it stands, would not meet the requirement of being in the public interest. However, pursuant to s 206(4) of the Act, I order that the decision be published in an anonymised format as it involves a discussion of the obligations of a lawyer where a conflict of interest arises.

DATED this 22nd day of April 2021

O 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 YJ as the Applicant

Mr GK as the Respondent

Mr ST and Mr MH as the Respondent's Representatives

Mr ZR as a Related Person

[Area] Standards Committee [X]

New Zealand Law Society