LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 206

Ref: LCRO 149/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**WM** Applicant
AND	**VE and DP** Respondents

DECISION

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

Introduction

[1] Dr WM has applied for a review of a decision by the [Area] Standards Committee (the Committee) to take no further action in respect of his complaint concerning the conduct of Mr VE and Mr DP, lawyers, and at the relevant time partners with [law firm] (the firm) who he claims despite being conflicted acted against him.

[2] Dr WM says Mr VE and Mr DP acted for Company A Limited (the company) in which he and his family's interests were one of five shareholders. He says Mr VE and Mr DP had acted for him and his family's interests, yet when acting for the company they also acted for the other four shareholders/directors who were in a dispute with him.

[3] Since 2009, the firm had acted for the company on a number of matters.[1]

[4] As one of five directors, Dr WM and his family trust held 20% of the company's shares. He was responsible for the company's [Y] practice. The other four directors, who together with their family interests similarly each held 20% of the shares, were responsible for the company's [Z] practice.[2]

[5] Around mid-2015, the firm acted for Dr WM's wife on an employment matter. Dr WM subsequently asked the firm to act for him and his family interests. He had their wills, family trust and other documents moved to the firm which later acted for a family company on the sale of a residential property.

[6] As detailed in my later analysis, towards the end of 2017, the four [Z] directors had concerns about the way they considered Dr WM was running the [Y] practice. In April 2018 those concerns were set out by one of the [Z] directors, Mr IQ, in an email to all directors.[3]

[7] In September 2018, Mr IQ, on behalf of the company, asked the firm for advice on how to restructure the company. By early December 2018, Mr DP had provided advice to the company, and produced a term sheet which proposed splitting the company's business into two business units by transferring the [Z] practice to a new company (newco) with the [Y] practice remaining with the company.

[8] On 21 March 2019, Mr DP provided formal advice to the company about implementing that proposal ahead of a directors' meeting a week later also attended by Mr DP, Mr VE, and Dr WM's lawyer from an independent firm who, on 25 March, provided a counter-proposal to the firm.

[9] On 30 August 2019, Mr DP sent to Dr WM's lawyer the four [Z] shareholders'/directors' proposal to acquire Dr WM's shares in the [Z] company and sell their respective shares in the [Y] practice to him. The directors met again on 27 September 2019 and resolved by majority that the company sell the company's [Z] practice to newco.

[10] In his 2 October 2019 letter Dr WM's lawyer raised with Mr DP and Mr VE "problems" about that proposal. He claimed Mr VE and Mr DP, by acting for the four [Z] shareholders/directors, were conflicted but said he had advised Dr WM to mediate the

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[1] Letter, Mr VE, Mr DP to LCS, 2 December 2019.
[2] Associated companies included [Company A Limited] in which all five directors similarly held a 20% share; the other four directors were Mr IQ, Mr NW, Mr PF, and Mr NG.
[3] Email, Mr IQ to Messrs NW, NG, WM and PF, 5 April 2018.

dispute. For that purpose, and to avoid costs, he said Dr WM would agree to litigation members of the firm representing the four [Z] directors at a mediation.

[11] On 10 October 2019, Mr KY, also a partner with the firm, responded (by letter) stating the four [Z] shareholders/directors rejected mediation. He "accepted" that having acted for the company, the firm could not act for a prospective purchaser, including a shareholder. He said the firm's role would be confined to advising the company about protecting its interests concerning the proposed restructure.

[12] In response on 14 October 2019, Dr WM's lawyer demanded the firm "forthwith cease acting" for the company. He said Dr WM intended laying a complaint with the Law Society.

[13] On 16 October 2019, Mr VE and Mr DP referred the company to an independent law firm. Two weeks later, on 1 November 2019, the four [Z] directors resolved that the company provide its informed consent to Mr VE and Mr DP acting for them on the sale of the company's [Z] practice.

[14] In December 2019, the four [Z] shareholders/directors and Dr WM resolved their dispute at mediation.

Complaint

[15] Dr WM lodged a complaint with the Lawyers Complaints Service (LCS) on 31 October 2019. He claimed Mr VE and Mr DP, by acting for more than one client on the proposed restructure of the company, contravened r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).[4]

(1) Company, shareholders

[16] He alleged since "at least November 2018" whilst purporting to act for the company on the restructure proposal, Mr VE and Mr DP, in conflict with their professional duties owed to the company, and to him as a shareholder and director, and "without the requisite authority", received instructions from, and provided advice and documents to the four [Z] shareholders/directors.

[4] Rule 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 obligations owed to 1 or more of the clients".

[17] He said it was "inappropriate" for Mr VE and Mr DP to advise the company on the restructure proposal, and they ought to have referred the four [Z] shareholders/directors for independent advice if requested to act for them on that matter.

[18] Dr WM stated the firm no longer acted for the company, but "despite having acted" for the company and him personally, "continues to act" for the four [Z] shareholders/directors and their respective interests concerning "the proposed sale of the [Z] side" of the company.

[19] He said he had received from his lawyer a copy of the 1 November 2019 directors' resolution, signed by the four [Z] directors which he said "purport[ed] to give [the company's] informed consent" to the firm "continuing to act" for the four [Z] shareholders/directors on that sale.

[20] In his view, "given the level of conflict that has arisen", the company "could [not] give informed consent" to the firm acting for the four [Z] shareholders/directors.

[21] He said he had not received notice of the directors' meeting "at which this resolution was discussed or put to a vote", and had not signed the resolution. In his view, that was not a decision for which "a simple majority suffices", and it was therefore "wrong" for the company to provide its informed consent "without the unanimous consent of the directors and shareholders".[5]

(2) Former client

[22] Dr WM also said he did not consent to the firm acting for the four [Z] shareholders/directors "in a matter in which [he is] on the other side, given [he is] a previous client" of the firm.

Response

[23] In my later analysis, I refer to and include Mr VE's and Mr DP's response in which they said there was "no substance or merit" to Dr WM's complaint, in their view made by him "for tactical reasons".[6]

[24] In essence, they said they had "never acted or purport[ed] to act" for Dr WM concerning his "business affairs". They explained the company's instructions to the firm "necessarily reflected the position of the majority" of the board of directors, and they discharged their duty to advise the company on the issues requested.

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[5] Email, Dr WM to LCS, 28 November 2019.
[6] Letter, Mr VE/Mr DP to LCS, 2 December 2019.

Standards Committee decision

[25] The Committee delivered its decision on 17 June 2020 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

(1) Company

[26] In reaching that decision the Committee explained the different interests of a company on the one hand, and its shareholders and directors on the other stating the dispute was between Dr WM and his trust, as shareholders, with the other four shareholder groups.

[27] The Committee noted Dr WM acknowledged that (a) until the 28 March 2019 directors' meeting, Dr WM had been "content" for Mr VE and Mr DP to act for the company which included providing advice concerning "the breakdown of the relationship between the [Z] directors", and (b) had seen Mr DP's 21 March 2019 advice letter before attending that meeting accompanied by his lawyer from another firm.

(2) Shareholders

[28] The Committee observed that when Mr VE and Mr DP subsequently acted for the four [Z] shareholders/directors, Dr WM complained that Mr VE and Mr DP had a conflict with their professional duties owed to the four [Z] shareholders/directors on the one hand, and to him and his trust as shareholders on the other.

[29] Before then, and in response to being asked by the four [Z] shareholders/directors to represent them in the dispute, the Committee noted Mr VE and Mr DP (a) advised them the company must first obtain independent advice, and (b) having subsequently obtained the company's informed consent had complied with r 6.1.3, and "had no grounds to refuse to act".[7]

[30] In the Committee's view there was "no issue" with Mr VE and Mr DP "continuing to act for the four shareholder groups in a dispute with [Dr] WM and his trust as shareholders" noting Mr VE and Mr DP "were not acting for individual directors in that capacity".

[7] Rule 6.1.3 – "Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent in a lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached". Rule 6.1.2 requires, in effect, that if, when acting for more than 1 client on a matter a conflict of duties arises, then the lawyer "must immediately inform each of the clients of this fact and terminate the retainers with all of the clients".

[31] The Committee referred to Dr WM, through his lawyer, having agreed to Mr VE and Mr DP continuing to represent the four [Z] shareholders/directors on the condition they mediate the dispute, but when they declined Mr VE and Mr DP advised them to obtain independent advice.

(3) Former client

[32] The Committee referred to Mr VE's and Mr DP's statement that the firm first acted for the company, and subsequently the other four shareholder groups in the dispute with Dr WM, but had not acted for Dr WM "personally", or "in relation to [Dr WM's] business affairs or in relation to the affairs of [the company]".

Application for review

[33] In his application for review filed on 20 July 2020, Dr WM asks for a decision that "support[s] [his] complaint". He says instead of focussing on Mr VE's and Mr DP's professional duties owed to him as a shareholder in the company, the Committee discussed whether (a) he was a client of the firm, and (b) the other four [Z] shareholders/directors could obtain advice from the firm.

(1) Company

[34] Dr WM says the firm also acted for related companies: (a) the [Z] company, in which his family interests held 20% of the shares, on the purchase and development of a commercial property, and (b) a company, in which he held 5.5% of the shares, on the sale of that company's assets.

[35] He says contrary to the Committee's statement, he had not been "content" with Mr VE and Mr DP acting for the company on the proposed restructure up to the 28 March 2019 meeting.

[36] He says as a director, he did not consent to Mr VE and Mr DP continuing to act for the company as well as the four [Z] shareholders/directors. He denies receiving "any advice" they provided about that to the company. He says he does not consider they complied with r 6.1.3.

(2) Shareholders

[37] Dr WM says the four [Z] shareholders/directors wanted to ease him out of the [Z] practice.

[38] He says the issues between him and his family trust on the one hand, and the four [Z] shareholders/directors were "contentious" and "would affect the value of [their] company shareholding". Yet, he says Mr VE and Mr DP "continued to act against" his family's interests by "developing and sanctioning the sale of 2/3rds" of his interest in the company to newco.

[39] He says illustrations of Mr VE's and Mr DP's conflict of duties are (a) Mr VE having chaired the 27 September 2019 directors' meeting called to discuss the restructuring proposed by the four [Z] shareholders/directors, and (b) Mr VE's and Mr DP's subsequent representation of "some shareholders" at the mediation, with the company being represented by another independent lawyer.

[40] He explains by 2 October 2019, when he agreed to Mr VE and Mr DP continuing to act for the four [Z] shareholders/directors on condition they agree to mediate the dispute, Mr VE and Mr DP had been conflicted for 12 months.

[41] He says he had already obtained independent legal advice because it "was obvious" to him the firm was not acting "to benefit the company", but "the other shareholders" against his and his family trust's "minority shareholding".

[42] In his view allowing the firm to continue acting for the four [Z] shareholders/directors at a mediation "could not make matters worse", and "was the best option" to resolve the dispute which subsequently occurred.

(3) Confidential information

[43] Dr WM says Mr VE and Mr DP "held confidential information" about him and his wife having acted for his family, and dealt with him on the company's matters. For that reason, he says when Mr VE and Mr DP acted for the other four [Z] shareholders/directors there was "a more than negligible risk" that disclosure of information about him held by the firm to the four [Z] shareholders/directors would be "prejudicial" to him.

Response

[44] In their response, Mr VE and Mr DP submit that there was "no basis" for Dr WM to assert they did not comply with their obligations under the Rules, and therefore there is "no good reason to overturn or alter" the Committee's decision. They say they stand

by their responses to Dr WM's complaint submitted to, and considered by, the Committee.[8]

(1) Company

[45] Mr VE and Mr DP say from March 2019, Dr WM had his own lawyer due to his perception they preferred the four [Z] shareholders/directors over him and may not be providing independent advice to the company. They explained they subsequently referred the company to an independent law firm.[9]

[46] They acknowledge in 2017, following the retirement of Mr CD who until then was their point of contact with the company, Dr WM communicated with Mr DP about a commercial lease, the instructions for which began in August 2015, and concluded on 9 November 2017. They say that was the only company matter on which Dr WM provided the company's instructions.[10]

(2) Shareholders

[47] They explain having obtained the company's informed consent, provided by the company on 1 November 2019 after it received independent advice, the firm was able to act for the four [Z] shareholders/directors on the "proposed restructure".

[48] For that reason, Mr VE and Mr DP submit they "had no good basis for declining to act" for the four [Z] shareholders/directors on that matter, Dr WM was "not prejudiced" by the firm doing so, and he had "no right" to complain about them on those grounds.

[49] They say Dr WM had his own lawyer "throughout the shareholder dispute", and because another law firm provided the company with that independent advice, they could not comment on Dr WM's claim he did not receive a copy.

(3) Confidential information

[50] Mr VE and Mr DP say (a) they had "never acted" for Dr WM "personally", or concerning his "business affairs generally", or concerning his business affairs as a shareholder in, and a director of the company, and (b) the firm's work on Dr WM's

[8] Letter, Mr VE, Mr DP to LCRO, 5 August 2020.
[9] Mr VE and Mr DP explain due to a typographical error, the firm's two invoices referred to by the Committee were dated November 2019 instead of November 2018.
[10] Email, Mr DP to LCRO, 25 August 2020.

personal matters was "extremely limited", and in 2019 not relevant to the shareholders' dispute.

[51] They say they did not hold information "on other files" about Dr WM or his affairs that was "even remotely relevant" to the shareholder dispute. In their view, because the company, not Dr WM, was the firm's client, the fact the firm communicated with him about that matter is "of no relevance and of no assistance" to his complaint.

Hearing

[52] The parties attended a review hearing (audio-visual) in [city] on 24 November 2021. Mr VE and Mr DP were represented by Mr KY.

Nature and scope of review

[53] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[11]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[54] More recently, the High Court has described a review by this Office in the following way:[12]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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[11] *Deliu v Hong* [2012] NZHC 158 [2012] NZAR 209 at [39]–[41] (citations omitted).
[12] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[55] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

[56] The issues I have identified for consideration on this review are:

(a) For whom did Mr VE, and Mr DP act when providing advice concerning the proposed restructuring of the company?

(b) If Mr VE and Mr DP acted for the company, as well as for either or both the four [Z] shareholders/directors, and Dr WM, what were Mr VE's and Mr DP's professional obligations, and duties? Did they comply with those obligations, and duties?

(c) Did Mr VE and Mr DP have other professional obligations concerning, and professional duties owed to Dr WM, and did they act in contravention of such obligations and duties?

(d) Did the firm hold information about Dr WM and his family interests relevant to the company's restructuring proposal? If so, did Mr VE and Mr DP use that information for the company's benefit against Dr WM?

Analysis

(1) Mr VE's, and Mr DP's client(s) – issue (a)

[57] The first question on this review is by whom Mr VE, and Mr DP were retained when they provided advice to the company about restructuring its business.

[58] The following chronology of events provides context for consideration of all issues.[13]

[13] Unless otherwise stated, all written communications were by email.

(a) Context

[59] Mr VE and Mr DP say from 2017 Mr IQ, a director, provided the company's instructions on legal matters to the firm. They say by 2 December 2019, the date of their response to Dr WM's complaint, the firm had opened 29 separate matters.[14]

April 2018 – initial proposal

[60] On 5 April 2018, Mr IQ raised with his co-directors, including Dr WM, concerns about the profitability of the company's [Y] practice, for which Dr WM was responsible. He proposed the four [Z] shareholders/directors acquire Dr WM's 20% [Z] shareholding in exchange for 5% of the [Y] shares from each of the four [Z] shareholders/directors.[15]

September 2018 – instructions

[61] Mr DP's 17 September 2018 letter of engagement to the company, for Mr IQ's attention, headed "Confirmation of Instructions", described the legal services requested as "act[ing] on the Company's behalf in all respects in relation to proposed company restructure, including meeting with [Mr IQ], attendances with accountant, effecting company restructure including preparing all necessary documents…".

[62] Mr DP issued invoices to the company dated (a) 14 November 2018 for "Advice on Shareholdings" with particular reference to the company and Dr WM's family trust, and (b) 15 November 2018 concerning "Company Restructure".

December 2018 – Term Sheet

[63] Dr WM says on 3 December 2018 Mr IQ sent him a "Term Sheet", prepared by Mr DP, which contained terms of a proposed restructure of the company, to take effect from 1 July 2019, into "two separate business units" by transferring the [Z] practice to newco with the [Y] practice remaining with the company.

March 2019 – advice, directors meeting

[64] In his 21 March 2019 letter to the company Mr DP provided advice requested by Mr IQ explaining how "a proposed restructure concerning the divestments of the [Z]

[14] Letter, Mr VE, Mr DP to LCS, 2 December 2019.
[15] The result - the four [Z] shareholders/directors would each hold 25% of the [Z] shares, and 15% of the [Y] shares. Dr WM would end up with 40% of the [Y] shares.

and/or the [Y] parts" of the company's business "may be effected". He noted Mr IQ's instructions that "all but one" of the directors and shareholders were "likely to agree".

[65] Mr DP advised the restructure could be achieved by the directors "resolving to sell the [Z] part" at valuation "subject to the approval of 75%" of the company's shareholders. He noted from Mr IQ's instructions (a) "conflict" between the four [Z] directors, and Dr WM, and (b) "a level of incompatibility" among them over "a period of time" which "[u]nless resolved" would "likely" be an "impediment to the efficient operation" of the company and "erod[e its] value".

[66] He explained any of the four [Z] shareholders/directors who wanted to purchase the [Z] practice would need to disclose that interest, and any shareholder voting against the proposal could require the company to purchase that shareholder's shares at a "fair and reasonable price". He said he and Mr VE would be available to attend the 28 March 2019 directors' meeting at the firm's premises to discuss his advice which he expected would "be circulated amongst all Directors".

– *Counter proposal*

[67] On 25 March 2019, Dr WM's lawyer sent to Mr DP Dr WM's counter-proposal whereby Dr WM would (a) purchase the [Y] practice from the company, and (b) sell his shares in the [Z] company, and the partnership company to the four [Z] shareholders/directors. Dr WM attended the 28 March 2019 directors' meeting accompanied by his lawyer.

August 2019

[68] Five months later, on 30 August 2019, Mr DP informed (by letter) Dr WM's lawyer of the four [Z] shareholders'/directors' similar proposal to purchase Dr WM's [Z] shares, in exchange for his shares in the [Y] practice, with Dr WM to pay the cash difference in value.

September 2019 – directors meeting

[69] At another directors' meeting held on 27 September 2019, chaired by Mr VE, the company resolved – the four [Z] directors in favour, Dr WM against – to sell the company's [Z] business.[16]

Conflict of duties alleged

[70] On 2 October 2019, Dr WM's lawyer raised (by letter) with Mr VE "a number of problems" about the four [Z] shareholders'/directors' "less than commercial" proposal not "market tested", and from which they would "personally benefit". He said the four [Z] directors should have "disclosed their interests" in the proposal to the company.[17]

[71] Dr WM's lawyer referred to potential breaches of the shareholders agreement, and to Dr WM's options including injunctive relief against the four [Z] shareholders/directors.[18]

[72] Referring to a transcript of the 27 September 2019 directors' meeting, Dr WM's lawyer claimed the firm (a) had "a significant and incurable conflict of interest", (b) "should immediately cease acting" for the company, and (c) "should not act for any shareholder, or indeed any party looking to buy the [Z] business". He said it was "clear" the firm had "discussions with some of the directors", and had "advis[ed] on the ability to resolve shareholder issues" arising from the proposal.

[73] However, to avoid legal and accounting costs he said he recommended Dr WM mediate the dispute for which Dr WM would "allow" the firm's litigation members to advise the four [Z] shareholders/directors, with the mediation costs being paid by the company. He asked for a response within three working days.[19]

[74] As noted earlier, in his response on 10 October 2019 Mr KY, also a partner with the firm, explained (by letter) that to resolve "incompatibility" among the directors, Mr IQ had sought advice for the company "in relation to a proposed restructure of its affairs".

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[16] Resolutions: (a) the company's [Z] business be sold; (b) the directors call a special shareholders meeting, which Mr IQ was authorised to arrange, to consider the directors' resolution; and (c) Mr IQ was "authorised" on the "company's behalf" to "implement the sale".

[17] The "problems" referred to by Mr JR included (a) a "defective" directors' resolution which also breached the directors' obligations to act in the company's best interests, their duty to exercise reasonable care, diligence and skill, and to comply with their statutory and fiduciary duties; (b) the valuer who valued the company's business was "not independent"; (c) Mr IQ, appointed by the directors to "negotiate for both sides" therefore had a "clear conflict of interest".

[18] Also, Dr WM voting against the shareholders' special resolution thereby "triggering the right to receive fair value" for Dr WM's shares, or to initiate a claim for breach of the shareholders agreement.

[19] In the transcript of that meeting, Dr WM is recorded as responding to Mr VE that [Dr WM] had not received "correspondence" about the restraint of trade issue.

He said having advised the company on that matter, he "accepted" the firm could not act for "any of the shareholders", or "any other potentially interested" purchaser of the [Z] practice.

[75] Mr KY explained Mr IQ would be "involve[d] in detailed [sale] negotiations" with "prospective purchasers" subject to the directors' duty to act in the company's best interests. He said the directors, then the shareholders, would "decide whether to agree to the proposed course or to suggest alternatives". He said the key concern was to achieve "a fair price" for the sale of the [Z] business.

[76] In conclusion Mr KY said Dr WM could "seek … redress", and directors who were "prospective purchasers" must "disclose their interests", but would not be excluded from voting on the proposal. He explained the four [Z] shareholders/directors considered "a restructure [was] in the best interests" of the company. He noted they "d[id] not favour mediation", and would consider "recommending" to shareholders "a binding process (e.g. price fixed by expert determination)".[20]

[77] On 14 October, Dr WM's lawyer repeated (by letter) to Mr KY his view the firm "ha[d] a conflict". He stated with the four [Z] shareholders/directors having rejected mediation, the firm "should forthwith cease acting for [the company]". He said Dr WM would "respond to the points raised" if still the company's "position" after the company had obtained independent legal advice. He said Dr WM would be making a complaint about the conflict to the Law Society, and reserved his right to seek injunctive relief "should [the firm] continue to act for [the company]".

Firm ceases acting for company

[78] On 16 October 2019, Mr VE and Mr DP referred the company to another law firm. When subsequently asked by the four [Z] shareholders/directors for advice on the matter they advised the company's informed consent for them to do so was required after the company had first received independent advice.[21]

[79] On 31 October 2019, Dr WM complained to the Law Society about Mr VE's and Mr DP's conduct. The next day, on 1 November 2019, the four [Z] directors signed a resolution providing the company's informed consent to the firm acting for them "in relation to the sale of the [Z] side of the business".

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[20] Mr KY referred to Dr WM's remedies of seeking relief under s 174 of the Companies Act 1993, or initiating the right to be "bought out" under the shareholder agreement.

[21] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 6.1.3, 8.4(a).

[80] The four [Z] shareholders/directors, and Dr WM settled their dispute at mediation in December 2019.

(b) Retainer

Company

[81] The firm was engaged by the company to provide advice concerning the "proposed company restructure".[22]

Four [Z] shareholders/directors

[82] However, Dr WM claims Mr VE and Mr DP also acted for the four [Z] shareholders/directors, and him on the matter.

[83] The agreement or contract between a lawyer and client for the provision of legal services by the lawyer is known as a "retainer", described in r 1.2 of the Rules as:[23]

> an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[84] The term "client", although not defined in the Act or the Rules is referred to in this definition, and is included in a number of the rules as the recipient of legal services from a lawyer.[24]

[85] Although preferable for evidentiary purposes, as noted above a retainer need not be in writing to be enforceable.[25] A person claiming the existence of a contract has the burden of proof.

[86] The question whether a lawyer is retained by a person is to be "determined objectively".[26] The test is "whether a reasonable person observing the conduct of both

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[22] Mr DP's 17 September 2018 letter of engagement, 14, and 15 November 2018 invoices issued, and 21 March 2019 advice letter to the company.
[23] Rules 3.4, 3.5, 3.6 in respect of lawyers other than barristers sole; rules 3.4A, 3.6A, 3.6A in respect of barristers sole - a lawyer must nonetheless provide a client with information on the principal aspects of client care and service, including the basis of charging, in advance of commencing legal work on a retainer.
[24] The Australian Solicitors' Conduct Rules, June 2011 similarly provide that "client" "with respect to the solicitor or the solicitor's law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter."
[25] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer*, (5th ed, LexisNexis, Wellington, 2016) at [5.4].
[26] *Hartlepool v Basildon* LCRO 79/2009 (3 September 2009) at [23] - the fact a lawyer may have "had personal reservations" whether he or she would act for a person is "relevant only in so far as [such reservations] were objectively ascertainable"*;* see also GE Dal Pont, *Lawyers' Professional Responsibility*, (6th ed, Thomson Reuters, Pyrmont, NSW, 2017) at [3.20].

[the lawyer] and [the client] would conclude that the parties intended [a] lawyer-client relationship to subsist between them" for which "some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer". [27]

[87] For that reason, it is important that at the outset the lawyer identifies his or her client, particularly when instructed by a number of persons among whom there may be differences or even conflicts.

(b) Parties' positions

Dr WM

[88] Dr WM says since Mr IQ's 5 April 2018 email, the four [Z] shareholders/directors had endeavoured to acquire his shares in the [Z] practice in exchange for a greater share in the [Y] practice.

[89] He says he had not been consulted about a restructure of the company before Mr IQ sent him Mr DP's 21 March 2019 letter of advice, and there had been no directors' meeting to discuss the proposal which he described as "part of an orchestrated series of steps designed" to remove him from the [Z] practice.

[90] He says he had already obtained independent legal advice because it "was obvious" to him Mr VE and Mr DP were not acting to "benefit" the company, but "the other shareholders" over his and his family trust's "minority shareholding".

[91] He says from comments made by Mr VE at the 27 September directors' meeting, he suspected Mr VE, or a colleague at the firm, had advised "some of" the directors about "the best way to remove" him from the [Z] practice.[28]

[92] Dr WM says on 2 October 2019, by which time he says Mr VE and Mr DP had been conflicted for 12 months, through his lawyer he agreed to them continuing to act for the four [Z] shareholders/directors on condition they mediate the dispute. As noted earlier, he explains this "could not make matters worse", and "was the best option" to settle the dispute.

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[27] *Hartlepool v Basildon* LCRO 79/2009 (3 September 2009) at [23] referring to *Day v Mead* [1987] 2 NZLR 443, 458; *Blyth v Fladgate* [1891] 1 Ch 337; *Giffith v Evans* [1953] 1 WLR 1424, 1428. See also *T v G LCRO 29/2009 (April 2009)* at [26].

[28] Dr WM says at the end of the meeting he left the room returning a few minutes later to find the four [Z] directors in conversation with Mr VE which ended when he told them he would stay for the discussion.

Mr VE, Mr DP

[93] Mr VE and Mr DP explain they provided advice to "the director who … sought the advice" not to the other directors as well regarding that as an internal matter for the company. They say since 2017, they dealt with Mr IQ, but during that year Dr WM communicated with Mr DP on a commercial lease matter.

[94] They say Mr IQ instructed them to advise the company of restructure options, including whether the [Y], and [Z] practices could be separated, citing a breakdown in the working relationship between Dr WM, the [Y] practice director, and the four [Z] practice directors.

[95] They explain the company's instructions "necessarily reflected the position of the majority" of the directors, and there was no impediment to them providing that advice to a long-standing client. They say Mr DP recommended his 21 March 2019 advice letter be "circulated amongst all directors, following which a meeting", suggested for 28 March, "would be convened".

[96] Mr VE and Mr DP reject any suggestion that in acting for the company they favoured the four [Z] shareholders/directors. They say on 16 October 2019 they took the "pragmatic" approach of referring the company for independent advice despite Dr WM having been advised by his own lawyer since March 2019. They explain this was due to Dr WM's perception they may not be providing independent advice to the company, having preferred the four [Z] shareholders/directors over him.

[97] They say when subsequently asked by the four [Z] shareholders/directors to act for them in their dispute with Dr WM, they required informed consent from the company which, having received independent advice, resolved on 1 November 2019 to provide.

[98] In their submission, Dr WM had "no standing" to complain about the company's decision "simply because" he was not happy for them to represent the four [Z] shareholders/directors, and it was not open to him "to force the company to withhold consent".

(c) Discussion

[99] Dr WM contends despite claiming to act for the company, Mr VE and Mr DP were also representing the four [Z] shareholders/directors in their endeavours to acquire Dr WM's 20% shareholding in the [Z] practice.

Company's authority

[100] In doing so he questions the ability of the company to authorise Mr IQ, one of the [Z] shareholders/directors, to provide the company's instructions to Mr VE and Mr DP. He says the proposed restructure of the company was not in the company's best interests and there had been no directors' resolution providing that authority.

[101] Mr VE and Mr DP say from mid-2017, Mr IQ was the company's director authorised to provide the company's legal instructions to the firm. They say it was not necessary for the directors to resolve unanimously to provide that authority otherwise it would be "impossible for any company" to obtain advice where the minority directors disagreed with the majority.

[102] At the hearing Mr KY explained there was a division between the four [Z] shareholders/directors, and Dr WM which had given rise to "problems in the business". He said Mr IQ's April 2018 proposal of a shareholder "buyout" of Dr WM's [Z] shares, not sent to the firm, could also have been achieved by the company purchasing Dr WM's shares.

[103] Mr KY said Mr DP's December 2018 Term Sheet distributed to the directors by Mr IQ followed the firm's advice to the company, billed in the firm's November 2018 invoices issued to the company. In his submission, Mr VE and Mr DP had no duty to individual shareholders or directors in providing that advice.

[104] Although the four [Z] shareholders/directors, as holders of 80% of the company's shares and comprising four of the five directors, controlled the company, it is reasonable to expect that if Mr VE and Mr DP had any doubts Mr IQ did not have that authority they would have raised the issue with Mr IQ at the outset.[29] No evidence they had such doubts has been produced.

[105] For the purposes of this review I note that, in broad terms, s 18(1) of the Companies Act 1993 constrains a company from raising as a defence to non-performance of a contract, an absence of capacity or authority for the company to enter into the contract. The proviso to s 18(1) allows that defence where the contracting party has actual or imputed knowledge of the company's contravention otherwise protected by the section.

[106] Disputes among shareholders/directors about the governance of a company are not matters for resolution in this disciplinary jurisdiction. Any challenge by Dr WM at the

[29] Email, Mr RH (Dr WM's lawyer) to Mr DP, cc Dr WM, 25 March 2019; Term Sheet, Mr DP, 3 December 2018; Letter, Mr DP to LCS, 2 December 2019.

relevant time whether Mr IQ was authorised by the company to instruct the firm would therefore have been for the Courts to determine.

Company's best interests

[107] In his 21 March 2019 advice letter Mr DP noted Mr IQ's instructions that "all but one" – Dr WM – of the shareholders/directors were "likely to agree to" the restructuring proposal which would "significantly reduce" internal conflict. For those reasons Mr DP advised "it appears clear" the proposal was in the company's best interests.

[108] Mr DP explained how the restructuring proposal "may be effected". He referred to the Companies Act provisions to be complied with. He explained the restructuring could be achieved by a majority directors' resolution ratified by a 75% majority shareholders resolution. He noted the proposal "is to be circulated amongst", and discussed by the directors at a meeting on 28 March 2019 which he and Mr VE would attend.

[109] In his 25 March 2019 response, Dr WM's lawyer noted the firm acted for the company which was "largely control[led]" by the four [Z] shareholders/directors who held 80% of the voting rights in each capacity.

[110] He said the proposal was not in the company's best interests, and bearing in mind the four [Z] shareholders'/directors' control of the company it was "difficult to see why" the proposal was "necessary to avoid [the] significant operational inefficiency and loss in shareholder value" referred to by Mr DP.

[111] In particular, Dr WM's lawyer said the proposal (a) "if implemented, will breach" clauses of the shareholders agreement and thereby "trigger the dispute resolution process" in the shareholders agreement, and (b) "over the last several months" the four [Z] shareholders/directors had taken "steps … materially reducing" Dr WM's "rights", and "increasing [his] obligations".

[112] However, as with the previous "authority" issue, Dr WM's concern whether the restructuring of the company proposed by the four [Z] shareholders/directors was in the best interests of the company is similarly not within the jurisdiction of a Standards Committee, or a Review Officer, but a matter for the Courts to consider and determine.

Conclusion

[113] To recap, the company's [redacted] practice, incorporated under the Companies Act 1993, comprised the [Z] practice operated by the four [Z] shareholders/directors, and the [Y] practice operated by Dr WM.

[114] The company was controlled by the majority (80%) four [Z] shareholders/directors who no longer regarded the [Y] practice as essential to the overall practice, and proposed a restructuring of the company whereby Dr WM would relinquish his interests in the [Z] practice. On behalf of the company, Mr IQ sought legal advice from Mr VE and Mr DP, how best to achieve that goal.

[115] Mr VE and Mr DP (a) initially provided in September – November 2018, advice to the company, and (b) in early December 2018, Mr DP's Term Sheet which outlined the main features of a restructuring proposal of separating the company's business into "two business units".

[116] As I have noted, Mr DP's 21 March advice letter to the company, circulated by Mr IQ to all directors, explained how that proposal could be implemented.

[117] Dr WM sought legal advice from another law firm either before, or having received Mr DP's 21 March 2019 advice letter, and on 25 March Dr WM's lawyer put forward Dr WM's counter-proposal.

[118] In my view, having received Dr WM's lawyer's 25 March response, it would have been preferable for all parties at that stage had Mr VE and Mr DP, whilst continuing to act for the company, as they did until mid-October 2019, advised the four [Z] shareholders/directors to obtain legal advice from another law firm.

[119] However, I say that somewhat with the benefit of hindsight, and noting it was not until 2 October 2019 that Dr WM's lawyer requested the firm cease acting for the company, and going forward not to act for the four [Z] shareholders/directors.

[120] The firm was retained by the company, as evidenced in the firm's letter of engagement, invoices issued, and advice provided to the company in circumstances where the restructuring of the company was proposed and driven by the four [Z] shareholders/directors.

[121] For that reason, although there was no formal engagement of the firm by the four [Z] shareholders/directors as there was with the company, adopting the objective approach I have referred to the position I have reached from my analysis of the information produced, and hearing from the parties, is that the firm was also acting for

them on the proposed restructuring. In my view, to conclude otherwise would be to ignore the reality of that position.

[122] Finally, at the hearing Dr WM acknowledged Mr VE and Mr DP did not act for him personally in the matter, but he considered they were also "acting for him" as a shareholder in the company.

[123] As noted above, the term "client" is not defined in the Act or the Rules but is referred to, and included in, a number of the rules as the recipient of legal services from a lawyer.[30]

[124] No information has been produced that would suggest Mr VE and Mr DP advised Dr WM on the company's proposed restructuring, or on any other current related or unrelated matter. It is evident Mr VE and Mr DP did not provide advice to Dr WM on this matter before 21 March 2019, and from 25 March 2019 at the latest he was represented by his own independent lawyer.

(2) Acting for more than 1 client – issue (b)

(a) Parties' positions

[125] Dr WM claims (a) notwithstanding the "clear divergence" between his interests, and those of the four [Z] shareholders/directors, and their endeavours to remove him, and (b) despite not being in the "best interests" of the company, Mr VE and Mr DP "continued to advise all or some" of the four [Z] directors/shareholders, and the company.

[126] He explains he made his complaint about Mr VE and Mr DP because he considered a "reputable" law firm should "work to protect a minority shareholder['s] rights". He says the restructuring proposal would create a conflict between him, and the four [Z] shareholders/directors, and was not in the company's, or his best interests.

[127] Mr VE and Mr DP say they discharged their duty to advise the company on the issues requested, and in doing so were "not acting for any of the individuals involved" who would need "to seek advice elsewhere" as required.

(b) Professional rules

[128] Because I have concluded that, when advising the company, Mr VE and Mr DP also advised the four [Z] shareholders/directors, the question is whether their professional obligations and duties permitted them to do so. In particular, were they

[30] See above n 24.

conflicted in their professional duties by acting for more than one client on the restructuring matter?

[129] Rule 6.1 prohibits a lawyer from acting for more than one client in the circumstances described in the rule, namely, "where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients".

[130] The threshold of "a more than negligible risk" above, which the prohibition in r 6.1 applies, is very low, and is described by one Review Officer as where there is "no meaningful risk that the obligations owed to the parties would not be able to be discharged", and "a real risk of an actual conflict of interest".[31]

[131] The distinction between contentious and non-contentious matters can be a useful way to assist determining whether a conflict of duty exists, or is likely to arise in a particular situation.[32]

[132] In the latter category, where the parties "… are negotiating and significant terms remain to be resolved, it would be more or less impossible for a lawyer to act for both parties … an advantage acquired by one client will often result in a detriment to the other client".[33] The responsibility for making that determination rests with the lawyer concerned, not with the client.[34]

(c) Discussion

Dr WM

[133] Dr WM says he was unaware Mr VE and Mr DP had advised the company about "restructure", or "advice on shareholdings" when he says they "singled out" his trust. He says he took no part in the meetings referred to, and despite his later request, was not provided with details of the matters discussed.[35]

[134] Dr WM says from Mr VE's comments at the 27 September 2019 directors' meeting, he suspected Mr VE, or another member of the firm, had advised "some of" the

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[31] *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [27] and [36]. In this context, the word "negligible", which is not defined in either the Act or the Rules means, "unworthy of notice or regard; so small or insignificant as to be ignorable": *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003) Vol 2.
[32] Webb, Dalziel and Cook, above n 25, at [7.2]. See *Sandy v Kahn* above n 32, and more recently *ZAA v YBC* LCRO 243/2013 (27 June 2017); generally, Dal Pont, above n 26, at [7.35], [7.95] and [7.115].
[33] Webb, Dalziel and Cook, above n 25 at [7.2].
[34] *Taylor v Schofield Peterson* [1999] 3 NZLR 434, 440 (HC).
[35] Dr WM refers to the firm's 14, 15 November 2018 invoices to the company.

directors about "the best way to remove" him from the [Z] practice. He says despite detail yet to be worked out, the four [Z] shareholders/directors resolved at that meeting to sell the company's [Z] practice to a new company.

[135] He says from April 2018 the four [Z] directors/shareholders, whilst able to out vote him concerning the company's [Y] business "tr[ied] to force" him out of the [Z] practice on "unfavourable terms".

[136] He says the dispute was one among shareholders, and because his "rights" were protected by the shareholder(s) agreement he declined those terms, and suspects this led the four [Z] shareholders/directors to instruct the firm to "try and find another way to force [him] out".

[137] He says (a) there was no prior directors' meeting, (b) he was not consulted by another director, or by Mr VE and Mr DP about the company's restructuring proposal outlined in Mr DP's December 2018 Term Sheet, or before Mr DP's 21 March 2019 advice to the company, and (c) "made no attempt to tell [him]" to obtain independent advice.

[138] At the hearing Dr WM explained notwithstanding Mr IQ's April 2018 profitability concerns, and the way that was subsequently portrayed by Mr VE and Mr DP, "the company's profit doubled in the four months before the mediation", and the company was "rated in the top three most profitable [redacted] clinics" in the country.

[139] He says by the time of the 28 March 2019 directors' meeting, the "the two groups" of shareholders were "in conflict" and Mr VE and Mr DP ought to have referred each group for independent advice.

[140] He says in response to his lawyer having informed Mr VE on 2 October 2019 that he and Mr DP were conflicted, on 10 October 2019, their litigation partner, Mr KY, acknowledged the firm "could not act for any shareholder or potential purchaser" of the [Z] practice.

[141] Dr WM also raised his concern that in breach of a non-disclosure provision in the settlement agreement, Mr VE's and Mr DP's submissions for this review disclosed "commercial terms". However, having listened to my explanation about the confidential nature of these review proceedings between the same parties, he acknowledged little if any harm was done by that disclosure.

Mr VE, Mr DP

[142] Mr VE and Mr DP say by the 28 March meeting Dr WM was being advised by an independent law firm.

[143] They say Mr VE "may have led some aspects of the discussions" but "did not chair th[at] meeting". They say the extract from the meeting transcript referred to by Dr WM "reflected Mr VE's understanding" that the issues raised at the meeting by Dr WM were addressed in Mr DP's 21 March advice letter circulated to the directors beforehand.

[144] They explain that, having been unsuccessful in their communications with Dr WM's lawyer to "find an outcome" that "might be acceptable" to Dr WM, the four [Z] directors resolved at the 27 September meeting to seek shareholder approval for the proposed restructure.

[145] At the hearing, Mr KY reiterated the firm was "never retained" by Dr WM on "company or other business matters", and from March 2019 Dr WM was represented by his own lawyer.

[146] Mr KY also explained the four [Z] shareholders/directors "formed the view" at the 27 September meeting the dispute with Dr WM would continue to cause harm to the company hence the resolution that the [Z] business be sold.

[147] In his submission, Mr VE and Mr DP were "not obliged to take the minority side" but because the dispute "became an unwelcome distraction" to the company's business, on 16 October 2019 in the company's "best interests" the firm referred the company to an independent law firm.

[148] He explained the company, when subsequently referred to an independent law firm, wanted to avoid having to pay again for legal advice already provided by Mr VE and Mr DP. For that reason, he says Mr VE and Mr DP were asked by Mr IQ to act for the four [Z] shareholders/directors in their dispute with Dr WM.

[149] Mr KY said with the company having obtained independent legal advice, on 1 November 2019 the directors resolved, for the purposes of r 6.1.3 of the Rules, that the company provide its informed consent to Mr VE and Mr DP acting for the four [Z] shareholders/directors. He explained this did not mean the firm had already been acting for the four [Z] shareholders/directors, as well as the company on the matter.

[150] In Mr KY's submission, if r 6.1.3 did not apply, there was "no other impediment" to the firm acting for the four [Z] shareholders/directors. He explained by then,

endeavours to resolve Dr WM's exit terms had become a litigation matter subsequently settled by the mediation.

[151] Mr KY drew a distinction between the legal advice provided to the company by the independent law firm concerning the "restructuring" on the one hand, and Mr VE's and Mr DP's legal work provided to the four [Z] shareholders/directors at the mediation.

[152] He said Mr VE and Mr DP did not act for the four [Z] shareholders/directors against the company, a former client, and had "checked and double checked" there was no risk to any breach of fiduciary duty owed by the firm to the company.

Consideration

[153] Mr VE and Mr DP considered the company's restructuring proposal was in the company's best interests, and for that reason a company matter. They did not, and do not consider they were also acting for the four [Z] shareholders/directors.

[154] I have already concluded in these particular circumstances Mr VE and Mr DP were in fact also advising the four [Z] shareholders/directors, and it would have been preferable had they identified from March 2019 that the company's failure to reach agreement with Dr WM on the company's restructuring proposal could (a) lead to a dispute among the two groups of shareholders, and (b) the need to for each group to be independently advised.

[155] However, in saying that there appears to have been little if any risk of Mr VE and Mr DP being unable to discharge their professional obligations and duties owed to the company, as well as to the four [Z] shareholders/directors.

[156] This is largely because the company was controlled by the four [Z] shareholders/directors. For all intents and purposes they were one and the same. It is therefore reasonable to expect information about the restructuring provided by Mr VE and Mr DP to the company would have been passed on to the four [Z] shareholders/directors, and vice versa.

[157] It follows, in my view, that in these particular circumstances any risk of a breach of confidence of information concerning the restructuring proposal belonging to either the company, or the four [Z] shareholders/directors to the other was theoretical, and in practical terms "negligible" if at all.

[158] However, in circumstances where a lawyer determines that the prohibition in r 6.1 does not apply, the lawyer must comply with r 6.1.1 before being permitted to act

for the clients concerned. The requirements or condition in r 6.1.1 to the exercise of that permission is that "the prior informed consent of all parties concerned is obtained".

[159] The term "informed consent" is defined in r 1.2 as:

> 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.

[160] It will be evident that the process of obtaining informed consent under r 1.2 requires positive steps taken by the lawyer explaining to the clients the material risks to each of them if the lawyer acts for them, and the alternatives available to them such as each client instructing an independent lawyer. Having done that, a lawyer must believe, on reasonable grounds, that the clients understand these considerations.

[161] Informed consent from one client must be given without influence, and independent from the other clients.[36] For evidentiary purposes it is sensible that the lawyer records the client's informed consent in writing.[37]

[162] No evidence has been produced that Mr VE and Mr DP obtained the informed consent of both the company and the four [Z] shareholders/directors. Technically then, Mr VE and Mr DP contravened r 6.1.1, although it is reasonable to expect both would have provided that consent bearing in mind the effective control of the company rested with the four [Z] shareholders/directors.

(3) Other professional duties owed to Dr WM? – issue (c)

[163] Because Mr VE and Mr DP acted for the company, the first question concerning this aspect of Dr WM's complaint is what professional duties Mr VE and Mr DP owed to Dr WM, whom they did not represent.

(a) Professional standards, rules

[164] If a determination is made that a lawyer's conduct warrants a disciplinary response, a finding can be made of either (a) unsatisfactory conduct pursuant to s 12 of the Act; or (b) misconduct pursuant to s 7.[38]

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[36] *Sandy v Kahn*, above n 31 at [41]-[42].
[37] *Sandy v Kahn*, above n 31, at [41]. Rule 6.2: these rules still apply where different lawyers in a firm act for different parties in a matter or a transaction; r 6.3: "[a]n information barrier within a practice does not affect the application of, nor the obligation to comply with, rr 6.1 or 6.2".
[38] Lawyers and Conveyancers Act 2006, s 12 - unsatisfactory conduct: (a) "… conduct that falls short of the standard of competence and diligence … of a reasonably competent lawyer"; (b) "conduct that would be regarded by lawyers of good standing as being unacceptable including -

[165] The Rules, which concern the way in which lawyers must (a) conduct themselves, and (b) act for their clients, can be placed into three broad categories.[39]

[166] First, those duties which directly concern the provision of legal services by lawyers to their clients;[40] secondly, duties which concern lawyers' dealings or interactions with other lawyers, and third parties; and thirdly, duties which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.[41]

Non-clients

[167] There may be times when a lawyer owes a duty, other than a professional duty, to persons for whom the lawyer does not act. For example, a duty of care in negligence. Generally, however, a lawyer acting for a client would not owe a duty to a person such as Dr WM on the opposite side of the dispute with the company initially, and from 1 November 2019, the four [Z] shareholders/directors.[42]

[168] For that reason, "the existence of a duty" owed to a non-client has been described as "exceptional".[43] Where a lawyer acts for a party to a transaction, the different interests possessed by each party explains the Courts' reference to policy considerations why that lawyer does not owe a professional duty to the opposing party.[44]

Clients

[169] This position can be contrasted with the professional duties lawyers owe their clients included in the first category of the Rules.

(i) conduct unbecoming …; or (ii) unprofessional conduct"; (c) -"… a contravention of [the] Act, or of any regulations or practice rules made under [the] Act … [when] …provi[ding] regulated services …"; (d) (a condition or restriction to a practising certificate). A misconduct finding can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[39] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Schedule, Notes about the rules - the Rules do not represent "an exhaustive statement of the conduct expected of lawyers", but "set the minimum standards that lawyers must observe and are a reference point for discipline".

[40] Lawyers and Conveyancers Act 2006, s 4 – lawyers' fundamental obligations - (b) "be independent"; (c) "…act in accordance with all fiduciary duties and duties of care…"; (d) "…protect [clients'] interests…".

[41] Lawyers and Conveyancers Act 2006, s 4(a) – "uphold the rule of law and … facilitate the administration of justice in New Zealand".

[42] Unless, for example, where a lawyer acting for a client on a transaction provides an undertaking, say, to pay rates, or water charges, or a certificate for e-dealing purposes in Landonline, or to a bank: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 2.5, 2.6.

[43] Webb, Dalziel and Cook, above n 25 at [5.4.3] - referring to *Burmeister v O'Brien* [2010] NZLR 395, at [234].

[44] Webb, Dalziel and Cook, above n 25 at [5.4.3].

[170] To illustrate, Mr VE's and Mr DP's professional duties owed to the company, and as I have found the four [Z] shareholders/directors, when acting for them, would have included the duties to act competently (r 3); to treat them with respect and courtesy (r 3.1); to respond to their inquiries promptly (rr 3.2, 7.2); to provide them with information on the principal aspects of client service and client care at the commencement of the retainer (rr 3.4, 3.5);[45] to be independent (r 5); to protect and promote their interests to the exclusion of third parties' interests (r 6); to disclose relevant information to, and consult with them (rr 7, 7.1); to hold their information in confidence (r 8); and, to charge them fees that are fair and reasonable (rr 9, 9.1).

Broader duties

[171] As also noted, there are professional obligations and duties of a broader nature included in the second category of the Rules which concern lawyers' dealings or interactions with other lawyers, and third parties; and in the third category which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.

(b) Discussion

[172] At the hearing Dr WM said he understood Mr VE and Mr DP were also acting for him. He said he "thought [they] would have his interests at heart and advise him to obtain independent advice".

[173] Because, as I have found, Mr VE and Mr DP did not act for Dr WM in this matter, or on any other current matter related or otherwise, they did not owe him any of the client-related professional duties referred to above.

[174] They did, however, owe him professional duties of a wider nature which apply to all lawyers including those concerning the rule of law, and administration of justice, lawyers' interactions with other lawyers, proper professional practice, and dealings with third parties.[46]

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[45] Rules 3.4A, 3.5A apply to barristers sole.

[46] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Chapter 2, Rule of law and administration of justice; Chapter 10, Dealings with other lawyers (from 1 July 2021, replaced with a new Chapter 10); Chapter 11, Proper professional practice (from 1 July 2021, replaced with a new Chapter 11); Chapter 12, Third parties.

[175] In this regard, Dr WM claims Mr VE and Mr DP, knowing [Dr WM] was "self-represented", should, as required in r 12.1, have "inform[ed] [him] of the right to take legal advice".

[176] The exercise of that duty by Mr VE and Mr DP may have first been triggered in early December 2018 when Mr IQ distributed the Term Sheet, prepared by Mr DP, to the directors; and again four months later when Mr IQ circulated to the directors Mr DP's 21 March 2019 advice letter to the company.

[177] However, by 25 March 2019 at the latest, the date of Dr WM's lawyer's response email to Mr DP, Dr WM was legally represented.

[178] In these circumstances I do not consider any professional issues of an adverse nature concerning this, or any other professional rule in the broader category of rules I have referred to that apply to non-clients, arise for Mr VE and Mr DP concerning this aspect of Dr WM's complaint.

(4) Confidential information - issue (d)

[179] The remaining issue to consider is whether, when acting for the company and the four [Z] shareholders/directors, Mr VE and Mr DP held information about Dr WM relevant to the restructure proposal which they used for the benefit of the company, and the four [Z] shareholders/directors against Dr WM.

(a) Acting against a former client

(i) Parties' positions

Dr WM

[180] Dr WM says the firm's attendances on an employment matter for his wife in 2015, acting on the sale of his family company's residential property, preparing documents and advising him on business matters, holding his and his family's documents, and his "payment of [the firm's] invoices" is "pro[of]" he was a client of the firm.[47]

[47] He says he had his and his wife's "wills, family trust documents, company documents transferred" to the firm.

Mr VE, Mr DP

[181] Mr VE and Mr DP say they considered at the time they were not "precluded" from acting for the company, and subsequently for the other four directors/shareholders, "simply by reason" of the firm having "previously advised Dr WM on other entirely unrelated matters of narrow compass" which were not relevant to the shareholders' dispute in 2019.

[182] They say they did not hold information "on other files" about Dr WM or his affairs that was "even remotely relevant" to the shareholder dispute, and any information the firm held "about [M]r WM or his affairs" was of no "conceivable relevance" to the company's matter.

(ii) Duty of confidence

[183] A lawyer's duty to protect and hold in strict confidence all information concerning the client, the retainer and the client's business and affairs acquired in the course of the professional relationship outlives the lawyer-client relationship.[48]

[184] As noted below, the duty may also arise for a lawyer outside a lawyer-client relationship, namely, where the lawyer does not act for the person from whom the lawyer receives information.[49]

(iii) Former client's confidential information

[185] Concerning a former client, the broad prohibition in r 8.7 is that 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".

[186] More specifically, r 8.7.1 provides that a lawyer "must not act against a former client of the lawyer or of any other member of their practice where" the circumstances in paragraphs (a) to (d), referred to below, all exist or are met.[50]

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[48] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 8, 8.1.
[49] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.8.
[50] *AD v ZX* LCRO 87/2010 (14 December 2010) at [20] – rr 8.7 and 8.7.1 have been described as "reflect[ing] 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".

– Confidential information – para. (a)

[187] The first limb in r 8.7.1(a) requires that "the practice, or any lawyer in the practice" holds confidential information belonging to a former client that "was used, or could have been used, against" the former client "such that ought to have disqualified" the lawyer from acting for the new client.[51]

[188] Considerations which have assisted the Courts to determine relevance of information held by the lawyer concerned include whether the former client (a) provided instructions to the lawyer on a "piecemeal" basis, and fully briefed the firm on the former client's affairs, and (b) instructs other law firms.[52] The elapse of time "since the earlier retainer and the narrow nature of the new retainer" may make a lawyer's acceptance of a retainer less "objectionable" to the former client".[53]

[189] A former client's information acquired during the lawyer-client relationship, characterised as the "getting to know you principle", held to have been relevant, includes a lawyer's knowledge about the former client's (a) "… honesty or lack thereof ... reaction to crisis, pressure or tension … attitude to litigation and settling cases and tactics";[54] and (b) "… personalities ... weaknesses, fears and reactions".[55]

[190] Any disquiet by a former client about his or her former lawyer acting against the former client must be weighed against "a person's right" to "solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally". Such considerations include "[m]obility within the profession", and "[a]ccess to specialist services and market competition".[56]

Dr WM

[191] By acting for him and his family on the matters referred to, Dr WM claims he was a client of the firm "across all parts of [his] personal and business life".

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[51] *Mansfield v Southwell* LCRO 199/2009 (8 September 2010) at [32].
[52] *GBR Investment Limited v Keung* HC Christchurch CIV-2009-409-1486, 19 March 2010 at [60], [63].
[53] *Q v I* LCRO 41/2009 (2 June 2009) at [14].
[54] *GBR Investment Limited v Keung* HC Christchurch CIV-2009-409-1486, 19 March 2010 at [65], referring to *Yunghanns v Elfic Ltd* (unreported, Supreme Court, Victoria, 3 July 1998) per Gillard J as cited in *Mintel International Group Ltd v Mintel (Aust) Pty* (2000) 181 ALR 78, 87, see also *GBR Investment Limited v Keung* at [67]; the Courts "have shown a greater sensitivity" towards the protection of confidential information in family law and criminal matters (at [68]).
[55] *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408.
[56] *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 (CA) at 651.

[192] At the hearing he acknowledged Mr VE and Mr DP knew he and his family trust held shares in the company, but says apart from these matters the firm had not acted on any other matters for him and his family.

[193] Concerning any "getting to know you" information, Dr WM said it was "hard to define" what information about him the firm would have held which could have been used against him when acting for the company.

Mr DP, Mr VE

[194] Mr VE and Mr DP similarly acknowledge the firm provided legal services to Dr WM's wife and his family interests, but submit because the firm had "never acted for" Dr WM, or "advised" his trust on "business affairs", or "in relation to the affairs of [the company]", Dr WM "overstate[s] the extent to which" the firm acted for him personally.

[195] They explain at the time Dr WM asked the firm to administer his family trust [Dr WM] knew the firm had acted for the company "for many years", and the firm had similarly provided "family trust and conveyancing" services for three of the [Z] shareholders/directors.

[196] In their submission, because the company, not Dr WM, was the firm's client, the fact the firm communicated with him about the proposed restructuring is "of no relevance and of no assistance" to his complaint.

[197] At the hearing, Mr KY said the firm had no insight into Dr WM's affairs that would have given the firm "a strategic advantage" in acting for the company on the matter. He said (a) the firm did not hold information about Dr WM and his family interests relevant to the company matter; (b) the company's lease matter on which Dr WM liaised with the firm during 2017 was for "a brief period"; and (c) Mr VE had no contact with Dr WM apart from the 28 March 2019 meeting when Dr WM was accompanied by his lawyer.

Consideration

[198] In a practical sense there must be "a sufficient relationship between the general matters" of the former client, and "the subsequent matters" in which the lawyer is acting against the former client.[57] The burden of establishing the lawyer or firm holds a former client's confidential information which is relevant falls on the former client, but is not a heavy burden.[58]

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[57] *Mansfield v Southwell* LCRO 199/2009 (8 September 2010) at [24].
[58] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 at 527.

[199] As noted, Mr VE and Mr DP acknowledge that approximately three years before Mr IQ's 5 April 2018 email to all the directors the firm provided legal services to Dr WM's family, and began "administer[ing]" his family trust which was a shareholder in the company.

[200] As custodian for Dr WM's and his family's documents since 2015, Mr VE and Mr DP, and other firm members as applicable, would have known Dr WM and his family trust were shareholders in, and that he was a director of the company.

[201] However, apart from the information contained in the legal documents about the company held by the firm, including the company's documents, Mr VE and Mr DP deny they or the firm had any other information about Dr WM and his family interests.

[202] It is not clear whether Mr VE and Mr DP knew, from 2015 or two years later in 2017 when Dr WM liaised with the firm concerning the company's lease matter, that Dr WM was responsible for running of the [Y] practice. Still, that information would have been disclosed to them in September 2018 when they received the company's instructions for advice concerning a proposed restructuring.

[203] As noted above, Dr WM stated at the hearing apart from the matters on which the firm had acted for him and his family "there were no other matters" from which information about him and his family interests could have been gained by the firm, and it was "hard [for him] to define" what information the firm would have held that could have been used against him when acting for the company.

[204] This is consistent with Mr VE's and Mr DP's position that the firm did not hold information about Dr WM that might have been helpful to them when they advised the company, and Mr KY's submission at the hearing, the firm "had no [advantageous] insight" into Dr WM's affairs concerning, or relevant to the company's proposal.

– Disclosure – para. (b)

[205] The second limb of r 8.7.1 requires that disclosure of the confidential information "would be likely to affect the interests of the former client adversely". For example, whether any of the information held by the lawyer "is or may be relevant to the proceedings".[59]

[59] *Torchlight Fund No 1 LP (In Receivership) v NZ Credit Fund (GP) Ltd* [2014] NZAR 1486, 1492 at [20].

[206] By "focus[ing] on the possibility of actual harm" to the former client,[60] this limb of r 8.7.1 illustrates the tension between a lawyer's duty of disclosure to a client and the duty of confidence owed to a former client, or protecting and promoting one client's interests over the other.[61]

[207] Whilst Mr VE and Mr DP acknowledge that by acting for the four [Z] shareholders/directors they "may [have[be[en] acting against" Dr WM's interests as a shareholder in the company, they say, as noted above, the firm's work on his personal matters was "extremely limited".

[208] For that reason, their position is that any information the firm held about Dr WM and his family interests was of no relevance to them in advising the company on the proposed restructuring. Dr WM similarly stated it was "hard" for him to "define" any such information held by the firm that belong to him.

[209] In those circumstances, on balance I am not persuaded that any information about Dr WM and his family interests held or known by the firm could, if disclosed, have been used against Dr WM and his family interests "adversely" in the context of the company's restructuring proposal.

[210] I make the observation that it is reasonable to expect when first instructed Dr WM's lawyer would have raised this issue, and would not have advised Dr WM to permit the firm to represent the four [Z] shareholders/directors at the subsequent mediation had Dr WM considered the firm held information about him or his family interests adverse to him in the settlement negotiations.

– "a more than negligible risk of disclosure" – para. (c); fiduciary obligation – para. (d)

[211] As noted above, all limbs of r 8.7.1 must be satisfied before the prohibition in that rule applies. Because I have concluded any information about Dr WM and his interests held by the firm was not captured by the circumstances described in paragraph (b) of the rule, it is not necessary for me to consider the application or otherwise of the circumstances described in paragraphs (c), and (d).

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[60] *Penzance v Runcorn* LCRO 170/2009 (16 December 2009) at [10].
[61] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 7, 7.1, 7.2 (Disclosure); rr 8, 8.1 (Confidence).

(b) Outside a lawyer-client relationship

[212] For completeness I refer to r 8.8, noted above, which recognises that a lawyer may owe a duty of confidence to a person outside a lawyer-client relationship by prohibiting the lawyer concerned from "breaching or risk breaching":

> … a duty of confidence owed by the lawyer that has arisen outside a lawyer-client relationship, whether to benefit the lawyer, a client, or otherwise. In such a case the lawyer must not act for a client against a person in respect of whom confidential information relevant to the matter in issue is held. (footnote omitted)

[213] For the duty to apply, the person, a non-client, from whom the lawyer received the information must prove that the duty of confidence claimed "arose independently of a lawyer-client relationship". Alternatively, the person could apply to the Court exercising its inherent jurisdiction "to preserve the appearance of justice".[62]

[214] The concern is that the lawyer "may consciously or unconsciously use or disclose something gleaned as a result of his participation in the mediation, thereby giving the plaintiffs an unfair advantage".[63] The footnote to r 8.8 explains that "[e]xamples" of application of the rule might be "duties owed by company directors and officers of the Crown".[64]

[215] In the context of either a social or family setting, a lawyer may owe a duty of confidence to a person where there is "a reasonable expectation of confidentiality", but any such disclosures are "not informed by the same policy imperative as the protection of confidences shared with a lawyer in the course of a retainer".[65]

[216] The High Court has stated that the rule "does arguably endorse the … approach" taken in a decision of the Court of Appeal, namely, where:[66]

> [the Court] can be satisfied that the claim in which [the lawyer] wishes to act [for the plaintiff] is sufficiently dissimilar that the course of the prior mediation [in which the lawyer participated against the defendant] has no relevance to it.

[217] Examples of situations where these issues have been considered by the Courts include a lawyer who acts for a client against his or her spouse or relationship partner

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[62] Dal Pont, above n 26 at [8.160].
[63] *South Island Commercial (2004) Ltd v Kiwi Green Island Club Ltd* HC Christchurch CIV-2008-409-261 at [3].
[64] See also the commentary to r 1.11 of the New Zealand Law Society's Rules of Professional Conduct for Barristers and Solicitors, which similarly warned lawyers against acting for a client where a lawyer by virtue of the lawyer's directorship of the company "comes into possession of information detrimental" to the company.
[65] Dal Pont, above n 26 at [8.165].
[66] *South Island Commercial (2004) Ltd v Kiwi Green Island Club Ltd* HC Christchurch CIV-2008-409-261 at [61], [64], referring to *Carter Holt Harvey Forests Limited v Sunnex Logging Limited* [2001] 3 NZLR 343 (CA), 350 at [28].

possesses information from having previously acted against the person claiming confidentiality.[67]

Consideration

[218] The prohibition in r 8.8 does not apply to a client's information obtained by the client's lawyer when acting for the client, but in circumstances where information about a person is obtained by a lawyer in another setting.

[219] For example, information about Dr WM obtained by the firm when, on behalf of the company, he dealt with Mr DP about the company lease, or perhaps when he met with Mr DP, Mr VE or another member of the firm in a social setting.

[220] Mr KY submits that r 8.8 did not apply because there was no information about Dr WM and his family interests held by the firm that was "outside" the company documents, including the shareholders agreement. No information has been produced, or submissions made by Dr WM that such information of his existed.

Decision

[221] Because I have found Mr VE and Mr DP ought to have obtained, pursuant r 6.1.1, the informed consent of both the company, and the four [Z] shareholders/directors to act for both, it is open to me to make an unsatisfactory conduct finding under s 12(c) of the Act. However, I do not propose to do so, for a number of reasons.

[222] A breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait*[68] the Court observed that:

> The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[223] That position was affirmed in *Chapman v The Legal Complaints Review Officer* where the Court noted that:[69]

> … it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

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[67] Dal Pont, above n 26 at [8.165].
[68] *Burgess v Tait* [2014] NZHC 2408 at [82].
[69] *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].

[224] In conducting a review, a Review Officer may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.[70]

[225] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.[71] That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.[72]

[226] The function of the disciplinary process is protective, not punitive. No broader issues of consumer protection or public welfare are directly raised by this review, other than the public interest in practitioners maintaining professional standards and ensuring compliance with the Rules.

[227] My particular reasons for not making an adverse finding against Mr VE and Mr DP are:

(a) Although acting against Dr WM as a former client, both parties acknowledge at the hearing it was doubtful the firm held any information about Dr WM advantageous to the company, and the four [Z] shareholders/directors.

(b) Soon after Dr WM's lawyer raised his concerns that they had a conflict of duties, Mr VE and Mr DP referred the company to another law firm.

(c) Until 16 October 2019, when Mr VE and Mr DP referred the company to another law firm for independent legal advice, they considered they had been acting for the company alone;

(d) Although I have found Mr VE and Mr DP acted for more than one client - the company, and the four [Z] shareholders/directors - on the matter, in these particular circumstances my finding is they did not contravene r 6.1 in doing so.

[228] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee to take no further action on Dr WM's complaint is confirmed.

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[70] Lawyers and Conveyancers Act 2006, s 211(1)(b).
[71] Lawyers and Conveyancers Act 2006, s 138.
[72] Lawyers and Conveyancers Act 2006, s 138(2).

DATED this 14TH day of DECEMBER 2021

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BA Galloway
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:

Dr WM as the Applicant
Messrs VE and DP as the Respondents
Mr KY as Representative for the Respondents
[Area] Standards Committee
New Zealand Law Society