LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 111

Ref: LCRO 119/2021

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 [X]
BETWEEN	**FE** Applicant
AND	**AD of [Firm 1]** Respondent

DECISION

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

Introduction

[1] Mr FE has applied for a review of a decision by the Area Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, Mr AD.

Background

[2] Mr FE was a minority shareholder and director of a company, [XG] Co Ltd ("[XG]" or "the company"). Mr LM ("Mr LM") was the majority shareholder in [XG] and a director.

[3] In February 2016, the Bank of [XX] ("XX" or "the bank") approved a loan facility of $700,000 to the company. [XX] required that loan to be supported by guarantees to be executed by Mr FE and Mr LM, and another director and shareholder, Mr TM.

[4] The bank documents, provided to the company and potential guarantors, informed the guarantors as follows:

> BEFORE you execute this Guarantee, you must receive independent legal advice (without the Customer being present). The independent legal advice must be given by a solicitor who does not act for the Customer, another guarantor or any third party receiving a direct benefit from any:
>
> (i) loan or facility made to the Customer;
>
> (ii) instrument of any kind issued by us at the request of the Customer; or
>
> (iii) guarantee that the Customer has provided to us in relation to another person or persons.
>
> You may choose not to receive independent legal advice. If you do so, you MUST sign a waiver of this requirement in the form provided to you.

[5] Mr AD acted for the bank and the company on the transaction.

[6] Mr AD provided the guarantors with a waiver of independent advice and indemnity relating to guarantee.

[7] All the documentation relevant to the transaction was executed following a meeting at Mr AD's office.

[8] Sometime after the loan advance was finalised, Mr FE and Mr LM fell out. It was Mr FE's contention that Mr LM had misappropriated funds received from the loan drawdown.

[9] Mr AD acted for Mr LM in the shareholders' dispute.

The complaint and the Standards Committee decision

[10] Mr FE lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 2 September 2020. The substance of his complaint was that:

(a) Mr AD had "advised on all matters", when he and Mr LM had formed a joint venture under the umbrella of the [XG] company; and

(b) Mr AD had an intimate knowledge of his business affairs, having acted for him previously on many occasions; and

(c) Mr AD had advised him when he was required to provide a personal guarantee in support of the company; and

(d) Mr AD continued to act for Mr LM and the company after a serious dispute had arisen between Mr FE and Mr LM; and

(e) he had relied on Mr AD to protect his interests when presented with a waiver; and

(f) Mr AD should not have allowed him to waive his right to independent advice; and

(g) Mr AD had made disparaging comments about him in correspondence to his lawyer.

[11] In summarising his complaint, Mr FE contended that Mr AD had:

(a) failed to maintain proper standards and deal with third parties with integrity, respect and courtesy (rr 10 and 12);[1] and

(b) acted for a client against a former client in circumstances where he had breached r 8.7; and

(c) failed to terminate all retainers in circumstances where it was apparent that he could no longer continue to act for [XG] and Mr LM.

[12] On 17 September 2020, Mr FE wrote to the Complaints Service to advise that he wished to add further to his complaint. His allegation was, that Mr AD had, despite giving indication that he had ceased acting for the company, continued to act for the company.

[13] Mr AD responded to Mr FE's complaint on 7 October 2020. He submitted that:

(a) he had played no part in advising either of the parties in respect to the establishment of the [XG] company; and

(b) in the course of acting for [XG] subsequent to its incorporation, the nature of the instructions received from the company were such that he was not in a position to acquire any confidential information relating to Mr FE; and

(c) in the course of acting for the company, there was no requirement for him, or obligation on him, to advise Mr FE concerning the $700,000 loan advance; and

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

(d) whilst he had acted for Mr FE's company, he had never acted for Mr FE in his personal capacity; and

(e) he held no information confidential to Mr FE, which could have had potential to affect Mr FE's interests; and

(f) if Mr FE had genuine concern that he retained information confidential to Mr FE, it could have been expected of Mr FE that he would have disclosed his concerns earlier; and

(g) complaint that he had made disparaging comments about Mr FE were "ludicrous"; the comments alleged to have caused offence had done no more than express his client's view as to the frivolous nature of allegations that were being made at the time by Mr FE; and

(h) he had ceased acting for [XG] from 16 June 2020 and his attendance at the company premises subsequently was for purposes of representing Mr LM in his personal capacity.

[14] Mr FE provided a response to Mr AD. In correspondence to the Complaints Service of 21 October 2020, Mr FE submitted that:

(a) he had evidence to support his contention that Mr AD had previously acted for him; and

(b) the waiver document prepared by Mr AD clearly disclosed that Mr AD had been acting for him in respect of the [XX] financing transaction; and

(c) Mr AD would have acquired confidential information about him in the course of acting on a number of transactions; and

(d) he rejected suggestion that he had consented to Mr AD continuing to act for Mr LM; and

(e) Mr AD had played an active part in endeavouring to enforce trespass notices which sought to prevent him (Mr FE) from accessing his own premises; and

(f) Mr AD could not distance himself from discourteous remarks made in his correspondence of 13 August and 28 August by argument that the comments were the responsibility of his client.

[15] Mr AD responded further in correspondence to the Complaints Service of 5 November 2020. Mr AD:

(a) acknowledged that he had acted for Mr FE's companies on some straightforward conveyancing transactions, but reiterated that he had never represented Mr FE personally; and

(b) submitted that Mr FE had failed to provide evidence to support contention that Mr AD was in possession of information confidential to Mr FE; and

(c) concluded that he had not breached any professional conduct rules.

[16] The Standards Committee issued the parties with a notice of hearing on 18 December 2020 and invited submissions from the parties.

[17] Mr RA, for Mr FE, provided a response to the notice of hearing on 22 January 2021. Mr RA submitted that:

(a) whilst Mr FE maintained that there had been a systematic and ongoing breach by Mr AD of r 6.1 over the years, complaint that Mr AD had breached r 6.1 by acting when there was a more than negligible risk of him being unable to discharge his obligations, was focused on two matters, being:

(i) Mr AD's actions in acting for [XG] and Mr FE in the execution of a $700,000 [XX] loan facility; and

(ii) Mr AD acting for [XG] in 2020 in endeavouring to persuade the police to enforce a trespass notice purportedly issued by [XG] against Mr FE in circumstances where Mr AD had previously advised that he would refrain from acting for [XG].

(b) Mr AD had breached r 8.7 by acting against Mr FE in circumstances where Mr AD had intimate knowledge of Mr FE's personal and business affairs.

[18] Mr DL, for Mr AD, provided a response to the Committee's notice of hearing on 12 February 2021. It was submitted for Mr AD that:

(a) Mr FE's complaint lacked merit; and

(b) Mr AD had ceased acting for [XG] in June 2020; and

(c) Mr AD had never acted for Mr FE in his personal capacity; and

(d) Mr FE had failed to provide an evidential foundation for argument that Mr AD had acted for two parties in a dispute; and

(e) Mr AD's actions in attending to the guarantees were "appropriate and standard", and Mr FE had been advised to obtain independent legal advice; and

(f) Mr AD was not in possession of information that was confidential to Mr FE.

[19] The Standards Committee identified the issues for determination as being:

(a) had Mr AD breached r 6.1 of the Rules by acting for more than one client on a matter (being one current matter and one historical matter) where there was more than a negligible risk that Mr AD may be unable to discharge obligations owed to 1 or more of the clients; and

(b) had Mr AD breached rr 8.7 and/or 8.7.1 of the Rules by acting for Mr LM and/or [XG] in respect of matters in dispute between Mr LM, Mr FE and/or [XG] and

(c) whether Mr AD owed fiduciary obligations to Mr FE in his capacity as a former client; and

(d) whether any of Mr AD's conduct complained about constituted unsatisfactory conduct as defined in s 12(a) and/or 12(c) of the Lawyers and Conveyancers Act 2006.

[20] The Standards Committee delivered its decision on 29 June 2021.

[21] The Committee determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[22] In reaching that decision the Committee concluded that:

(a) Mr FE was not a client of Mr AD's in the transaction involving a shareholder dispute between Mr FE and Mr LM as shareholders of [XG]; and

(b) Mr AD had acted for LM and FE Investments Co Ltd[2] in the transaction securing funding from the [XX], and had advised Mr FE of his right to receive independent legal advice; and

(c) Mr FE had waived his right to receive independent advice; and

(d) there were no grounds to establish that Mr AD was acting for Mr FE personally in relation to his obligations under the personal guarantee; and

(e) whilst Mr AD had acted for companies in which Mr FE was involved, he had not represented Mr FE in Mr FE's personal capacity; and

(f) there was no evidence to support contention that Mr AD held information that specifically related to Mr FE personally; and

(g) the information that Mr AD or his firm held was information that had been available and disclosed to Mr FE's fellow directors and information that therefore could not properly be described as confidential; and

(h) there was not a more than negligible risk that disclosure of that information could be made, and that the fiduciary obligations owed to Mr FE in his personal capacity would be undermined.

Application for review

[23] Mr FE filed an application for review on 10 August 2021.

[24] He submits that:

(a) whilst he did not take issue with Mr AD continuing to act for Mr LM in the [XG] dispute, he did object to Mr AD continuing to act for [XG]; and

(b) the Committee had erred in concluding that Mr AD did not act for [XG] against Mr FE; and

(c) the Committee had erred in describing the company LM and FE Ltd as being the customer of the [XX] in respect to the financing transaction; and

(d) whilst the waiver executed by Mr AD did record that he did not wish to be advised concerning the wisdom of entering into the transaction, and did

[2] This was an error. The Standards Committee was presumably intending to reference the company [XG] Co Ltd.

advise him to secure independent legal advice, that waiver nevertheless clearly records that Mr AD's practice (or Mr AD personally) acted for Mr FE in respect to providing advice on the guarantees; and

(e) Mr AD had acted for Mr FE in a personal capacity on a number of transactions, in the course of which, Mr AD had acquired personal information about Mr FE; and

(f) the Committee had neglected to consider Mr FE's complaint that Mr AD had behaved in a discourteous and disrespectful manner to Mr FE.

[25] Mr AD was invited to comment on Mr FE's review application.

[26] Mr DL, for Mr AD, provided a response on 24 August 2021.

[27] In that response, Mr AD submits that:

(a) Mr FE's review application simply restates the arguments that had previously been put to the Standards Committee; and

(b) Mr AD had not issued the trespass notice in relation to [XG's] premises, nor did he call the police when Mr FE turned up at [XG's] premises; and

(c) he had attended at the [XG] premises at the time the police had been summoned in precisely the same capacity as had Mr FE's counsel attended, that is, in the capacity as legal representative for a shareholder of the company; and

(d) Mr AD had appropriately discharged his obligations when advising Mr FE of the option to take independent advice in respect to the guarantees; and

(e) there was no information to support contention that Mr AD held information confidential to Mr FE; and

(f) Mr AD had not breached any conduct rules by commenting on Mr FE's mental health.

Hearing

[28] A hearing proceeded on Wednesday, 9 February 2022. Mr FE was represented by Mr RA Mr AD by Mr DL.

Nature and scope of review

[29] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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.

[30] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[31] 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:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Discussion

[32] In the course of advancing and responding to the complaint and the review application, both parties filed extensive submissions setting out their respective positions. By the time the matter arrived at the door of the LCRO, both Mr FE and Mr AD

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[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

had benefited from abundant opportunity to set out their positions. Much of what could be said had been said. The parties' counsel, recognising the extent to which the arguments had been traversed in the written submissions, helpfully focused their arguments at hearing on succinctly addressing the points they considered to be most critical to their respective client's cases.

[33] The issues to be considered on review are:

(a) Had Mr AD breached r 6.1 of the Rules by acting for more than one client on a matter where there was more than a negligible risk that Mr AD may be unable to discharge the obligations owed to one or more of his clients?

(b) Did Mr AD continue to represent [XG] after the breakdown in Mr FE and Mr LM's business relationship?

(c) Had Mr AD breached rr 8.7 and/or 8.7.1 of the Rules by acting for Mr LM and/or [XG] in respect of matters in dispute between Mr LM and/or [XG] and Mr FE?

(d) Did Mr AD conduct his dealings with Mr FE in a courteous and respectful manner?

Had Mr AD breached r 6.1 of the Rules by acting for more than one client on a matter where there was more than a negligible risk that Mr AD may be unable to discharge the obligations owed to one or more of his clients?

[34] It is so axiomatic to approach the trite to emphasise that a lawyer must not act for more than one client in circumstances where there is possibility for the interests of the clients to conflict.

[35] It has been stated that a central aspect of the duty of loyalty is the obligation of a lawyer not to act for two clients whose interests conflict. However, this obligation is better expressed as an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients conflict. The foundation of the obligation to avoid a conflict of duties is the fiduciary duty owed by the lawyer to each client independently.[5]

[36] The professional prohibition on acting in the face of a conflict of interest is found in r 6.1 of the Rules, which provides:

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[5] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at p 209.

> 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.

[37] In addressing the question as to whether Mr AD had breached r 6.1, the Standards Committee noted that Mr AD had been instructed to act for [XX] and [XG] Co Ltd.[6] The Committee observed that Mr AD was required to act for both [XX] and the company "as is usual when receiving instructions for lending from a banking institution", noting that the complaint was "not about whether Mr AD had a conflict in acting for the [XX] and the company. The complaint is whether Mr AD acted for Mr FE personally in relation to this transaction".

[38] The Committee concluded that there were no grounds to support conclusion that Mr AD was acting personally for Mr FE in matters relating to the guarantee. The Committee considered that the extent of Mr AD's obligation was confined to advising Mr FE of the need to take independent advice, and that he had fulfilled that obligation. Having concluded that Mr AD's obligations were narrow, the Committee determined that there had been no breach of r 6.1.

[39] With every respect to the Committee, I do not consider, when the circumstances of this particular transaction are closely scrutinised, that Mr AD can distance himself from argument that he owed obligations to Mr FE, by recourse to argument that his obligations were strictly confined to the [XX] and the company.

[40] In reaching that view, I have had the benefit (which was not available to the Standards Committee) of hearing at length from both Mr FE and Mr AD as to the circumstances in which the loan arrangements were finalised.

[41] It is helpful to briefly identify the background circumstances that led to Mr FE first attending at Mr AD's office to finalise documentation for the $700,000 [XX] loan advance. Mr AD explained that documentation was also prepared for other transactions, but for purposes of this review, the focus is solely on the process followed in finalising the documentation for the $700,000 advance.

[42] When responding on 16 June 2020 to complaint from Mr FE's lawyer that he had been conflicted, Mr AD explained that he had provided copies of the loan documentation to Mr FE "days before signing" and that Mr FE had been advised to obtain independent legal advice.

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[6] Recorded as LM and FE Investments Co Ltd.

[43] Having had opportunity to hear from the parties, I think it likely that Mr AD was mistaken in his recollection that he had provided documentation to Mr FE prior to the meeting. I hasten to emphasise that in forming that view I do not for one moment consider that Mr AD was deliberately providing an inaccurate account of events. Mr AD was open at the hearing in conceding that he had difficulty recalling events after such a lengthy period of time. I formed an impression of Mr AD, in the course of the hearing, that he was making sincere and honest effort to ensure that his evidence was accurate to the best of his recollection.

[44] What I am clear on, having had opportunity to consider the circumstances leading up to the first of the meetings held at Mr AD's office, is that Mr LM was the driving force behind the steps that were being taken to organise various loan advances.

[45] Mr FE explained at the hearing, that he and Mr LM had discussed plans to expand their business. In particular, they were contemplating the purchase of a large freezer which would provide greater capacity to enable expansion of the company's food distribution business.

[46] Mr LM collected Mr FE and delivered him to Mr AD's office.

[47] Mr FE says that he was somewhat confused when he arrived at Mr AD's office, as he had no idea as to what the purpose of the meeting was. He had not been provided with copies of any documentation prior to the meeting. He had not appreciated that the plans he and Mr LM had discussed to expand the company had progressed to the point where bank loans had been secured and were awaiting finalising with the execution of the necessary documentation.

[48] Mr FE says that when he was informed that the meeting had been organised to attend to signing documents which would secure a bank loan, he was extremely unhappy with what was being proposed. He was particularly disconcerted by suggestion that he would be required to execute a personal guarantee.

[49] He says that he was overwhelmed by the volume of the documentation put in front of him and hampered in his ability to understand the purpose of the documentation, by his limited English. He felt ambushed by the situation.

[50] Mr FE says that he made it very clear to Mr AD that he was unhappy at suggestion that he be required to act as a guarantor for the proposed loan.

[51] Mr AD's recollection of the initial meeting was substantially in accord with that of Mr FE.

[52] Mr AD's evidence was that Mr FE:

(a) was "surprised" to learn that the purpose of the meeting was to finalise documentation for the bank loan; and

(b) had not had an opportunity to peruse the documentation; and

(c) was discomforted at suggestion that he be required to execute the documentation; and

(d) was "clearly unhappy".

[53] Mr AD says that Mr FE's level of disquiet indicated to him that it was clear that the company directors had not fully discussed the loan proposal.

[54] In the face of indication from Mr FE that he was unhappy about the proposed arrangements, Mr AD says that he advised Mr FE to take the documents away and to seek legal advice. It was Mr AD's understanding that Mr FE had a family member who was a qualified lawyer. It is his recollection that he recommended to Mr FE that he consult with his family member.

[55] Mr FE says that immediately following the meeting at Mr AD's office, he had a discussion with Mr LM. The discussion took place in Mr LM's car. Mr FE says that Mr LM was annoyed that Mr FE had refused to sign the documentation. After discussing matters with Mr LM, Mr FE says he came around to the view that he should place his confidence in Mr LM and his lawyer and sign the documents.

[56] Mr FE and Mr LM returned to Mr AD's office two or three days later.

[57] Mr AD says that it was his impression that Mr FE was "in a better mood" on his return, and that he seemed "confident" about the transaction proceeding.

[58] Mr AD says that he navigated the parties through the waiver document, not by way of a detailed step by step, paragraph by paragraph analysis, but nevertheless in sufficient detail to ensure that he was satisfied that what he described as the "gist" of the document was understood.

[59] It was Mr FE's recollection that Mr AD had provided minimal explanation as to the purpose and effect of the waiver. He says that he returned to Mr AD's office with a willingness to execute the documents as he had been persuaded by Mr LM that it was in his interests to do so, and with confidence that the lawyer who he considered was acting for him, would ensure that his interests were protected.

[60] The question as to the extent to which Mr AD had traversed matters in the waiver with the proposed guarantors was the subject of considerable discussion at the review hearing. It was my impression from the evidence given by Mr AD, that he had not provided a comprehensive explanation of the document, but rather briefly highlighted the matters he considered to be of importance.

[61] It was unclear from the evidence of the parties as to the identity of the company's shareholders at the time the documentation was executed.

[62] There was evidence that Mr LM and his wife each held 35 per cent interest in the company with the remaining share of 30 per cent held by Mr FE.

[63] Against that, there was evidence given that the shareholders were Mr LM (35 per cent), an employee of the company (35 per cent) and Mr FE (30 per cent).

[64] Three parties were required to execute guarantees, as the company had three directors at the time the documentation was executed.

[65] Whilst it is impossible to resolve the issue as to the identity of the three shareholders, I am satisfied that Mr LM was controlling 70 per cent of the shareholding at the relevant time.

[66] So what Mr AD was confronted with, when Mr FE was brought into his office, was a situation where:

(a) Mr FE was expressing surprise as to why he had been brought to Mr AD's office; and

(b) expressing concern that he had not been informed as to what was going on; and

(c) expressing a forceful reluctance to requirement that he execute a personal guarantee; and

(d) indicating (as confirmed by Mr AD) that he was unhappy with the situation.

[67] As noted, the Standards Committee's conclusion that Mr AD's conduct was not captured by r 6.1, rested on its finding that Mr FE was not Mr AD's client for the purposes of the financing transaction.

[68] In my view, the Committee in adopting that approach, adopted an unduly narrow view of the relationships between the parties engaged in the transaction.

[69] The conduct rules must be viewed through the prism of the parties the rules are designed to protect, and not from a lawyer-focused perspective.

[70] It is critical, when considering the application of a particular rule, to pay close attention to context.

[71] The starting point was that Mr AD's firm had represented [XG], Mr LM and Mr FE over a number of years. Mr AD was aware of the closely intertwined business relationship that Mr FE and Mr LM enjoyed.

[72] When Mr AS became (as he was) alerted to the fact that there was disagreement between the majority and minority shareholders, if his intention was (as it appeared to be) to continue to advise Mr LM, he had an obligation to advise Mr FE not simply to seek independent legal advice, but rather to insist that he do so.

[73] What tilted the scales in this particular transaction from it being a transaction where a lawyer could properly meet their obligations by simple tendering of recommendation to seek independent advice, was:

(a) the history of Mr AD's practice having acted for the company, Mr LM, and Mr FE; and

(b) his realisation that Mr FE, as an individual director and shareholder, had expressed in forceful terms his reservations concerning the loan transaction; and

(c) Mr FE's reluctance to execute a guarantee; and

(d) his awareness of Mr FE's vulnerability as a minority shareholder.

[74] The question whether a lawyer has been retained is to be determined objectively.

[75] In particular, "… whether a reasonable person observing the conduct of both (the lawyer) and (the client) would conclude that the parties intended [a] lawyer-client relationship to subsist between them … some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer."[7] For that reason, it is important that the lawyer identifies who his or her client is, particularly when instructed by a number of persons among whom there may be differences or even conflicts.

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[7] *Hartlepool v Basildon* LCRO 79/09 (3 September 2009) at [23] referring to *Day v Mead* [1987] 2 NZLR 443 (CA) at p 458; *Blyth v Fladgate* [1891] 1 Ch 337; and *Giffith v Evans* [1953] 1 WLR 1424 (EWCA) at p 1428. See also *T v G* LCRO 29/2009 (April 2009) at [26].

[76] When all the circumstances of the case are considered, I am satisfied that when Mr AD provided advice to the shareholders at the second meeting in respect to the waiver of independent advice and indemnity relating to guarantee ("the waiver"), Mr AD was acting for each of the shareholders in their personal capacity.

[77] I do not agree with the Committee that the circumstances of the transaction are properly characterised as "usual" and that Mr AD was inoculated from risk of offending r 6.1 by seeking safe haven in argument that the extent of his obligations was confined to the company and the bank.

[78] A careful examination of the waiver document can lead to no other conclusion than that Mr AD was advising the shareholders in their individual capacities.

[79] It bears repeating, that Mr AD was providing this advice in circumstances where he had been made aware that the shareholders were not in agreement.

[80] This obstacle was not overcome on the basis of Mr AD concluding that Mr FE appeared happy when he returned to his office.

[81] The waiver is addressed specifically to the three shareholders.

[82] Throughout the document, there is repeated reference to the individuals being advised by "our solicitor". This clearly refers to Mr AD, the lawyer who had taken the shareholders through the waiver document.

[83] The waiver records that Mr AD had:

(a) fully advised of the legal implications and effects of the transaction; and

(b) advised of specific matters required by the lender; and

(c) advised the guarantors of their obligations as principal debtors; and

(d) alerted the guarantors to the financial risks in providing the guarantee; and

(e) informed the guarantors that the lender may enforce the guarantee against the guarantors; and

(f) informed the guarantors in respect of the obligations and liabilities of the borrower to the lender.

[84] With every respect to Mr AD, the extent of the advice that is said to have been provided presents somewhat at odds with the rather limited approach Mr AD had described at hearing when asked to explain the steps taken to explain the waiver document.[8]

[85] Running side-by-side with the advice provided to the shareholders in respect to the guarantee, were a number of provisions in the waiver document which reinforced advice provided to the guarantors that no liability would attach to Mr AD's firm as a consequence of the guarantors refusing to be independently advised.

[86] The objectives which the waiver sought to achieve present as somewhat ambivalent and contradictory.

[87] On the one hand, the waiver records that the shareholders have been "fully advised of the legal implications and effects of the transaction and in particular that there is a potential conflict of interest" and confirms that the parties have received comprehensive advice. On the other hand, the waiver records that the shareholders "do not wish to be advised" regarding the wisdom of the transaction.

[88] In providing advice to the individual shareholders on the legal effects and implications of the transaction, and specific advice on the implications and consequences of acting as guarantors, it cannot be the case that Mr AD was providing this advice to the bank or the company. He was advising the individual shareholders and in doing so was required to consider possibility that in acting for the bank, the company, and the individual shareholders, consideration needed to be given to the question as to whether there was potential for him to be conflicted.

[89] Rule 6.1 forbids a lawyer from acting for more than one client on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to all clients.

[90] The lawyer must ensure that this first hurdle can be cleared. If a lawyer cannot clear this hurdle, then no amount of informed consent, or provision of information will cure problems of potential conflict.

[91] It was clear to Mr AD that when Mr FE returned to his office, he had not availed himself of the opportunity to be independently advised.

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[8] I have checked the audio record of the hearing on this point to ensure accuracy of my recollection.

[92] Mr AD ought to have been aware that in providing advice to the individual shareholders (as he did), attention had to be paid to the question as to whether there was potential for the shareholders to be conflicted. It could have been expected that he would have been acutely attentive to the need to avoid risk of potential conflict, bearing in mind that he was aware that Mr FE had expressed a reluctance to execute the loan documents, and to act as a guarantor for the loan.

[93] Mr AD should have been alert to the fact that when Mr FE returned to his office, and he proceeded to provide the shareholders with advice on the waiver and guarantee, that the circumstances were such that there was a more than negligible risk that he may be unable to discharge the obligations owed to one or more of his clients.

[94] This requirement was accentuated by the fact that Mr FE was a minority shareholder.

[95] With respect to the Committee, I do not agree with its decision to discount possibility of a breach of r 6.1 having occurred, on the back of its conclusion that Mr AD was not acting for Mr FE. In my view he was.

[96] Examining Mr AD's approach to the transaction, from the perspective that he was representing Mr FE, I think it compellingly clear that there was a "more than a negligible risk" that he would be unable to discharge the obligations owed to one or more of his clients.

[97] At the point Mr FE had signalled his concerns, Mr AD could not proceed to provide advice on the transaction, and specifically the guarantees, and have expectation that the force of this advice would be nullified by Mr FE providing consent to waive his right to independent advice.

[98] Mr LM was providing the momentum for the refinancing. It was he who had made arrangements with the bank and instructed Mr AD to facilitate the transaction. Whilst the loan was being advanced to the company, at the point where it became obvious to Mr AD that there was dissension between the shareholders, it should, in my view, have been clear to Mr AD that advising both Mr LM and Mr FE on the transaction, exposed him to risk of being unable to discharge obligations owed to both.

[99] Mr AD should have insisted that Mr FE be independently advised.

[100] The waiver of indemnity and guarantee as executed, provides clear indication that Mr AD had provided advice to Mr FE in circumstances where there was a more than

negligible risk that Mr AD would be unable to discharge the obligations owed to one or more of his clients.

Did Mr AD continue to represent [XG] after the breakdown in Mr FE and Mr LM's business relationship?

[101] It was contended for Mr FE that Mr AD had, subsequent to the breakdown in the business relationship between Mr LM and Mr FE, continued to represent [XG].

[102] Mr AD emphatically rejected suggestion that he had continued to represent the company. He said that he had made it clear in correspondence to Mr FE that he had ceased acting for the company in June 2020.

[103] It is important, when considering this conduct complaint, to consider the history of Mr FE and Mr LM's business relationship.

[104] Mr FE and Mr LM had been business partners since 2008.

[105] In April 2016, they merged their business, and continued to trade under the umbrella of the [XG] company. They purchased premises for the [XG] business. That purchase was made in the name of another company, LM and FE Investments Co Ltd, for the not insignificant sum of 5.2 million dollars.

[106] Mr FE, in addition to his business relationship with Mr LM, continued to operate an independent business from the [XG] premises.

[107] Considered in the context of a closely interlocking business relationship which had survived over a number of years, it is perhaps not surprising that when the relationship broke down, the fallout was substantial. Accusations were made by both Mr FE and Mr LM that the other had diverted funds from the company for their personal use.

[108] Mr FE pointed to two instances which he considered provided incontrovertible evidence that Mr AD, despite his protestations to the contrary, was continuing to represent the company in the dispute.

[109] Of particular concern to Mr FE was an incident that had occurred at the company premises on 17 September 2020.

[110] Mr FE says that, in the process of passing the company premises, he noticed that attempts were being made to lock him out of the premises.

[111] Mr LM's son was endeavouring to secure the premises.

[112] The steps taken to exclude Mr FE were apparently prompted by Mr LM's concerns that Mr FE was removing stock from the [XG] premises without authority, an accusation vigorously denied by Mr FE.

[113] Mr FE called his lawyer, Mr RA. Mr LM's son called Mr AD.

[114] Both lawyers turned up at the premises.

[115] The police were called.

[116] Attempts were made to serve Mr FE with trespass notices. Those notices were issued in the name of the company.

[117] It is Mr FE's view that Mr AD's actions in arguing the case for the enforcement of trespass notices which sought to exclude Mr FE from exercising his legitimate right to access his premises, provided compelling evidence of the extent to which Mr AD had resiled from his purported position that he was representing Mr LM, and not the company.

[118] In responding to complaint that he was prohibited from representing the company, Mr AD in correspondence to the Complaints Service of 7 October 2020, argued that:

(a) there was no legal impediment to him acting for [XG] and Mr LM; and

(b) in doing so, there was no conflict of interest and no breach of the conduct rules; and

(c) nevertheless, he had voluntarily ceased acting for [XG] on 16 June 2020 as he considered that it may not be "wise to act for [XG] until the separation process was complete and Mr FE is no longer a shareholder in [XG]"; and

(d) he was representing the major shareholder in [XG], a shareholder who had legitimate concern that Mr FE was selling [XG] company products for his own purposes.

[119] Attempting to lock Mr FE out of premises from which he had a legitimate right to operate his business, was inevitably seen by Mr FE to have been a highly provocative act.

[120] The indignity for Mr FE was no doubt exacerbated by the fact that attempts were being made to exclude him from premises from which he had operated a business for a number of years.

[121] Mr DL for Mr AD, whilst fairly conceding that lines can become blurred in circumstances where former directors and shareholders of a company are in bitter dispute, rejected suggestion that Mr AD was acting for Mr LM when he attended at the company premises at the request of Mr LM's son.

[122] He notes that the company had to be represented, and that steps taken by Mr LM's son were prompted by concerns that goods were being illegally removed from the premises.

[123] Mr DL emphasises that Mr AD had not been responsible for issuing the trespass notices.

[124] This was an unfortunate situation. It is not uncommon when disagreements arise between partners who have been in business together for a lengthy period of time, for the dispute to become acrimonious. The tensions appear to have been exacerbated by the fact that Mr LM and Mr FE continued to operate their businesses from the same building. This appears to have provided fertile ground for allegation on both sides that the other had been engaging in unscrupulous business practices.

[125] I accept that Mr FE may have perceived Mr AD's involvement in the fractious incident at the premises as providing firm evidence that Mr AD was continuing to advise [XG], but I do not consider that the evidence is sufficiently conclusive to establish that Mr AD had stepped back from the assurances earlier provided that he would cease acting for the company. The evidence is certainly not at the level necessary to support serious allegation that Mr AD had misled both the Complaints Service and the LCRO in reporting that he had not continued to act for the company subsequent to his advice that he would not do so.

[126] The second matter raised by Mr FE, was concern that correspondence prepared by Mr AD subsequent to him providing assurances that he was no longer representing the company, contradicted that position.

[127] I have considered that correspondence and I agree with Mr RA that on its face, the correspondence would appear to indicate that Mr AD was continuing to act for the company.

[128] Mr AD explains that reference to him acting for the company was an error. He says, and I accept his evidence, that after many years of acting for the company he had become accustomed to prefacing correspondence involving the company with reference to him acting for the company. He says that it was his intention to commence the offending correspondence with indication that he was acting for a shareholder of the company, but had in error inadvertently reverted to what had been a familiar practice for him in the past.

[129] I am not persuaded, on the basis of that evidence before me, that the correspondence is conclusive of Mr AD having continued to act for the company.

[130] Mr FE submitted that further evidence to support his contention that Mr AD had continued to act for the company, was provided by an examination of the company bank records, which recorded payments having been made by the company to Mr AD's firm, after it had been contended by Mr AD that he was no longer representing the company.

[131] Mr DL explained that the payments made were likely related to work that had been completed prior to Mr AD providing assurances that he would refrain from acting for the company.

[132] There is insufficient evidence before me to enable a firm view to be reached on the question of the bank records.

[133] Having carefully considered the evidence advanced to support allegation that Mr AD was continuing to represent the company when he had provided assurances that he would not, I am not persuaded that the evidence provided establishes the complaint made.

Had Mr AD breached rr 8.7 and/or 8.7.1 of the Rules by acting for Mr LM and/or [XG] in respect of matters in dispute between Mr LM and/or [XG] and Mr FE?

[134] Rule 8.7 provides 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.

[135] Further, r 8.7.1 provides that a lawyer must not act for a client against a former client of the lawyer or any other member of the lawyer's practice where:

(a) the practice or a lawyer in the practice holds information confidential to the former client; and

(b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and

(c) there is a more than negligible risk of disclosure of the confidential information; and

(d) the fiduciary obligation owed to the former client would be undermined.

[136] It was contended for Mr FE, that in the course of Mr AD's practice having acted for Mr FE over a number of years both on personal and business matters, Mr AD would have acquired an intimate knowledge of Mr FE's affairs and, as a consequence, would have been well placed to use that knowledge to assist Mr LM in his dispute with Mr FE.

[137] It was argued that the advantage secured to Mr LM was not simply that Mr AD would have been in a position to assess Mr FE's financial capacity to litigate a dispute with Mr LM, but that he would also have had an appreciation of Mr FE's appetite for risk, and an understanding of the degree of fortitude Mr FE would likely bring to sustaining a dispute.

[138] Mr AD acknowledged that Mr FE had been a client of his firm for a number of years, but emphasised that Mr FE had, during those years, dealt primarily with Mr JB, a partner of Mr AD's.

[139] Mr AD explained that his firm had represented Mr FE in the following transactions:

(a) 2004: purchase of a property.

(b) 2008: purchase of a business.

(c) 2014: purchase of a private property.

(d) 2012: executing a personal mortgage.

(e) 2013: sale of a residential property.

(f) 2015: preparation of a trust deed.

(g) 2016: sale of a business.

[140] Of the transactions detailed above, Mr AD says that his involvement was limited to acting for Mr FE on one transaction only, being the sale of Mr FE's business in 2016. Mr AD describes that transaction as entirely conventional.

[141] It was Mr AD's understanding his firm had not continued to act for Mr FE in his personal capacity after 2016, and that Mr FE had secured the services of another lawyer.

[142] Mr AD submitted that the information that his firm had acquired during the time it had acted for companies associated with Mr FE (particularly LM and FE Investments Co Ltd and [XG]), retained no element of confidentiality, as the information had been disclosed to all of the companies' directors.

[143] Having considered the evidence, I am not persuaded that Mr AD (or the legal practice in which he was a partner) had acquired information in the course of acting for companies associated with Mr FE or Mr FE personally, which exposed Mr AD to risk of breaching r 8.7.

[144] When first responding to Mr FE's complaint, Mr AD said that he could not recall, to the best of his recollection, having ever acted for Mr FE. He subsequently acknowledged, having checked his practice records further, that he had acted for Mr FE's company on the sale of a business in 2016 (mentioned earlier).

[145] Having had opportunity to hear from Mr AD, I was satisfied that he was providing accurate account when he reported that he could not initially recall having acted for Mr FE. When he did bring the sale transaction to mind, he could not identify any aspect of the 2016 transaction which would have led him to acquire confidential knowledge of Mr FE's affairs such as could have compromised his ability to act for Mr LM.

[146] A number of cases have considered a lawyer's professional obligations when seeking to act against a former client. Whilst those cases focus primarily on the inherent jurisdiction of the court to regulate its processes, a number of the cases enunciate principles which have particular relevance to the application of r 8.7.1.

[147] In *Black v Taylor*,[9] a lawyer had acted for a former client and his family over a number of years and was intending to act against the former client in an estate dispute. Whilst the Court was satisfied that little direct information had been conveyed to the lawyer, it was nevertheless satisfied that, in the course of acting over a number of years, the lawyer had acquired a considerable amount of information about his former client, and that the information was both confidential and relevant to the matter the lawyer was intending to act on. The Court noted that information relevant to the personal characteristics of the client such as knowledge of a client's weaknesses, fears and reactions, could constitute confidential and relevant information.[10]

[148] In *Morris v Morris*,[11] the Court was considering a lawyer's decision to act against a former client in relation to a partnership dispute, in circumstances where the lawyer

[9] *Black v Taylor* [1993] 3 NZLR 403 (CA).
[10] At pp 407–408.
[11] *Morris v Morris* [2015] NZHC 2315.

had provided advice to the partnership over a number of years. The Court concluded that the fact that the lawyer had enjoyed a lengthy association with the members of the partnership, was not sufficient for it to conclude that the lawyer held confidential information that was relevant to the dissolution of partnership proceedings, and the dispute that was before the Court. The Court observed that whilst another member of the lawyer's firm had acted on the sale of four partnership properties, it could find no evidence from those transactions, of any relevant confidential or privileged information being obtained. Nor did the Court consider that the transactions would have led to the lawyer acquiring any particular knowledge of his former client's personal characteristics.[12]

[149] In *Torchlight Fund Number 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd*,[13] the Court was considering the decision of a law firm to accept instructions to act in litigation against a former client of the firm. The client had been a significant client of the law firm for a number of years. In that decision, the Court reinforced the principle, that it was incumbent on a plaintiff who sought to restrain his former solicitor from acting in a matter for another client, to establish both:

(a) that the solicitor was in possession of information which was confidential to the former client and that the client had not consented to its release, and

(b) that the information was or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.

[150] The Court noted "although the burden of proof is on the plaintiff, it is not a heavy one. The former may be readily inferred; the latter will often be obvious".[14]

[151] Having considered the approaches adopted in the cases referenced, I am not persuaded that there is sufficient evidence to support contention that the transactions that Mr AD's firm had managed over a number of years for Mr FE had resulted in Mr AD acquiring information of a confidential nature that would have had particular relevance to the shareholder dispute engaging Mr LM.

[152] I think it probable that Mr LM and Mr FE would inevitably have had a reasonable understanding of the other's personal and financial circumstances, by virtue of the fact that they had been in business together for a lengthy period of time.

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[12] At [29] to [39].
[13] *Torchlight Fund Number 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd* [2014] NZHC 2552.
[14] Citing Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm*) [1992] 2 AC 222 (HL).

[153] To the limited extent that what has been described as the “getting to know you” factors can be characterised (it being inevitable that such factors are largely individual to the particular case), an understanding as to the capacity of a client to financially bear the cost of becoming embroiled in a legal dispute, and knowledge of a client’s personal characteristics which may provide insight into the ability of the client to withstand the rigours that are frequently the close travelling companion of confrontational litigation, are oft cited as factors which may be influential in determining that a lawyer’s acquired knowledge of a former client was sufficient to disqualify them from acting against their former client.

[154] I am not persuaded that Mr AD had acquired, from his limited involvement with Mr FE, knowledge of Mr FE’s personal characteristics to the extent that this knowledge could reasonably be categorised as confidential information.

[155] I think it probable that in the course of their lengthy business relationship, Mr LM and Mr FE had acquired a thorough understanding of the other’s personal traits and characteristics.

[156] Whilst I do not consider that Mr AD was precluded from representing Mr LM, it is understandable that Mr FE was discomforted by Mr AD’s decision to represent Mr LM in the shareholders’ dispute.

[157] The subtlety of argument that there is distinction between a lawyer acting for a company and acting for a shareholder of the company is frequently lost on lawyers’ clients in circumstances such as these, where Mr FE quite understandably was concerned that the lawyer who had acted for a company, in which he had been a director and significant shareholder for a number of years, was now representing a fellow shareholder and long-time business associate in a dispute over management of the company.

[158] Mr FE’s apprehension at what he perceived to be a clear conflict of interest, was likely heightened by his difficulty in understanding how a partner in a law firm that had represented his interests over many years (albeit in mainly straightforward conveyancing transactions), could act against him.

Did Mr AD conduct his dealings with Mr FE in a courteous and respectful manner?

[159] Mr FE made complaint that Mr AD had acted discourteously by alleging in correspondence to his lawyer that Mr FE:

(a) was behaving in an “abnormally paranoid” fashion; and

(b) was suffering a mental illness; and

(c) did not (along with his lawyer) appear to understand the law.

[160] A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect and courtesy (r 12).

[161] A lawyer is required to promote and maintain proper standards of professionalism in their dealings (r 10).

[162] The comments as expressed by Mr AD were unfortunate and unnecessary. They were clumsy. Mr AD's view that he considered there was no foundation to the claims being advanced by Mr FE could have been more adroitly expressed.

[163] Mr AD properly conceded at the hearing that, with the benefit of hindsight, he would not use such phrases again.

[164] The comments were unfortunate, but I am not satisfied that the comments reach the threshold of requiring consideration of a disciplinary response.

Conclusion

[165] I am satisfied that Mr AD provided advice to Mr FE on the issue of the loan guarantees and, that in providing that advice, Mr AD was acting for Mr FE. In doing so, Mr AD was in breach of r 6.1 as there was a more than negligible risk that he would be unable to discharge obligations owed to one or more of his clients.

[166] That breach constituted unsatisfactory conduct pursuant to s 12(c) of the Act.

[167] It is not established that Mr AD held information confidential to Mr FE that, if disclosed would have likely adversely affected Mr FE's interests.

[168] Nor is it established that Mr AD breached his obligations to engage with Mr FE in a respectful manner.

Penalty

[169] Having determined that Mr AD's conduct was unsatisfactory, attention turns to penalty.

[170] The primary purposes of disciplinary proceedings is to protect the public and to maintain professional standards through deterrence (both in terms of the individual practitioner and the profession generally).[15]

[171] In addressing appropriate penalty, attention must first be given to the nature and gravity of the conduct, having regard to the aggravating and mitigating factors.

[172] In this case, I am satisfied that Mr AD's failure to recognise the potential for conflict was neither intentional, negligent or reckless, but rather a consequence of him failing to appreciate that the recommendation to Mr FE to take independent legal advice, was insufficient to discharge his professional responsibility not to act when there was more than a minor risk of conflict.

[173] I accept that Mr AD genuinely considered that the interests of all parties were best served by ensuring that the loan facility was put in place.

[174] But from the moment that Mr FE expressed reservations about the transaction and a reluctance to provide a guarantee, Mr AD should have recognised that his commitment to ensuring a satisfactory commercial outcome had to be tempered by necessary advice to Mr FE that he must be independently represented.

[175] I consider a fine of $2,000 to be appropriate.

Costs

[176] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr AD is ordered to pay costs in the sum of $1,600 to the New Zealand Law Society for this review.

Enforcement of money order

[177] Pursuant to s 215 of the Act, the money orders made in this decision may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[178] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

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[15] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [97], [128] and [151].

ORDERS

(1) The Standards Committee finding that there had been no breach of r 6.1 is reversed and substituted with a finding that Mr AD had breached r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

(2) By reason of a breach of r 6.1 and pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006, Mr AD's conduct constituted unsatisfactory conduct.

(3) Mr AD is, pursuant to s 156(i) of the Lawyers and Conveyancers Act 2006, directed to pay a fine of $2,000 to the New Zealand Law Society, that fine to be paid within 30 days of the date of this decision.

(4) Mr AD is, pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, directed to pay costs in the sum of $1,600 to the New Zealand Law Society, those costs to be paid within 30 days of the date of this decision.

(5) In all other respects, the decision of the Standards Committee is confirmed.

DATED this 14TH day of OCTOBER 2022

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R Maidment
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 FE as the Applicant
Mr AD as the Respondent
Mr RA as the Applicant's Representative
Mr DL as the Respondent's Representative
Mr PK as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society