

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Otago Standards Committee

BETWEEN

JY

Applicant

AND

QD

Respondent

DECISION

Background

[1] Mr JY seeks a review of the Otago Standards Committee determination that certain delays in making payments of bequests to Ms QD from an estate (of which he was a trustee and solicitor) were unduly and amounted to unsatisfactory conduct.

[2] While the existence of the delay is not disputed, Mr JY states that the delays were, substantially, not due to his failure and that in any event he took steps to ameliorate any loss to Ms QD due to the delays.

[3] Under the terms of the will of the testator Ms QD was entitled to:

- a. \$1,000 immediately (the bequest);
- b. \$5,000 as the beneficiary under an education trust (the education trust funds); and
- c. \$10,000 when she attained age 30 which would occur in 2013 (the general trust funds).

[4] Similar bequests were made to Ms QD's brother, QC. The trustees were Mr JY and QB (Ms QD's Aunt).

On the Papers Review

[5] This review has been undertaken on the papers pursuant to section 206 of the Lawyers and Conveyancers Act 2006. The parties have consented to this process, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Chronology

[6] An outline of the course of events in this matter may assist:

31 October 1995	Testator dies.
23 July 1996	Funds transferred to AEW trust account.
21 May 1998	Payment by QB to QD.
18 August 2000	Payment to AEU of: <ul style="list-style-type: none"> • QD bequest (\$1,000) • QD education trust funds (\$5,000) • QD general trust funds (\$10,000) • QD interest (\$1,500) • QC education trust funds (\$2,800)
28 August 2001	Payment to AEU of: <ul style="list-style-type: none"> • QC interest (\$410.33)
2002	First request of QD for trustees to use power of advancement to pay education trust funds for Open Polytechnic fees.
2003	Date at which QD turned 20, the bequest vested and ought to have been paid.
7 October 2003	AEU wrongly pays QD education trust funds to her brother.
Early 2005	Ms QD retains firm of AEW to assist in obtaining general trust funds.
20 April 2005	AEW seeks QD funds from AEU.
20 May 2005	Copy of will provided to QD.
20 May 2005	Payment of QD bequest and QD general trust funds to QD (\$11,497.26).
2006 – 2008	Numerous email communications between Ms QD and Mr JY in respect of trust fund entitlements.
10 April 2009	Complaint made to the New Zealand Law Society.

Mid 2009	Funds obtained from AEU.
14 September 2009	Education trust funds paid to QD (\$3122.71) with “top up” from Mr JY (\$877.29).

[7] The Applicant and Respondent settled their differences in respect of the payments before the Standards Committee determined this matter. On 13 July 2009 Ms QD indicated (by email to Mr JY) that the payment of the funds, including an additional top up sum, would be “an acceptable settlement” and that she would “withdraw the complaint immediately”. This was notified to the Standards Committee by Ms QD by an email of 14 July.

[8] Mr QA of the Law Society Inspectorate had commented in a letter of 17 September 2009 to the Committee that the transactions involved were “worthy of further consideration”. On the basis of this report, the Standards Committee resolved to continue to consider the complaint.

[9] The root cause of this complaint is the long delay in payment of funds to Ms QD from her father’s estate. This is exacerbated by the fact that the funds lost a significant part of their value when invested with AEU over a period when most investment funds of this type declined in value.

[10] It should be noted that Ms QD was not entitled to the funds (other than the \$1,000 bequest) except in terms of the trusts created by the will. These required, in respect of the education trust, that the funds be used for educational purposes, and that in respect of the general trust, that Ms QD achieve the age of 30. There was, however, a power of the trustees to pay out this latter fund early under a common power of advancement found in the terms of the will.

[11] Mr JY’s primary argument on review is that the delays were not caused by any dilatoriness on his part, but rather were a result on the part of AEU who wrongly paid the funds to QC.

[12] Two other arguments are raised on review. First, that the omission to pay the \$1,000 bequest was an error of an unnamed solicitor in the firm who was handling the file and not of Mr JY. Second that his co-trustee refused to make payments under the power of advancement to Ms QD.

[13] Mr JY has accepted that there was an oversight in respect of the payment of the \$1,000 legacy and has apologised for the delay in resolving these matters.

Pre August 2008 Conduct

[14] A large part of the conduct in question occurred prior to 1 August 2008. As such the standards applicable to that part of the complaint are those found in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

...of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society NZLPDT*, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105).

[15] Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test is whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be reached. That standard is that:

...the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[16] In the present case, the pre 1 August 2008 conduct involved an error in failing to pay a small bequest, and considerable delays in dealing with Ms QD in respect of other aspects of the trust funds.

[17] Although perhaps to be criticised, this conduct did not fall short of the standards which were in force at that time.

Post 1 August 2008 Conduct

[18] Subsequent to 1 August 2008 the standards applicable are those found in the Lawyers and Conveyancers Act and the Conduct and Client Care. The conduct which occurred after 1 August 2008 must, however, be viewed against the background of the delays and errors that had already occurred.

[19] That conduct involved continuing email communications in respect of the remaining estate funds to be paid to Ms QD (which had been on-going since 2006). On 14 October 2008 Ms QD indicated her frustration at not having had a reply to an email of 25 July 2008 and indicating that she would take the matter to the Disputes Tribunal. When no response was received she sent a further email on 26 October 2008. It appears that no response was received to that email.

[20] The complaint with the Society was lodged on 10 April 2009. Ultimately this bore fruit and on 14 September 2009 payment was made to Ms QD of the remaining funds.

[21] While some of the earlier delay may be explained by the fact that there had been an administrative error on the part of AEU, and also that the co-trustee took a particular approach to the bequests, this does not provide a reasonable explanation of the significant delay of in responding to the enquiries.

[22] By 3 August 2006 it was apparent that payment of the AEU funds held for Ms QD had been made to an account other than that of Ms QD. Later that month it became clear that those funds had been paid to QC. Over the ensuing months Ms QD continually contacted Mr JY, frequently with no response at all, and often with a response that was not substantive and simply indicated that he would attend to the matter shortly.

[23] It was not until April 2008 that Mr JY indicated that he needed to confer with his co-trustee on this matter. This still had not occurred by mid July 2008 (in the pre 1 August 2008 period).

[24] Against that background the conduct of Mr JY in failing to respond to the further enquiries of Ms QD later in 2008 was unsatisfactory.

[25] Although Ms QD was not a client of Mr JY, she was still entitled to be dealt with respect and courtesy in accordance with the Rules of Conduct and Client Care (r 12). While a lawyer administering an estate is not required to respond immediately to all enquiries and requests of beneficiaries, in the present case this matter had been ongoing for some time. It is clear that errors had been made and it was incumbent on Mr JY to get to the bottom of the matter. It was unacceptable for Mr JY to simply ignore Ms QD for several years. In the context of this finding it was unacceptable for Mr JY to ignore the emails after 1 August 2008, given the fact that Ms QD had been requesting action on this matter constantly since 2006.

[26] It is clear that the only reason that progress was made in this matter was due to the fact that a complaint was made to the Society. It should not require a complaint to be made to the Society against a lawyer before he or she properly attends to such an enquiry. The enquiry was clearly a reasonable one.

[27] This conduct was in breach of the obligation of courtesy found in Rule 12 of the Rules of Conduct and Client Care. It was also unacceptable under s 12(b) of the Act being conduct which a lawyer of good standing would reasonably consider to be unacceptable.

[28] The decision is the Committee is therefore affirmed albeit for slightly different reasons.

[29] Given that the Practitioner has not been successful in the review application it is appropriate that he makes a contribution to the costs of the review.

[30] This matter is now to be returned to the Standards Committee to consider the issue of orders.

Decision

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

Orders

Pursuant to s 210 of the Act, the Practitioner is ordered to pay the sum of \$500 to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 10th day of September 2012

Hanneke Bouchier
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:

JY as the Applicant
QD as the Respondent

Otago Standards Committee
The New Zealand Law Society