

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Auckland Standards Committee 4

**BETWEEN**

**KW**  
of Auckland  
Applicant

**AND**

**WB**  
of Auckland  
Respondent

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

**DECISION**

*Background*

[1] The Standards Committee declined to uphold a complaint made by KW (the Applicant) against law Practitioner, WB (the Pracitioner), and the Applicant seeks a review of that decision.

[2] The Practitioner acted for the Applicant and the Applicant's wife (they were separated at the time) in relation to the sale of their home, and after the transaction was complete, the Practitioner's firm held in its Trust Account the balance of the proceeds on an interest bearing account. Settlement appears to have taken place in October 2009. The Practitioner was acting at the time on the joint instructions of the Applicant and his former wife.

[3] The Applicant and his former wife engaged different lawyers in relation to their relationship property distribution. On 18 December 2009 the Practitioner received joint instructions from the solicitors acting for the Applicant and his former wife, instructing

the Practitioner to pay the sum of \$80,000 into the trust accounts of each of those lawyers, which the Practitioner did. The Practitioner relied on the instruction of the Applicant's lawyer in taking this action, but did not contact either the Applicant or his former wife personally prior to transferring the monies.

[4] The Applicant complained that the Practitioner had transferred the money to his other lawyer without his (the Applicant's) consent. The complaint was that the transfer had been made, and without reference to himself.

[5] In reply, the Practitioner explained that in transferring the sum of \$80,000 to the trust accounts of the lawyers acting for the Applicant and his former wife respectively, he was acting on the joint instructions of their lawyers. He considered the direction of the Applicant's lawyer to be an appropriate authority. He explained, with reference to Rule 10.2 of the Conduct and Client Care Rules 2008 (the Rules), that the fact the Applicant was by that time represented by another lawyer prevented him from contacting the Applicant directly.

[6] The Standards Committee canvassed these transactions and considered the responses of both parties, but considered it was unnecessary to take any further action in the circumstances and resolved pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action.

#### *Review application*

[7] The Applicant sought a review citing the following grounds:

- He was acting for himself in relation to the sale and purchase and this did not involve his later lawyer. (He could see no barrier to the Practitioner contacting him over the sale proceeds).
- He did not authorise his relationship property lawyer to receive the \$80,000 into their Trust Account.
- He expected the Practitioner to contact him before transferring any money.
- The Practitioner relied solely on the advice of another lawyer without any reference to himself which he considered to be plainly wrong.
- The outcome he wanted was a decree that no New Zealand law firm is to rely on instructions from another New Zealand law firm without first referring

the matter and seeking instructions from the first New Zealand law firm's client.

[8] This review was undertaken on the papers pursuant to, and in accordance with, section 206 of the Lawyers and Conveyancers Act 2006.

[9] Several investigative steps were taken by this office. First, the Practitioner was asked to consider the application of Rule 10.2 in the light that his retainer with the Applicant was solely in relation to the property conveyance, while the Applicant's other lawyer was dealing with an entirely different matter. He was asked particularly to explain the assertion that the Applicant's other lawyer represented the Applicant in relation to the release of the client's funds held by the Practitioner.

[10] The Practitioner responded that on completion of the conveyance, there was no agreed division about the funds that were held in the firm's Trust Account until agreement could be reached by the parties or the matter be determined by a Court. The Practitioner wrote "*at that point in time our brief was finished apart from the eventual distribution of the funds.*" He explained that the firm's role changed from being conveyancing solicitors to solicitors holding funds until the relationship property dispute had been determined.

[11] The Practitioner continued that in his view there was no reason why he should have communicated with the Applicant, since the lawyers representing the Applicant and his wife respectively had jointly signed a direction to release the funds and he considered that the firm should be able to rely on that.

[12] The Applicant was invited to respond to the Practitioner's letter. Commenting on the Practitioner's description of his role, he disagreed with the statement that the Practitioner's brief was finished apart from the distribution of the funds. The Applicant said this statement "was incorrect as distributions of funds agreed to by the parties was the responsibility of [the Practitioner's firm]". He continued that the Practitioner did not know that he had engaged the other lawyer prior to when that lawyer requested the transfer of the funds.

[13] The Applicant was unable to comment on Rule 10.2 but thought it should be changed if it meant that lawyers could transfer money from one firm to another for a client without reference to the client. He argued that the Practitioner did need his prior consent, which he would have refused.

[14] A further step taken by this office was to seek comment from the Applicant's relationship property lawyer, Ms H, as to the basis of her authority with regard to the instruction that had been forwarded to the Practitioner.

[15] Ms H responded, saying that she met with the Applicant in December 2009 to discuss an interim distribution, at which time the Applicant instructed her that an \$80,000 interim distribution could be made to each party. Ms H said that she confirmed with the wife's lawyer by facsimile that the client would consent to an interim distribution where the parties were to be paid \$80,000 each. A joint letter of authority, signed by Ms H and the lawyer acting for the wife, was then sent to the Practitioner on 18 December 2009, and this was followed by the Practitioner acting in accordance with that joint signed letter.

[16] Ms H maintained that the Applicant was aware that the interim distribution was to be paid, and that he had made no request or instruction for the distribution to be made to his bank account. She added that further additional legal costs were about to be incurred and she considered it appropriate in the customary commercial manner that the funds would be transferred from one solicitor to another.

[17] The Applicant was invited to respond to Ms H's letter. In reply he said that he had no recollection of authorising payment of \$80,000 to the Trust Account of his new lawyer. He added that he still thought the Practitioner had erred with not contacting him before paying the money out to Ms H's firm.

### *Considerations*

[18] After the conveyancing transaction was completed, the Practitioner's law firm held funds jointly for the Applicant and his former wife. The funds were clearly owned by the parties jointly, and were still subject to an agreement by both parties as to distribution.

[19] The Applicant instructed another law firm in relation to property relationship matters. I accept that the Applicant may have no recollection of having discussed with Ms H the matter of the transfer of \$80,000 to her firm, but I must assume that it was the Applicant himself who informed her where the sale proceeds were being held, for without such knowledge it is not apparent how Ms H would have known from where to obtain the funds. I accept the evidence of Ms H that there was a discussion with the Applicant about the distribution of \$80,000 to each of the Applicant and his wife. It is unlikely that the request for the funds would have been made without authority from the Applicant, and there is nothing to suggest this was the case. There may have been

some misunderstanding between the Applicant and Ms H as to the process, and I accept that he would have been unfamiliar with the practice of client funds being transferred between law firms' trust accounts on the instruction of new counsel.

[20] The question is whether any disciplinary issues arise for the Practitioner in relying on instructions of counsel, and not contacting the client direct.

[21] Rule 10.2 is cited as a barrier to such contact. This Rule states:

A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.

[22] I do not see that this Rule would have prevented the Practitioner from communicating with the Applicant in relation to the transfer of the sale funds. The Rule prohibits a lawyer from contacting another lawyer's client in relation to "a matter" that the other lawyer is acting on. The matter that the Practitioner had acted in was the house sale. The nature of the funds in the Practitioner's firm's Trust Account were jointly owned sale proceeds of a house. In distributing any part of the proceeds I can see no basis for any objection had the Practitioner made direct contact with either of his former clients.

[23] The above conclusion does not automatically mean that his failure to contact his former clients, and instead complying with a direction from the Applicant's new lawyer, raises disciplinary concerns for the Practitioner. The issue is whether acting on Ms H's instruction amounts to unsatisfactory conduct on the part of the Practitioner.

[24] The Practitioner was aware of the couple's separation and he would therefore not have been surprised to have received, from solicitors acting in the property relationship matter, an instruction concerning the transfer of funds.

[25] I also note that the instruction to transfer the funds was made jointly by the lawyers acting for each of the parties, each separately signing the direction. This would have provided additional confidence that there would be equal distribution to the parties. An unequal distribution may have led to some enquiry by the Practitioner but in the circumstances that each of his former clients was to receive an equal share I am unable to see any part of the direction that could have alerted the Practitioner to the Applicant's objection to the transfer.

[26] If there was any impediment to Ms H conveying the instruction to the Practitioner, (and I do not find that this is the case), it was not apparent on the face of the joint

instructions from the solicitors. The transfer was made from the Practitioner's trust account to the trust accounts of the counsel acting for each of the parties.

[27] It is customary for lawyers rely on advices or instructions conveyed by other lawyers on behalf of client. It is not expected that a lawyer should "look behind" the instruction given by a client to his or her lawyer. Only in rare circumstances would a lawyer question another lawyer's claim to be acting on a client's instruction. In this case there was nothing on the face of the joint instruction to have alerted the Practitioner to any objections of the Applicant to the distribution. Indeed, the Practitioner was following a well established practice in responding to a direction from a lawyer acting for the client whose funds were held in the Practitioner's Trust Account.

[28] It is difficult to see that there has been any breach of the Act or any of the Practice Rules. I note that the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 section 12, which deals with receipt and payment of trust money, provides at section 6(b) that a law "practice may make transfers or payments from a client's trust money only if the practice obtains the client's instructions *or authority* for the transfer or payment, and retains that instruction *or authority (if in writing)* or a written record of it;" and (6)(c) "payments to a third party are made in a form which permits the crediting of money only to the account of the intended payee".

[29] It is clear from this Regulation that the transfer may be made on either the client's instruction, or the client's authority. In this case the authority for the transfer was given by Ms H who acted for the Applicant. Acting on that authority, the Applicant made a payment to Ms H's law firm in a manner that appears to have complied with subsection 6(c), the transfer being made in a form that permitted the crediting of money only to the account of the intended payee, the Applicant.

[30] I can find no other parts of any Regulation or the Act that require consideration in relation to this complaint. I note that section 12 of the Act defines "unsatisfactory conduct" as the "conduct of a lawyer or an incorporated law firm that occurs at a time when he or she is providing regulated services and is conduct that falls short of a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer," or is "conduct that would be regarded by lawyers of good standing as being unacceptable," including conduct unbecoming or unprofessional conduct.

[31] It is well established that lawyers who represent clients will also convey to third parties their clients' instructions. I can find no basis for upholding a complaint where the Practitioner appears to have complied fully with his professional obligations.

[32] Having considered all matters, I can find no disciplinary concerns arising from the Practitioner having relied on a direction from counsel acting for the Applicant in this case. There is no basis for taking a different view to that taken by the Standards Committee. The application is declined.

### **Decision**

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

**DATED** this 20<sup>th</sup> day of April 2012

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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:

KW as the Applicant  
WB as the Respondent  
The Auckland Standards Committee 4  
The New Zealand Law Society