

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Standards Committee

**BETWEEN**

**ZU**

Applicant

**AND**

**PJ**

Respondent

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

**DECISION**

**Introduction**

[1] Ms ZU has applied for a review of the Standards Committee's decision in which the Committee determined to take no further action in respect of Ms ZU's complaint against Mr PJ.

**Background**

[2] Mr PJ was the lawyer for the executor of Ms ZU's partner's estate.

[3] Ms ZU had a claim on her partners' estate. Proceedings were filed in the [District] Family Court. The parties reached agreement on division of estate assets, the terms of which were recorded in a consent order sealed by the Court on 5 October 2011.

[4] Under the terms of the agreed settlement, Mr PJ as lawyer for the executor, was required to pay funds to Ms ZU in accordance with the terms of the consent order.

[5] At the time this payment was made Ms ZU was residing in a property which was to be transferred to her under the agreement (the [X] Road property).

[6] In November 2010, two payments were made to the rates account for the [X] Road property. One of those payments made by Ms ZU, the other by Mr PJ. The effect of the double payment was to create a credit in the rates account.

[7] Another residential property also formed part of the estate's assets (the [Y] property).

[8] Settlement of the estate was finalised in October 2011. At that time, the issue of the overpayment came into focus. Mr PJ deducted from the settlement sum to be paid to Ms ZU, the sum of \$468.00 that his firm had inadvertently paid to rates on the [X] Road property.

### **The Complaint and the Standards Committee Decision**

[9] Ms ZU filed a complaint with the New Zealand Law Society Lawyers Complaints Service on 14 December 2011.

[10] She made complaint that:

- Mr PJ had breached the terms of the consent order.
- Mr PJ had no authority to deduct funds paid by his firm towards rates.
- It was unacceptable for a lawyer to breach the terms of a court order.
- Mr PJ had ample opportunity to raise concerns regarding any adjustment on settlement, but had failed to do so.

[11] In response to the initial complaint, Mr PJ submitted that:

- At all material times he acted as attorney for the deceased's brother, Mr CB, who was named as executor under the will.
- His duties to Ms ZU were limited.
- Ms ZU had brought the rates instalment into his office, together with a separate rates account for another estate property.
- He was asked, as executor, to pay the rates instalment on the [X] Road property.

- When later reconciling the estate's ledger, it came to his attention that the rates instalment had been paid twice.
- Ms ZU had, perhaps inadvertently, instructed him to pay the rates instalment on the [X] Road property in error.
- Funds paid to the rates instalment were deducted from Ms ZU's settlement funds.
- Mr PJ understood that Ms ZU's solicitor had agreed to the deduction being made.

[12] The Standards Committee distilled the issues to be considered as follows:

- Was Mr PJ's conduct acceptable in the circumstances?
- If not, did his conduct amount to unsatisfactory conduct in terms of s 12 of the Lawyers and Conveyancers Act 2006?

[13] The Committee delivered its decision on 31 May 2012, and determined that Mr PJ's conduct did not amount to unsatisfactory conduct in the circumstances. It elected to take no further action on the complaint in accordance with s 138(2) of the Lawyers and Conveyancers Act 2006.

[14] The Committee was critical of the fact that Mr PJ had failed to identify potential problems with the rates payment prior to settlement, but concluded that when the conduct was considered in the round, there were a number of factors which would mitigate against the Committee concluding that Mr PJ's conduct had been unsatisfactory. Significant among the factors considered by the Committee, was its belief that the deduction made by Mr PJ on settlement, did not appear to be inconsistent with the strict terms of the consent order.

### **Application for Review**

[15] Ms ZU filed her application to review the Standards Committee decision on 26 June 2012.

[16] Grounds advanced in support of her review application were:

- Mr PJ was required to transfer funds to her in the sum of \$160,000 pursuant to the terms of the consent order.
- Compliance with the court order could only be achieved by Mr PJ transferring funds without deduction.

- Mr PJ breached the terms of the consent order.
- Mr PJ's conduct was not competent, and well removed from the standard of competence and diligence that members of the public are entitled to expect of a reasonably competent lawyer.

[17] By way of remedy, Ms ZU seeks:

- Reimbursement of the rates payment deducted on settlement.
- Interest.
- Costs incurred in pursuing her complaint.

[18] In response to Ms ZU's application, Mr PJ submits that Ms ZU's application raises no new issue, and accordingly he seeks to rely on his submissions provided to the Standards Committee.

### **Role of the LCRO on review**

[19] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.

[20] It is pertinent to note that standards committees are made up of practising lawyers, familiar with the practise of law including the conduct of litigation in the courts, as well as lawyers' duties and obligations and the pressures under which lawyers often find themselves. Standards committees must also include a lay member. This format allows for a range of views – legal and non-legal – to be considered. The process is flexible and robust.

### **Analysis**

[21] Both parties attended a hearing on 20 May 2015.

[22] The submissions advanced at hearing in large part reflected the written submissions filed.

[23] Some factual issues pertaining to the background circumstances which lead to the complaint were clarified at the hearing.

[24] Ms ZU advised that she had assumed responsibility for paying the rates on the [X] Road property from the time of her former partner's death, to the time that settlement was effected and the property was transferred into her name.

[25] She had then been paying rates on the property for two years.

[26] The estate was responsible for paying the rates on the [Y] property.

[27] Ms ZU advised that it was her practice over a period of time to drop accounts into Mr PJ's office for payment.

[28] I am satisfied that it is probable that Mr PJ's explanation for the error which lead to his firm inadvertently making payment of an instalment of rates on the [X] Road property is correct, in that Ms ZU likely brought into his office two rate accounts, and by mistake left the [X] Road account with his office with instructions for payment to be made.

[29] Mr PJ's office was not responsible for paying the rates on the [X] Road property but did have to ensure that rates were paid on the [Y] property. The [X] Road accounts were sent directly to Ms ZU. It is very probable that Ms ZU mistakenly provided Mr PJ's office with an account that he was not required to pay.

[30] This was a simple and explainable error, and not an error which could reasonably attract a disciplinary sanction.

[31] Ms ZU advanced argument that the terms of the settlement she agreed to may have been different if she had been made aware of the double payment to the rates.

[32] I did not find that argument to be persuasive. It is unlikely that the terms of the settlement would have been materially different if the overpayment had been identified prior to the settlement being concluded. The settlement was negotiated on the basis of what must have been, as reflected in the agreement, an understanding that the estate would continue to pay the mortgage outgoings on the [X] Road property to date of settlement, and Ms ZU would be responsible for payment of the rates. That was likely seen to be part of the costs she would meet in return for retaining the right of occupation. If there was disadvantage to any party in the negotiations, it was the estate. It had paid a debt which was Ms ZU's responsibility to meet.

[33] Underpinning much of Ms ZU's submission was concern that she had been materially disadvantaged by Mr PJ's actions in deducting funds at time of settlement. She submits that it was her expectation that she would receive the funds recorded in the court order, but did not do so.

[34] I accept that Ms ZU was disconcerted by the fact that she received a lesser sum on settlement than she had anticipated, but I do not agree that she was financially disadvantaged. She was not. She had received a credit in her rates account to which she was not entitled.

[35] Criticism is made that Mr PJ should have identified the error earlier, and there is merit in that criticism. But simple accounting mistakes can be made, and to remain unnoticed for a period of time. The fact that Mr PJ in managing the estate was required to make regular payments to rates on one property may well have contributed to the failure to earlier identify that an error had been made.

[36] Ms ZU's advances fair argument that a lawyer should, in facilitating a settlement which is recorded in a court order, comply strictly with the terms of the order. It is not appropriate for lawyers to make unilateral decisions to vary orders, and in this case, a decision which materially affected the amount of funds she received on settlement.

[37] I agree with that argument, and it would be rare that a failure to correctly implement a court order would not be subject to critical scrutiny.

[38] The Standards Committee concluded that the deduction did not appear to be inconsistent with the strict terms of the consent order.

[39] I have some difficulty in agreeing with the Committee's reasoning on that point. The strict terms of the consent order provided that Ms ZU was to receive a specified sum on settlement. She didn't receive that sum.

[40] But if the Committee's argument was influenced by conclusion that Ms ZU did achieve the settlement sum provided under the agreement by virtue of the fact that she had received the benefit of a credit to which she was not entitled, then argument can be sustained that she suffered no loss, and in effect received the full amount she was due under the terms of the settlement.

[41] It is not uncommon when property settlements are finalised, for there to be various adjustments to be made before final settlement is achieved. It would be reasonable, if errors were identified in the settlement terms recorded in a court order, for the parties to vary those terms by agreement.

[42] It was understandable that Mr PJ advised Ms ZU's lawyer of the error that had been made. It was unfortunate that the error was identified late in the piece, but that was what happened. Mr PJ's obligations to the estate and its beneficiaries demanded that he endeavour to remedy the error.

[43] Mr PJ advised Ms ZU's lawyers on 28 October 2011 that he considered a deduction would need to be made to account for the overpayment made. He enclosed documentation recording the rates payment. He clearly considered that the request for adjustment would be uncontentious.

[44] On 31 October, the legal executive managing the file for Ms ZU advised Mr PJ that the proposal to deduct was not agreed to by her client.

[45] On 1 November 2011, Mr PJ deposits funds to Ms ZU's lawyer's account. He deducts the sum paid to the rates, and confirms that he has checked with the council and received confirmation that Ms ZU, as a consequence of the payment made by his firm, received a credit to her rates account.

[46] He is then advised by Ms ZU's lawyer that payment of the full sum recorded in the Court order is required.

[47] Mr PJ then contacts Mr SM, a director of the firm that Ms ZU engaged. Mr PJ reports that he explained the background to Mr SM, and understood it to be Mr SM's position that if Mr PJ was able to clarify that an overpayment had been made, settlement could proceed on the terms as proposed by Mr PJ.

[48] On the afternoon of 1 November, settlement day, Mr PJ forwards correspondence to Mr SM in which he reiterates that a payment had been made to the rates, that the council had confirmed payment, and confirmation of the payment is evidenced by enclosing a copy of the relevant trust account records.

[49] Shortly after, Mr PJ is advised that the bank loan on the [X] Road property has been repaid, and request is made for Mr PJ to forward the transfer document. That presents as acquiescence to agreement to settle on the terms proposed by Mr PJ.

[50] There is no evidence to suggest that Ms ZU's lawyers proceeded to settle the matter under protest, or that they settled on the basis of reserving rights to pursue further action. In light of the objections initially raised, it must be assumed that Ms ZU's lawyers were instructed by her to settle on the terms proposed by Mr PJ. That would present as consistent with Mr PJ's evidence that he received instructions from Mr SM that settlement could proceed if matters surrounding the payment of the rates account were clarified.

[51] It would be unlikely that Ms ZU's lawyers would have settled the transaction without her express authority to do so.

[52] Considering the conduct in its totality, I arrive at a similar view to the Standards Committee. Whilst there were aspects of Mr PJ's conduct which could be the subject of some criticism, particularly the failure to identify the issue with the overpayment earlier, viewed in its totality, I do not consider that the conduct was such which should reasonably attract a disciplinary sanction.

[53] Nor is it the case that in reaching that conclusion, Ms ZU should be concerned that the Committee's decision stands as authority for the proposition that a lawyer is able to make unilateral changes to a court order. That is not the case.

[54] But when, in implementing a settlement, an error is identified that indicates that the global terms of the settlement agreed have not been achieved because of an accounting error of the type and scale identified in this particular case, and there is apparent agreement of the parties to finalise the settlement by minor amendment, that does not present as an attack on the sanctity of court orders.

[55] It would lead to intolerable outcome if legitimate errors could not be remedied by agreement of the parties in circumstances where one of the parties would be advantaged by the error not being corrected.

[56] I am satisfied that Mr PJ did, on reasonable grounds, consider that the deduction was authorised. Importantly, no detriment occurred to Ms ZU. She did, for all practical purposes, receive the settlement sum contemplated by the agreement and confirmed in the Court order.

## **Decision**

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

**DATED** this 26<sup>th</sup> day of May 2015

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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:

Ms ZU as the Applicant  
Mr PJ as the Respondent



Mr SG as a Related Person under s 213  
The Standards Committee  
The New Zealand Law Society