

CONCERNING

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

AND

CONCERNING

two determinations of [A Standards Committee]

BETWEEN

MRS EA

Applicant

AND

MR ZZ

Respondent

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

Introduction

[1] Mrs EA has applied for a review of two determinations of [A Standards Committee} concerning the conduct of Mr ZZ when acting as the solicitor for the estate of Mrs EA's grandmother (Mrs EB). Mrs EA is one of two executors of her grandmother's estate. The other executor is her Aunt (Mrs EC). The two executors have not acted co-operatively and some of Mrs EA's complaints concern the actions of her co-executor which she considers Mr ZZ should have taken steps to prevent. Her complaints also arise from the fact that Mr ZZ did not seemingly deal with both executors equally.

The complaints

[2] Mrs EA's first letter of complaint was sent to the New Zealand Law Society Complaints Service on 4 April 2011. Issues arising from her letter of complaint were:

- (a) Mrs EB died on 15 June 2010. Mr ZZ was advised of this by Mrs EC the following day. Mr ZZ's first communication with Mrs EA was by way of letter dated 29 July 2010 when he sent to her the Affidavit to Lead Grant of Probate and other documentation.

- (b) Accompanying the letter of 29 July 2010, Mr ZZ sent to Mrs EA a copy of Mrs EB's original will and a codicil to that will. He also provided copies of a handwritten letter from Mrs EB addressed to the executors of her will and two typed lists relating to the disposal of her jewellery. Mrs EA doubted the authenticity of the two typed lists, but the jewellery had already been disposed of by Mrs EC in accordance with those lists without reference to Mrs EA. Mrs EA's complaint is that Mr ZZ communicated the content of the lists to Mrs EC but did not advise her that distribution should not be made without approval from Mrs EA. She also considers that she should have been provided with the same information, at the same time as her co-executor so that she could have had an opportunity to intervene.
- (c) Mr ZZ did not "freeze" Mrs EB's bank accounts following notification of her death. Mrs EC continued to operate those accounts as Mrs EB's attorney and Mrs EC did not obtain approval from Mrs EA to make payments from those accounts.
- (d) Mr ZZ has accepted that a vehicle which belonged to Mrs EB had been sold to, and paid for by, one of her sons, whereas Mrs EA does not accept that this is the case, and considers that the vehicle remains an estate asset. Mrs EA has not been shown the bank statements belonging to Mrs EB's son which Mr ZZ relies on to support his view, or any other evidence. As a result Mrs EA is unable to form a view as to the validity of this evidence and has documentation from the person who was Mrs EB's attorney at the time, which does not support the view that a sale has taken place. The documentation which Mr ZZ relies on for his view has been shown to and discussed with Mrs EC.
- (e) Mrs EA has not received the same communications from Mr ZZ about administration of the estate as Mrs EC, and has described the communications that she has received as being "vague, sometimes hostile and even bias (sic) towards the other executor".¹
- (f) Mrs EA seeks an itemised bill of costs showing the work undertaken by Mr ZZ. She also considers that a bill for \$356.06 charged

¹ Letter of complaint EA to NZLS (4 April 2011) p 3.

to the estate to correct errors in the Probate documentation should not be payable by the estate.

Overall, Mrs EA complained about the quality of the service that she has received from Mr ZZ.

[3] On 5 April 2012 Mrs EA sent a further letter of complaint to the Complaints Service. This related to information provided to her by Mr ZZ about Powers of Attorney made by Mrs EB. In a letter to Mrs EA dated 1 October 2010, Mr ZZ referred to a Power of Attorney dated August 2004, in which Mrs EB appointed Mrs EC her Attorney. Mrs EA requested a copy of that document.

[4] In response, Mrs EA received a copy of a Power of Attorney dated 21 July 2006.

[5] Mrs EA subsequently requested copies of any Powers of Attorney which predated this, and received a further Power of Attorney dated 16 June 2000. In response to a request from Mrs EA for Mr ZZ to confirm she had copies of all Powers of Attorney granted by Mrs EB, Mr ZZ advised, “[w]e have no other documents”.²

[6] Mrs EA then sought clarification of the reference to a Power of Attorney granted in August 2004, and advises that Mr ZZ replied that the reference in his letter of 1 October 2010 was incorrect.

[7] Mrs EA had been told by the bank that it held a Power of Attorney dated August 2004 and she requested a copy of that document. It is dated 11 August 2004 and was prepared by Mr ZZ’s firm. Mrs EB’s signature is witnessed by a rest home staff member and the signature of the Attorney (Mrs EC) is witnessed by Mr ZZ.

[8] Mrs EA’s complaint concerns the misinformation given to her, and also raises the question as to whether or not Mr ZZ had received instructions direct from Mrs EB herself to prepare this document, as she considered that Mrs EB lacked capacity at the time to give instructions.

The Standards Committee investigation and determinations

[9] The Complaints Service acknowledged receipt of Mrs EA’s letter of complaint dated 4 April 2011³ and advised that a copy had been sent to Mr ZZ for comment. The

² Letter ZZ to EA (9 June 2011).

³ The Legal Standards Officer recorded the date of the letter of complaint as being 8 April 2011.

Legal Standards Officer advised Mrs EA:⁴

I expect that when I do respond to you at the direction of the Standards Committee I will enclose a copy of the reply received from the practitioner for your information.

[10] Mr ZZ responded by letter dated 3 May 2011. Included with that response were copies of a number of letters from various parties. In a subsequent letter to the Complaints Service dated 5 May 2011, Mr ZZ noted:

Some of this correspondence refers to matters in a manner that would not be conducive to enhancing relations between the parties and some discretion might be exercised relating to the distribution of these.

[11] Whether as a result of this letter or otherwise, it would seem that Mr ZZ's response was not sent to Mrs EA for her information or comment. When the Standards Committee file was sent to this Office following receipt of the review application, the Legal Standards Officer advised:⁵

I wish to draw your attention to Mr ZZ's letter of 5 May 2011. There was clearly considerable animosity between the Complainant and Mrs EC. In the internal correspondence, Mr ZZ points out it would not be conducive to the settlement of the relationship between Mrs EA and Mrs EC.

It was the Committee's informal view that Mr ZZ was making considerable efforts not to inflate the situation between the executrix.

[12] This is in accordance with previous comments from this Office that the Complaints Service should take care when forwarding correspondence from the parties to a complaint, not to include communications that contain inflammatory comments. In addition, the decision taken by the Standards Committee was to take no further action in respect of the complaint following its review of Mr ZZ's response and it had therefore determined to conclude its consideration of the complaint at that stage.

[13] I therefore take no issue with the fact that the Standards Committee did not send on Mr ZZ's response, although the Standards Officer had given Mrs EA an expectation in its letter of 12 April 2011 that it would do so.

[14] The Committee made the following comments in respect of the complaints contained in the first letter:

⁴ Letter NZLS to EA (12 April 2011).

⁵ Letter from NZLS to LCRO (29 June 2011).

*Distribution of the jewellery*⁶

The Complainant states that Mrs EC distributed the jewellery based on the Lawyer's directions. It appears in fact that the jewellery was distributed either in 2003 or at the funeral - in either case before the Lawyer had any input.

Accordingly, the Committee fails to see how the Lawyer could have impressed on Mrs EC that the distribution of jewellery could not be effected without the Complainant's knowledge. Certainly Mrs EC should have consulted with the Complainant, however the fact that she did not do so, can hardly be imputed on the Lawyer.

*Freezing the bank accounts.*⁷

The Lawyer had no reason to believe that Mrs EC was still mistaken as to her ability to use [the bank account] especially as he [Mr ZZ] had pointed out to her in his initial letter, that the Power of Attorney had ceased to be of effect.

*Ownership of the vehicle:*⁸

The Lawyer has formed a view, based on a copy of [Mr FA]'s bank account which shows a payment of \$4,000.00, which [Mr FA] made in November 2002. [Mr FA] has had the vehicle since that time and states that he has paid for it. The deceased's bank statements for that time are not available. Mrs EC accepts that the payment has been made. The Complainant doesn't. Again, if the Complainant has an issue with this, then she needs to take steps to resolve the matter. It is not able to be resolved by the Lawyer. Again, he is powerless without the cooperation of the executrices.

*Communication with Mr ZZ:*⁹

The Complainant has expressed some frustration about her communications with the Lawyer. The Committee expects that frustration is mirrored by Mr ZZ and for that matter the other executrix and no doubt the beneficiaries.

*Costs:*¹⁰

...the Committee understands that an itemised account has been provided for the 23 September 2010 invoice. The Committee is unaware of any subsequent invoice having been issued, although it seems from the complaint that the Lawyer has indicated that the fee will rise beyond \$6,000.00.

⁶ Standards Committee decision dated 3 June 2011, at [1.4(i)].

⁷ Above n6 at [1.4(ii)].

⁸ Above n6 at [1.4(iii)].

⁹ Above n6 at [1.4(vi)].

¹⁰ Above n6 at [1.4(v)].

[15] The Committee made no comment about the initial communications with Mrs EA but otherwise made some general comments about the family dynamics, adding a comment about what it considered would have been “the correct approach for the Complainant to take”.¹¹

[16] The Committee also determined to take no further action with regard to the second complaint. The aspect of the complaint relating to the creation of the Power of Attorney in 2004 fell to be dealt with in accordance with the transitional provisions of the Lawyers and Conveyancers Act 2006, and as a result the conduct complained of must be conduct which could have been the subject of disciplinary proceedings under the Law Practitioners Act 1982. Disciplinary proceedings under that Act could only be commenced in respect of conduct attracting a finding of misconduct or conduct unbecoming. The Committee determined that because there was no requirement at the time for a lawyer to be present or to witness a donor’s signature to a Power of Attorney, “disciplinary proceedings would not have been issued”¹² and therefore the Committee lacked jurisdiction to consider the complaint.

[17] The Committee also seems to have applied the same reasoning to the misinformation given by Mr ZZ when he advised that there were no other documents other than the Powers of Attorney created in 2000 and 2006. However, it went on to “clarify the matter for Mrs EA”¹³ by noting that it seemed to be simply a matter of misfiling which led Mr ZZ to make the statements that he did. This comment was made in reliance on Mr ZZ’s explanation that when he advised Mrs EA that he did not have any further documents, it seemed that the 2004 Power of Attorney had been re-deposited into his firm’s Deeds system, and was not attached to any of the other documents on file.

Review

[18] A hearing in respect of both applications was held in [location] on 21 November 2013. Prior to the hearing, Mr ZZ advised that he was no longer able to attend to the matters as he had retired from practice on 31 January 2013. He also expressed some puzzlement that the second complaint in particular, was being dealt with, as the conduct complained of took place prior to the commencement of the Lawyers and Conveyancers Act 2006, although he had consented to the Committee addressing the matter.

¹¹ Above n6 at [1.4(vi)].

¹² Standards Committee decision dated 30 April 2012, at [8].

[19] By way of explanation, I referred at the beginning of the hearing to the transitional provisions contained in s 351 of the Lawyers and Conveyancers Act 2006. These provide that if a lawyer is alleged to have been guilty of conduct prior to 1 August 2008, in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made to the Complaints Service.

[20] Although the Committee has expressed its decision in terminology which is commonly used by Standards Committees, i.e., that it lacked jurisdiction to consider the (second) complaint, such a decision necessarily involves a consideration as to whether or not disciplinary proceedings could (not would as referred to by the Committee) have been commenced under the Law Practitioners Act 1982. The Committee does not automatically lack jurisdiction because the conduct took place prior to 1 August 2008. In addition, any determination of the Committee is subject to review by this Office.

[21] Further, the complaint alleging misinformation about which documents Mr ZZ had in his possession, relates to advice given by Mr ZZ in 2011, after the commencement of the Lawyers and Conveyancers Act 2006, and falls to be dealt with directly under that Act.

[22] One of Mrs EA's complaints was that she did not receive the same correspondence that had been sent to her co-executor. At the review hearing, Mr ZZ voiced his opinion that it was not conducive to good relations between Mrs EA and Mrs EC for some of the correspondence received from Mrs EC to be passed on to Mrs EA. However, he agreed that there was no reason why his communications to Mrs EC should not also have been provided to Mrs EA. He therefore agreed that he would provide Mrs EA with copies of all of his correspondence to Mrs EC in connection with the administration of the Estate. Accordingly, following the hearing, I issued the following Minute:¹⁴

Mr ZZ is to provide to Mrs EA copies of all correspondence from him to Mrs EC in connection with the administration of the estate of [Mrs] EB during the period of time when he was acting as solicitor for the Estate.

This direction has been complied with.

Mr ZZ's communications with Mrs EA

¹³ Above n12 at [15].

[23] Mrs EA has complained about a number of aspects of Mr ZZ's communication (or lack of communication) with her:

- Mr ZZ's first communication with Mrs EA was some six weeks after the death of her grandmother;
- Mr ZZ had in the meantime communicated certain information to Mrs EC that was not communicated to Mrs EA;
- Mr ZZ corresponded separately and differently with Mrs EC;
- Mr ZZ met with Mrs EC but declined to meet with Mrs EA; and
- Mr ZZ "does seem to communicate openly, regularly and convivially with the other executor"¹⁵ whilst she finds Mr ZZ's communications to her to be "vague, sometimes hostile and even bias[ed] towards the other executor".¹⁶

[24] It is not uncommon that Executors of an Estate fail to agree on matters relating to its administration. It is essential that the lawyer acting in the administration of an Estate remains impartial and recognises that each executor is a client of the solicitor who must be dealt with in the same way.

[25] A lawyer must also be careful not to make decisions on behalf of the executors, and conversely, the executors cannot ask or expect the Estate lawyer to, in some way, mediate between executors who do not agree.

[26] Mr ZZ has taken issue with this view of the role of the lawyer acting for an Estate. He says:¹⁷

It has been suggested that I am employed by the executrices on a solicitor client basis. I think it is more correct that I or my firm are employed to administer the estate and for them on a representative basis.

I am unclear as to what Mr ZZ means by this, but assumptions made by him that the executors were in accord with each other, particularly at the commencement of his instructions, has contributed to Mrs EA's dissatisfaction with his services.

[27] Mr ZZ made a number of references to his assumptions at the review hearing:

¹⁴ Minute from LCRO dated 21 November 2013.

¹⁵ Above n1.

¹⁶ Above n1.

¹⁷ Email ZZ to LCRO (3 December 2013) at [6].

- he thought that Mrs EA was being fully informed by Mrs EC;
- he imagined Mrs EA would be at the funeral;
- he thought the executors were communicating with each other;
- he expected that Mrs EA would make contact with him;
- he assumed at all times that Mrs EC was communicating with Mrs EA and that Mrs EA was content; and
- it did not occur to him that there was disagreement between the executors.

If Mr ZZ had communicated with each executor directly and in the same way, he would not have made these assumptions.

[28] Even if executors are communicating and in agreement, the Estate lawyer must be vigilant to ensure that with utmost scrupulousness, each executor receives the same advice and communication from the lawyer. One clear way in which this needs to be adhered to is to ensure all correspondence is sent to all executors, preferably at the same time.

[29] Mr ZZ's initial communications about Mrs EB's death came from Mrs EC. He was aware from the outset that Mrs EA was an executor of the Estate. Although it is understandable that he communicated the content of the documents he held to Mrs EC verbally, he did not impress on her at the time that any distribution (particularly of the jewellery or chattels) should only be made in conjunction with Mrs EA.

[30] Again, whilst it may be possible to accept that Mrs EC should have recognised this obligation without the need for it to be impressed on her, it is not acceptable that Mr ZZ should address his first communication¹⁸ only to Mrs EC, and provide her with information about administration of the Estate without ensuring that Mrs EA received this communication at the same time. It is apparent from Mr ZZ's letter to Mrs EC of 18 June 2010 that she was already in possession of a copy of Mrs EB's will and codicil (although I acknowledge that there is no evidence as to how these came to be in her possession). If (as is evident) Mr ZZ did not have Mrs EA's contact details, these could have been sought by telephone from Mrs EC.

¹⁸ Letter ZZ to EC (18 June 2010).

[31] Instead, the first direct communication that Mrs EA received from Mr ZZ was his letter dated 29 July 2010, some six weeks after Mrs EB's death. Even then, Mr ZZ did not provide Mrs EA with the same information and advice as had been communicated to Mrs EC.

[32] This same pattern of communicating with Mrs EC separately, and differently from Mrs EA, continued, and has contributed to Mrs EA's dissatisfaction. I note also that Mr ZZ has communicated separately with Mrs EA in response to her communications and this too is not appropriate.

[33] Mrs EA has complained that Mr ZZ's communications have been vague, sometimes hostile, and biased towards Mrs EC. The allegation of bias arises from the separate communications referred to above and the suspicion which this arouses. Mr ZZ advises that the content of his responses to Mrs EA are similar in tone to communications with all of his clients throughout his years of practice. He also notes the volume of communications received from Mrs EA, and the fact that issues being raised by her were in some cases not related to his role as the Estate solicitor. He also expressed concerns as to the impact of the costs of administering Mrs EB's estate, which was modest. This concern affected his willingness to engage with many of the issues raised with Mrs EA.

[34] I have reviewed the correspondence from Mr ZZ to Mrs EA. Whilst I agree that his responses could be described as being somewhat terse in some instances, and do not always address all of the matters raised by her, I do not consider that they reach the level where they are deserving of rebuke. Mr ZZ is correct in his response that either the executors must agree on the way forward, or they must seek separate advice as to how to resolve matters between them. It is not his role as the Estate solicitor (acting for the executors jointly) to participate in the disagreements – his role is to act on their joint instructions after agreement has been reached between them.

[35] In conclusion, I have reached the view that Mr ZZ has failed in his duty to treat each executor equally as clients, and that this does constitute unsatisfactory conduct in terms of s 12(c) of the Lawyers and Conveyancers Act 2006, by way of breaches of the Conduct and Client Care Rules,¹⁹ in particular, Rule 10 (requirement to promote and maintain proper standards of professionalism) and Rule 7 (lawyer to promptly disclose all information to the client).

¹⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008).

[36] I do not consider however that this failure by Mr ZZ is deserving of any penalty. The finding of unsatisfactory conduct in itself will be of concern to Mr ZZ. In addition, there is no meaningful penalty which can be imposed which will address Mrs EA's concerns, which lie as much with the conduct of her co-executor as they do with Mr ZZ. Accordingly, I do not propose to impose any penalty consequent on the finding of unsatisfactory conduct.

[37] I turn now to address the other specific areas of Mrs EA's complaints.

The failure to notify the bank of Mrs EB's death

[38] Mrs EA contends that Mr ZZ should have immediately advised the bank of Mrs EB's death, as a result of which the bank would have suspended operation of the account by Mrs EC as Attorney. The real point at issue here is that the Attorney (Mrs EC) operated on the account when she should not have. She had been advised by Mr ZZ that her appointment as Attorney ceased on Mrs EB's death, both verbally and in writing in his letter of 18 June 2010, two days after Mrs EB's death. However, she assumed that she could continue to operate on the account as trustee²⁰ but was subsequently advised by Mr ZZ that this was not the case.

[39] In his letter of 24 August 2010 to Mrs EA, Mr ZZ acknowledged:

It is normally a solicitor's responsibility to inform the bank that the holder of the account has died. A solicitor would normally only become involved after he or she has been advised by members of the family as to what bank accounts are held, and then to arrange the procedures for closing those accounts.

[40] I agree with Mr ZZ's summary of what could be expected of a lawyer acting in the administration of an Estate.

[41] Mr ZZ was advised of the bank details by Mrs EC in her letter of 30 June 2010, but there is no indication that Mr ZZ took the steps that he advised were "normally" the responsibility of the solicitor. The list of payments made by Mrs EC includes payment on 23 August 2010, so it is clear that the bank was not notified before that date.

[42] In a later letter, Mr ZZ resiled from what he had earlier accepted was "normally" the solicitor's responsibility. He says:²¹

²⁰ Letter EC to ZZ (30 June 2010).

²¹ Letter ZZ to EA (3 February 2011).

We have already given an explanation relating to Bank Accounts in our letter to you of the 23rd September 2010. To be blunt, early notification to the Bank of the death of a deceased account holder would normally be given in the first instance by the executors or close family members. Did you advise the Bank?

[43] This is a somewhat unnecessary and rather confrontational response to correspondence from Mrs EA, particularly given Mr ZZ's earlier acceptance that it was his role to advise the bank of Mrs EB's death.

[44] In addition Mr ZZ took the view that Mrs EC had "acted in an entirely appropriate manner in her operation of the bank accounts"²² based on the explanation she had given for the payments. In making this statement, Mr ZZ took it upon himself to make a decision as to the correctness of the payments which was not a decision for him to make.

[45] The consequences of Mr ZZ failing to do what he had accepted was a solicitor's role, and then siding with Mrs EC as to the correctness of her actions, have contributed to the escalation of this complaint. An early acknowledgement by him that he should have given notice to the bank and an apology to Mrs EA for not doing so may have been a better response.

[46] I hesitate to reach a finding of unsatisfactory conduct in respect of the failure to advise the bank in itself. However, the combination of Mr ZZ having accepted that it was normally the solicitor's responsibility to do this, and then denying this responsibility subsequently and placing the obligation on to Mrs EA, as well as then confirming the appropriateness of Mrs EC's actions when the decision was not his to make, all contribute to a conclusion that this conduct constitutes unsatisfactory conduct on Mr ZZ's part.

[47] Mrs EA has suggested that what she considers were wrongful payments out of the account by Mrs EC should be refunded by Mr ZZ. If I were to make such an Order, that would mean that I accept her view of what should have been paid. That is not a decision for me to make in the context of a complaint about Mr ZZ's conduct. Instead, I consider that an appropriate penalty is to require Mr ZZ to acknowledge his shortcomings in advising the bank of Mrs EB's death and to apologise to Mrs EA for this and his somewhat terse response to her in his letter of 3 February 2011.

[48] Mrs EA has also raised queries about payments out of the account by Mrs EC prior to Mrs EB's death. Mr ZZ had no part to play in conducting any enquiry into this

matter as it does not relate to administration of the Estate. Mrs EA will have to take independent advice as to her remedies in this regard.

The motor vehicle

[49] Mrs EB owned a motor vehicle which was in the possession of Mr FA, her son, at the date of her death. The question arose as to whether or not Mr FA had paid for the vehicle – if he had not then it remained an Estate asset.

[50] Mrs EA does not accept that it has been paid for. Mrs EC considers that it has. Mr ZZ supported Mrs EC's view. Neither Mrs EC or Mr ZZ are able to disclose the evidence on which this decision has been made as they do not have Mr FA's consent to do so.

[51] The issue for this review is whether or not Mr ZZ has acted properly in his responses to Mrs EA about the vehicle. The answer to that issue is simply that the decision is not one for Mr ZZ to make. The executors must reach a decision with which they both agree.

[52] The issue with regard to the vehicle arose obliquely, in that Mrs EA's complaint is that Mr ZZ has failed to advise her what the consequences would be for the Estate if the vehicle is stolen or involved in an accident. Whilst I agree that Mr ZZ has not properly advised Mrs EA in this regard, it is not a matter in respect of which there should be a further finding against Mr ZZ. Mrs EA should ask the same questions of the solicitor presently acting for the Estate and act accordingly.

Mr ZZ's bill of costs

[53] At the time of the complaint, Mr ZZ had rendered one account. This was debited to the Trust's ledger on 24 September 2010. The total debited was \$3,037.50. It is not clear to me how the amount of the fee was communicated to Mrs EA, as in her complaint she refers to an estimate of \$3,200 but that Mr ZZ's costs stood at approximately \$6,000. It does not seem to me that the bill had been sent to Mrs EA, or indeed, to Mrs EC initially. In his letter of 21 October 2010 to Mrs EC, Mr ZZ refers to not having previously sent her the account and encloses a copy of it. Whether or not the Trust account regulations²³ have been complied with is not a matter for this review.

[54] Mr ZZ advised in his letter of 3 December 2013 to this Office that the bill was produced at Mrs EA's request. Mrs EA denies this, but that is largely irrelevant.

²² Letter ZZ to EA (24 August 2010).

[55] Mrs EA has not specifically complained about the quantum of the bill as at the time of her complaint she was asking for an itemised account, and until the date of the review hearing, Mr ZZ had still not provided that.

[56] In his letter of 3 December 2013 to this Office, Mr ZZ advised that when he retired from the practice it was a requirement of the arrangements between him and his partner that draft bills of costs be prepared for all files he was working on at the time of his retirement. Consequently, a further account for a total of \$14,337 was debited to the trust ledger on 31 January 2013, but contemporaneously written off. It would seem that the account was not actually rendered to the executors and I do question whether or not this procedure was appropriate.

[57] However, for the purposes of this review, Mrs EA's complaint is that Mr ZZ had not provided the detail of his account. The Standards Committee determined that an itemised bill had been provided but Mrs EA disputed this and I concur with her in this regard. She has now however been provided with Mr ZZ's time sheets which formed the basis for his account and has therefore received the detail that she had been requesting.

[58] Although I do not consider it appropriate to make a further finding of unsatisfactory conduct in this regard, it is somewhat disturbing that it was necessary for Mrs EA to go to the extent of complaining, and then lodging a review application to be provided with this information. She retains the right to complain about the quantum of the bill, although Regulation 29 of the Complaints Service and Standards Committees Regulations²⁴ provides that a Standards Committee must not deal with a complaint if a bill of costs was rendered more than two years prior to the complaint unless the Committee determines that special circumstances exist. Mrs EA will be able to produce this decision in support of a claim that special circumstances do exist should she decide to complain about the quantum of the bill.

[Firm A]'s bill

[59] Mrs EA has complained that an account for \$356.06, rendered by a [Firm A], for amending the documents prepared by Mr ZZ to be signed by Mrs EC to Lead Grant of Probate, should not be charged to the Estate. Mrs EA contends that because the documents were wrongly prepared by Mr ZZ, the Estate should not be liable for this account. There is no information as to what the nature of the errors were, and what

²³ Lawyers and Conveyancers Act (Lawyers: Trust Account) Regulations 2008.

instructions were given by Mr ZZ to [Firm A] with regard to the alterations to be made. I have noted that he has indicated that he was not necessarily in agreement with the steps that [Firm A] took, although I note also that that account has been paid.

[60] This is an issue that remains to be resolved between the executors and is not an issue that falls to be addressed in the context of a complaint about Mr ZZ's bill of costs. There is however a question as to whether or not the bill has been paid with the authority of the executors. At this stage, no funds have been received by [Firm 2] for the credit of this Estate, and so effectively the bill has been paid by the firm. If the executors do not agree to the payment, then there is no authority to debit the Estate's ledger, and the firm should take steps to rectify that. As this is not a matter within Mr ZZ's control now, it is a matter best left to Mr GH to address and will arise as the Estate administration accounts are prepared for sign off by the Executors. Obviously, Mrs EA may refer the matter back to the Complaints Service if the matter is not resolved.

The Powers of Attorney

[61] The facts relating to Mrs EA's complaint regarding the Powers of Attorney are set out in [4] - [9] of this decision. As I perceive it, Mrs EA's primary complaint is that Mr ZZ provided her with misleading information about the Powers of Attorney when he denied that there was a document which had been executed in August 2004, when he had otherwise referred to such a document in his letter of 1 October 2010. Mr ZZ's explanation is that the document had been returned to the firm's Deeds file and not retained on the Estate file, and that he had therefore not realised his error when he denied the existence of the document. He says, however, that he felt tricked by Mrs EA in the way in which she made her series of requests of him. There may be some validity in Mr ZZ's objection, but equally, it could be considered that he was careless in his responses to Mrs EA. However, I do not consider that it is appropriate to take this complaint any further.

[62] The other aspect of the complaint relating to the Powers of Attorney is that Mr ZZ acted at the direction of Mr GI, who was the existing Attorney, in preparing the Power of Attorney in 2004, rather than on direct instructions from Mrs EB. The document was then presented to Mrs EB (it seems by Mrs EC) whose signature was witnessed by a rest home worker. Mrs EA contends that if Mr ZZ had insisted on receiving instructions direct from Mrs EB and attended on her himself, he would have ascertained that she did not have the capacity to execute the document.

²⁴ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees

[63] At the time, there was no requirement for a Power of Attorney to be witnessed by a solicitor, or for any certificates as to competency to be provided. Mrs EA's contentions may very well reflect what would have been best practice, but given that the events took place in 2004, the transitional provisions of the Lawyers and Conveyancers Act apply to this conduct²⁵ and I do not consider that Mr ZZ's conduct was such that disciplinary proceedings could have been commenced under the Law Practitioners Act. Consequently, the Standards Committee decision to decline to consider this complaint was an appropriate response.

Conclusion

[64] Having considered all of the material provided in respect of the complaints, conducted a hearing, and then considered the subsequent material, I have reached different conclusions from the Standards Committee with regard to some aspects of Mrs EA's complaints. In particular, I have reached the view that Mr ZZ's conduct with regard to the communications with Mrs EA, and the responses with regard to her queries relating to the bank account, constitute unsatisfactory conduct. I have also determined that this finding in itself is appropriate with regard to the communications in general, and that Mr ZZ should provide an apology to Mrs EA in respect of his conduct relating to the bank account. The form that apology should take should be readily apparent from the content of this decision.

[65] I acknowledge that Mr ZZ has now retired from practice and note his advice that in [a number of] years of practice he has never had even a suggestion of a complaint about his conduct. The Lawyers and Conveyancers Act 2006 (which came into force on 1 August 2008) introduced the concept of unsatisfactory conduct which focuses on the service aspects of a lawyer's conduct, as distinct from professional misconduct or conduct unbecoming to which the disciplinary processes were previously restricted. This decision needs to be considered in this context and Mr ZZ is referred to articles as to the nature of a finding of unsatisfactory conduct on the website of this Office at <http://www.justice.govt.nz/tribunals/legal-complaints-review-officer>.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee dated 3 June 2011 is modified in the following way (but is otherwise confirmed):

Regulations 2008.

²⁵ Refer [17].

- (i) Mr ZZ's communications with Mrs EA in the administration of the Estate of Mrs EB as identified in this decision, constitutes unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 by reason of breaches of Rules 7 and 10 of the Conduct and Client Care Rules. No penalty is imposed.
- (ii) Mr ZZ's conduct in failing to advise the bank of the death of Mrs EB, the subsequent denial of those obligations, and his correspondence with Mrs EA following this , collectively constitutes unsatisfactory conduct pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006. Mr ZZ is ordered to provide an apology to Mr EA in this regard pursuant to s 156(1)(c) of the Lawyers and Conveyancers Act 2006, such apology to be provided by no later than 10 February 2014.
- (iii) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee dated 30 April 2012 is confirmed.

Costs

Where a finding of unsatisfactory conduct is made or upheld against a practitioner, it is appropriate for an Order for costs to be made against the practitioner in accordance with the Costs Orders Guidelines issued by this Office. Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 Mr ZZ is ordered to pay the sum of \$600 by way of costs to the New Zealand Law Society by no later than 24th February 2014. It should be noted that this is one half of the amount specified in the Guidelines, such amount reflecting the penalties that have been imposed consequent on the finding of unsatisfactory conduct.

DATED this 24th day of January 2014

O W J Vaughan

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:

Mrs EA as the Applicant
Mr ZZ as the Respondent
Mr GH as a related person or entity
[A Standards Committee]
The New Zealand Law Society