

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [Area Standards Committee X]

**BETWEEN**

**ZF**

Applicant

**AND**

**H BU AND G BU**

Respondents

**DECISION**

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

**Introduction**

[1] [Area Standards Committee X] determined that Mr ZF had a conflict of interests when he represented the interests of several parties in various transactions. The Committee also determined that Mr ZF had wrongly applied funds received from a borrower's property manager on account of payments due under a nominee company mortgage towards his fees.

[2] Mr ZF has applied for a review of those findings and the consequent penalties imposed by the Committee.

**Background**

[3] The facts recorded by the Standards Committee provide an adequate understanding of the matters in which Mr ZF was involved and the relevant paragraphs of the determination are reproduced, using the Standards Committee numbering:

19. Mr HBU and Ms GBU are the children of BU Seniors.
20. BU Seniors owned a property at [Town] which included a family bach. They had allowed Mr LR, and his wife, to build on that property as well. There was an understanding that the LR's "owned" the second building. Prior to BU Senior's death he (and later Mr H BU, worked with Mr ZF to establish a trust to own the [Town] property. The Trust was to be for the benefit of both families. The exercise was not completed before Mr BU Senior died.
21. Mr BU Senior died in August 1999. He left a life interest in his estate to his wife but she died very shortly afterwards in May 2000.
22. Mr and Ms BU are the executors of both their parents' estates. There was a disagreement between Mr and Ms BU which resulted in a deed of family arrangement being prepared in 2002. There was an interval through to 2006 when the [Town] property was finally dealt with by subdividing it, so that the LR and BU families could each take title to their own baches.
23. It is Mr ZF's handling of the [Town] property and dealings with the estate of BU Seniors that is the catalyst for these complaints.

### **The complaints**

[4] Mr and Ms BU complained about Mr ZF's conduct. Mr H BU corresponded with the Lawyers Complaints Service on behalf of himself and his sister.

[5] The Standards Committee has summarised Mr BU's complaints<sup>1</sup> and they are reproduced here:<sup>2</sup>

- (1) Mr ZF took too long to administer his parents' estates;
- (2) the costs to administer those estates, and his sister's life interest in those estates, was excessive;
- (3) there was inadequate reporting to the executor of the estates (that is to Mr H BU);
- (4) Mr ZF failed to administer his sister's legal affairs properly;
- (5) Mr ZF failed to follow contributors' instructions in a nominee company loan; meaning the contributor's instructions in the [AB] Apartments Limited loan through Mr ZF's nominee company.

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<sup>1</sup> Although the complaints were made by both Mr H BU and his sister the Standards Committee refers to the complainant as being Mr H BU

<sup>2</sup> Standards Committee determination (8 May 2013) at [1]–[3].

- (6) failed to act on instructions and to answer correspondence;
- (7) failed to supply information and detail pertaining to an invoice presented to his sister;
- (8) failed to establish an inter vivos trust during the life of Mr H BU's father resulting in some of the estate complications that followed;
- (9) failed to follow Mr H BU's instructions, as one of the trustees of the BU Seniors Estate, in that in lending estate funds to Ms G BU he did not include in the documentation a clause increasing the principal by the amount of inflation; and
- (10) used mortgage interest instalments to pay the costs of proceedings without the authorisation of contributors.

#### **The Standards Committee investigation/delay**

[6] The Standards Committee appointed an investigator (Mr BS) to provide a report. A copy of Mr BS's report was provided to the parties in April 2012.

[7] A Notice of Hearing was issued on 7 June 2012 and final submissions/comments were called for by 29 June 2012.

[8] Mr ZF did not provide his submissions by the date specified; despite several extensions granted by the Committee, he had not provided his response by February 2013.

[9] In a letter dated 21 February 2013, the Committee advised Mr ZF it would not agree to any further extensions of time and set a final date of 20 March 2013 for him to comply.

[10] Notwithstanding, Mr ZF requested yet a further extension of time in two letters dated 16 April 2013 which dealt extensively with his medical condition. The Committee declined the request and proceeded to consider and determine the complaint.

[11] The Committee's decision was issued on 8 May 2013.

[12] The delays and requests for further time have been briefly referred to here because on review Mr ZF objected to the fact that the Committee had not allowed him to provide his final submissions/comments.

[13] Section 140 of the Lawyers and Conveyancers Act 2006 (the Act) requires Standards Committees to inquire into complaints as soon as practicable, and one of the purposes of the Act is to provide a more responsive regulatory regime in relation to lawyers.<sup>3</sup>

[14] The Committee extended the time for Mr ZF to respond on many occasions. Mr and Ms BU's complaints had been lodged in December 2009 and the Committee was statutorily obliged to inquire into and determine the complaints as soon as practicable. The Committee noted that Mr ZF was able to provide many pages of material and comments concerning his health issues when he could have directed that time and energy to providing his responses to the complaints.

[15] The Committee considered it had all relevant material to enable it to determine the complaints and acted properly in proceeding to consider and determine the complaints.

### **The Standards Committee determination**

[16] The Committee addressed each of the 10 complaints set out above and determined each in the manner following:

#### **Mr ZF took too long to administer the estates**

The Committee noted Mr BS's advice that "the time taken to administer [the estates] was understandable in the circumstances."<sup>4</sup>

"Nothing in Mr BU's letters of submissions persuade[d] the Standards Committee that the delays were inordinate or inappropriate".<sup>5</sup>

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<sup>3</sup> Lawyers and Conveyancers Act 2006, s 3(2)(b).

<sup>4</sup> Standards Committee determination at [24].

<sup>5</sup> At [25].

**The cost to administer the estates and Mr BU's sister's life interest is excessive**

The Committee noted that bills rendered by Mr ZF totalled \$78,518.97 and determined:<sup>6</sup>

The Standards Committee has no information on which to be able to base a determination that these costs either individually or collectively crossed the threshold into conduct unbecoming a solicitor to such an extent as to warrant commencing proceedings of a disciplinary nature under the former Law Practitioners Act 1982.

The advice which the Standards Committee has from Mr BS, in relation to Mr [sic] BU's costs as life tenant, is that they were of a satisfactory level, although the work covered a lengthy period so that the complaint is understandable.

**There was inadequate reporting to Mr BU as one of the executors of the estate**

The Committee noted Mr BS's report that "reporting during the course of the administration of the estates was only barely adequate".<sup>7</sup> In this regard, the Committee noted three areas of concern identified by Mr BS:

- (i) ... it was likely Mr BU was not consulted as fully as possible in relation to the administration of the testamentary trust, given tensions which had arisen between Mr and Ms BU and the fact that Mr ZF acted for Ms BU.<sup>8</sup>
- (ii) "Mr ZF failed to answer correspondence ...".<sup>9</sup>
- (iii) "... Mr ZF did not send his accounts in a timely manner".<sup>10</sup>

Having noted these issues, the Committee nevertheless was "satisfied that [the reporting] was still sufficient".<sup>11</sup> It concluded "there [was] no material on which the Standards Committee [could] rely to reach an alternative decision" and determined to take no further action on this complaint.<sup>12</sup>

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<sup>6</sup> At [26]–[27].

<sup>7</sup> At [28].

<sup>8</sup> At [28].

<sup>9</sup> At [30].

<sup>10</sup> At [31].

<sup>11</sup> At [32].

<sup>12</sup> At [32].

### **Mr ZF failed to administer Ms BU's affairs properly**

Mr BS reported that he had interviewed Ms BU who confirmed the complaints insofar as they related to her. However, when interviewed by Mr BS, Ms BU "was unable to refute what was stated in Mr ZF's affidavit."<sup>13</sup> The Committee accepted Mr BS's recommendation that Mr ZF had satisfactorily answered the complaints by Ms BU.

### **5 & 6 Mr ZF failed to follow the instructions of contributors and respond to correspondence**

The Standards Committee noted "there were real difficulties in getting clear instructions from all of the contributors"<sup>14</sup> and Mr BS reported there was "insufficient evidence to support this complaint".<sup>15</sup> The Committee agreed and determined to take no further action in respect of these complaints.

### **Mr ZF failed to supply information in detail pertaining to an invoice presented to Ms BU**

Mr ZF deposed that he had carefully discussed his bill with Ms BU when he presented it to her. The Committee determined that "in the absence of a refutation of Mr ZF's statements from Ms BU this complaint [could] proceed no further".<sup>16</sup>

### **Mr ZF failed to supply an inter vivos trust during the life of Mr BU's father**

The Committee accepted Mr ZF's evidence that "Mr BU senior never gave clear instructions to form a trust"<sup>17</sup> and was "satisfied that this complaint should not be taken further".<sup>18</sup>

### **(b) Mr ZF failed to follow Mr BU's instructions**

Mr BU was one of the trustees of the Mr BU Senior estate. The Committee conflated this complaint with allegations that Mr ZF had a conflict of interests

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<sup>13</sup> At [35].

<sup>14</sup> At [38].

<sup>15</sup> At [39].

<sup>16</sup> At [43].

<sup>17</sup> At [44].

<sup>18</sup> At [45].

when acting for Ms BU on the purchase of a home using money from the tenant's trust.

Mr BU was a trustee of that trust and had raised the issue of inflation proofing the advance to be made to Ms BU. Mr BU was the residuary beneficiary of that trust.

The Committee determined that "there was a conflict when Mr ZF purported to act for all interests".<sup>19</sup>

**Mr ZF used mortgage interest instalments to pay his costs without authorisation from contributors**

Mr BU and the life tenant trust invested funds in a mortgage advanced through Mr ZF's nominee company. The mortgage fell into default and the borrower's property manager paid rental receipts derived from the property into Mr ZF's trust account on account of mortgage payments. Mr ZF deducted his fees from these funds before accounting to contributors for the balance.

The Committee determined "that Mr ZF had no implied right to help himself to funds lodged with him and which were intended for a specific purpose".<sup>20</sup> It was "not satisfied that Mr ZF enjoyed the right to take his fee in this way. In the absence of a written authority to deduct costs he was not entitled to do so".<sup>21</sup>

[17] Having considered these issues, the Standards Committee was:<sup>22</sup>

... satisfied that Mr ZF's behaviour in relation to the complaints 9 and 10 amounts to conduct unbecoming a solicitor in that he continued to act when there was a conflict of interest and also deducted his fee without proper authorisation.

[18] The Committee continued:<sup>23</sup>

As the finding against Mr ZF of conduct unbecoming a solicitor meets the threshold for commencement of a proceeding of a disciplinary nature under the former Law Practitioners Act 1982, as required by section 351 of the Lawyers

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<sup>19</sup> At [56].

<sup>20</sup> At [61].

<sup>21</sup> At [62].

<sup>22</sup> At [63].

<sup>23</sup> At [64].

and Conveyancers Act 2006 the penalties that might be imposed are those under section 106(4) of the Law Practitioners Act ...

It noted that any penalty must be a penalty that could have been imposed pursuant to the Law Practitioners Act 1982 as all of the conduct complained about took place prior to 1 August 2008.

[19] Having made these observations, the Committee:

- (a) censured Mr ZF;
- (b) imposed a fine of \$1,000; and
- (c) ordered Mr ZF to pay the sum of \$15,000 to the New Zealand Law Society by way of costs.

### **Mr ZF's application for review**

[20] Mr ZF's reasons for applying for a review of the Standards Committee determination are:

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- The Standards Committee wrongly did not wait for me file my closing submissions and evidence that are highly relevant and crucial to ensuring a fair outcome is reached on the Complaint;
- The reasoning given by the Standards Committee in closing off in this way is misleading and lacking in substance because most of the cause of the delay in reaching an outcome arises from the Christchurch earthquakes, notably that of 22 February 2011 and my suffering two bouts of serious illness;
- That more particulars of the time frame is recorded in the chronology that will be filed with the substantive papers in about 10 working days from now;
- That during the period of time from October 2011 to 21 January 2012 I was fully engaged in retrieving from the electronic record and compiling an extensive submission on another case, particulars of which the LCS was aware and because of my limited personal resources I could not devote time to the BU Complaint;
- The more particulars of this particular point and the manner in which I was handicapped will be recorded in the said substantive papers that will shortly be filed herein;
- That again I was hampered by needing to give priority to the same case from January 2013 until mid March 2013 in connection with the filing of Review papers with the LCRO. I was also significantly affected by three episodes or cardiac exhaustion, each lasting about one week during that time;



- That I was entitled to give priority to the H Review Application, because it was in a superior jurisdiction [to] the Lawyers Complaints Service being operated by the Standards Committee;
- That I have provided medical evidence to the Standards Committee which establishes that I have genuine health problems and am not engaged in any sort of delaying process;
- Again, further evidence in support of same is in the course of being drafted and will be filed with the other aforementioned papers with the LCRO;
- That the Standards Committee was wrong in rejecting the medical information and refusing to accept my submission that it withhold further taking further action until I was able to file my closing submissions and evidence;
- That the Standards Committee appears to have pre-determined this particular issue;
- That the decision by the Standards Committee to close the matter down appears to stem in part at least from the belief that I was being obstructive and was desiring to delay matters. I totally deny the truth of either statement for the reasons set out above that I am entitled to give priority to an LCRO case because it is in higher jurisdiction and because I have been given sharp reminder of my mortality by the cardiac condition from which I suffer. I have a number of things that I wish to achieve in the remainder of my life and spending countless hours dealing with Law Society complaints is not one of them.

## Process

[21] The Review Officer apprehended from the manner of Mr ZF's application and submissions that he was under the impression that a review by this Office was in the nature of judicial review and the only outcome, if his application was successful, was that the Standards Committee determination would be set aside and the complaint returned to the Lawyers Complaints Service for fresh consideration.

[22] In *C v Legal Complaint Review Officer* the High Court found that there had been "a breach of the requisite requirements of natural justice because the LCRO did not provide the practitioner with any warning of the prospect that she might order a reconsideration by the Standards Committee on the terms she did."<sup>24</sup>

[23] As the possible outcome of this review was one which may have differed from Mr ZF's expectation, the Review Officer wrote to the parties on 28 September 2017, to alert them, in particular Mr ZF, that "an outcome favourable to [Mr ZF] will not

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<sup>24</sup> *C v LCRO* [2012] NZHC 3528, [2013] NZAR 398 at [79]

necessarily result in the matter being referred back to the Standards Committee". The Review Officer advised that it was his intention to bring finality to the process.

[24] The paragraphs which follow in this decision under the heading 'Nature and scope of review' were attached to the letter.

[25] Mr ZF responded with two letters on 2 October 2017, in one of which he sought that the Review Officer (Mr Vaughan) recuse himself. Mr ZF was under the impression that Mr Vaughan had been a member of the Canterbury Westland Standards Committee which had considered previous complaints about him and that Mr Vaughan was also a member of the Law Practitioners Disciplinary Tribunal (or the Lawyers and Conveyancers Disciplinary Tribunal) which had considered charges brought against him some years ago.

[26] Mr Vaughan responded by acknowledging that whilst he may have been a member of the Disciplinary Tribunal which considered charges against him, he had no recall of the matter and "there is, in any event, authority for the principle that a judicial officer is not required to recuse him or herself merely because he or she has heard previous charges/cases against the same person".

[27] Mr Vaughan has never been a member of a Canterbury Westland Standards Committee.

[28] At the commencement of the review hearing, Mr ZF advised he did not wish to pursue his request for recusal.

### **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:<sup>25</sup>

... 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

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<sup>25</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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:<sup>26</sup>

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.

## **Review**

### *Delegation*

[32] An applicant-only hearing took place in Christchurch on 3 October 2017 attended by Mr ZF and Mr and Ms BU, both of whom brought support persons.

[33] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 of the Act. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

## **Conflict of Interests**

[34] Mr ZF acted for the estate of Mrs BU Senior

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<sup>26</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[35] Mr ZF acted for the trust established for Ms BU (G) by Mrs BU in her will. The trustees of the trust were Mr H BU (H) and G

[36] G was the beneficiary of the trust.

[37] The trust capital was one half of Mrs BU's estate. The other half passed directly to Mr BU.

[38] On Mrs BU's death, the trust capital (being the other half of Mrs BU's estate) passed to H. He was separately advised on all matters relating to the trust and the estate.

[39] G entered into an agreement to purchase a replacement home. Mr ZF acted for her in respect of that purchase.

[40] Mr ZF prepared a resolution to be signed by G and H as trustees of the trust. It read:

1. That the application by G BU for a loan of up to \$70,000 to assist in the purchase of [Property 1] (which she has purchased conditional upon the sale of her own property) is approved; and
2. That the monies are advanced on first mortgage over the property and are repayable upon demand; and
3. That there is no need for interest to be charged on the loan as the said G BU is the life tenant of the Estate.
4. That the said G BU is responsible for the legal costs of the security documentation;
5. That there is no need for a registered valuation of the property on account of the Quotable Value valuation (copy **attached**) being \$320,000, and in all probability the registered valuation will be greater than that if it were to be made; and
6. That the said G BU has first disclosed her interest as the life tenant in the Estate before the resolution is completed.

[41] The resolution was signed and dated 21 December 2009.

[42] Mr ZF prepared the mortgage documents to secure the advance. The advance of \$70,000 was to be secured by first mortgage over the property being purchased. G also needed access to trust funds (\$22,500) to enable her to pay the deposit on the new property. Mr ZF prepared a mortgage to secure those funds by way of a mortgage over her existing property.

[43] Mr ZF provided the two sets of securities to G and in the covering letter, dated 17 February 2010, he advised he had prepared them “pursuant to H’s requirement that any money lent to you by your mother’s Estate must be secured by way of a mortgage.

[44] He briefly explained the nature of the securities and concluded the letter with a request:

Will you kindly acknowledge on the copy letter **attached** that you fully understand the nature and implications of the mortgage documents that you will be signing.

[45] The letter is marked – “by hand delivery”.

[46] The accompanying acknowledgement included the following statements:

I acknowledge that I am not signing an A & I because of your telling me that the mortgage will not be registered on account of it being repaid in the normal course from the proceeds of sale from my property when that occurs on Friday 26 February 2010.

I further acknowledge that if anything untoward was to happen that you are able to arrange for the estate to register a caveat over my property.

I also acknowledge receipt of the mortgage over my new property for \$70,000 to my mother’s estate. This is also at nil per cent and is repayable when the property is sold, although it is expressed to be repayable upon demand. You have advised me that this is a normal way for family moneys to be advanced and secured in property transactions.

[47] At the review hearing, Mr ZF seemed unable to comprehend the conflict of interests between acting for the lender and the borrower in these transactions. He argued that he was merely implementing the terms of the trust resolution, ignoring the fact that it was he who had prepared the resolution.

[48] That submission fails to acknowledge the significant conflict that existed for G being both lender and borrower, with the separate and quite distinct obligations she was assuming in those different capacities. H also had an interest as lender, and, as became apparent, he was concerned to protect his interest as the ultimate beneficiary of the trust funds.

[49] The differences became evident when H stipulated that the mortgage should include a provision which required the amount necessary to redeem the mortgage was to include a sum equivalent to the proportion that the principal sum bore to the increase in the value of the property.

[50] Mr ZF resisted these requests. He argued on G's behalf that she was entitled to receive the "net annual produce" and this included any increase in the value of the property. Therefore, Wayne was not entitled to share in any increase in the value of the property. He also argued that the terms of the resolution approving the advance did not provide for it.

[51] Pressure was brought to bear on H to abandon his requests. Mr ZF advised him he could be sued, as G faced the possibility of being unable to settle her purchase if the funds were not made available. In addition, Mr ZF advised that any default would mean that G would not receive the benefit of a clause which provided for a reduction of the purchase price.

[52] I am left in no doubt that Mr ZF had a conflict of interests in the many roles that he assumed. This arose largely because both G and H themselves were conflicted in the positions they held — G, as lender to herself and H as lender and end beneficiary. Although Mr ZF recognised the conflicts that H and G had, in a letter to Wayne dated 18 March 2010, he did not help to resolve those conflicts by acting for them in their several capacities.

[53] Mr ZF should have restricted his role to acting as the lawyer for the Trust and restricted himself to providing advice to G and H as trustees only. The finding of the Standards Committee that Mr ZF's conduct was conduct unbecoming is modified to being unsatisfactory conduct by way of conduct unbecoming, pursuant to s 12(b)(i) of the Lawyers and Conveyancers Act 2006.

### **Breach of s 110 Lawyers and Conveyancers Act 2006**

[54] The Standards Committee also found that Mr ZF had breached s 110 of the Act in that he had made the advance of \$70,000 to G without approval from H.<sup>27</sup> At the review hearing, Mr ZF advised that H had authorised the advance to proceed notwithstanding the issue as to inflation protection remaining unresolved as at the date of settlement. Mr ZF's contention is drawn from the following exchange of emails on 17 and 18 February 2010:

Dear Mr BU

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<sup>27</sup> Standards Committee determination at [55].

Further to recent correspondence, we inform you that the sale of G's existing property and purchase of her new property have both been confirmed with settlement set down for 26 February 2010.

G is required to pay a \$36,500 deposit to the agent today for her purchase of 73 Peverel Street. Of this amount, \$14,000 is being paid from funds received from the deposit of her sale. The remaining \$22,500 needs to be borrowed out of the \$70,000 already agreed to by you. The security for this loan is a first mortgage over her existing property. G has already signed this mortgage document and we attach a copy for your information.

G has also signed in advance the mortgage document for the \$70,000 loan. This will [be] registered on the title of her new property upon settlement next Friday. We also enclose a copy of this document for your information

If you have any questions or comments, will you please not hesitate to contact us.

Yours sincerely  
Mr ZF

Ms XF  
Solicitor  
ZF Lawyers

Dear Mr ZF

I am pleased to see that G's property sale and purchase have been confirmed.

I have received mortgage documents by fax from XF but cannot see on those anything that pertains to my instructions (agreed by G & LR) on the inflation protection of the trusts funds. I am advised that this arrangement is commonly handled by a trust purchasing a share of a property.

If this is a separate document could you please email it through.

If you are addressing the matter later to avoid delaying the house change process then that is fine.

I look forward to your advice.

Yours sincerely  
HBU

Dear XF,

I confirm receipt of your email regarding G's mortgage and am pleased that her sale and purchase have been confirmed.

There is a matter pertaining to the mortgage that I will address to Mr ZF but it is not now to effect the matters in progress. [sic]

Thank you for your advice.

H BU

[55] In his report, Mr BS opined that Mr ZF “breached s 110 Lawyers and Conveyancers Act 2006 when he advanced the mortgage funds contrary to H BU’s direction”. The Committee agreed with Mr BS.<sup>28</sup>

[56] Neither the Standards Committee or Mr BS referred to the emails noted at [54] above. In his email sent on 18 February 2010, H advised that the issue was “not now to effect [sic] the matters now in progress”. That did not amount to a prohibition against the loan proceeding. Mr ZF’s contention that H had authorised the advance to proceed on the understanding the issue would be addressed and resolved subsequently is accepted.

[57] At the review hearing, Mr BU did not seek to emphasise that Mr ZF had proceeded with the advance without authority. The finding that Mr ZF was in breach of s 110 of the Act by making the advance cannot be sustained.

#### **Deduction of fees from mortgage payments**

[58] Mr BU’s initial complaint was dated 16 December 2009. In a subsequent email to the Lawyers Complaints Service, on 9 February 2010, Mr BU referred to a further issue arising out of a letter received from Mr ZF’s office on 19 January 2010. In that letter, which is presumably a letter to all contributors, Ms XF advises:

At present, there is \$3,604.29 in our firms [sic] trust account. This is from income received from GC Management since the last interest instalment paid to you at the beginning of December 2009. We propose to take \$3,300 as part payment of the October proceedings for costs – see our letter to [Law firm] of today. Of the remaining \$304.29, \$280 will pay for further Court filing fees for the new set of proceedings, leaving a small balance in Trust of \$24.29. Once a number of payments from GC Management have been received, we will be able to make another interest payment to all contributors.

We draw to your attention that the mortgage document provides for payment of our enforcement costs, as well as the principal sum, interest and all penalties.

[59] That prompted Mr BU to raise an additional complaint:

The use of mortgage interest instalments to pay proceedings costs without the authorisation of contributors...

[60] In response to this Mr ZF pointed out, in a letter to the Lawyers Complaints Service dated 22 February 2010, that the payments received into the borrower’s account were:

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<sup>28</sup>Standards Committee determination at [36].



Not interest payments from the borrower but rather net rental proceeds from the management company, GC Property Management & Investments Limited which is an independent company from the borrower.

[61] In respect of this matter Mr BS says:

Mr ZF now states under oath but without corroboration that "...the borrower made it clear to me when he was directing his manager to pay the net proceeds of the letting of the rooms to my trust account, that the payments were on account of all the borrower's liabilities under the mortgage, not just the liability to pay interest."

Mr ZF has been unable to produce any written authority from the contributors to deduct costs. The questions for the Committee are whether in the absence of a written authority, the right to deduct costs or to set off costs from funds in hand is in some way implied and if so whether they take priority over interest payments.

[62] The Standards Committee said:

61. Mr BS has posed the question for the Standards Committee as to whether, in absence of a written authority, the right to deduct costs or to set off costs from funds in hand, is in some way implied and if so whether they are taking priority over interest payments. The Standards Committee considers that Mr ZF had no implied right to help himself to funds lodged with him and which were intended for a specific purpose

62 The Committee is not satisfied that Mr ZF enjoyed the right to take his fee in this way. In the absence of a written authority to deduct costs he was not entitled to do so.

[63] I am unable to agree with the Standards Committee. The payments received from the property management company would have been credited to the borrower in Mr ZF's trust account. In the usual course of events, a mortgage interest payment would then have been transferred by way of journal to the contributors' separate accounts and from there paid out to each contributor after deduction of any commission.

[64] In the present instance, payments were being received from the borrower, effectively for general purposes, as the payments were being derived from rental receipts from the property manager rather than from the borrower for specific interest instalments. I do not agree with the Standards Committee when it observed that the funds had been paid in for a specific purpose.<sup>29</sup>

[65] If Mr ZF had rendered an account for enforcement action it would have been addressed to the borrower and the fee posted to the borrower's ledger in the trust

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<sup>29</sup> Standards Committee determination at [34].

account. Unfortunately, Mr ZF has not been able to produce the accounts or the trust account ledger but whether or not the bill had been rendered and posted does not alter the process. On this basis, there would have been no need for Mr ZF to obtain consent from the contributors as his fees were being deducted before the balance was distributed to the contributors.

[66] It is inescapable however, that Mr ZF's clients were the contributors to the mortgage. In effect, his interests (to have his fees paid) conflicted with the interests of his clients. He has preferred his own interests over those of his clients thereby increasing the losses sustained by each borrower. In so doing also, Mr ZF has passed liability for his costs on to the contributors, and it is clear that he did not either render his account to the contributors or have their authority to use the funds that would otherwise have been credited to them for this purpose.

[67] In summary, therefore, I reach the same conclusion as the Standards Committee, that this conduct constitutes unsatisfactory conduct, albeit with somewhat different reasoning.

### **Fees and reporting**

[68] Mr BU complained that Mr ZF's costs to administer his parents' estates and his sister's life interest were excessive. He included in his complaint about the quantum of the costs, a complaint that Mr ZF did not provide details of costs when requested or provide invoices for approval by the executors.

[69] It must be noted that the majority, if not all, of the costs in connection with these matters were incurred prior to 1 August 2008. The relevance of that date with regard to the quantum of the fees is that a lawyer's conduct with regard to billing must have been such as to constitute conduct unbecoming pursuant to the Law Practitioners Act 1982 thereby enabling the Standards Committee to consider the complaint.<sup>30</sup> In simple terms, the threshold to be achieved before billing pre-1 August 2008 can be considered under the Act, was significantly higher than under the present legislation.

[70] There are however, some additional issues arising from Mr BU's complaints that the Standards Committee does not seem to have considered. Mr BU says that he

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<sup>30</sup> Lawyers and Conveyancers Act 2006, s 351(1).

requested costs' updates from Mr ZF on a number of occasions but these were not provided.

[71] In a letter to the Standards Committee dated 29 January 2010, Mr ZF says the fees were charged progressively. He says that:

The invoice charges were fully detailed and rendered to the BUs who had the opportunity to query or dispute any charges – they never did.

[72] The statements by Mr BU and Mr ZF cannot be reconciled and were not able to be clarified at the review hearing. For reasons that were not clear, Mr ZF advised he was unable to access his files. Neither were his trust account records available in either hard copy or electronically.

[73] Mr BU says, in his 15 December 2009 letter of complaint, that:

When statements for estate matters were finally supplied (legal fees already having been deducted from the estates' funds) they were presented as separate documents, which were difficult to follow as they covered our Father's Estate, our Mother's Estate, the Combined Estates and the life Tenant Trust. Charges were mainly described as being 'for legal services'; which is very hard to pin down.

[74] Mr BU advised he had identified the following costs from the statements:

Estate of Mrs BU	\$31,109.23
Estate of Mr BU	\$25,112.30
Estate of Mr and Mrs BU	\$10,787.65
Life Interest	\$311.62

[75] Mr BS reported:

From what I could find from statements which were sent out Mr ZF banked up his billing as the following dates (and amounts) demonstrate:

15 March 2005	\$10,787.65
15 August 2005	\$25,112.30
15 August 2005	\$31,109.23
8 March 2006	\$9,169.79
9 March 2006	\$2,340.00

[76] The statements produced by Mr ZF and provided by Mr BU with his complaint has entries that follow the following format:

TO Total bills of costs for periods specified  
 Period 2 \$3,566.25 (bill rendered you with our last report)

Period 3	\$1,406.25
Period 4	\$1,153.13
Period 5	\$281.25
Period 6	\$337.50
Period 7	\$2,390.63
Period 8	\$1,321.88
Period 9	\$2,694.38

[continuing to period 24]

[77] There were no individual bills of costs provided and the fact that Mr BU says he continued to ask Mr ZF for details of ongoing costs leads to the conclusion that Mr ZF did not provide them progressively as he asserts.

[78] Without being provided with a copy of the trust account ledger it is not possible to ascertain when the costs were deducted, but given the format in which the accounts were provided (i.e. with reference to periods of time), the inference to be drawn is that fees were deducted progressively, but no bills rendered to the executors.

[79] A general comment with regard to the format of the 10 statements dated 9 March 2006 provided by Mr ZF is that they appear to amount to nothing more than a transcription of the trust account ledgers. They are difficult to follow and cannot be considered to amount to clear and understandable reports which should have been provided to the executors.

[80] Mr BU says the bills totalled \$67,320.

[81] The total amount of the fees identified by Mr BS is \$78,518.97. Without the files and records the amounts cannot be reconciled. However, this also adds to the conclusion that Mr ZF's reporting and billing was inadequate.

[82] The change in legislation on 1 August 2008 again needs to be considered. All of the work associated with the estates occurred prior to 1 August 2008. Mr BU's complaints are dated 15 December 2009. A complaint about conduct prior to 1 August 2008 made after that date may only be considered if the conduct is such that "proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982."<sup>31</sup>

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<sup>31</sup> Lawyers and Conveyancers Act 2006, s 351(1).

[83] Weighing up all of the evidence, I have come to the conclusion, on a balance of probabilities, that Mr ZF's lack of reporting and inadequate reporting would have constituted conduct unbecoming by reason of the fact that provisions of the Trust Account Rules<sup>32</sup> and Regulations<sup>33</sup> have not been complied with. The Rules and Regulations have been reproduced in an Appendix to this decision.

[84] Mr ZF's conduct in this regard therefore attracts a further finding of unsatisfactory conduct by way of conduct unbecoming.

[85] Section 352(1) of the Act provides:

**352 Penalty**

- (1) If a complaint is made under this Act about conduct that occurred before the commencement of this section, any penalty imposed in respect of that conduct must be a penalty that could have been imposed in respect of that conduct at the time when that conduct occurred.

[86] Penalties that could have been imposed under the Law Practitioners Act included a censure and a fine not exceeding \$2,000.<sup>34</sup> The censure by the Committee is therefore reinforced and a further fine of \$500 is appropriate in the circumstances to reinforce the additional finding of unsatisfactory conduct.

**Quantum**

[87] The Committee did not request a formal cost assessor's report but Mr BS viewed Mr ZF's files and reviewed the work undertaken. He said:

Given the complexities of the estates and the issues arising out of the disputes between the siblings, I believe the time taken was understandable.

In relation to the life tenant's costs I have formed the view that they were of a satisfactory level for the work covered although the complaint is understandable given the lengthy period the bill covered.<sup>35</sup>

[88] This aspect of Mr BU's complaint can be taken no further and it is appropriate to rely upon Mr BS's report in this regard. In the circumstances, no further action is taken with regard to the quantum of Mr ZF's fees.

**Other matters**

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<sup>32</sup> Solicitors' Trust Account Rules 1996, r 5(8) (repealed).

<sup>33</sup> Solicitors' Trust Account Regulations 1998, regs 3(1)(a), 8 (repealed).

<sup>34</sup> Law Practitioners Act 1982, s 106(4)(a) (repealed).

<sup>35</sup> BS report page 3.

[89] I have addressed above all of the issues raised on review by both Mr ZF and Mr BU. Other than the modifications and reversal of the Standards Committee determination, I reach the same conclusion as the Standards Committee in respect of all other matters, and confirm the determination of the Committee in those regards.

### **Decision**

1. The Standards Committee determination with regard to the conflict of interest is confirmed. The finding of conduct unbecoming is modified to one of unsatisfactory conduct by way of conduct unbecoming as provided in s 12(b)(ii) Lawyers and Conveyancers Act 2006.
2. The finding that Mr ZF was in breach of s 110 Lawyers and Conveyancers Act 2006 is reversed.
3. The finding of unsatisfactory conduct in respect of deduction of fees from funds received from the property management company is confirmed but the reasons modified as set out in paragraphs [58]–[67]
4. Mr ZF's conduct in reporting and deduction of fees with regard to estate and trust matters constitutes unsatisfactory conduct by way of conduct unbecoming. Mr ZF is censured and ordered to pay a fine of \$500 pursuant to s 106(4)(a) of the Law Practitioners Act 1982 and s 152(1) Lawyers and Conveyancers Act 2006.
5. In all other respects the determination of the Standards Committee is confirmed.

[90] These findings and orders are made pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006.

### **Costs**

[91] Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 this Office has a discretion to order payment of costs as the LCRO sees fit. The Costs Orders Guidelines issued by the Office provides that where a finding of unsatisfactory conduct is made or upheld costs orders will usually be made against the practitioner in favour of the Society.

[92] In this review a further finding of unsatisfactory conduct has been made while a finding of unsatisfactory conduct by the Committee has been reversed.

[93] The review involved a significant amount of material and was of more than average complexity. A hearing was required.

[94] In accordance with the Guidelines, the appropriate order for costs is \$1,600 to be paid to the New Zealand Law Society by no later than 27 November 2017.

**DATED** this 27th day of October 2017

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**D Thresher**  
**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 ZF as the Applicant  
Mr and Ms BU as the Respondents  
[Area Standards Committee X]  
New Zealand Law Society

## APPENDIX

- (a) Rule 5(8)
- (8) Each solicitor shall provide to each client for whom trust money is held a complete and understandable statement of all trust money handled for the client, all transactions in the client's account, and the balance of the client's account –
- (a) In respect of ongoing investment transactions, at intervals of not more than 12 months; and
  - (b) In respect of all transactions which are not completed within 12 months, at intervals of not more than 12 months; and
  - (c) In respect of all other transactions, promptly upon or prior to the completion of the transaction.
- (b) Regulations 3(1)(a) and 8
- 3. Solicitor's duty to account for trust money and keep trust account records –**
- (1) Every solicitor who receives or holds trust money must –
- (a) Account properly for trust money to his or her clients; and
  - ...
- 8. Restriction on debiting trust accounts with fees**
- (1) No trust account may be debited with any fees of a solicitor (except commission properly chargeable on the collection of money and disbursements), unless—
- (a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
  - (b) An authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.
- (2) If fees are debited under subclause (1)(a) before an invoice is delivered or posted to the person liable for the payment or to that person's solicitor, an invoice must be delivered or posted to that person or to that person's solicitor immediately after the fees are debited.