

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Waikato-Bay of Plenty Standards Committee 1

**BETWEEN**

**MS AZ**

of [North Island]

Applicant

**AND**

**MR YX**

of [North Island]

Respondent

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

**DECISION**

**Background**

[1] The Applicant and her former solicitor Mr BA, were Trustees of a Trust known as the AAQ Trust (the Trust).

[2] Mr BA had retired from his former firm in [North Island] and the Applicant consulted with Mr YW (Mr YW) of the firm, AAR in [North Island] with a view to Mr YW assuming the role of solicitor for the Trust, and specifically to document the retirement of Mr BA and appointment of the new Trustee.

[3] Mr YW himself was intending to retire the following year and after his retirement the firm became known as AAS. I will refer to the firm therefore as "AAS" as it was following Mr YW's retirement that the matters complained of arose.

[4] The Trust owned three properties, one in Auckland and two in [North Island]. Consequently, in addition to the Deed to effect the retirement of Mr BA and appointment of a new Trustee, it was necessary to register a transfer of the title to these properties into the names of the new Trustees.

[5] Westpac Bank had a mortgage over the property in X and one of the [North Island] properties and a file note on the firm's file, presumably by Mr YW, referred to a need to obtain the consent of the Bank to the transfer to the new Trustees.

[6] The file note also records a figure of \$1,000, which is acknowledged to be the amount indicated by Mr YW as being the estimated cost of the legal work to attend to this. Unfortunately, there is no indication on the file note whether this figure included GST and disbursements. The Applicant says that it did. The Respondent, Mr YX, says that it represented the fee only and did not include disbursements. Mr YX, however does not say whether he considers it included GST or not, but it is assumed for the purposes of this review that his position is that it did not.

[7] It is relatively clear however that Mr YW intended that the sum of \$1000 would cover the cost of documenting the change of Trustee, obtaining the bank's consent to the transfer, and effecting a change of the registered proprietors of the properties into the names of the new Trustees.

[8] The Applicant wished to appoint her sister as the replacement Trustee. This presented a problem identified by Mr BA, that the Trust Deed contained a provision that one of the Trustees of the Trust had to be independent of the Applicant's family. There were to be two Trustees, the Applicant and her sister. Consequently, to appoint the Applicant's sister as a Trustee, the Trust Deed had to be varied to delete the restriction as to who could be a Trustee.

[9] This had not been anticipated by Mr YW and was not included in his estimate of costs.

[10] In addition, when he wrote to the bank to seek its consent to the transfer, the bank advised that it required the existing mortgages to be discharged, a Deed of Novation to be executed, new mortgages prepared and executed by the new Trustees, and registered. All of this would not have been within Mr YW's contemplation when he provided his estimate.

[11] In the course of this being carried out, the Applicant decided that she wished to refinance the Trust's loans with Kiwibank. Kiwibank had an arrangement whereby a straightforward refinancing was carried out at no cost to the customer. This was not an arrangement whereby the work was carried out by the client's lawyer whose fees were reimbursed to the client, but involved Kiwibank doing the work itself in conjunction with a firm of solicitors retained by Kiwibank for this purpose.

[12] Because the titles to the properties had not been transferred at the time the refinancing was to take place, Kiwibank was unable to attend to the refinancing in the usual way and it was necessary for Kiwibank to instruct AAS to carry this out.

[13] Because the documentation required by Westpac involved discharging the existing mortgage, and registering a new mortgage for Westpac, it appears that the Kiwibank mobile manager formed the view that there should be no additional cost for AAS to complete and register the mortgage to Kiwibank.

[14] There are two points to note here:

- (i) The estimate from Mr YW only contemplated that Westpac would consent to the transfer and not require replacement documentation; and
- (ii) Contrary to the view expressed by the Kiwibank mobile manager, refinancing would necessitate attendances additional to those required to complete the work required by Westpac.

[15] Consequently, in addition to the necessity for the Trust Deed to be varied, AAS was to be involved in additional work to that anticipated by Mr YW even if Westpac were to remain the Trust's lender, and further work would be required if the Westpac facilities were to be replaced by Kiwibank.

[16] It was also noted late in the piece, that the registered proprietors of one of the [North Island] properties still included the Applicant's ex-husband, who had retired as a Trustee of the Trust. Although a Deed of Retirement had been executed, it seems that registration of a transfer recording the name of the new Trustees had been overlooked. AAS was subsequently involved in additional attendances to effect this.

[17] Before all of this work was completed, Mr YW retired and Ms YV, a legal executive in the firm, assumed responsibility for the file.

[18] In September 2009, the Applicant had asked Ms YV to advise what the legal costs would be to refinance the Westpac facilities. Ms YV had advised that the costs with regard to the Trust would be in the vicinity of \$1200 to \$1500 plus GST and disbursements, and the cost to effect the refinancing would be in the vicinity of \$600 to \$800 plus GST and disbursements.

[19] The Applicant pointed out that Mr YW had advised her that costs with regard to the Trust would be no more than \$1000, and that in an earlier conversation with Ms YV, she had indicated that the cost to refinance would be between \$500 and \$600.

[20] Ms YV responded by email dated 2 October 2008, agreeing to keep to Mr YW's estimate with regard to the costs relating to the Trust but pointing out that the estimate

of costs with regard to the refinancing included two properties which involved additional costs to a “standard” refinancing. She agreed, however, to fix the costs of refinancing at \$600 plus GST and disbursements.

[21] Because the Kiwibank mobile manager had advised the Applicant there was no additional work necessary to put the Kiwibank security in place, and because there was some misunderstanding as to whether the fee estimated by Mr YW included GST and disbursements, the Applicant expected that all of the work would be carried out for her by Ms YV for no more than \$1000.

[22] The refinancing was completed and the total costs charged by Ms YV was \$1,600 plus GST and disbursements, a total of \$2,348.

[23] The Applicant was unaware of this until she received the report from Ms YV following completion of the work, and realised that the amounts drawn down by Ms YV from Kiwibank included sufficient to make payment of the firm’s costs and disbursement.

### **The complaint**

[24] The Applicant was unhappy about this and met with Mr YX on 24 February 2010 to discuss the matter. It would appear that Mr YX advised her that the firm was not prepared to offer any further concessions to her by way of a reduction in fees. The Applicant followed that meeting up with a letter on 28 February 2010 with a request that Mr YX reconsider the firm’s position.

[25] Mr YX responded by letter dated 14 April 2010, and in conclusion, advised that he considered “the fees charged were reasonable and met the estimate originally given by Mr YW”.

[26] The Applicant lodged a complaint with the Complaints Service of the New Zealand Law Society on 17 April 2010. With the complaint form the Applicant included copies of the correspondence between the Applicant and Mr YX and included a request for “the Complaints Officer to make a fair and reasonable settlement amount”.

### **The Standards Committee decision**

[27] The Standards Committee determination names Mr YX only as the person complained about. In fact, the complaint form completed by the Applicant referred to Mr YX and Ms YV as the persons against whom the complaint was lodged.

[28] The Standards Committee resolved pursuant to s138(2) of the Lawyers and Conveyancers Act 2006, to take no further action in respect of this complaint. This decision was reached for the following reasons:-

- [a] that the Standards Committee had no jurisdiction to consider complaints about costs that are less than \$2,000 pursuant to Regulation 29(b) of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008;
- [YX] that it was not accepted that the practitioner had acted without instructions and the Applicant had not objected to the solicitors undertaking the work;
- [BA] that the costs rendered were within the estimate provided by Mr YW and were considered reasonable;

### **The application for review**

[29] The Applicant is unhappy with the decision of the Standards Committee for the reason that she considers the Committee's assessment of her complaint is unfair. It is noted that the Applicant refers to her complaint as being against Mr YX, but as the complaint was lodged against Mr YX and Ms YV it is appropriate that the review proceed on that basis.

[30] The outcome sought by the Applicant is a reimbursement for the costs charged by AAS which the Applicant considered was unnecessary because Kiwibank was able to do the work.

### **Review**

[31] Both parties consented pursuant to s206(2)(b) of the Lawyers and Conveyancers Act 2006 to the review being conducted by the LCRO on the basis of such information, records, reports, or documents available. This included the firm's files.

[32] A review by the LCRO is a review of all matters arising out of the original complaint, and is not necessarily restricted to the matters referred to in the application. Consequently, although the complaint is primarily about costs which the Applicant considers were unnecessarily incurred, the review also needs to consider the drawdown and deduction of costs. This was a matter referred to by the Applicant in her complaint to the Law Society when she noted that she was unaware that this had been done until receipt of the statement and report from Ms YV following completion of the matter in December 2009.

### **Was the work authorised?**

[33] The first matter that must be dealt with is the suggestion by the Applicant that the work was unauthorised and unnecessary because Kiwibank was able to do the work. This is not correct. Kiwibank was only able to carry out the work if the registered proprietors of the properties were correctly recorded and this is something that AAS was in the course of doing. Kiwibank therefore issued its instructions to AAS to complete the refinancing in conjunction with the change to the titles.

[34] On receipt of these instructions, Ms YV proceeded to complete the refinancing in the usual way. This required the Applicant to execute the Kiwibank loan documents provided to her by Ms YV and it would have been clear to her that Kiwibank staff were not involved in any way with the process. I do not think it is tenable for the Applicant to assert that Ms YV was carrying out the work to complete the refinancing without instructions from her.

[35] In any event, the instructions came from Kiwibank, but this is a technicality which may not have been understood by the Applicant.

### **Quantum**

[36] The complaint concerning costs could be disposed of readily if it were to be considered by reference to quantum only. Regulation 29 of the Complaints Service and Standards Committee Regulations provides as follows:

“If a complaint relates to a bill of costs rendered by a lawyer ... unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if a bill of costs –

(YX) relates to a fee that does not exceed \$2,000 exclusive of Goods and Services Tax.”

The fee charged by AAS was \$1,600 plus GST and disbursements. Consequently the Committee is precluded from dealing with the complaint unless it is satisfied that there are special circumstances that would justify otherwise.

[37] In considering this aspect of the complaint it is appropriate to have regard to the estimate provided by Mr YW. The initial question is whether the figure of \$1,000 estimated by Mr YW included GST and disbursements. Unfortunately, there are no means of resolving the conflicting statements in this regard. Mr YW did not record his estimate other than in the file note, and I would expect that even if Mr YW and the Applicant were to be questioned personally, there would remain a conflict between

them as to what was included in the estimate. In the end, I have not found it necessary to make any determination in this regard.

[38] The estimate provided by Mr YW was based on the fact that he anticipated that Westpac would consent to the transfer to the new Trustees without additional documentation. Instead, the Bank required its existing mortgage to be discharged, and new securities prepared, executed and registered. In addition, it was necessary to vary the Trust Deed to accommodate the Applicant's wish to appoint a member of her family as a replacement Trustee. None of this was anticipated by Mr YW and consequently would not have been included in his estimate of \$1000.

[39] Notwithstanding this, the firm agreed to carry out all of the work within the estimate provided, but on the basis of its understanding that the estimate was exclusive of GST and disbursements.

[40] When the Applicant made a decision to change banks, she sought advice from Ms YV as to the costs associated with that. She was advised by Ms YV that the cost would be \$600 plus GST and disbursements.

[41] Where things went astray, is that the Applicant assumed that because the Kiwibank refinancing was normally carried out at no cost to the customer, the same would apply in this instance. This assumption was made on the advice of the mobile lending manager, who advised that it had been agreed with the Applicant's solicitors that there would be no extra cost to substitute the Kiwibank mortgage for the Westpac documentation. There is no evidence on the file of any discussion between Ms YV or any other member of AAS and the mobile manager to this effect. Mr YX notes in his letter of 19 May 2010 to the Complaints Service that Ms YV is confident that she did not agree with the mobile lending manager that there would be no charge for the mortgage.

[42] It seems that there has been a lack of communication between the Applicant and Ms YV in this regard, or at least a misunderstanding. Kiwibank was unable to do the work as the transfer of the titles needed to be attended to before the refinancing could take place. As this was all to be carried out contemporaneously, it needed to be carried out by Ms YV and it is understandable that the firm would want to be paid for that work.

[43] The cost to effect a refinancing had already been communicated to the Applicant as being \$600 plus GST and disbursements, and the work was carried out for that cost.

[44] In all of the circumstances, I consider that the Applicant has benefited significantly from the firm's agreement to keep to Mr YW's initial estimate. The firm carried out additional work to vary the Trust Deed and also to subsequently complete the transfer of the title of the other [North Island] property. It would also appear that gifting documentation was included in the fee of \$1,600 and considerably more attendances were required to obtain everything necessary from the Applicant's previous firm in [North Island] than would have been anticipated by Mr YW.

[45] AAS would have been justified to charge fees for this additional work required of it. Consequently, I concur with the view of the committee that the fee charged by AAS was fair and reasonable, even on the basis that it was exclusive of GST and disbursements.

### **The Kiwibank email**

[46] The Applicant's expectations were largely based on the information provided to her by the Kiwibank mobile lending manager.

[47] In his email dated 16 April 2010 he commented that: "Had the solicitor completed the initial transactions in a reasonable time-frame, [Kiwibank] would then have been able to complete the refinance without referral to them". The implication of this statement, is that AAS had been tardy in completing the work. This is unfair to AAS as it is apparent from the file that not only was additional work required, but there were delays occasioned by the Applicant's previous firm. It is only from a proper examination of the file that a view could be expressed as to the reasons for the delays and the mobile manager did not have this.

[48] He also stated that: "... if the solicitor had arranged the Trust so that the independent Trustee was a company (in the modern manner) and not an individual, then none of the title transfers or mortgage discharge/replacement for WC would have been necessary". Again, this seems to imply some fault on the part of AAS.

[49] This too is unfair. AAS played no part in the establishment of the Trust, and in any event, even if there had been a corporate trustee, on changing solicitors, there would need to be a transfer from the corporate trustee of the previous law firm to the corporate trustee administered by AAS

[50] I cannot help but think that the comments by the mobile manager have misled the Applicant to some extent.



### **The drawdown of funds and deduction to pay fees**

[51] The loan from Kiwibank was divided into two parts – a table portion of \$96,000 on a fixed rate, and the balance of \$70,000 on a revolving credit basis. In paragraph 1 of her complaint to the Law Society, the Applicant complained that Ms YV had increased the loan from the amount required to repay Westpac (\$95,306.73) to \$96,000. This is not correct. The table portion of the loan was on a fixed rate, and had to be drawn-down in full, as otherwise there would have been effectively a part repayment which would have attracted penalty interest.

[52] However, the Applicant is justified in complaining that the amount drawn down on the revolving credit basis, was increased by Ms YV to include sufficient to pay the firm's costs and disbursements without her approval. This inherently involved a deduction of costs without approval of the client.

[53] In his response to this aspect of the complaint on 14 April 2010, Mr YX advised that "On settlement of the refinance our fees and disbursements were drawn down for payment with the funds necessary to clear your existing mortgages. This is common practice."

[54] While it may be common practice for sufficient funds to be drawn from the lending bank to clear costs and disbursements, this can only be done with the authority and agreement of the client. It is, after all, increasing the client's indebtedness to the bank which should only be done with the client's authority.

[55] Having drawn down those funds, the next question is whether the firm was entitled to deduct its costs. This is a matter which has been considered by the LCRO in *Abbott v Macclesfield* (LCRO 40/2009). The LCRO referred to the decision of *Heslop v Cousins* [2007] 3 NZLR 7679 in which Chisholm J held that "even if an account is rendered, a solicitor is not entitled to deduct his or her costs from funds held in a Trust account if the deduction would be contrary to the client's directions." The position adopted by the lawyer defendant in that case was a commonly held position within the profession, namely that, provided an invoice had been rendered, a practitioner was entitled to deduct fees from funds held. In *Heslop v Cousins*, the solicitor had received the funds for the specific purpose of repaying a loan to the bank, and had also received specific instructions from the client that the funds were not to be used for payment of the practitioner's costs. Quite clearly, in that case, to then deduct fees from those funds was contrary to the client's direction. In that case the relevant legislation was s89 of the Law Practitioner's Act 1982. That section is now reflected in s110 of the Lawyers and Conveyancers Act 2006 which provides as follows:

[1] A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person –

(b) must hold the money, or ensure that the money is held, exclusively for that person to be paid to that person or as that person directs.”

[56] The LCRO concluded at paragraph [25] of *Abbott v Macclesfield* that:

“A lawyer may only deal with Trust funds in two ways pursuant to ...s110 of the Lawyers and Conveyancers Act 2006, that is by paying those funds to the client, or paying them at the direction of the client. Accordingly, if a lawyer wishes to deduct his or her fees from the funds of that client held in Trust, he or she must obtain the direction of the client to do so.”

[57] In the present circumstances, Ms YV clearly had no such direction from the Applicant, given that the Applicant was unaware of the draw-down by Ms YV to cover these costs and disbursements.

[58] It is noted that Mr YX did not assert any form of authority from the Applicant. It is a little surprising that this matter had not been discussed with the Applicant given the subsequent action of drawing down sufficient funds on the revolving credit facility to make payment of the firms costs.

[59] This aspect of the complaint has not been pursued to any extent by either party and in the circumstances I do not propose to make an adverse finding in respect of this matter. Nevertheless, I do signal that this aspect of the complaint is not entirely without merit.

[60] I have given some consideration to making a costs order pursuant to s210(3) of the Act to mark this. However, that section requires not only that the LCRO consider the proceedings to be justified, but that it is just to make such an order. Given that AAS has carried out significantly more work that was originally included in the estimate, yet charged the Applicant in accordance with the estimate, I do not think that it would be just to impose any order for payment of costs.

[61] Nevertheless, I do draw the attention of Mr YX and Ms YV to the discussion in LCRO 40/2009 as to the procedure to be adopted when deducting costs, and for the need to have the consent of the client when drawing funds under a bank facility to meet payment of these.

## **Decision**

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

**DATED** this 25<sup>th</sup> day of March 2011

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Owen 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:

AZ as the Applicant  
YX as the Respondent  
The Waikato Bay of Plenty Standards Committee 1  
The New Zealand Law Society