

LCRO 18/09

CONCERNING

The Lawyers and Conveyancers Act
2006

AND

CONCERNING

a review of a decision of a Complaints
Committee of the Wellington District Law
Society pursuant to Section 97 of the
Law Practitioners Act and s 355 of the
Lawyers and Conveyancers Act

BETWEEN

COMPLAINANT I of Otaki

Applicant

AND

LAWYER P, of Wellington

Respondent

REPORT

Background

[1] This is a review of a decision of the Complaints Committee of Wellington District Law Society in respect of a complaint by Complainant I against Lawyer P. Complainant I complained to the Wellington District Law Society in respect of conduct by Lawyer P relating to the estates of his mother and father. Complainant I is a life beneficiary under the will of his father. Both Complainant I and his sister are life beneficiaries in the estate of his mother.

[3] The trustees of the estate trust of both deceased are Complainant I and Lawyer P.

[3] At the heart of this complaint is a conflict between Complainant I and Lawyer P as to the proper use of funds held in the estates of his father and how that estate in particular should be administered. To a lesser extent the issues also appear to touch on the estate of Complainant I's mother. However while Complainant I is a beneficiary under that estate he is not a trustee or executor.

[11] The Wellington District Law Society inquired into the matter and its Complaints Committee provided a decision on 12 August 2008. That decision concluded that the conduct of Lawyer P did not amount to a professional breach. Accordingly the complaint was dismissed.

Nature of Review

[12] On 18 October 2008 Complainant I alleged to the Lay Observer that the Complaints Committee of the Wellington District Law Society had not properly considered his complaint. The Lay Observer commenced an inquiry into the treatment of the complaint in accordance with s 97 of the Law Practitioners Act.

[13] By virtue of the reform of the law relating to the regulation of Legal Practitioners the office of Lay Observers ceased to exist on 1 February 2009. Under of s 355 of the Lawyers and Conveyancers Act 2006 any inquiries which are incomplete as at that date are to be completed by the Legal Complaints Review Officer, a statutory Office created on 1 August 2008. In completing the inquiry the Legal Complaints Review Officer has the duties and powers that the Lay Observer would have had under the Law Practitioners Act 1982. It is on this basis that this inquiry is being undertaken. In conducting this review I therefore effectively stand in the shoes of the Lay Observer.

This Review

[14] In seeking a review of the decision of the Complaints Committee of the Wellington District Law Society Complainant I complained that the Committee had not dealt with the bulk of the matters raised. He complains that the Committee's decision does not deal with the fundamental issue that (he alleges) Lawyer P made investments in his own trust account without any consideration for the joint executor without reference to the terms of the wills. Complainant I also appears to be of the view that the Committee failed to properly deal with the complaint that Lawyer P dismissed a proposal of Complainant I regarding the investment of estate funds.

[15] The Lay Observer in commencing his enquiry requested the Law Society to comment on the treatment of the complaint, how it viewed the allegations of Complainant I, and how the matters are dealt with by the relevant professional rules. The Society responded by letter dated 16 March 2008 stating that it considered that the complaint had been properly dealt with and the decision was not "off the topic". It also expanded on the relevant professional rules.

[16] This review will focus on those matters raised in the complaint by Complainant I to the Lay Observer. That complaint concerned mainly the use and control of estate funds. This review will not look in detail at the charging practices of Lawyer P, the payment of interest to Lawyer P, the provision of information to Lawyer P or other secondary matters raised in the original complaint. These matters were not specifically raised by Complainant I with the Lay Observer. However, for completeness I note I have considered these aspects of the decision of the Committee. It is clear that these questions were considered by the Committee which concluded that Lawyer P had acted in accordance with the Rules. Given the rules and how they have been applied and interpreted by the profession these were reasonable conclusions to reach and conclusion which were open to the Committee on the material before it.

The Inquiry of the Society

[17] The role of the Lay Observer is to consider an allegation by a member of the public "concerning any District Law Society's treatment of a complaint about the conduct of a practitioner" pursuant to s 97(1) of the Law Practitioners Act 1982. The primary focus of the enquiry is therefore on the proper consideration of the complaint and the material put before the Society and its Complaint's Committee. I turn to consider the investigation of the Society.

[4] Complainant I complained to the Wellington District Law Society on 1 April 2008 about various aspects of the conduct of Lawyer P. They related mainly to the way in which funds were invested and income was distributed. Other aspects included complaints about charging, taking commission on interest earned and failure to respond to correspondence. With his complaint he provided a large number of supporting documents. Complainant I provided further documents on 28 April 2008. Lawyer P responded to the complaint on 1 May 2008 and also provided some additional documents. Complainant I replied to Lawyer P's response on 23 May 2008 and provided further documents. Complainant I provided a copy of a letter he wrote to Lawyer P dated 17 June 2008 to the Society and also wrote twice to the Society on 1 July 2008. Lawyer P provided further documents on 15 July 2008. Complainant I further corresponded with the Society on 21 July 2008 and also provided the Society with a copy of a letter to Lawyer P dated 6 August 2008.

[5] It can be observed that a good portion of the material put before the Society (not all of which is traversed above) concerned disputes which were extant between

Complainant I and Lawyer P. It was noted by the Committee that it was not useful for such material to be forwarded to the Committee.

[26] From the correspondence and documents on the file it is clear that the parties were given an adequate opportunity to make their views known and they fully availed themselves of that opportunity.

[27] It is also clear from the correspondence and the documents on the file that the Committee had before it sufficient information to consider the matter and that its inquiries were sufficiently extensive.

The Findings of the Committee

[28] Complainant I objected to the fact that Lawyer P invested the funds of the estate trust without consulting him. He observes that the funds were held on deposit through Lawyer P's trust account. Lawyer P complains that this course of action has been taken without agreement of himself as co-executor and co-trustee and without consideration for the interests of the life tenants (of which he is one).

[29] The response of the Society to this matter was to point out that Lawyer P was obliged to place the funds in his trust account on their receipt and to put them on interest bearing deposit while held. This is a default obligation in the sense that if (for whatever reason) the funds are to be held by a solicitor, then they are to be held on interest bearing deposit wherever practicable.

[30] In the present case it appears that the co-trustees could not agree on how the estate funds should be invested. Trustees are obliged to act unanimously. In the absence of agreement Lawyer P was obliged to hold the funds on interest bearing deposit by default. This was Lawyer P's obligation as solicitor to the estate in the absence of some other clear agreement from the trustees about the investment of the funds.

[31] The Committee also considered the fact that Lawyer P took a commission of 10% of the interest earned on those funds. They concluded that this was permissible under the applicable trust account rules (being Regulation 8 of the Solicitors Trust Account Regulations 1996).

[11] I am satisfied that the Committee considered the issue of whether Lawyer P acted in accordance with his professional obligations in investing/placing the trust's funds in his trust account on interest earning deposit. They reached the conclusion that

in these actions Lawyer P was not in breach of his professional obligations. This was a reasonable conclusion to reach which was available on the material before it.

[32] Complainant I also complains that Lawyer P did not adhere to the terms of his parents' wills in the manner in which the money was invested. He gives the rejection of a proposal he made regarding the use of the funds (which appeared to involve advances to him and his sister interest free secured on certain property). Complainant I is of the view that his proposal would be in accordance with the terms of the trust. Lawyer P does not agree.

[33] The Committee noted that as executor and trustee Lawyer P's primary duty is to uphold the provisions of the will. Disputes between trustees (and disputes between trustees and beneficiaries) are not uncommon. It is not the role of a Complaints Committee to resolve a legal question of entitlements under a will or legal questions regarding the proper conduct of a trustee. The Committee properly directed itself in this regard in stating that it is not its role to give legal advice.

[11] Whatever the merits of Complainant I's proposal the Committee could find no professional breach by Lawyer P in his not acceding to it. This was a reasonable conclusion to make on the material before the Committee.

Conclusion

[40] I note that Complainant I's complaint had a number of strands which he elaborated on in several communications with the Society subsequent to his original complaint. I am of the view that the substance of those complaints was properly considered by the Complaints Committee.

[13] The Committee gave this matter its full consideration, gave the parties a full and proper opportunity to be heard and considered and dealt with all of the matters which were in issue. The conclusions it reached were reasonable and open to it on the material before it.

DATED this 11th day of February 2009

D Webb

Legal Complaints Review Officer

In accordance with s 97(6) of the Law Practitioners Act 1982 copies of this decision are to be provided to:

Complainant I as complainant

Lawyer P as the person about whom the complaint was made

The New Zealand Law Society as the successor of the Wellington District Law Society