LCRO 192/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Wellington Standards Committee 1
BETWEEN	**MR JW** Applicant
AND	**MR QE** Respondent

Introduction

[1] This is a review of the Standards Committee determination in respect of a complaint by Mr JW about the conduct of Mr QE in which the Standards Committee determined to take no further action.

Background

[2] Mr QE acted for the Estate of Mr JW's mother. Mr QE and Mr JW were the executors and trustees of that Estate.

[3] In her will, Mrs JX had bequeathed the residue of her Estate to be divided in half, and to divide one half equally between Mr JW's children (he had 2) and the other half equally between her daughter's children (she had 3), when they reached the age of 25.

[4] Pending distribution, the funds were invested. In August 2009 the trustees agreed that on maturity of a bank term deposit the funds would be invested with FAI Finance. Mr QE forwarded a partially completed form to Mr JW to complete and return

to enable the investment to be implemented. He indicated on the form that Mr JW should sign as the "primary investor", but he was concerned that his personal tax situation would be affected as the form stated that "the primary investor is the nominated taxpayer for this investment". The form also required Mr JW's IRD number to be completed and this added to his concerns.

[5] Correspondence between the parties indicates that the relationship between Mr QE and Mr JW was not a good working relationship and Mr JW has previously complained to the Law Society about Mr QE's conduct in the administration of the trust established in his mother's will. The determination of the Standards Committee in that complaint was also referred to this Office for review.

[6] Mr QE responded to Mr JW's questions about the manner in which the form had been completed, but Mr JW was not satisfied with the response. A series of email communications between the parties ensued in a somewhat tetchy tone from both parties.

[7] The investment with FAI was completed in September 2009 although Mr QE did not confirm this to Mr JW until Mr JW pursued a response.

[8] In March 2010, the funds invested with FAI were repaid. At that time, the grandchildren had not reached the age of 25. However, the will included a power of advancement which enabled the trustees to distribute the funds to the grandchildren provided the trustees were satisfied that the funds would be put to approved uses. Mr JW advised Mr QE of the intended use of the funds by each of the grandchildren and Mr QE ultimately agreed to this proposal, notwithstanding some further exchanges between the parties, including a challenge by Mr QE of Mr JW's motives for proposing the early distribution and his competency to be a trustee/executor.

[9] On 12 April 2010, Mr QE rendered an account for $1,040 plus GST for attendances up to and including the discussion as to the proposed early distribution and agreement in respect thereof.

[10] The distribution was effected and Mr QE rendered a further account on 10 May 2010 for $1,500 plus GST.

[11] Mr JW's complaints relate to Mr QE's conduct with regard to the investment with FAI and the distribution as well as the level of his costs.

Review

[12] Both parties consented to this review being completed on the basis of the material before me. In addition, I requested Mr QE's file which was before the Standards Committee and the costs assessor appointed by the Committee.

Mr QE's conduct

[13] Mr JW's complaints, other than the complaint about costs, were as follows:

1. That Mr QE had not acted competently, in a timely manner or in accordance with any arrangements made and did not provide clear information and advice.

2. That Mr QE had not kept him informed about the work being done or advised him when it was complete.

3. That Mr QE had not provided him with information as to how to make a complaint or deal with his complaint promptly and fairly.

[14] These complaints arise out of Mr QE's conduct in response to Mr JW's questioning him about the FAI investment. Mr QE was provided with a copy of Mr JW's complaints but in his reply dated 11 November 2010, he did not provide any substantive response. Instead, he responded in a general way that "[t]his current complaint is not made in good faith and is **yet another** trivial, frivolous, vexatious and possibly vindictive attempt by Mr [JW]." (Emphasis in original.)

[15] From my review of this matter, the complaints made by Mr JW have some substance. The FAI form should have recorded the Trust as the investor, and it seemed to indicate that the trustees would themselves personally be the "primary investor" and therefore liable to tax on the investment. Mr QE should also have confirmed that the investment had been completed, given the concern to have it completed before the deadline to invest prior to the expiry of the government guarantee scheme.

[16] Mr JW and Mr QE had not operated well together in fulfilling their duties as executors and trustees. Mr QE may very well have been justified in considering that Mr JW questioned his bills "automatically" and that his emails were unnecessary and time

wasting. However, Mr QE is bound by the Conduct and Client Care Rules.[1] In addition to the matters raised by Mr JW I find the content of Mr QE's emails to Mr JW to be discourteous,[2] and unprofessional.[3] Although Mr JW has not complained about Mr QE's communications neither the Standards Committee or I are constrained by that.

[17] Mr QE did not consider Mr JW to be his client when he noted in his email of 31 March 2010: -

> Furthermore, you are NOT a client (thank God).

[18] He was mistaken in that regard. Mr JW was an executor and trustee and Mr QE acted for the Estate and the Trust. Mr JW was therefore his client. In any event, rule 10 applies whether or not a person is a client.

[19] Examples of Mr QE's communications where he has breached rules 3 and 10 are as follows:-

- I'm getting sick and tired of your incessant and tiradal ramblings in this matter. You just don't know what needs to be done. (Email 8 October 2009.)
- You are not competent to judge the adequacy of a Legal Complaints Procedure clause. The Law Society has confirmed that my clause is adequate. I suggest you stick to the IT industry. (Email 31 March 2010.)
- Are you totally incapable of writing a brief email message. (Email 22 April 2010.)

[20] The Standards Committee referred to the tone of correspondence from Mr QE as being unsuitable behaviour for a professional person to engage in. This comment in itself should result in a finding of unsatisfactory conduct by reason of a breach of rule 10.

[21] Having noted this, and with regard to the comments above, I therefore find Mr QE's conduct to be unsatisfactory conduct by reason of section 12(c) of the Lawyers and Conveyancers Act 2006 by reason of breaches of rules 3 and 10 of the Conduct and Client Care Rules.

[22] Because the relationship between Mr QE and Mr JW was poor, communications and advice from Mr QE was also poor. This is not intended to provide any excuse for Mr QE's conduct, but in essence, lack of timely advice complained of by

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2006.

[2] Rule 3 Conduct and Client Care Rules.

[3] Rule 10 Conduct and Client Care Rules.

Mr JW derives from this poor relationship. Consequently, I do not consider that there are grounds for a separate finding of unsatisfactory conduct in respect of Mr JW's complaints in this regard.

[23] Mr JW complained that Mr QE lacked competence. He provides examples of this when referring to completion of the FAI form and the failure to confirm that the investment had been made. However, I do not consider these matters are such as to warrant a separate finding of unsatisfactory conduct in terms of section 12(a) of the Act.

[24] Mr JW also complains that Mr QE did not provide him with the contact details for the independent lawyer to be contacted in respect of complaints about Mr QE. Rule 3.8 does not make it mandatory that the complaints mechanism provided by a sole practitioner (as Mr QE is), includes reference to an independent lawyer. However, where that mechanism does include that option it is logical that a complainant be provided with contact details. Mr QE should rectify that in his Terms of Engagement. Other than this observation I do not consider that this complaint as such as would support a finding of unsatisfactory conduct. In any event, I note that Mr QE did provide a contact phone number for Mr TS in his email to Mr JW of 31 March 2010.

The bills of costs

[25] As noted, Mr QE rendered two bills of costs, one on 12 April 2010 for $1,040.00 plus GST and disbursements (total $1,250.00), and the second on 10 May 2010 for $1,500.00 plus GST (total $1,687.50).

[26] The first matter to be determined is whether the complaint about the bills of costs should be accepted by the Standards Committee for consideration. Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that a Standards Committee must not deal with a complaint if the bill of costs relates to a fee that does not exceed $2,000.00 exclusive of goods and services tax. Each of the bills of costs were below $2,000.00, but the sum of the bills exceeded that amount. Where more than one bill of costs is rendered, that are in respect of services provided in the same matter, this Office and the Standards Committee have treated the bills as being a single bill and therefore

subject to review not withstanding that each bill is less than $2,000.00.[4]

[27] There must however be sufficient commonality of subject before adopting this approach. In this instance, the bills of costs were in respect of matters related to the administration and distribution of the trust established by Mrs JX's will. The narration in the two bills of costs appears to overlap as pointed out by Mr JW. The bill dated 12 April 2010 refers to the emails regarding early distribution and a consideration of the proposed use of the funds. The narration in the second bill also refers to receiving information on the proposed use of the funds. Both bills refer to estate administration in the heading while the second bill also refers to the distribution.

[28] By dealing with the complaint and making a determination, the Standards Committee has impliedly adopted this approach. I agree with this, and for the sake of clarity confirm that the special circumstances provided for in regulation 29 which enable the complaint about the bills of costs to be dealt with, are that the two bills have sufficient commonality such that they should be treated as one.

[29] I have noted that the costs assessor did comment on this issue of jurisdiction. He considered that there was a "high threshold" to be reached before the special circumstances referred to in regulation 29 applied. He also considered that the bills dealt with separate, distinct and severable aspects of the administration of the Estate. He notes that the first bill deals with the investment and reinvestment of the Estate funds over a period of time, while the second bill deals with distribution of the Estate.

[30] In the first instance, I consider that the costs assessor has exceeded his brief. The question of jurisdiction is one for the Standards Committee to make, and it is not the role of an assessor to comment on that. In addition, I disagree with his view that the two bills relate to separate and distinct matters and therefore should be treated separately in terms of regulation 29 for the reasons referred to in [27] above.

[31] Following receipt of the costs assessor's report, Mr JW made a number of submissions with regard to what he considered constituted errors in the report. In its determination, the Standards Committee did not specifically address Mr JW's submissions, but noted that it had carefully considered both the report and the submissions. It noted that "[a]s a matter of law, the Committee is not bound to accept the recommendation of the costs assessor and has itself also reviewed the bills of

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[4] See for example *Maidenhead v Margate* LCRO 108/2010

costs submitted with Mr [JW's] complaint." It referred to the recommendation of the costs assessor that a fair fee for Mr QE's services as an executor and solicitor for the executors of the estate (invoice of 12 April 2010) would be a fee in the order of $800.00 to $1,000.00. It then noted that Mr QE's fee dated 12 April 2010 was for $1,040.00 plus GST and disbursements and concluded that given the minimal difference between the recommendation of the costs assessor and the actual fee charged, that the fee was therefore fair and reasonable.

[32] Mr JW considers that the costs assessor had made an error when considering this account. In his report he stated that the work covered by this bill of costs dealt with "*...investments and reinvestments of the Estate capital over a period culminating in March 2010 when the Estate funds that had previously been deposited with Speirs Group, then with National Bank and then with FAI*". Mr JW has assumed that the costs assessor has therefore included in this the work carried out by Mr QE from approximately July 2008. He points out that Mr QE rendered an account on 1 August 2008 for $620 plus GST and concludes that the account dated 12 April 2010 also included the work carried out in 2008 which had already been billed.

[33] However, the costs assessor had reference to a handwritten timesheet that he found to be not unreasonable. I have had reference also to that timesheet, and it commences with a reference to work carried out on 12 March 2010, and finishes with a reference to an email to Mr JW on 12 April 2010. It is therefore clear that the 12 April account does not include any element of work covered by the bill rendered on 1 August 2008.

[34] The second bill dated 10 May 2010 relates to the distribution to the beneficiaries. Contrary to the comment by the costs assessor that the first bill was rendered prior to any thought of early distribution of the estate being raised, the matter had clearly been raised prior to 18 March 2010 when Mr JW sent an email to Mr QE outlining the intended uses of the funds by the grandchildren.

[35] In his email of 12 April 2010, Mr QE states:-

> My fees for an earlier distribution and all matters to finalise Estate likely to be about $1,800 plus GST and disbursements.

That fee was reduced to $1,500.00 plus GST and disbursements.

[36] The costs assessor considered it "highly relevant" that this fee was agreed to in advance by Mr JW. However, in an email dated 16 April 2010 Mr QE stated: -

> Once I receive agreement to my costs (both the account already rendered and the anticipated future costs), I will proceed with actioning the distribution.

[37] Mr JW asserts that he agreed under protest to this fee so that Mr QE would proceed with the distribution. Whether or not a fee is agreed to, it must still be fair and reasonable in terms of rule 9 of the Conduct and Client Care Rules. In addition, an agreement to a fee when a solicitor is saying that he will not otherwise do the work carries little, if any, weight. Mr JW had no choice. If he did not agree, the beneficiaries would not receive the distribution. By adopting this approach, Mr QE was placing himself in a position whereby he was putting his own interests ahead of those of the beneficiaries.

[38] Notwithstanding these comments, the costs assessor considered that the fee of $1,500.00 to be reasonable in the circumstances, albeit at the top end of any possible range. The Standards Committee made an independent assessment of the bill and accepted that it was fair and reasonable. Members of the Standards Committee include Practitioners familiar with the type of legal services being provided, and it would be wrong for me to impose a different outcome without any basis for doing so.

[39] In the circumstances, there is no basis for making an Order adjusting either bill.

Penalty

[40] I have found that Mr QE's conduct in respect of the breaches of rules 3 and 10 constituted unsatisfactory conduct. It is therefore necessary to consider what penalties are appropriate in the circumstances. It follows from the findings above that the penalty to be imposed relates to Mr QE's lack of professionalism and courtesy.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed.

Mr QE's conduct in his communications with Mr JW constitutes unsatisfactory conduct by reason of breaches of rules 3 and 10 of the Conduct and Client Care Rules.

Orders

1. Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006, Mr QE is reprimanded.

2. Mr QE is to apologise to Mr JW (only) on his letterhead in the form attached.

Costs

In accordance with the Costs Orders Guidelines issued by this Office Mr QE is ordered to pay the sum of $900.00 by way of costs to the New Zealand Law Society within four weeks of the date of this decision.

DATED this 19th day of September 2012

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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:

JW as the Applicant
QE as the Respondent
The Wellington Standards Committee 1
The New Zealand Law Society

Apology

1. I refer to the decision of the LCRO dated 17 September. In that decision the LCRO has found that I was discourteous and unprofessional in my communications with you.

2. I therefore unreservedly apologise for the remarks made by me in the various emails to you.

Yours sincerely

QE