

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Wellington Standards Committee 2

**BETWEEN**

**MR AND MRS CI**

Applicants

**AND**

**MS XM**

Respondent

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

**DECISION**

**Background**

- [1] The facts giving rise to this complaint are relatively straightforward.
- [2] In February 2000 the Applicants instructed the Respondent to form a Trust for the purpose of protecting their assets from potential creditors.
- [3] They instructed the Respondent to transfer their family home into the Trust and this was duly attended to. The usual process whereby the house was transferred into the Trust resulted in debts owing by the Trust to each of the Applicants for the balance of the purchase price.
- [4] In conjunction with the transfer of the home into the Trust, each of the Applicants gifted the sum of \$27,000 by way of reduction of the debt due to them by the Trust.
- [5] In the usual course, gifts were due to be completed following each anniversary of the initial gift until the balance outstanding had been fully gifted.

[6] This was not done for the years 2001, 2002, 2003 and 2004. It was not until the Applicants realised that gifting had not been attended to that they contacted the Respondent in 2005. In June 2005, further gifts of \$27,000 each were made by the Applicants in reduction of the amounts due to them by the Trust.

[7] Unfortunately, the business operated by the Applicants became insolvent and was placed into liquidation in December 2005. Mr CI was declared bankrupt in March 2006.

[8] As part of the administration of his bankrupt estate, the Official Assignee in Bankruptcy made demand on the Trust for the sum of \$39,664.78. This sum was made up of \$12,664.78 being the balance of the debt due to Mr CI by the Trust together with the sum of \$27,000 gifted in June 2005. This gift was voidable as against the Official Assignee pursuant to section 54(1) of the Insolvency Act 1967, having been made within two years of the date of bankruptcy.

[9] Had the gifting been completed annually after the initial gift, the last gifts made by the Applicants would have been in July 2002, well beyond the two year "claw-back" period.

[10] Mrs CI was not declared bankrupt. However, the liquidator of the company made demand on her for the sum of \$56,301.02 being the amount owed by her to the company through her overdrawn current account. If she did not pay, she faced being declared bankrupt also, and the Official Assignee in her bankruptcy would then have been in a position to recover payment from the Trust in the same way as the Official Assignee was seeking to recover from Mr CI.

### **The Standards Committee's decision**

[11] The Standards Committee determined that the Respondent had failed the Applicants to the extent that her conduct constituted unsatisfactory conduct by way of conduct unbecoming.

[12] It censured the Respondent and ordered her to pay the sum of \$500 costs towards the investigation.

[13] In paragraph [3] of its determination, the Committee noted that it "felt there was a contributory element by the CIs as transferring property into the Trust was the reason for establishing the Trust and they were well aware that only one amount of gifting had been done. Clearly, further gifting would need to take place to progress the transfer."

[14] It also made the following observation and order:-

Under the Law Practitioners Act 1982 the maximum amount which could be ordered by way of compensation was \$5,000. In this situation the Committee orders, pursuant to section 156(1)(d) the payment of compensation in the sum of \$5,000.

### **Application for review**

[15] The Applicants have applied for a review of that decision. They raise three issues:

1. They consider that the Law Society has failed in its duty to increase the maximum amount of compensation in accordance with provisions of the Law Practitioners Act, and requested that the maximum value be adjusted in accordance with the Consumer Price Index.
2. They submit that the complaint by them should be treated as two separate complaints and that they each be awarded the sum of \$5,000.
3. They reject the statement by the Standards Committee that there was a contributory element on their part for failing to take the matter up with the Respondent at the appropriate times.

### **Review**

#### **The finding of unsatisfactory conduct**

[16] Following receipt of an application for review, the LCRO conducts a review of all of the matters considered by the Standards Committee in its decision. The LCRO is not limited to the matters raised by the Applicant in the application for review, and consequently, this review will first consider the finding of unsatisfactory conduct by way of conduct unbecoming against the Respondent.

[17] The conduct in question took place prior to the commencement of the Lawyers and Conveyancers Act 2006 on 1 August 2008.

[18] Section 351 of the Lawyers and Conveyancers Act provides that if a lawyer is alleged to have been guilty before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the Complaints Service established under section 121(1) by the New Zealand Law Society.

[19] The relevant section of the Law Practitioners Act is section 106 and the only provision that could be applicable to the Respondent's conduct is whether the Respondent's conduct could be considered to have been conduct unbecoming pursuant to section 106(3)(b). The test as to whether or not conduct could be considered to be conduct unbecoming is whether the conduct is acceptable when measured by the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at page 811).

[20] Given the reasons why the Applicants had established the Trust, it was important that the gifting programme be completed as expeditiously as possible. The Respondent therefore had a duty to ensure that she either made contact with the Applicants at the appropriate times to continue the gifting programme (as she had stated she would) or to make it clear to the Applicants that it was their responsibility to contact her. The failure to complete the gifting programme has had a significantly detrimental effect on the Applicants.

[21] The Standards Committee considered that the Respondent's conduct fell short of the standards of a competent and responsible practitioner and consequently determined that the Respondent's conduct constituted unsatisfactory conduct by way of conduct unbecoming.

[22] I see no reason to disagree with the Standards Committee.

### **The maximum award**

[23] The Applicants consider that the Law Society has failed in its duty to increase the maximum amount of compensation in accordance with the provisions of the Law Practitioners Act. Unfortunately, neither the Standards Committee nor the LCRO have any power to either amend the maximum sum or order the New Zealand Law Society to do so. The maximum amount of compensation that could be ordered was fixed by resolution in 1988 at \$5,000, and that is the amount which the Standards Committee can order.

### **The conduct of the Applicants**

[24] In conjunction with the transfer of the home to the Trust, the Respondent had prepared the necessary documents to effect the gifts in 2000, and these would have been signed by the Applicants. It would therefore be a reasonable assumption to make that the Applicants could not have been entirely unaware that some documentation was required to effect a gift in reduction of the debt.

[25] However, many law firms offer as a service to their clients, a system whereby they make contact with their clients annually to make arrangements for further gifts to be carried out and in her letter of 14 September 2000 the Respondent had indicated that she would be in contact with the Applicants “about the same time next year to see what needs to be done in that year”.

[26] While it would be reasonable for the Applicants to rely on the Respondent making contact with them in the following year, they cannot disown all responsibility for making sure that appropriate action was taken to effect further gifts. It is a moot point whether in fact the Respondent’s instructions were such as to impose an obligation on her to ensure that appropriate steps were taken.

[27] Consequently, I do think that the observation by the Standards Committee that the Applicants must bear some responsibility for the failure to complete the gifting in a timely manner is appropriate. What is not clear is what consequences have flowed from this observation.

### **Compensation**

[28] It is my view that the Standards Committee intended to award the maximum compensation that it was able to. In the first place, the Committee refers in its decision to the fact that the maximum it could award is \$5,000, and then makes an award of that amount. I have also had the benefit of viewing memoranda between members of the Committee and the Legal Standards Solicitor who was investigating this complaint. From these, I am left in no doubt that it was the Committee’s intention to award the maximum it could.

[29] I have also formed the view that section 106(4)(e) of the Law Practitioners Act is quite clear in its terms in that it provides for the payment of compensation to “any person [who] has suffered loss by reason of any act or omission of the practitioner”. As a result, I consider that it was open to the Standards Committee to have awarded the sum of \$5,000 to each of the Applicants.

[30] This then leaves the question as to whether it is appropriate that some recognition should be made for the fact that the Standards Committee considered that the Applicants had contributed to their losses by not taking some responsibility themselves to follow up on the gifting to be carried out.

[31] The Applicants have been obliged to pay the sum of \$79,329.56 as a result of the failure to make gifts at the appropriate time. The maximum award by way of compensation that could be made is \$10,000.

[32] Even if the Applicants were considered to have been equally responsible for the loss, they will have paid more than one half of the losses by reason of the limitations on the amounts that can be awarded to them.

[33] In the circumstances, I consider that it is appropriate that the Applicants should be compensated to the maximum extent possible and an order will therefore be made to amend the compensation to be paid to \$5,000 to each of Mr and Mrs CI.

### **Decision**

[34] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified to order payment of the sum of \$5,000 to each of the Applicants. pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006.

### **Costs**

[35] Where an application for review is successful, it is usual that an award of costs will be made against a practitioner Respondent. However, it would be somewhat unfair if an award were to be made in these circumstances, and consequently no award of costs will be made.

**DATED** this 10<sup>th</sup> day of June 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:

Mr and Mrs CI as the Applicants

Ms XM as the Respondent  
The Wellington Standards Committee 2  
The New Zealand Law Society