LCRO 202/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 4
BETWEEN	**MR KS** Applicant
AND	**MR WF** Respondent

DECISION

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

Background

[1] Mr WF acted for Mrs WE in relation to relationship property matters.

[2] Mr KS acted for Mr WE.

[3] As Mr WE was residing in the matrimonial home, Mr WF agreed that Mr KS should act for both parties on the sale of the property. The Agreement for Sale and Purchase of the property recorded the vendors as being Mr and Mrs WE "as trustees of the ADT Trust".

[4] Settlement of the sale of the property was scheduled for 28 September 2010. On that day, Ms WD, a solicitor in the firm of ADU where Mr WF was a partner, sent the necessary A & I to Mr KS by e-mail with the following message:-

> "Mr [WF] has asked me to forward to you the attached document (Mrs [WE]'s A & I) for settlement today. This is forwarded to you strictly on the basis that the funds will not be dispersed until the necessary agreement has been signed. The original will be posted to you."

[5] The original A & I was sent by Ms WD to Mr KS on the same day under cover of the following letter:-

> "Further to our email to you, please find attached our clients A & I for the sale for the [street name] property. As advised, this is forwarded to you strictly on the basis that funds will not be dispersed until such time the [*sic*] agreement is reached as to the division and the necessary documents are signed."

[6] On 1 October, Mr WF sent the following letter to Mr KS:-

> "[1] Your email 30 September refers [*sic*]. We confirm our client has signed the Relationship Property Agreement and required Trust documentation to complete settlement of our respective client's affairs.
>
> [2] As we had yet to receive from you the original Relationship Property Agreement signed by your client, we have had out client sign the unsigned version. We believe it is prudent that original signatures are on both documents. Please arrange for your client to resign the Relationship Property Agreement when it is forwarded to you."

[7] He also proposed that the costs of unwinding the Trust and the dissolution of marriage be shared between their respective clients.

[8] It took some time for agreement on this issue to be reached and following agreement, Mr WF made demand of Mr KS for his client's share of the sale proceeds. It was then that he was advised by his client that Mr WE had applied his share of the proceeds of sale towards the purchase of a property in [North Island] on the same day as the sale of the matrimonial home had settled – i.e on 28 September 2010.

The complaint and the Standards Committee determination

[9] On learning that Mr KS had released his client's share of the sale proceeds on 28 September, Mr WF complained to the Complaints Service of the New Zealand Law Society.

[10] His complaints were that Mr KS had ignored instructions from Mr WF as to the basis on which the sale proceeds were to be held and had failed to report to Mrs WE as to the distribution of the sale proceeds.

[11] The Standards Committee determined that Mr KS was in breach of Rules 3, 5 and 10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, section 110 of the Lawyers and Conveyancers Act 2006 and Regulation 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and was therefore guilty of unsatisfactory conduct. The Committee imposed a fine of $2,000.00 on Mr KS in respect of these breaches and ordered him to pay costs of $500.00 to the New Zealand Law Society.

The Application for Review

[12] Mr KS has applied for a review of that determination. The basis on which he had applied for the determination to be reviewed was as follows (reproduced as written):-

> "1) The Standards Committee has concluded that an ambiguous note accompanying the return of an A & I form provided on the day of settlement was to be preferred to a clause in a Relationship Property Agreement & Winding Up of [ADT] Trust document which I drafted and which each party had signed separate copies of stating... "The Parties agree to distribute the proceeds of the sale of the [street name] property... in the manner provided in Schedule A "which schedule was adhered to in the final distribution. This does not meet a balance of probabilities standard and I cannot see how this could be allowed to overrule a signed statement of the intent of the parties.
>
> 2) No consideration was given to the prospect that the complainant's lawyer simply made a mistake in that he thought he was dealing with the [street name] as a property owned by the Trust and did not realise or certainly did not investigate that the [street name] property was the only property that had been put into the trust thereby rendering nugatory his effort a month after settlement to have completed a formal surrender of a Deed of Life Estate Lease for a property sold in 2004.
>
> 3) There had to be at least 50/50 chance that my client would be moving out of [street name] and using the proceeds to buy another property even if nothing was spelt out to that effect and so to expect that he could do so without the distribution of his share of the proceeds for that purpose is untenable. My client tells me that he had discussed with [*sic*] his purchase of a property in [North Island] with Mrs [WE].
>
> 4) In light of the above my actions or inactions did not breach either Sections 3, 5 and 110 of the Lawyers and Conveyancers Act 2006 or Regulation 12 of the Trust Account Regulations 2008."

[13] Mr KS seeks that the decision be reversed and that name publication not be applied.

Review

[14] A review hearing was held in Auckland on 8 May 2012. Mr WF attended in person as did Mr KS who was represented by Mr KT.

Preliminary Issues

[15] The Standards Committee recorded the complaint as being by Mrs WE. The complaint form lodged by Mr WF recorded himself as the complainant. In addition, he commenced his letter of complaint dated 25 November 2010 in the following way:-

> "The writer wishes to make a complaint against [KS] for what the writer considers to be unprofessional conduct."

It is therefore clear that Mr WF was the complainant in this matter and this decision will record him as the respondent.

[16] In his application for review, Mr KS seeks that the Standards Committee decision be reversed and "named publication not be applied."

[17] In the final paragraph of its determination the Standards Committee "ordered the publication of the facts of the matter, but not any details that might lead to the identification of any of the parties, in LawTalk and in the NZLS' Electronic Bulletins." The Standards Committee has not therefore ordered publication of Mr KS's name and consequently this outcome as sought by him is irrelevant.

[18] At paragraph 1 of his review application, Mr KS referred to a clause inserted by him into the Property Relationship Agreement which authorised distribution of the sale proceeds. At the review hearing he acknowledged this clause had been in an earlier draft of the Agreement but was not included in the final document. One could speculate that he had thought this clause remained in the document when proceeding as he did, but this is of little relevance to this review.

Did Mr KS have authority to release Mr WE's share of the sale proceeds?

[19] Mr WF's complaint is that Mr KS had released funds to his client in contravention of the basis on which the A & I had been provided to him. This was set out by Mr WF in paragraph 7 of his letter of complaint where he states as follows:-

> "The writer practices in the area of relationship property extensively and finds it unacceptable that the practice of lawyers is to ignore instructions from fellow lawyers as to the basis upon which funds are to be held and further fails to report to the clients as to his dealings with the trust account funds."

[20] As he later observed, this goes to the core of his complaint. It is an important issue. Solicitors must be able to rely on other practitioners to abide by the terms on which documents are provided. The practice of law in many areas would become unworkable if practitioners routinely ignored conditions imposed by other practitioners when providing documents, or indeed any form of consent or authority.

[21] Following receipt of the Agreement for the sale of the property, Mr WF wrote to Mr KS on 13 September 2010. At paragraph 2 of that letter he wrote:-

> "[2] We will now proceed to draft the Relationship Property Agreement. We are advised in relation to the property settlement this will provide that upon sale of the property the following will occur:
>
> (a) The bank loan of $45,682.91 will be repaid.

(b) Mrs WE will be repaid the sum of $40,000.00 being the inheritance funds advanced by Mrs [WE] to the Trust by way of loan.

(c) The balance of the proceeds of sale will be divided equally subject to credit to be given by Mrs [WE] to Mr [WF] for the loans due to the parties by [ADV] ($80,000.00) and [KU] ($10,000.00) which are to be assigned to Mrs [WE], i.e. from Mrs [WE]'s one half share of the proceeds of sale she will credit Mr [WF] the sum of $45,000.00.

(d) Please find attached settlement statements which set out the financial position."

At paragraph 4 of that letter he then referred to documentation required to wind up the trust.

[22] As noted in [4] Ms WD sent the A & I to Mr KS on 28 September 2010. In the email to which the A & I was attached, she refers to the funds being held until "the necessary agreement has been signed. The original will be posted to you".

[23] The terminology of the letter dated the same date and with which the original of the A & I was sent, was different. In that letter Ms WD advised that the A & I was sent "strictly on the basis that funds will not be dispersed until such time the agreement is reached as to the division and the necessary documents are signed [*sic*]". However, this letter would not have been received by Mr KS until after settlement and release of the funds to Mr WE, and Mr KS would therefore have been operating on the basis of the email from Ms WD.

[24] On 1 October, Mr WF confirmed that Mrs WE had signed the Relationship Property Agreement, but did not return it to Mr KS pending agreement on outstanding matters relating to the trust. In that letter, Mr WF also indicates that he had not received the original Agreement signed by Mr WE. That presumably arrived subsequently and it was clearly contemplated by Mr WF that the Agreement would be signed as one document and not in two parts. Mr KT and Mr KS made submissions that it was common for relationship property Agreements to be signed in parts, but whether or not that is the case, there had been no arrangement with Mr WF to this effect, or any specific clauses in the Agreement recording that arrangement.

[25] Mr KS advised that he thought he had received telephone advice from Ms WD on 28 September that Mrs WE had signed the Agreement. He could not however provide any written record of that telephone conversation. In addition, from a review of the correspondence, it seems to me that Mrs WE attended ADU's offices on 30 September to sign the Agreement as evidenced by Ms WD's email (of the same date) where she advised that "we are arranging for Mrs WE to come in at 4:30 p.m. today as she will not be available until next week."

[26] Mr KS argued that as he was aware that the Agreement had been signed by Mrs WE as at 28 September, he therefore had authority to release Mr WE's share of the sale proceeds to him.

[27] I do not consider that this is a defensible position. In the first instance, it seems to me that Mrs WE had not signed the Agreement as at 28 September. In addition, there was no agreement between Mr WF and Mr KS that the Relationship Property Agreement would be signed in parts, and whether or not Mr WE would have been able to obtain orders enforcing the Agreement. It was clear that as far as Mr WF was concerned, he intended that the Agreement be signed as one document.

[28] I therefore come to the conclusion that Mr KS did not observe the terms on which the A & I was sent to him and failed to continue to hold the funds for both parties. The fact that he had not provided any specific undertakings to hold the funds is of no relevance - he did not abide by the terms on which the A & I had been provided and had no authority to release the funds to Mr WE.

[29] Rule 10 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 provides as follows:-

> "A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings"

I concur with the Standards Committee when it determined that Mr KS had acted in breach of this rule by failing to abide by the terms upon which the A & I was sent to him.

[30] It follows therefore, that Mr KS did not have authority from Mrs WE to make payment of the funds out of the trust account held for Mr and Mrs WE (in their capacity as trustees or otherwise). Section 110 of the Lawyers and Conveyancers Act 2006 imposes an obligation on lawyers to hold money received in the course of practice exclusively for the person on behalf of whom the funds are received to be paid to that person or as that person directs. Given that Mr KS did not have authority from Mrs WE to disperse funds from the trust account, it follows that Mr KS is in breach of this section as well.

[31] Mr KS is also in breach of Regulation 12(6) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 which requires that payments may be made from a client's trust money only if "the practice obtains the client's instructions or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it." While the determination of the Standards Committee refers to a

breach of Regulation 12, it seems to me that this is in relation to the failure to report (being a breach of Regulation 12(7)) and inasmuch as it is necessary to do so, the Standards Committee's determination is modified to include reference to this breach.

[32] Much has been presented by both parties concerning the question as to whether the property was owned by the Trust or not. The history of the matter and the documentation provided would suggest that it was owned by the Trust and Mr & Mrs WE certainly considered that it was at the time they signed the Agreement for Sale and Purchase.

[33] This discussion has relevance only to the extent that it is accepted that trustee resolutions would have been necessary to authorise the sale. Any authority to release the funds would still have been required from both Mr and Mrs WE, whether as trustees or personally. In this regard, the Standards Committee also found that Mr KS was in breach of Rules 3 and 5 of the Conduct and Client Care Rules.

Rule 3:-

> "In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care"

Rule 5:-

> "A lawyer must be independent and free from compromising influences or loyalties when providing services to his/her clients."

These rules have some application to Mr KS's conduct, albeit marginal, and I do not intend to modify the Standards Committee determination in this regard.

Failure to report

[34] Mr KS was acting for both Mr and Mrs WE in connection with the sale of the property. As such he assumed obligations to them both in connection with the sale. Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 provides that:

> [7] Each practice must 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 that are not completed within 12 months, at intervals of not more than 12 months; and

(c) In respect of all other transactions, promptly after or prior to the completion of the transaction.

[35] Following settlement, Mr KS did not provide any form of report to Mrs WE. He was therefore in breach of Regulation 12(7) whether or not he dispersed the funds to Mr WE. That failure was compounded when he made payments from the joint trust ledger and again did not provide any report to Mrs WE.

[36] In addition, if he considered he had authority from Mrs WE to release the funds, he had a duty to account to Mrs WE for her share of the proceeds of sale as well. He had a direct duty to Mrs WE in this regard which was not only to be activated on a request for payment from Mr WF or Mrs WE herself.

[37] Finally, I also agree with Mr WF's submission that Mr KS has not followed proper trust account procedures when he credited the joint account of Mr and Mrs WE with funds from Mr WE to be applied to his purchase. The proper course would have been to establish a separate trust account ledger for Mr WE and when he held the appropriate authorities, to journal Mr WE's funds from the joint ledger to the ledger for Mr WE alone. The funds provided by Mr WE personally should have been credited directly to that separate ledger and payment for the purchase made from there.

[38] I also observe that no entries appeared in the trust account ledger provided to me for payment of the disbursements required to be paid to the purchaser's solicitor for the discharge of mortgage, or any entries in respect of Mr KS's fees. It is of course possible that he has not billed this matter and I have not sighted the final statements (if indeed there are any) when reporting to Mrs WE. Although I do not propose to make any formal directions in this regard, it may be appropriate that the society's audit inspectors be made aware of these comments.

Conclusion

[39] As noted at the beginning of this decision, it is of extreme importance to all lawyers in many areas of practice that they are able to rely on and trust other practitioners absolutely. While there may have been room for Mr KS to rationalise the release of funds to Mr WE on the basis of a strict interpretation of the single e-mail sent by Ms Hopkins, nevertheless, in the context of the matter and in the circumstances, there was no room for him to make unilateral decisions where there was doubt as to the basis on which he held the funds. A professional approach would have been to be absolutely forthright and transparent in his dealings with Mr WF and Ms WD and advise of his intentions before the funds were released. By acting in the manner in which he

did and then failing to report to Mrs WE shows a marked lack of professionalism which does nothing to maintain public confidence in the provision of legal services or enhance the standing of the profession.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, modified as referred to in [31].

Penalty

The Standards Committee imposed a penalty of $2,000 on Mr KS for these breaches. As noted in [39] it is fundamental to the practice of law that other lawyers can rely absolutely on other practitioners, and for them to err on the side of caution should there be any uncertainties as to the basis of dealings between practitioners. In the present circumstances, Mr KS has not met those standards, and breached section 110 of the Lawyers and Conveyancers Act 2006, Rules 3, 5 and 10 of the Conduct and Client Care Rules, and Regulations 12(6) and (7) of the Trust Account Regulations. In the circumstances, I consider that the Committee could very well have imposed a greater penalty, but after giving the matter some consideration, I have determined not to interfere with the Committee's determination in that regard.

Costs

[40] Pursuant to section 210 of the Lawyers and Conveyancers Act and the Costs Orders Guidelines issued by this Office, where a finding of unsatisfactory conduct is upheld against a practitioner, Costs Orders will usually be made against the practitioner in favour of the Society. In accordance with the Guidelines Mr KS is ordered to pay the sum of $1,200.00 to the New Zealand Law Society by way of costs. Such sum is to be paid within one month of the date of this decision.

DATED this 21st day of May 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:

KS as the Applicant
WF as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society