

LCRO 241/2011

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee 2

BETWEEN

SI
Applicant

AND

MO
Respondent

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

Introduction

[1] This review involves a consideration of the obligations of a lawyer to obtain approval from a client to make payment from funds held for the client. It arose in the context of a conveyancing transaction involving the sale of a property and as such is relevant to all conveyancing lawyers.

Background

[2] In May 2009 SI and SJ instructed MO to act on their behalf in respect of the sale of their residential property.

[3] Registered against the title to the property was a caveat by SK as well as another caveat and two mortgages.

[4] SK had previously been employed by a company which for the purposes of this review can be taken as being "owned" by SI and SJ. Earlier in the year the company had got into financial difficulties and SK had advanced various sums of money to the company. One particular advance of \$7,500 was the subject of an informal acknowledgement of debt that read; -

To: SK

We SI and SJ acknowledge that we are indebted to you in the sum of \$7,500.00 and that such sum may be secured against our property at [Street Name] Place, [Location] (CT NA ___/___).

SI

SJ

5 March 2009

[5] A caveat was lodged to secure these funds but did not of course refer to the specific amount protected by the caveat. It is understood that the caveat was expressed as having been lodged pursuant to an agreement to mortgage or an unregistered mortgage although I have not sighted the underlying documents.

[6] In February 2009 the business was sold to SK and SI and SJ allege that the sale price had been reduced by the amount owed to SK other than the amount of \$7,500 which remained outstanding.

[7] MO had not acted for the SI and SJ in relation to the sale of the business and was not therefore privy to this background information. All he was aware of was that there was a caveat registered against the title to the property to be sold which needed to be withdrawn to enable the sale of the house to proceed.

[8] The Agreement for the sale of the property was forwarded to MO by the agent on 26 May 2009. On 29 May 2009 MO made a file note which I accept was a record of a telephone conversation with SI, rather than a face to face meeting.

[9] The file note referred to the sums owed to the mortgagees and the caveators. Beside a figure "(4)" (referring to the 4th encumbrance on the title, being the caveat) was recorded the figure "\$10,000".

[10] A second undated file note also included reference to the sum of \$10,000 together with further notes with regard to an issue raised by the purchaser concerning the property.

[11] It is accepted by the parties that these file notes referred to discussions between them as to the amount due to SK and that SI had advised MO that the amount due was \$7,500 but could be up to \$10,000.

[12] Once the Agreement was declared unconditional MO sought repayment figures from the mortgagees and caveators and handed the file to MN, a legal executive, to complete the settlement.

[13] Settlement was scheduled for 15 July 2009. On 14 July 2009 the solicitors for SK provided a detailed statement from their client and advised that the total amount of \$82,912.29 shown in the statement was required to discharge the caveat.

[14] An appointment with MO was scheduled for SI and SJ on the morning of 15 July but they did not attend. However, they came in later that day when MO was out of the office. In his absence MN attended on them in the reception area of the office and obtained the signatures required from them to the various documents.

[15] MN had prepared a draft statement showing all of the amounts required to discharge the two mortgages and the two caveats and it is not disputed by SI that MN asked them if they would like to go through the figures. Neither is it disputed that the SI and SJ declined the opportunity to do so because they considered they knew what the repayment figures were.

[16] Settlement proceeded and the sum of \$82,912.29 was paid by MN to SK's solicitors to enable the caveat to be withdrawn. The payments were made by MN who had signing authority on the firm's trust account as MO was still out of the office.

[17] The amount received by SI and SJ was therefore some \$72,000 less than they were expecting and has not been recovered from SK.

[18] In their complaint to the New Zealand Law Society Complaints Service, SI and SJ sought "settlement of the balance monies owing".

The Standards Committee determination

[19] In its determination the Standards Committee made the following observations:

[43] Two of the purposes of the LCA are to (a) maintain public confidence in the provisions of legal services; and (b) to protect the consumers of legal services.

[44] These purposes are achieved in part by providing 'for a more responsive regulatory regime in relation to lawyers...', 'and stating ' the fundamental obligations with which, in the public interest, all lawyers... must comply in providing regulated services.'

Fundamental obligations of lawyers

[45] The fundamental obligations of lawyers include being required to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients, and to protect the interests of clients, subject to lawyers' overriding duties as officers of the High Court, and to the duties under any enactment.

RCCC Rules

[48] The RCCC Rules expand on the fundamental obligations, "...set the minimum standards that lawyers must observe and are a reference point for

discipline,” and ‘define the bounds within which a lawyer may practise’ within which ‘each lawyer needs to be guided by his or her own sense of professional responsibility.’

Compliance with the RCCC Rules by lawyers is mandatory.

Trust Account

[49] Section 110(3) of the LCA provides that a lawyer ‘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.’

The TA Regs. Regulate the administration of lawyers’ trust accounts, and include regulations relating to handling client’s funds.

Although not mandatory, the Trust Account Guidelines (“the TA Guidelines”), published by the Law Society, are designed to assist lawyers to comply with the requirements of the LCA and the TA Regs.

Discussion

Essence of the complaint and response

[50] The essence of [SI and SJ’s] complaint is that contrary to their instructions to [MO] as to the approximate amount of money they expected to have to repay to [SK] to obtain a withdrawal of [SK’s] caveat for settlement, [MO], without referral to them paid [SK’s] solicitors a considerably larger sum of money from the sale proceeds.

[20] The Standards Committee then canvassed the facts giving rise to the overpayment, or more correctly, the payment made without the authority of SI and SJ and identified five ways in which the “miscommunication” could have been averted.

[21] It also recorded its view that there was nothing preventing the delegation by MO of his authority in relation to the trust account although it noted that such delegation should only be used in urgent cases and with appropriate checks and balances in place.

[22] Its conclusions and findings were recorded in the following way: -

[82] Having had due regard to all the circumstances in this matter and for the reasons discussed above, the Committee finds that although there are some administrative shortcomings in the way [MO’s] practice is run, these shortcomings are not of such a nature that they reach the threshold to be considered unsatisfactory conduct in relation to [MO’s] conduct. It was clear that [MN] had tried to get [SI] to review the draft statement before settlement but he had refused to do so. The Committee was of the view that [SI’s] refusal to review the draft statement had contributed in a significant way to the current situation in which he found himself.

[83] However, the Committee did not consider that [MO’s] conduct, in these particular circumstances, fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, or that it was conduct that would be considered by lawyers of good standing as being unacceptable. Further the Committee did not consider that there had been

any contravention of the LCA or of the practice rules or regulations. In the Committee's view, there was no need for any further action to be taken. Consequently, by a majority decision, the Committee determined to take no further action on the complaint pursuant to the provisions of s152(2)(c) of the Lawyers and Conveyancers Act 2006.

Review

[23] In conducting this review, it is important to not lose sight of the essential facts and the clients' expectations.

- SI told MO (it would seem on two occasions) that they expected the amount due to SK was approximately \$7,500, maybe up to \$10,000.
- They did not consider it necessary to review the figures with MN as they knew what to expect.
- The payment made by MN was considerably more than expected resulting in them receiving approximately \$72,000 less than anticipated.

The above facts are the essential facts from SI and SJ's point of view.

[24] As noted by the Standards Committee, the purposes of the Lawyers and Conveyancers Act include the maintenance of public confidence in the provision of legal services and the protection of consumers of legal services. It is difficult to see how these purposes have been met by the determination of the Standards Committee.

MN's role

[25] This complaint has been treated by the Complaints Service as a complaint against MO. That arises from the way in which the complaint was presented by SI.

[26] The payment was made by MN and it could be considered that her conduct could also have been the subject of complaint as it was she who made the payment without approval from SI and SJ. However that would be somewhat unfair. She was handed the file by MO without any specific advice or instructions other than to complete settlement of the sale. A withdrawal of the caveat was required for this purpose.

[27] MN's attendance on SI and SJ was unexpected as it had been intended that they were to see MO in the morning. MN provided SI and SJ with an opportunity to review the figures which they declined.

[28] Overall, it could be said that MN fulfilled MO's instructions such as they were.

[29] It must also be noted that in a practice where MO is the sole partner and MN the sole employee, necessity dictates that she have signing authority on the trust account and, given her years of experience and qualifications, it was not unreasonable for MO to delegate that to her. In that regard I concur with the Standards Committee comments that there is no issue with that.

MO's role

[30] Before considering MO's role, it is pertinent to record the provisions of the Lawyers and Conveyancers Act, the various Conduct and Client Care Rules¹ and the trust account regulations which are relevant to this transaction.

Lawyers and Conveyancers Act

12. In this Act unsatisfactory conduct in relation to a lawyermeans

(a) conduct of the lawyer ... that occurs at a time when he or she... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

...

(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer ... or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7).

...

110(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.

Trust Account Regulations

12(6) A practice may make transfers or payments from a client's trust money only if:

...

(b) the practice obtains the client's instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it.

...

16(4) Every trust account supervisor-

(a) Is responsible for the administration of the trust accounting of the practice:

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

(b) is responsible for ensuring -

(i) that the provisions of the Act relating to trust accounts, these regulations, and any practice rules made under section 94(k) of the Act are complied with by the practice.

Conduct and Client Care Rules

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.

...

4.2 a lawyer who has been retained by a client must complete the regulated services required by the client under the retainer....

7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

...

11 A lawyer's practice must be administered in a manner that ensures that the duties to the court and existing, prospective, and former clients are adhered to, and that the reputation of the legal profession is preserved.

[31] MO took instructions from SI. He recorded the approximate amounts that SI was expecting to have to pay to the mortgagees and the caveators in two separate file notes. He submits that those discussions took place within the context of him being satisfied that there would be sufficient funds to clear all encumbrances and that he considered his instructions were to pay whatever was required to clear these.

[32] That is a somewhat cavalier approach to his clients' money. In effect, he is adopting a position that whatever amount SK said was due was to be paid without reference to SI and SJ.

[33] That cannot be considered to be protecting his clients' interests or maintaining the confidence of the public in the profession. Often figures provided are approximate as was the case in this instance. In these circumstances, the clients' authority was to make payment within the range of \$7,500 to \$10,000. A lawyer will often exercise a discretion to pay the amount requested without reference back to the client depending on the nature of the institution to whom the money is to be paid, and the proximity of the amount required to the amount anticipated by the client. However, the ultimate responsibility for that decision lies with the lawyer and a client is entitled to expect that he or she will be consulted as to the payments to be made from their funds.

[34] When providing the file to MN, MO did not draw her attention to the figures he had noted in his discussions with SI. I acknowledge that minimal instructions are required to be provided to a legal executive with MN's experience. However, in this case the matter was unusual in that the caveator was a private individual who had advanced money to his former employer.

[35] The Lawyers and Conveyancers Act 2006 provides a lawyer with the right to undertake conveyancing and to handle client funds. With that right comes strict obligations, which I have referred to in this decision. It is important that the requirement to observe those obligations is not diminished in order to ensure that the confidence of the public in the profession is maintained.

[36] Whilst MO was not the person who ultimately made the payment, it was his failure to make sure that MN was properly instructed that was the cause of the unauthorised payment. In addition, MO as the partner in control must bear the ultimate responsibility.

[37] The Standards Committee considered that the refusal by SI and SJ to review the statement prepared by MN contributed significantly to the situation which arose. While I consider this fact is important in considering an appropriate penalty it cannot be a reason to excuse a lawyer from complying with the obligations imposed by the Act, the Trust Account Rules, and the Conduct and Client Care Rules.

[38] In the circumstances I have come to a different view than the Standards Committee, namely that MO's conduct constitutes unsatisfactory conduct in terms of section 12(a) of the Act, and in terms of section 12(c) by reason of breaches of the various provisions of the Act, the Conduct and Client Care Rules, and the Trust Account Regulations, all as referred to previously.

The appropriate penalty

[39] SI seeks to recover the amount of the over payment. Any such order would be pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act which provides that "where it appears to the Standards Committee that any person has suffered loss by reason of any act of omission of a practitioner...the Standards Committee may order the practitioner...to pay to that person such sum by way of compensation as is

specified in the order being a sum not exceeding the prescribed amount.” The prescribed amount is \$25,000.²

[40] There are too many uncertainties about this matter to be able to determine without doubt that the payment would not have been made if authority to do so had been sought. Amongst these are:

- A withdrawal of the caveat was required to enable the sale to proceed. To not make payment and therefore not receive a withdrawal of caveat would have placed SI and SJ in default of their sale agreement.
- There is no conclusive evidence as to what the correct amount due to SK was, and the disciplinary process of is not the proper forum in which to investigate and determine that issue.
- If the principles which apply to a claim in negligence were to be applied in the present instance, the contributory conduct of SI and SJ in declining to review the figures with MN must also be taken into account.
- Primarily SK is the person from whom recovery should be sought.

[41] In addition, as noted by Professor Duncan Webb in his text *Ethics, Professional Responsibility and the Lawyer* (second ed) “the disciplinary process is focused on the Practitioner’s discipline, rather than the wronged clients’ compensation”³.

[42] Taking these factors into account, I do not consider that a compensation order should be contemplated. Instead, the penalties imposed need to concentrate on the appropriate response to the conduct in respect of which the finding has been made.

[43] The unauthorised payment resulted from a failure by MO to properly instruct MN when handing the file over to her to complete settlement. The penalty to be imposed is in respect of this failure and also the breach of the Act and trust account regulations for which he must accept responsibility.

[44] Section 156(1)(i) provides that a fine not exceeding \$15,000 may be imposed where there has been a finding of unsatisfactory conduct. In *Workington v Sheffield*⁴

² Reg 32 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

³ Para 3.5.2 at page 86.

⁴ LCRO 55/2009.

the LCRO considered that a fine of \$1,000 is a proper starting place in the absence of other factors where there has been a finding of unsatisfactory conduct.

[45] In the circumstances, I consider that a fine of \$2,000 is the appropriate penalty to impose in this instance to reinforce the principle that a client is entitled to expect that no payment will be made from funds held on his or her behalf without authority and that staff will be properly instructed when files are transferred from one author to another.

Decision

The determination of the Standards Committee is reversed.

MO's conduct constitutes unsatisfactory conduct in terms of sections 12(a) and (c) of the Lawyers and Conveyancers Act 2006.

Pursuant to section 156(1)(i) of the Lawyers and Conveyancers Act 2006 MO is ordered to pay the sum of \$2,000 to the New Zealand Law Society, such sum to be paid by no later than 7 December 2012.

Costs

Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 and in accordance with the Costs Orders Guidelines issued by this Office, MO is ordered to pay the sum of \$1,200 by way of costs to the New Zealand Law Society, such sum to be paid by no later than 7 December 2012.

DATED this 7th day of November 2012

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:

SI as the Applicant
MO as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society