

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 1

BETWEEN

FI
of Wellington
Applicant

AND

UY
of Wellington
Respondent

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

DECISION

Background

[1] FI's father, FJ, died on 20 November 2008.

[2] FI and her sister (FK) were joint executrices of his will, which UY had prepared. UY had acted for FJ for some time.

[3] Following FJ's death, UY proceeded on the basis that he was to act in the administration of the Estate, and Probate of the will was obtained on 22 December 2008.

[4] The residuary beneficiary of the will was FJ's wife (FL) who suffered from Alzheimer's disease and dementia. FL had appointed FK her property attorney by an Enduring Power of Attorney dated 23 February 2005.

[5] Early in 2009, UY became aware of the significant acrimony between FI and FK and their respective husbands, following receipt of a letter written by FI's husband to FK and her husband. Following receipt of that letter FK and her husband advised FI

and her husband that from then on, they required all communications with regard to the Estate to be directed through UY's office.

[6] FJ & FL owned a unit in a retirement village in Wellington. FL was not living in the unit and the Occupation Licence was to be surrendered. In December 2008 it had been agreed that FI's husband would negotiate the surrender of the Licence with ACT. FI assumed that the unit formed part of the Estate and it does not appear that there was any discussion about the legal principles relating to the ownership of the unit. At that stage, that was of little relevance as FL was the ultimate recipient of the termination proceeds, either as the surviving joint owner, or as the residuary beneficiary of her husband's will.

[7] FJ & FL were also the holders of a bank account in Germany. It was initially thought by FI that this account was in her father's sole name. At the same time, FJ & FL continued to draw a New Zealand pension to which they were not entitled, given that they were in receipt of the German pension. FI was adamant that these funds, which had been unlawfully received, should be repaid to WINZ.

[8] In addition, the deceased held gold coins, three gold bars and a kruggerand. It would seem that the location of these items was unknown, but ultimately, FI alleged that UY had colluded with FK to conceal the whereabouts of these items.

[9] Another matter which caused disagreement between FI and FK, was a painting left by FJ to FK. FI and her husband alleged that this painting had been stolen and wished to return it to its rightful owner in Germany. To this end, FI's husband had made enquiries at the German Embassy and requested that FK cooperate with him by returning the painting, at least to UY's office, so that steps could be pursued to return it. FK did not believe the painting was stolen at all and intended to retain it pursuant to the terms of the will.

[10] In all of these matters and the others which were the subject of FI's complaint, UY states that he endeavoured to maintain a neutral position between FI and FK and their respective husbands.

[11] The matters complained of by FI to the Complaints Service were as follows:

- 1) That UY had made an unauthorised payment of \$148,529.00 from the funds held to the credit of the Estate in his trust account.
- 2) That he had breached client confidentiality by revealing the content of conversations which he had with the late FJ to FK and her solicitor.

- 3) That he was conflicted due to the fact that he had acted for FK and her family personally. Included in this aspect of the complaint was a complaint that UY had denied FI the opportunity initially to select an independent lawyer.
- 4) That UY had carried out unauthorised legal work by responding on behalf of FK to correspondence sent directly to her by FI.
- 5) That the basis of UY's charges was unclear and that he had charged the Estate for attendances on FK personally.
- 6) That he had assisted FK to transfer a German bank account held jointly by the deceased and FL, to FL without the authority of FI, thereby avoiding those funds being incorporated into Estate assets.
- 7) That he had ignored instructions with regard to the ACT unit, incurred unauthorised costs and declined to provide copies of file notes.

The Standards Committee Decision

[12] Following an investigation into the complaints, the Standards Committee conducted a hearing on the papers and determined to take no further action on it pursuant to section 152 (2) (c) of the Lawyers and Conveyancers Act 2006.

[13] The reasons provided by the Committee were as follows:

- 1) UY had acted appropriately in a difficult situation.
- 2) FK was entitled to obtain independent advice as trustee and as attorney for her mother.
- 3) There was no breach of client confidentiality when UY discussed matters with the lawyers instructed by FK;
- 4) The ACT unit was not included in the estate.
- 5) There was nothing improper in payment of UY's bill being arranged by FK.

[14] FI has applied for a review of that decision, expressing the view that the Standards Committee had erred in concluding that UY's conduct was acceptable, was wrong in concluding that the ACT unit was not part of the Estate, and generally had not recognised each of the separate complaints made by her.

[15] In its decision, the Standards Committee did not respond directly to each of the matters complained of by FI. It has instead responded in a general way in holding that UY had acted appropriately in a difficult situation. That does not mean that it did not consider each of the issues raised by FI.

[16] Although a Standards Committee is required to provide reasons for a decision to take no further action, it is nevertheless a summary jurisdiction, and it is not required to record reasons with the degree of detail that was possibly expected by FI. However, some explanation of the Committee's reasons would have assisted FI in understanding them.

The Law

[17] Before the Standards Committee (or the LCRO) may take action against a lawyer, it must first make a finding that the lawyer's conduct constitutes unsatisfactory conduct.

[18] That term is defined in the Lawyers and Conveyancers Act 2006, and in relation to this complaint, would require the Committee (or the LCRO) to come to the conclusion that the conduct of the practitioner fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (section 12 (a)).

[19] That establishes a "reasonable consumer" test which focuses not on the views of professional people as to what constitutes proper standards, but on the reasonable expectations of a lay person. It is important to note, that members of the Standards Committee include lay people to ensure that this perspective is reflected in the Standards Committee decision.

[20] If the Standards Committee (or the LCRO) comes to the view that the lawyer's conduct is unsatisfactory as defined, then it can make certain Orders as provided for in section 156 of the Act. Given the outcome of this review, I have not recorded what Orders may be made, but suffice to say that the Standards Committee (or the LCRO) does not have the ability to make some of the Orders sought by FI. In this regard, I do not know what information has been provided to FI prior or subsequent to lodging her complaint, but it would be useful if complainants were aware of the Orders that a Standards Committee has at its disposal, to avoid any unrealistic expectations.

[21] The LCRO has all of the same powers that the Standards Committee has in respect of the Orders that can be made.

The Review

[22] A hearing was held in Wellington on 7 September attended by FI and her husband, UY, and his assistant.

[23] Prior to the hearing FI had submitted a written presentation, included with which were a number of questions which she wished UY to reply to. It is important to recognise that the primary function of the LCRO is to review decisions of the Standards Committee, as well as to examine the process adopted by the Committee in investigating the complaint. It is a review carried out by the LCRO and hearings are held for the purpose of giving the parties the opportunity to present issues which concern them or to present their views to the LCRO, and also to enable the LCRO to clarify any matters with the parties. It is not a forum for either party to carry out any form of inquisition of the other. Consequently, I declined to allow FI to put the questions posed by her to UY. However, to the extent that it has been necessary for me to complete this review, I have had reference to those questions and indeed all of the material provided by the parties.

[24] As this is a review of the complaint to the Complaints Service, I have referred to the matters complained of by FI in her complaint to the Complaints Service, rather than directing myself to the matters referred to in the Application for Review, although that material is pertinent to an understanding of the issues of concern to FI.

[25] Because the Standards Committee did not respond in detail to each of the matters complained of by FI I have responded to some extent by way of clarification of the Standards Committee decision.

[26] In general terms, FI's complaints were that:

- a) UY had dealt with the funds from the sale of the ACT unit incorrectly;
and
- b) that UY had conspired and colluded with FK against FI.

The ACT Unit

[27] The complaint with regard to the ACT unit, is that UY has remitted the sale proceeds to FL without authority and that he had ignored instructions with regard to settlement of the Occupation Licence.

[28] Prior to the review hearing, I sought and obtained from UY, a copy of the Occupation Licence. FJ and FL are named as the residents in this document.

[29] The independent lawyer consulted by FK provided an opinion in which he came to the view that FL was entitled to receipt of the termination payment as the surviving resident. She was entitled to this by reason of the fact that FJ and FL were both included in the licence as residents and not by way of any entitlement through her late husband's estate.

[30] UY agreed with this and as a result, the payment received from the termination of the Occupation Licence belonged to FL. It should not have been paid into the Estate trust ledger account as it apparently was.

[31] For this reason, the money was not payable at the direction of the executors of FJ's will. It was payable at the direction of FL who had appointed FK her attorney. Consequently, UY was correct, and indeed obliged, to make payment of these funds to FL at the direction of FK.

[32] Similarly, FL was the surviving resident, and as such it was she alone who had the contractual relationship with ACT. FL's instructions with regard to the discussions with ACT unit as to the refurbishment costs were provided by her attorney, FK, and UY was obliged to act in accordance with those. Those instructions included a termination of the previous agreement that FI's husband be appointed to negotiate with ACT and UY acted in accordance with those instructions.

[33] The decision of the Standards Committee was that ACT unit was not included in the estate. In this regard the Committee has confirmed the view of FK's solicitor as to FL's entitlement to those funds as do I. The question is a legal question, and if FI does not accept these views, then she should seek her own advice and challenge the legal basis on which the payment has been made. There is however, no basis for a finding against UY that he has breached the standard of competence and diligence required of a lawyer.

Conspiring and colluding with FK

[34] This complaint is that UY acted on the instructions of FK alone.

[35] At the heart of the matters giving rise to this complaint, is the acrimony between FI and FK, such that FK made it clear at an early stage in the administration of the Estate that she would not correspond or communicate directly with FI.

[36] UY was therefore placed in the position of having to act as a "mailbox" for communications between the two sisters. In some instances, FI wrote to her sister

directly, but FK responded to this correspondence through UY. If he had not communicated FK's instructions to FI, then there would have been no possibility of obtaining instructions from both executrices. This no doubt created the perception that he was siding with FK when it came to dealing with Estate matters.

[37] An example of FI's suspicions was discussed at the hearing. FI advised that her father held three gold bars, some gold coins, and a krugrand at the date of his death which had been acquired from funds which FI considered her father was not lawfully entitled to. She considered that these items were in FK's possession, but that she refused to account for them so that they could be included in the Estate assets.

[38] UY advises that the first he was made aware of the existence of these items was when he was advised of them by FI's husband. FI on the other hand, alleges that UY had been made aware of them by her sister, but then took no steps to ensure that they were accounted for in the administration of the Estate, and in this way colluded and conspired with FK to enable her to avoid having to account for them in the Estate assets.

[39] The existence of these items was made known to UY by both parties. If FK was in possession of them, it was her duty to account for them to the Estate. She did not do so and UY had no ability to take any independent steps other than to reinforce the executors' obligations to account for assets within their control.

[40] If FK was concealing the location of the bars so that she could retain them for herself, then that is not something for which UY can be held responsible.

[41] There is absolutely nothing to support an adverse disciplinary finding against UY and it is unfortunate that FI has transferred her suspicions with regard to her sister's conduct onto UY.

Other Complaints

[42] Having addressed what I consider are the two main aspects of FI's complaint, I will deal with each of the remaining complaints in detail, so that FI can be satisfied that they have been addressed.

Breach of client confidentiality/conflict of interest

[43] The confidentiality complaint relates to two matters. The first is that UY disclosed the content of discussions he had with FJ to FK, who FI describes as "his

client". The second aspect is that UY discussed matters pertaining to the Estate with FK's solicitor.

[44] FI and FK were joint executrices of the estate. As such UY was acting for them jointly in the administration of the Estate. He was not acting for either of them in an individual capacity.

[45] Both FI and FK were entitled to know everything relevant to the Estate and its administration. It would have been wrong for UY to have declined to divulge information that he had as a result of discussions with FJ which would have affected the proper administration of the Estate. He cannot therefore be considered to have breached any obligation of confidentiality by advising FK of these discussions.

[46] FK sought independent advice. It follows that there was no issue with UY sharing with her solicitor all of the information to which she herself was entitled.

[47] There is no conflict of interest in UY acting for the executors of FJ's estate. As solicitor for the Estate, he was acting for both parties on joint instructions. The fact that he had acted for both executrices or their families previously does not mean that he was conflicted when acting for the Estate. However, where the executrices disagreed as to what was to happen in the administration of the Estate, the proper course was for each of them to seek independent advice. FK adopted that course but FI did not.

Appointment as Estate solicitor

[48] FI complains that UY did not advise that her approval was required for his appointment as the Estate solicitor, nor did he advise her of her duties and responsibilities as an executrix. She also notes that she did not sign the Letter of Engagement.

[49] The solicitor who acts in the administration of an Estate, acts on the instructions of the executors. It is common that the solicitor who acts is also the solicitor who has drawn the deceased's will and acted for the deceased during his or her lifetime. The logic of that is plain.

[50] In addition, the fact that the deceased has instructed a particular solicitor to act for him or her during his or her lifetime, can be taken as an indication of confidence in that solicitor and it is not unreasonable to take this as an implied expression of the deceased's intention for that solicitor to act in the administration of the Estate. FI was therefore correct to assume that her father had wished for UY to act in the administration of the Estate, although this had not been formally expressed.

[51] In the circumstances, unless an executor expresses some disquiet, it would be reasonable for UY to assume that the executors approved his acting. FI subsequently declined to accept UY's resignation when it was tendered and consequently I find it somewhat difficult to comprehend that this should now be part of FI's complaint.

[52] If an executor is unclear as to what his or her obligations are in administering a will, it is to be expected that questions would be asked. As noted by UY, there was ample opportunity for FI to raise any queries which she had in this regard.

[53] Finally, It is not necessary for Terms of Engagement to be signed by clients. Terms of Engagement contain information which a solicitor is obliged to provide to a client setting out the basis on which he or she will be undertaking work on behalf of the client. They contain information to be imparted to the client, but they do not need to be signed by the client. Obviously if the client does not agree to the terms of engagement, the instructions will be withdrawn, but that did not occur in this instance.

Basis of Charges

[54] A lawyer's fee takes account of the various factors expressed in UY's letter of engagement. He also included an estimate of his fee.

[55] UY did not provide a response to the question from FI as to his hourly rate and she was entitled upon enquiry to be advised of that.

[56] As advised at the hearing, FI must approve all accounts before they can be paid. At this stage UY's account has been paid by FL. FL is the residuary beneficiary and any bills paid by her results in a diminution of the funds received by her. Any person may pay another's bills voluntarily and consequently, although FI may not approve the account, the end result is that it has been paid by the person entitled to receive the residue of the Estate. If FI does not approve the bill, the Estate accounts may not be able to be finalised (at least to the extent of including this account) but from a practical point of view the matter has been dealt with, albeit at the direction of FK. If FI considers that this is an abuse of FK's appointment as FL's attorney, then that is a separate matter, once again, for which UY is not responsible.

[57] FI considers that UY has billed the estate for attendances on behalf of FK personally. Presumably she considers that UY's attendances on FK's lawyer should not be billed to the Estate.

[58] UY is not acting for FK personally - she has her own lawyer and any executor or beneficiary is entitled to take this step. UY has incurred costs in communicating with

FK's lawyer who is entitled to seek information on his client's behalf. Consequently, these are costs which have been properly incurred by UY when acting in connection with the administration of the Estate, and there are no reasons that his costs incurred on that basis should not be met by the Estate.

German bank account

[59] FI believed that the German bank account was in her father's name. It was administered by FM on behalf of the deceased in Germany. On this basis it formed part of the Estate.

[60] However, a letter was received from FM advising that the account was held in the joint names of FJ and FL, and that he managed the account by means of a power of attorney for banking purposes.

[61] On 5 June 2009, UY wrote to the executors advising that as the account was in joint names, under New Zealand law the account would be transferred to FL alone. On that basis, FK could, as FL's attorney, give instructions as to how the account was to be dealt with thereafter.

[62] As discussed at the hearing, jointly owned assets do not form part of the administration of an Estate, in that the asset passes by survivorship to the surviving owner. UY's advice reflected the law in New Zealand. It would appear from FM's correspondence that the same principles applied in Germany in respect of this account.

[63] On the same day, i.e. 5 June, FK wrote to UY advising that she had instructed her own solicitor to attend to matters with regard to the account, and from UY's file, it does not appear that he has had any further involvement with it.

[64] FI's understanding of the status of the bank account as expressed in her complaint does not accord with the advice provided by UY and FM. UY has provided advice which he considers to be correct and if FI does not accept this, then she should seek independent advice. The fact that UY has not agreed with FI's views does not expose him to disciplinary action.

[65] There is no basis for FI's allegation that UY has participated and colluded with FK to enable these funds to be excluded from the Estate administration.

[66] There is even less basis for the allegation that he has thereby participated in a conspiracy to defraud the New Zealand Government of these funds which FI considers is due to WINZ in repayment of the unlawful receipt of pension funds.

Estate file copies

[67] The final matter that I have noted is a request by FI for UY to provide her with copies of his file notes. File notes made by a solicitor are his personal property and a client is not entitled to these. By declining to provide these however, UY has not enhanced transparency in his dealings with FI and this has not been helpful. However, refusal to provide copies of file notes is not an action which can form the basis of disciplinary action against a lawyer.

Summary

[68] I have endeavoured to address each of the matters raised by FI in her letter of complaint so that she has a more comprehensive response to those matters than was provided by the Standards Committee. The end result is the same as the decision reached by the Standards Committee in that there is no basis to come to a conclusion that UY has acted otherwise than competently and diligently in administering this estate and/or in such a manner as to support an adverse disciplinary finding. There is significant disagreement between FI and her sister and their respective husbands, resulting in various accusations being made. UY endeavoured to tread a neutral path between the two factions but came to be viewed with suspicion of collusion by FI. From the information available to me, I can find no evidence of this and the Standards Committee decision will be confirmed.

Decision

[69] Pursuant to Section 211 (1) (a) of the Layers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed

DATED this 28th day of September 2011

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:

FI as the Applicant
UY as the Respondent
The Wellington Standards Committee 1
The New Zealand Law Society