

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

IR

Applicant

AND

AEI LIMITED

Respondent

DECISION

Introduction

[1] This is an application for review of a decision of the Wellington Standards Committee 1 which considered a complaint by IR (the Applicant) against AEI Limited (the law firm). The Standards Committee decided to take no further action on the complaint and the Applicant seeks a review of that decision.

Background

[2] When the law firm commenced acting for the Applicant and his (former) wife they had already signed a sale agreement to sell their house, and were in the process of separating. They wanted the law firm to do the conveyancing. The firm attended to the conveyancing which was completed in June 2008. The net sale proceeds were divided equally between the Applicant and his wife in accordance with their instructions.

[3] Some two years later (2010) the firm was asked to send the conveyancing file to another law firm (which was done) and the following year (2011) another lawyer contacted the law firm and suggested that it had breached its duty of care to the Applicant by "not addressing the issue of the debt ... owed to his late father's estate". This concerned a loan that had apparently been advanced to the Applicant and his wife from the estate of the Applicant's father. The loan had not been repaid to the estate at

the time of settlement of the sale, and consequently the Applicant's wife had received half of that amount when paid her half share of the property.

[4] The law firm denied any wrong doing, noting that the property documents had not recorded the loan, and their clients had made no mention of it, but directed that the net sale proceeds should be divided equally.

[5] Eventually the Applicant filed a complaint against the law firm with the New Zealand Law Society, but this was unsuccessful.

[6] The Standards Committee noted that the conduct complained of occurred prior to the coming into force of the Lawyers and Conveyancers Act 2006, which meant that the Committee's jurisdiction arose only if the section 351 jurisdictional threshold was met. Section 351 provides that, in relation to complaint about conduct that occurred before 1 August 2008, the conduct needs to be such that it could have led to disciplinary proceedings against the lawyer (responsible for the file) under the (former) Law Practitioners Act 1968.

[7] The Standards Committee described the standards that applied to the conduct and explained why it was of the view that the conduct did not reach the required threshold. The Committee decided to take no further action.

Review

[8] The Applicant sought a review of that decision. His review application largely repeated the original complaint (breach of duty, conflict of interest) and added other minor complaints which were not before the Standards Committee.

[9] The law firm relied on its original submissions to the Standards Committee and also commented on the minor matters referred to immediately above. It also submitted that it had never been shown any documentary evidence of the existence of the loan, and went on to point out that remedies were available to the Applicant under the Property (Relationships) Act 1976 had he chosen to exercise them in pursuit of the share of the loan monies he had allegedly lost to his former wife.

[10] This review has been conducted 'on the papers' pursuant to section 206 (2) of the Act, and with the consent of both parties. This section allows a review to be conducted on the basis of such information, records, reports or documents as are available, if the LCRO is of the view that the review can be adequately determined on that information and in the absence of the parties or their witnesses, and with the consent of the parties.

Considerations

[11] The evidence shows that it was the Applicant's wife who made first contact with the law firm and explained to the lawyer responsible for the file that she and the Applicant were separating. The Applicant was telephoned by the lawyer to confirm the situation. Soon after he came into the law firm's office alone and signed a written statement appointing his wife as his agent in all matters relating to the sale of the property.

[12] When settlement was approaching the Applicant and his wife together met with the lawyer where, among other things, they were shown a spreadsheet outlining the funds to be received and the debts to be repaid from the sale, the latter including a registered mortgage over the property. During that attendance they both signed an A & I (authority and instruction to pay funds) document, pursuant to which each was to receive half of the net proceeds. They declined the lawyer's advice that they should enter into a formal separation agreement, having been advised that this would necessitate one of them being separately advised. It appears that they believed they could sort most matters out between themselves and did not need to incur the costs.

[13] There was no reference on the certificate of title of the \$130,000 loan from the estate of the Applicant's father that had assisted them to originally purchase the property. Neither the Applicant nor his wife made any mention of it. The law firm had not acted for these clients before and had no knowledge of the loan.

[14] In declining to take any action, the Standards Committee set out in detail the positions of both parties to the complaint, and with reference to the significance of section 351 of the Act, provided full explanations of the types of poor conduct which need to be established before action can be taken. The Committee provided an explanation about the professional standards that applied, and why it considered that the conduct in this case did not reach that threshold of wrong doing.

[15] The conduct had occurred prior to the commencement of the Lawyers and Conveyancers Act 2006 and the Committee was correct to have identified that the conduct needed to reach a high threshold of wrongdoing before it had jurisdiction to take any action against the firm.

[16] I have independently considered the conduct in relation to the applicable standards. It is not clear how the law firm, or the lawyer responsible for the conveyancing file, could have know about the existence of the loan except by reference to the title documents of the property (no loan is recorded), or from the parties

themselves (no mention was made by them about the loan). I noted that the Applicant and his wife gave instructions to the lawyer as to how the proceeds were to be paid out.

[17] In his review application the Applicant suggested that the lawyer knew of the loan. There is no evidence that this is the case.

[18] The Applicant also suggested that had he been referred to a separate lawyer this would not have happened. He suggested that there had been a conflict between himself and his former wife, such that the law firm ought not to have acted for them both. He wrote that his former wife had taken advantage of him and “rushed me through the whole process of a relationship breakdown”. He added that if the law firm had pulled him aside and talked to him, or just sent him to another lawyer, this would not have happened.

[19] I have found nothing in any of the evidence or information that ought to have alerted the law firm to the existence of a conflict or a possible conflict between them. The evidence shows that the Applicant and his former wife were in accord as to the sale, that they wanted the firm to do the conveyancing only, that they did not want independent advice and that the house proceeds were to be divided equally between them.

[20] The Standards Committee could find no fault or wrong doing on the part of the lawyer or the law firm and I agree with that view. It was up to the Applicant (or his former wife) to bring to the lawyer’s attention the existence of the family loan. It cannot be presumed that the lawyer would know of this, nor that in the same circumstances another lawyer would have somehow gleaned that there was some other debt apart from the mortgage registered against the title.

[21] I am satisfied that the Standards Committee’s decision on the complaint is correct. The law firm carried out the instructions it received. It confirmed with the Applicant the original instructions received from his then wife, interviewed him separately and obtained written instructions from him that his wife was to be his agent, showed the couple a written breakdown of the distribution of the funds to be received (including their registered mortgage), received written instructions from both to pay out the net proceeds equally, and suggested the preparation of a separation agreement, explaining that that would involve one of the parties receiving independent legal advice. Never did the Applicant mention at any time the loan from his father’s estate.

[22] In its decision the Committee also addressed the lesser issue of alleged delay in sending the sale file to the solicitors who held the documents on the unregistered loan, and also for delay in replying to correspondence from the Applicant's current solicitor. These complaints also were rejected by the Committee, and I agree with the Committee's decision.

[23] The law firm's actions cannot be faulted. There is no reason to take a different view to that taken by the Standards Committee and accordingly the application for review is declined.

Decision

Pursuant to Section 211(1) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 22nd day of June 2012

Hanneke Bouchier
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:

IR as the Applicant
IU for the Applicant
AEI Limited as the Respondent
The Wellington Standards Committee 1
The New Zealand Law Society