LCRO 266/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [North Island] Standards Committee [X]
BETWEEN	**ZF** Applicant
AND	**XC** Respondent

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

Introduction

[1] Mr ZF has applied for a review of the determination by [North Island] Standards Committee [X] that his advice to Mrs XC was "clearly untenable and was incompetent to such a degree as to be in breach [of] his obligation to act competently and duty to take reasonable care".[1]

[2] The Committee censured Mr ZF, ordered him to pay Mrs XC the sum of $1500 and imposed a costs order in the sum of $500.

Background

[3] On 24 October 1985 Mr AB executed his last will and testament. Set out below are clauses 3, 4 and 5 of that will.

> …
>
> 3. I GIVE AND DEVISE the principal residence owned by me at the date of my death to my wife the said XC to have the use occupation and enjoyment thereof during her life (so long as she remains my widow) she paying all rates taxes and other outgoings thereon and keeping the same in a good and habitable state of repair fair wear and tear

[1] Standards Committee determination (15 August 2013) at [23].

> and damage by fire flood earthquake and other inevitable accident excepted and keeping the same insured against fire.
>
> 4. I GIVE all the rest of my estate to my Trustee UPON TRUST to pay my debts and funeral and testamentary expenses and all duties payable in respect of the whole of my dutiable estate and to hold the residue including any remaining ready moneys of my estate for my wife the said XC.
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> 5. I DECLARE that if my wife XC shall predecease me then my Trustees are to stand possessed of the said property and my residuary estate for such of them my children QW, TY, SD, GH, VP, NM and RJ as tenants in common in equal shares who shall survive me and attain the age of twenty (20) years (or marry under that age) and for all of any of the issue living at my death who survive me and attain the age of twenty (20 years (or marry under that age) of any child of mine who shall have predeceased me whether before or after the date of this my Will or shall fail to survive me such issue to take through all degrees according to their stocks in equal shares as tenants in common if more than one the share or shares which his her or their parent would have taken if such parent had survived me and so that no issue shall take whose parent survives me and is so capable of taking.
>
> …

[4] The children referred to in clause 5 were Mr AB's children from his previous marriage.

[5] Mr AB and Mrs XC resided in a property at [address]. The registered proprietor of the property was Mr AB.

[6] Mr AB died in 1991 and the property was transferred to Mrs XC as executor of his will. She continued to reside in the property pursuant to clause 3 of the will.

[7] At the time of administration of Mr AB's estate, the firm administering the will (which had also prepared the will), [Firm A], recognised that the provisions of the will were deficient in that clause 3 did not include provisions for what was to happen to the property on Mrs XC's death.

[8] In a letter dated 14 November 1991, Mr OI wrote to Mrs XC:

> …In paragraph 3 of the will you will see that the principal residence is given to you to have the use and occupation during your life. Usually in similar clauses there is a part at the end of the clause which indicates what happens to the property on your death. In your husband's will that part is missing although we think it was your husband's intention to give you the right to live in the house during your lifetime and after your death the house should go to his children as listed in paragraph 5. I think that on a proper reading of paragraph 5 if you had not survived your husband then the trustees would have been QW [child of AB] and EU and all the estate including the property would have gone equally between your late husband's children.

[9] Mr OI recommended that a Deed of Family Arrangement be entered into with Mr AB's children to achieve that.

[10] That recommendation was never acted upon. In any event, Mr OI had not canvassed the situation that arose some twenty years later when Mrs XC (then approaching 87) wished to sell the property and move to another property to be near her daughter.

[11] The first contact with the firm of [Firm B] where Mr ZF was a consultant was made by one of Mrs XC's granddaughters, Mrs PE. In an email dated 24 February 2011 to Mr DM of that firm, she wrote:

> …The reason that I had rung and left a message for you was I wanted to know how much a consultation would be with you to help us assist in the return of my grandmother's unit to her late husband's family. It is currently in her name 'as executor' and we want to hand the property back to his family as per his will.
>
> We feel it would benefit Gran to have this [important] advice before we go to the estate lawyers.

[12] In a subsequent email on the same day she wrote:

> …We know that we may miss out on this particular property but at least if we find out what we have to do to hand the property back to the [children of Mr AB] and another property becomes available we can act fast, or if this is still available we may be able to give the real estate agent an idea when Gran could move in. We do not want to move Gran and leave the property vacant in [city] for a long period and find that she has to cover costs on both properties.

[13] Mr DM responded:[2]

> …Unless there is something untoward in the will (and I doubt if there is) I think that it is open for your Gran to advise that she wishes to permanently move out – essentially break, at her option, the life tenancy arrangement and move on from there. She would need to give notice to OI who presumably continues to be the solicitor acting for the estate. He then advises the residuary beneficiaries, prepares the documents, etc.

[14] Mrs PE then sent Mr DM a copy of the will and the correspondence from Mr OI. Mr DM responded:[3]

> …I should not have spoken so soon – reference my comments 'unless there is something untoward in the will'. It does appear there was something untoward, albeit an omission. Reading through the correspondence you sent to me it appears to me that OI recognised the issue and sent off the correspondence which presumably would have been followed up by Gran and Mr AB's children from his first marriage signing a deed of family arrangement. However you have mentioned that Gran has no recollection of doing so! Strange. Although all of this was quite a while ago so we should check.

[15] It was then ascertained that Mr OI's recommendations had not been acted upon and there was no Deed of Family Arrangement. Mr DM wrote to Mrs PE again:[4]

> …I do not think any Deed of Family Arrangement was ever concluded/signed.
>
> I concur with your thoughts (and that of OI's) that there was an error in the will and that strictly speaking it should have been corrected by way of the Deed of Family Arrangement.

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[2] Email DM to PE (25 February 2011).
[3] Email DM to PE (28 February 2014).
[4] Email DM to PE (15 March 2011).

> If your Gran now wishes to leave the property then there is nothing to stop her from doing so and we can give formal notice to OI. He will then need to do the Deed of Family Arrangement correcting the will and providing for the child beneficiaries from Mr AB's first marriage to receive their entitlement. This will probably be done by way of selling the property which can be done while your Gran as executor (which effectively will be done by OI as solicitor to the estate).
>
> Is this what your Gran wants to do?

[16] It was at that stage that acceptance the property would be passed over to Mr AB's children changed. On 21 March 2011 Mrs PE emailed Mr DM:

> …We have spoken to Gran over the weekend and have come up with three options that we would like to run past you and see what the possibilities are like.
>
> Gran has it in her head that she would really like some cash out of the property as [Mr AB] had always said that she would have a home for her life and she thinks that the cash would assist in paying rent. She also said about the discussion they had prior to [Mr AB's] death about how she would get nothing out of the property and yet was contributing. I have explained to Gran that this is all relevant on cost as if it is going to cost thousands it is better to just hand the house back when we find her something and walk away.

[17] Mrs PE then posed three options:

> Option 1:
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> Referring to a power of investment in clause 6 of the will Mrs PE asked:
>
> Does that mean that Gran is able to sell the house and invest the proceeds of the house and live off the interest? She was told I think by Guardian Trust, that she was able to do this. If this is the case then what we would propose is that we sell the house and invest the money and write to [Mr AB's] children giving them the option of paying Gran out $15,000, instead of living off the interest. (She would settle for $10k but wanted room to negotiate) and they can have the rest of the funds now rather than wait for her to die.
>
> Option 2:
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> Mr AB's children get the original purchase price of $57,000 and the balance of the house is split eight ways – presumably by this it was meant that the balance would be divided equally between Mr AB's seven children and Mrs XC.
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> Option 3:
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> Mrs XC would revoke her life interest when a property in Paraparaumu could be located for her with the property and liabilities immediately reverting to Mr AB's children.

[18] Mrs PE noted that they had:

> …all agreed that whilst it would be nice to get Gran some money from the sale of the property we do not believe it is worth pursuing and using up the little savings Gran has, in legal fees. If we could have good 'odds' that we may be able to get a settlement then it

> may be worth taking the risk. We understand that there are no guarantees with options 1 and 2 but thought that we may be able to have a calculated risk involved.
>
> What we would like to know from you is if we are able to do options 1 and 2 and if so what sort of legal costs we would likely incur. I understand that any costs would only be an estimate and there would be mitigating factors in each option that could not be factored in until we actually proceed. Ballpark figures is what we are wanting so that we can calculate the risks.

[19] Mr DM then sought an opinion from Mr WY in the office who wrote directly to Mrs PE by email on 27 May 2011:

> I agree that option 1 provides the best course of action which would enable your grandmother to sell the house and live off the interest from the sale proceeds.
>
> If she then wishes to relinquish her 'life interest' in the sale proceeds then she could do so if all parties agree and this would need to be done by a Deed of Family Arrangement signed by her and by the other beneficiaries. Under that deed she would relinquish her life interest and would receive out of the house sale proceeds an appropriate amount which would represent the value of her life interest. This calculation is set out in the Estate and Gift Duties Act and is based on your grandmother's life expectancy and the current market value of the house. To enable me to do this calculation I will therefore need to know your grandmother's age and the amount of the sale proceeds once the house has been sold.
>
> Your grandmother could if she wished of course settle for less than the full value of her life interest, but if she did this this could represent a gift upon which gift duty could be payable. We can advise you on this point when we get to that stage.

[20] Mr WY then added:

> …I think the next step then is for the house to be sold, **if all parties agree**, and we can then do the valuation referred to above to ascertain the value of your grandmother's life interest.
>
> (emphasis added)

[21] Mr WY left the firm shortly thereafter and the matter was assigned to Ms GA, a legal executive described by Mr DM as being "proficient in estates and wills".[5] Mrs PE advised Ms GA in an email dated 8 July 2011 that the agent marketing the property had had a call from one of Mr AB's children wanting to know what was happening as they had noticed the property being advertised for sale. Mrs PE advised that she instructed the agent to respond they were acting on advice from their lawyers and adhering to the law, and if they [Mr AB's children] had any issues they should contact the estate lawyers.

[22] Mrs PE continued:[6]

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[5] DM to Lawyers Complaints Service (28 June 2012).

[6] I must observe at this point that I do not necessarily agree this is what Mr WY said in his email of 27 May. His letter is somewhat ambivalent but the important point to note is that Mrs PE, Mrs XC and the family were relying on advice provided by Mr WY not Mr ZF.

> …I am unsure if they are expecting money now from the settlement of the property or if they think that we are going to keep the proceeds of the sale but thought that it is prudent to advise you in case you are contacted. My understanding is that DM wrote to the estate lawyers earlier this year so they should have at least his name on file and of course WY advised that we are well within our rights to sell the house and invest the money.

[23] Ms GA responded to this on 11 July advising that she had had a call from the estate solicitors. She says:[7]

> …I advised him that we intended to follow the life interest rules and lodge the funds into our trust account for the interest to go to Mrs XC and we will (if necessary) put that in writing. He was quite happy to hear that everyone was on the same page.

[24] Mr OI (the estate solicitor) presumably then reported to Mr AB's children who instructed Mr HH. In a phone call to Ms GA on 13 July 2011 Mr HH noted that the will did not provide for the funds to be invested and the income generated to be paid to Mrs XC. He followed that telephone call with a letter of the same date in which he spelled out his views:[8]

> With respect, that is not what the will provides. We have a copy of the will made available to us and it provides, with the exclusion of the 'principal residence' – which is the [address] property – the whole of the residue of the estate is to go to the deceased's widow. The 'principal residence' is however provided to XC for her use and occupation for her lifetime or for so long as she remains the widow of the deceased, and thereafter it goes to the named children of the deceased as tenants in common in equal shares provided they survive him. They have all survived him. The will does not provide to XC the right to do what is proposed – namely, sell the property, invest the proceeds and receive the interest derived. The will provides to XC the right to use the property and in the event she chooses, for whatever reason, to relinquish the right of occupation, she is of course at liberty to do so, and she has demonstrated her decision to relinquish the property by moving from it and putting the property on the market for sale.

[25] It was at that stage that Mr ZF became involved to assist Ms GA. He reviewed the file and responded on the same day to Mr HH:

> …
>
> 2. Mr HH is rather economical in his references to the Will. He neither refers to the outright gift in clause 3, or the provision for the residue of the estate to go to the widow.
>
> …
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> 5. It is not open to anyone to read the Will in a way that ignores provisions that are apparently inconvenient to the reader. The status of clause 4 appears to have been put in this category and is not explained by any of the parties concerned.
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> 6. It is appears to have been acknowledged by the solicitors handling the estate, who probably drafted the Will, that there was a problem and their, sensible, solution was a Deed of Family Arrangement to try and resolve the ambiguities in a way that all would be happy with.
>
> …
>
> 9. It appears that clause 4 may have been intended to remedy this omission by effectively providing that everything other than the life interest, if such it is, fall into residue and

[7] Ms GA had adopted the view that the usual life interest rules were to apply and advised Mrs PE accordingly. Again, it is important to observe that this was not advice provided by Mr ZF.

[8] The will did not provide what Mr HH asserts either. There was nothing in the will which covered the situation where Mrs XC sold the property during her lifetime.

belong to the widow. There is nothing in clause 4 that specifically or by analogy excludes the house from the provisions of that clause. If the house was to be entirely excluded you would expect clause 4 to exclude from its effect the provisions in clause 3.

10. In our view you must read clauses 3 and 4 together, and also having regard to the provisions of clause 5. The latter clause only provides for AB's children if the "widow" does not in fact become the widow of AB. Again one would expect the provisions of clause 5 to be said to apply if our clients survived AB, and make some specific reference to it. The silence to make such a provision in this clause is significant.

11. You can see from our comments above that clauses 3 and 4 appear when read together or even if clause 3 is read on its own to provide a complete regime for the disposal of the property of AB. Clause 4 appears to provide confirmation of this. Clause 5 does not appear to contradict this. In our view therefore claims of the children other than on the moral basis that they are in financial difficulties, are not in the least bit persuasive.

12. The question is where do we go from here. Mr HH and his clients obviously have no ability to tell the executor how she should carry out her duties. Her duties are to do what is provided in the Will and to be accountable to the Court for the carrying out of these duties. It would therefore seem legitimate that based on a logical reading of the whole of the Will, that the executor effectively treat clauses 1 to 4 as coming into effect and clause 5 and subsequent clauses to have no standing in view of the executor, being the widow of AB, surviving him.

13. In these circumstances the offer of a benefit of some sort or other in relation to the house to the children of AB is a gesture recognising a wish to help those children in what are claimed to be difficult circumstances, and is at best a moral obligation. We understand that the widow's family are happy to look at a proposal whereby the house, or its value, are passed over to the children of AB following the death of the widow. A Deed of Family Arrangement would presumably remove any possible problem of gift duty, while the gift duty regime remains in force.

14. We suggest Mr HH find out the attitude of the child claimants promptly so that it does not interfere with the sale process of the Flat. This is not conceding a legal right which you will realise we do not think exists but to try and find a way of avoiding a complete break between the widow and the children having regard to her family's apparent willingness to assist AB's children.

15. The widow is of course entitled to sell the property and use the proceeds to provide herself with additional income and/or treat the proceeds as part of her overall estate. It would then be up to the children to try and obtain a declaratory judgement to establish what rights, if any, they had. In this situation the children would be highly likely to get nothing more than their costs paid, in following such a course, from the estate of their late father. Even to do this they might have to establish much more clearly some legal basis for their claims.

[26] The property had in fact been sold by way of an agreement dated 12 July 2011.

[27] The sale proceeded and settled on 25 July. Ms GA credited the net sale proceeds into Mrs XC's account on 5 August.

[28] The next communication from Mr HH was on 10 August. He recorded his view that the house was left to Mr AB's children and that they would receive their inheritance "in the event that XC remarried, or passed away, or any other possibility occurred". Mr HH disagreed with Mr ZF's interpretation that a property which was subject to a life interest could then be sold

and become part of the estate and therefore become the outright property of a person in whose favour the life interest existed.

[29] Mr HH proposed a pragmatic solution, that would reflect what would usually happen in these instances, namely that the income from the sale proceeds be paid to Mrs XC for her life and on her death the capital would pass to Mr AB's children. That was a concession to Mrs XC from the position which Mrs PE had originally expected and what Mr ZF proposed in his letter of 13 July.

[30] Mr ZF responded[9] and again defended his view that Mrs XC was entitled to receive the net proceeds of sale as part of the residue of the estate. He noted the maximum that Mr HH's clients could have expected to receive if a matrimonial property claim had been made at the time of Mr AB's death was one half of the net proceeds of sale.

[31] At that stage Mrs XC and her family became adamant that they were not going to negotiate or make any concessions to Mr AB's children and Mr ZF was ultimately instructed to cease to correspond with Mr HH. At one of the meetings attended by Mr ZF, Mrs XC's brother expressed what would seem to be the family's justification for refusing to negotiate with Mr AB's children, by stating that Mr AB had wanted Mrs XC to be adequately provided for, and that Mr AB's children had ignored Mrs XC over the years, and shown no interest in the property. These comments were advanced as reasons supporting their view that Mrs XC and/or her family had no moral obligation to Mr AB's family at all.

[32] After a period during which there was no further correspondence, proceedings were issued by Mr AB's children in January 2012. [Firm B] did not have a litigation team and Ms GA requested authority from Mrs XC's family to seek a second opinion from Ms MT of [Firm C).

[33] It would seem Ms MT then acted directly for Mrs XC and the matter was ultimately settled. The terms of settlement are unknown but from a brief report from Ms MT it would seem that settlement occurred on the basis that Mrs XC would have the income from the capital during her life and on her death the capital would pass to Mr AB's children.

The Complaint and the Standards Committee determination

[34] The complaint was lodged by Mrs PE on behalf of Mrs XC. It was a complaint about both Mr ZF and Ms GA. However, it was established early on that Ms GA did not provide any independent advice to Mrs XC and the complaint proceeded against Mr ZF alone. Ms

[9] Letter ZF to HH (22 August 2011).

GA may however have inadvertently reinforced the views that Mrs XC and her family drew from the advice provided to them by various members of the firm including Mr ZF.

[35] In her complaint Mrs PE says:

> Feb-May 2011 – I (PE) had been in contact with [Firm B] asking for their assistance with my grandmother's late husband's will and if that would enable her to sell the property she held a life interest in. It was confirmed that the property be sold and it was agreed once the property was sold the funds would be held in trust and the interest would be paid to my grandmother and when she died the capital would be given to her late husband's children. Upon this advice the property was subsequently sold.

[36] In the second paragraph of her letter of complaint she says:

> We were repeatedly assured by both Mr ZF and Ms GA that our grandmother was entitled to these funds as the will of the late Mr AB was unclear as to his wishes. Their assurance was always made that at the very least that Gran would be entitled to half of the proceeds of the house sale under the Matrimonial Property Act. Mr ZF and Ms GA believed that Gran was entitled to all funds and these were directly credited into her bank account.

[37] Referring to the advice from Ms MT, Mrs PE says:

> Next thing we knew was MT was giving us a completely different opinion and Gran was not actually entitled to any of the funds, only the interest for her lifetime and that if we went to court, in her opinion, Gran would not win and it would cost her a large amount. Ms MT requested that mum sign a letter of engagement to enable her to contact Mr HH on Gran's behalf. We found that as the date was drawing close for the court proceedings that we did not have an alternative but to accept Ms MT's assistance.

[38] The essence of Mrs XC's complaint is that if correct advice had been provided, she would not have incurred legal fees in responding to the claim by Mr AB's children and the outcome she sought was to be compensated for the costs incurred.

[39] The final part of the complaint relates to the response from [Firm B] to the letters of complaint sent by Mrs PE to the firm.

[40] Following a consideration of the matter the Standards Committee:[10]

> …issued a preliminary view that the advice that was provided by Mr ZF was wrong to such a degree as to amount to unsatisfactory conduct but that it may be possible to adequately resolve the matter if Mrs XC were to receive a refund of the fees she incurred.

[41] Mr ZF did not accept the preliminary view and requested the Committee to indicate why it considered his advice was incorrect. He also provided further submissions in support of his interpretation of the will.

[42] The Committee responded to Mr ZF by letter dated 4 June 2013 in which it said:

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[10] Above n 1 at [19].

> The Standards Committee noted the inadequacies with the drafting of the will, however, it is of the view that it should have been clear to a competent lawyer exercising reasonable care, that the intent of the will was that:
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> - paragraph 3 of the will only gave Mrs XC a life interest in the house;
> - paragraph 4 of the will gave Mrs XC all of the deceased's remaining estate; and
> - paragraph 5 of the will intends for the house to go to the children and if Mrs XC predeceased then the house would also be given to the children.

[43] Mr ZF responded, noting the Committee had not provided any explanation as to what its view was. He noted that there were several options as to what was meant by a "life interest" which the Committee had not explained. He also noted that the Committee's summary of clause 5 of the will was incorrect in that the clause only applied if Mrs XC predeceased Mr AB.

[44] In general terms, he submitted his instructions were to ascertain what the will actually said rather than to indulge in speculation as to what Mr AB's intentions were. He also advised that he had recommended to the family they should negotiate with Mr AB's family and reach an acceptable outcome for all concerned.

[45] Having received this response, the Committee met again and issued its determination. It repeated its earlier statements recorded in [43] above and went on to conclude:[11]

> The advice Mr ZF provided to Mrs XC regarding her entitlement to the entirety of the estate and the interpretation of the will was clearly untenable and was incompetent to such degree as to be in breach of his obligation to act competently and duty to take reasonable care.

Scope of review

[46] Section 203 of the Lawyers and Conveyancers Act provides that the Legal Complaints Review Officer may review all the aspects or any of the aspects of any inquiry or investigation for or on behalf of a Standards Committee in relation to the complaint or matter to which the final determination relates.

[47] In addition, Winkelmann J in *Deliu v Hong* noted that:[12]

> …the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her.

[11] At [23].
[12] *Deliu v Hong* [2012] NZHC 158 at [41].

Review

[48] The review proceeded by way of a hearing attended by Mr ZF in Wellington on 3 February 2015. Neither Mrs PE nor Mrs XC were required to attend and did not do so.

[49] The Standards Committee reached the view that Mr ZF's advice was "untenable". Members of the Standards Committee include lawyers who practice in the area of law involved with this complaint and I acknowledge and agree that the view of a Standards Committee in circumstances such as are involved here should not be substituted for a different view without good reason. In the present instance however I consider that there is good reason for doing so.

[50] It must be recognised that Mr ZF became involved with this matter when requested to do so by Ms GA following receipt of Mr HH's letter of 13 July 2011 when he laid claim on behalf of his clients to the proceeds of sale of the property. Mr ZF responded to that letter on the same day. Prior to this, advice had been provided to Mrs XC and her family by Mr DM and Mr WY. They had not advised that Mrs XC had no option but to pay Mr AB's children as demanded by Mr HH. Their advice had been that the will was deficient, and that any steps to be taken needed to be taken with the agreement of all parties.

[51] All lawyers involved in this matter recognised the defects in the will in that it did not provide for what was to happen to the proceeds of sale if Mrs XC were either to die or surrender the right to occupy the house as provided in clause 3 of the will.

[52] Mr WY's advice to the family was in response to Mrs PE's email of 22 May 2011 to Mr DM in which the family expressed a desire to achieve some payment for Mrs XC. In his email of 27 May 2011 Mr WY said: "I agree that Option 1 provides the best course of action which would enable your grandmother to sell the house and live off the interest from the sale proceeds".[13]

[53] Mr WY went on to say:

> If she [Mrs XC] then wishes to relinquish her 'life interest' in the sale proceeds then she could do so **if all parties agree** and this would need to be done by a Deed of Family Arrangement signed by her **and by the other beneficiaries**. Under that deed she would relinquish her life interest and would receive out of the house sale proceeds an appropriate amount which represented the value of her life interest.
>
> (emphasis added)

[54] Importantly, Mr WY concluded his email in the following way:

[13] Option 1 of Mrs PE's email referred to the power of investment in clause 6 of the will and she asked the question: "Does that mean that Gran is able to sell the house and invest the proceeds of the house and live off the interest?".

> I think the next step then is for the house to be sold, **if all parties agree**, and we can then do the valuation referred to above to ascertain the value of your grandmother's life interest.
>
> (emphasis added)

[55] Overall, the advice provided by Mr WY in his email was somewhat equivocal, but it is important to note that his advice was subject to the agreement of all parties, which in the context of the email included Mr AB's children.

[56] It is noted, that the email was sent on 27 May 2011. The family then proceeded to sell the property[14] without communication with Mr AB's family. Mr HH's letter was sent on 13 July 2011 and it was only at this stage that Mr ZF was requested by Ms GA to respond to Mr HH's demands.

[57] It is important to note at this stage, that Mr ZF did not provide a separate opinion to the family such as has been referred to by various parties in this complaint including the Standards Committee. His opinion was expressed in the letter dated 13 July 2011 responding to Mr HH's demand for payment. The objective of this letter was to resist the demand. As noted by Mr ZF:[15]

> …it would have been irresponsible to concede what Mr HH had claimed without specific authority to do so. As advised in previous correspondence, after the writer became involved, it was not possible to get any instructions on this point from Mrs XC or her children.

[58] In his letter of 13 July 2011 Mr ZF did hold out the prospect of a negotiated outcome. At paragraph 13 he said:

> We understand that the widow's family are happy to look at a proposal whereby the house, or its value, are passed over to the children of AB following the death of the widow.

[59] It was this letter that formed the basis of Mr ZF's advice to his clients and he contends that at all times both he and other members of the firm strongly recommended to Mrs XC and her family that it was necessary to enter into a negotiated outcome to resolve the matter. A file note on Mr ZF's file recording the discussions at a meeting with Mrs XC and members of her family on 5 October 2011 does not include any reference to these recommendations. Whether or not the recommendation to negotiate was put as strongly as Mr ZF advises, does not affect my decision.

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[14] The Agreement for Sale and Purchase is dated 12 July 2011.
[15] Letter ZF to Lawyers Complaints Service (17 June 2013) at [6].

[60] The determination of the Standards Committee was that Mr ZF's interpretation of the will was "untenable". It says his advice was "incompetent to such a degree as to be in breach of his obligations to act competently and [his] duty to take reasonable care".[16]

[61] The obligation referred to by the Standards Committee is contained within rule 3 of the Conduct and Client Care Rules.[17] A breach of the Conduct and Client Care Rules constitutes unsatisfactory conduct by virtue of s 12(c) of the Lawyers and Conveyancers Act 2006.

[62] Section 12(a) of the Act also provides a definition of unsatisfactory conduct as being 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.

[63] Professor Webb in his text *Ethics, Professional Responsibility and the Lawyer* notes:[18]

> Being competent does not, in professional practise, preclude the making of mistakes. Because law is not a science, practitioners sometimes err in their judgement. Lawyers do not guarantee the outcome of their work. It is conceivable that in hindsight it could be shown the course of action the lawyer proposed or the lawyer's interpretation of the law was demonstrably wrong. However, when an error is in the exercise of judgement or the interpretation of an uncertain, unclear or complex provision a lawyer cannot be said to be incompetent.
>
> (Citation removed).

[64] There is no question that the will was defective. It did not provide what was to occur in the circumstances which presented, or even what was to occur after Mrs XC's death or remarriage. At paragraph [22] of its determination the Standards Committee stated:

> …[I]t would have been clear to a competent lawyer exercising reasonable care that the intention of the will was clearly that:
>
> - paragraph 3 of the will gave Mrs XC only a life interest in the property;
> - paragraph 4 of the will gave Mrs XC all of Mr AB's remaining estate;
> - paragraph 5 of the will intended for the property to go to the children, and if Mrs XC predeceased Mr AB then the house would also go to the children.

[65] Clause 5 of the will commences with the words: "I DECLARE that if my wife XC shall predecease me then …". Clause 5 therefore only has application if Mrs XC predeceased Mr AB. She did not. I do not therefore agree that "paragraph 5 of the will intended for the property to go to the children" as stated by the Standards Committee. In the facts which exist, paragraph 5 has no application at all.

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[16] Above n 1 at [23].
[17] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[18] Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, Lexis Nexis, Wellington, 2006) at 353.

[66] Mr ZF also points out that whilst there is a commonly accepted understanding of what a "life interest" constitutes, it can take many forms. The will in fact did not provide for a "life interest" in those words, but that Mrs XC was to have the "use, occupation and enjoyment of the property during her life time".

[67] I emphasise again, that Mr ZF's advice was given in the context of resisting a claim for Mr AB's family to be paid the proceeds of the sale. The property had already been sold when Mr ZF was asked to assist. His resistance and response to Mr HH set the basis for a negotiated outcome.

[68] Mr ZF says that it was never his advice that the family should refuse to negotiate but that Mr HH should be asked to support his views. In fact, Mr HH had also proceeded, wrongly in my view, in stating that the property passed to Mr AB's children after Mrs XC's interest in the property had terminated.

[69] There are clearly many different views as to what the will provided. I do not suggest my view is necessarily correct and the Committee is wrong. What is clear, is that there were several possible interpretations of the will, no one of which could be said to be wrong given the defects in the drafting. The Committee formed a view as to what was a reasonable interpretation of the intent of Mr AB. That amounts to second-guessing Mr AB's intentions and that was not the basis on which Mr ZF's advice was provided. Neither can it be considered to be a basis upon which to label Mr ZF's advice as being "untenable". The views as to what Mr AB intended form the basis of negotiations to settle the matter, and it was unlikely that this matter would have ever reached court given the defects in the will. It was always a situation where the parties would have to recognise that a negotiated settlement was required.

[70] In addition, it seems to me that the family proceeded as much on the advice provided by Mr WY and (inadvertently or otherwise) reinforced by Ms GA. Mr ZF had no further contact with the family once they declined to negotiate.

[71] In all of the circumstances I do not agree there should be a finding of unsatisfactory conduct against Mr ZF on the grounds recorded by the Standards Committee.

The role of Ms MT

[72] Mrs XC also complained about the manner in which Ms MT assumed control of the matter. It had been suggested to the family by Ms GA that the matter should be referred to Ms MT for a second opinion. They were happy with this but were somewhat surprised when Ms MT sent them a letter of engagement for signature and assumed direct control of the file.

[73] Mr ZF too was surprised at the manner at which Ms MT assumed control of the proceedings. He had anticipated that his firm would at least retain an involvement as instructing solicitors.[19]

[74] In short, the referral to Ms MT did not involve Mr ZF. It was seemingly mismanaged by those who were involved and directions and instructions were not obtained from Mrs XC and her family.

The firm's response to the complaints

[75] Mrs PE initially contacted Mr DM in the firm by telephone to advise of the family's dissatisfaction with the firm's services. She followed that with a letter dated 20 March 2012. No reply was received from Mr DM and she followed that with another letter dated 23 April 2012 requesting that Mrs XC be reimbursed for Ms MT's fees. Again no response was received.

[76] In her letter of complaint to the Lawyers Complaints Service Mrs PE noted:

> To date no one from [Firm B] has ever contacted my mother, my grandmother, or me to offer an explanation as to why they thought we needed a second opinion, why their advice differs from other legal advice or even a simple apology if they made a mistake. They have not had the common courtesy to acknowledge the letters of complaint that I sent to them either.

[77] Although it is the responsibility of "each lawyer" to:[20]

> …ensure that the lawyer's practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice.

[78] This rule cannot be strictly applied to lawyers who do not have a part to play in the management of the firm. Mr ZF was a consultant to the practice at the time the events took place and was presumably not responsible for administrative matters. I do not consider that an adverse finding can be made against Mr ZF in this regard.

Outcome

[79] The outcome of this review is that I do not consider the finding against Mr ZF of unsatisfactory conduct by reason of the fact that he provided advice which was "untenable" should remain. It was particularly harsh that the Committee should censure Mr ZF for his advice.

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[19] Ms MT practised within the firm and was not a barrister sole. However, there is no reason that [Firm B] should not have retained involvement in the manner anticipated by Mr ZF.

[20] Above n 17, r 3.8.

[80] As a consequence of this finding being reversed, the compensation order in favour of Mrs XC is also reversed. In considering this matter it is apparent that, rightly or wrongly, Mrs XC and her children derived encouragement from their understanding of the comments made by Mr DM, Mr WY and Mr ZF, for their decision to resist Mr HH's initial demands without entering into negotiations to reach a settlement acceptable to all. In failing to respond to Mrs PE's initial letters of complaint direct to the firm, [Firm B] passed up the opportunity to discuss the matter with Mrs XC and her family in an environment where all parties may have been amenable to resolving the matter. Instead, the family has now been involved in the complaints process for some 18 months and Mrs XC's health has been badly affected by the stress and worry inherent in that process resulting in an outcome adverse to one of the lawyers involved which I have now reversed.

[81] This was a matter which should have engaged the firms's complaints procedure immediately and been addressed by the firm's partners responsible for administering that procedure. As this was a complaint against Mr ZF, there has been no adverse finding against him with regard to the failure to respond to the complaints. In the circumstances however, I would urge the firm's partners to consider a response to Mrs XC and her family which acknowledges this matter may not have needed to involve the Complaints Service, offer such apology with regard to this issue and the issues raised in the complaint as the firm considers appropriate, and give consideration to voluntarily giving effect to the orders of the Standards Committee (other than the censure of course).

[82] I emphasise that I am not giving any formal direction to the firm in the preceding paragraphs as that is not appropriate in the context of a complaint about Mr ZF. However, I perceive the complaint is generally about the services of the several persons in the firm who were involved with this matter and the firm may wish to take the opportunity to try and redress the family's dissatisfaction.

Decision

[1] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed.

[2] Pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 I determine that no further action be taken with regard to the complaint.

DATED this 19th day of February 2015

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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:

Mr ZF as the Applicant
Mrs XC as the Respondent
Mr DM as a related person as per section 213
[North Island] Standards Committee [X]
The New Zealand Law Society