

CONCERNING

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

AND

CONCERNING

BETWEEN

AZ

Applicant

AND

BY

Respondent

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

DECISION

Introduction

[1] Mr AZ has applied for a review of the determination by [City] Standards Committee [x] to take no further action in respect of his complaints about Mr BY. Mr BY acted for Mr AZ's mother in a relationship property dispute with Mr AZ's father in a drawn out and acrimonious separation.

Background

[2] The Standards Committee set out the relevant facts in its determination and they are repeated here to provide readers of this decision with the background information:¹

7. Mr and Mrs AZ were married for 35 years and separated in 2008. The principal asset for the purposes of relationship property division was a residential property at [address]. The registered proprietors of that property at all material times were [Mr AZ senior, Mrs AZ and CX], a solicitor. Those three parties held the property as Trustees of the [ABC] Trust created by deed on 18 August 1995. The primary beneficiaries of the [ABC] Trust were Mr AZ Senior and Mrs AZ.

¹ Standards Committee decision (2 October 2013) at [7]–[12].

8. In mid-2008 Mrs AZ engaged Mr BY to act for her after her marriage to Mr AZ ended. From this point onwards Mrs AZ lived alone in the [property]. Proceedings were settled in late 2011. The terms of the settlement agreement allowed for the transfer of the [property] to Mrs AZ on payment of an agreed sum to Mr AZ within 12 months.
9. Mrs AZ died on [Date] having been admitted to hospital on [Date]. At the time she died she owed Mr BY fees totalling \$76,291.17. Mrs AZ died before the settlement agreement referred to above could be implemented.
10. Mr BY, via his solicitor Mr [DV], had lodged a caveat against the [property] on 2 August 2012 to secure payment of outstanding legal fees.
11. The [property] was sold by Mr AZ and the executor of Mrs AZ's estate in 2013 for \$560,000.00. The executor of Mrs AZ's estate paid Mr BY fees prior to settlement in order to secure a release of the caveat, thereby allowing the sale to proceed.
12. The complainant and his sister Ms AZ are the beneficiaries of Mrs AZ's estate.

[3] The caveat had been lodged pursuant to an authority provided by Mrs AZ in an annexure to a letter of engagement provided by Mr BY. It read:²

Security for payment

- In consideration of the professional legal services provided under the Agreement the Client hereby irrevocably grants to BY and/or his instructing solicitor, DV, a power of attorney to execute on behalf of the Client a registrable all obligations mortgage (Memorandum number 1995/4004) to secure the unpaid fees and disbursements.
- The mortgage shall be secured over all the Client's estate and interest in the property at:

[Property Address]

Comprised in Certificate of Title NZ XXX/XXX and to support the mortgage and said BY and/or DV have the right to lodge a caveat against the title to the land.

...

I, **MRS AZ** acknowledge that this clause has been specifically explained to me and I confirm that I have understood the provisions of this clause.

[4] The annexure was signed by Mrs AZ and dated 3 February 2010.

[5] Mr BY had provided an earlier letter of engagement which included the following clause:³

9. In some circumstances I will require security for payment of fees in which case the annexure to this document will need to be completed.

²BY letter of engagement to Mrs AZ (2010) at Annexure B.

³Mr BY letter of engagement to Mrs AZ (2008) at [9].

[6] Those terms of engagement were also signed by Mrs AZ and dated 30 May 2008. The annexure was not signed in that instance.

[7] During the course of the dispute between Mr and Mrs AZ, Mr CX applied to the Court for orders that he be permitted to resign as a trustee of the Trust and for an independent trustee to be appointed. Those proceedings were resolved by consent and approved by the Court whereby Mr CX was permitted to resign leaving Mr and Mrs AZ as the remaining trustees. By agreement, the Trust deed was to be amended to enable the number of trustees to be reduced to two.

Mr AZ's complaints

[8] Mr AZ complained⁴ that Mr BY had not advised his mother to take independent advice when asking her to sign the annexure to the terms of engagement. He developed this issue in the course of the complaint, and on review, by asserting that Mr BY had a conflict of interest which required Mrs AZ to be referred for independent advice. Mr AZ also complained that the caveat should not have been registered over the title to the property as that was not what had been provided for in the Annexure.

[9] Mr AZ believes that having secured payment of his fees, Mr BY made Mrs AZ's determination to "litigate and dispute every issue"⁵ easier and that Mr BY "was prepared to act, rack up the fees, render invoice after invoice knowing that the value of the assets was not significant and that at times [his] mother was not being reasonable".⁶ He considers that if Mr BY "had required payment of his costs, at least annually, that would have provided an incentive for resolution. As it happened, BY for his own benefit, stayed the course because he wanted the house sold."⁷

[10] Mr AZ compared Mr BY's fees (\$65,745 plus GST and disbursements) to the fees incurred by his father, which amounted to \$45,000.

[11] Mr AZ also considered that the beneficiaries of the Trust (of which he was one) should have been consulted before amendments were made to the Trust deed.

[12] Mr AZ complains that Mr BY should have discussed with Mrs AZ how she was going to finance the purchase of her husband's interest in the property⁸ before proceeding with the settlement agreement whereby Mrs AZ was required to confirm finance within six

⁴ Letter from AZ to Lawyers Complaints Service (25 February 2013).

⁵ At 2.

⁶ At 2.

⁷ At 2.

⁸ The relationship property proceedings were settled on the basis that the property invested in Mrs AZ and she was required to pay her husband the sum of \$212,500. The settlement deed referred to her husband's "interest" in the property.

months of the mediation and make payment to her husband within 12 months from the date of the mediation. Mr AZ also complains that Mr BY did not give advice to his mother about her duties as a trustee which were breached by her in allowing the property to become subject to a caveat protecting Mr BY's fees.

The Standards Committee determination

[13] The Standards Committee identified five issues to be addressed:⁹

- i. Overcharging in respect of relationship property proceedings between Mrs AZ (the complainant's late mother) and Mr AZ Senior (the complainant's father);
- ii. Failure to provide Mrs AZ with terms of engagement in a timely fashion (the complainant alleged that terms of engagement were not provided until two years after Mr BY commenced acting);
- iii. Failure to advise Mrs AZ to take independent advice in respect of an agreement to mortgage [Property] ... and failure to ensure that the mortgage agreement was independently witnessed;
- iv. Failure to ascertain whether Mrs AZ had an interest over the property at [Address] over which to grant a mortgage;
- v. Variation of a Trust deed without first consulting the beneficiaries of that Trust;
- vi. Inappropriately registering a caveat against the property at [Address];
- vii. Failure to undertake interim billing thereby encouraging the late Mrs AZ to continue an unreasonable course in legal proceedings; and
- viii. Conflict of interest.

[14] A hearing on the papers was scheduled to consider two of these issues namely:¹⁰

- (a) Were the fees charged by Mr BY fair and reasonable?
- (b) Did Mr BY fail to provide appropriate advice on the objectives of litigation, how best to achieve those objectives and fail to refresh that advice as the matter progressed?

[15] The Committee had earlier determined to take no further action on the remaining issues and indicated it would provide reasons in its determination following the hearing.

⁹ Above n 1 at [1].

¹⁰ Notice of hearing (30 July 2013).

Mr BY's fees

[16] The Standards Committee commissioned a report from a costs assessor, Mr [XX]. Mr [XX] came to the view that Mr BY's fees should be reduced by \$23,637.19 because he had failed to:

1. "provide adequate written advice regarding the costs and objectives of litigation";¹¹
2. obtain informed consent from Mrs AZ acknowledging that the consequences of non-cooperation and delay would result in increased costs;
3. give Mrs AZ clear advice in writing that the costs of maintaining an independent trustee would have been less than engaging in the litigation commenced by Mr CX.

[17] The Committee noted that any adjustment to the fees charged by Mr BY could only proceed on the basis that his fees were not fair and reasonable, and not for the reasons proposed by Mr XX. Neither the Committee nor Mr XX criticised the work done by Mr BY or questioned the time recorded. On the basis of Mr BY's hourly rate of \$450, the fee on a time cost basis amounted to \$68,850. The fees charged by Mr BY (exclusive of GST and disbursements) amounted to \$65,745.

[18] The Committee determined that special circumstances existed to enable the Committee to consider all bills of costs but declined to accept Mr XX's recommendations. It therefore determined that Mr BY's fees were fair and reasonable.

Failure to provide objective advice

[19] The Committee commented that although Mr XX had exceeded his brief, it would take note of his comments about the competence of Mr BY's advice. Having considered all of the material provided it came to the following determination:¹²

The strategy adopted by Mrs AZ and carried out by Mr BY, for example non-cooperation with discovery orders and opposing the appointment of an independent trustee, was in hindsight questionable. However, Mr BY was at all times acting in accordance with Mrs AZ's instructions which were predicated on her desire to remain in the marital home as long as possible. As noted by the Committee at paragraph [28] above, the fact that written advice was not provided as to the pitfalls of Mrs AZ's litigation strategy does not mean that advice was not provided. Mr BY was placed in a difficult position, having taken instructions from

¹¹ Above n 1, at [29].

¹² At [46].

an obstinate client he was obliged to carry out those instructions to the extent that they were not in conflict with his ethical obligations.

Terms of engagement

[20] The Committee noted that Mr BY had provided a letter and terms of engagement in May 2008. Consequently Mr AZ was not correct when he complained that the terms of engagement were not provided until February 2010.

Interim billing

[21] The Committee noted (citing authority from this Office) that “while a failure to render interim accounts does not breach any professional conduct rules, best practice dictates that a client be kept abreast of costs as a matter progresses”.¹³ It noted Mr BY has rendered accounts “thereby keeping Mrs AZ informed of costs as they accrued, but did not insist on payment”.¹⁴

The caveat

[22] The issues relating to the caveat included:

- (a) whether it was appropriate to register the caveat;
- (b) whether Mr BY should have referred Mrs AZ for independent advice relating to the authority for Mr BY and Mr DV to register a caveat;
- (c) whether Mr BY should have ascertained what interest Mrs AZ had in the property to allow registration of the caveat.

[23] The Committee determined definitively that Mr BY did not have a conflict of interest¹⁵ and there was no requirement for Mr BY to require Mrs AZ to take independent advice. The Committee also noted Mrs AZ did have an interest in the property “by virtue of her position as trustee, primary beneficiary and appointer in the [ABC] Trust”.¹⁶

¹³ At [57].

¹⁴ At [57].

¹⁵ At [63].

¹⁶ At [63].

The variation of the Trust deed

[24] Mr AZ complained Mr BY had prepared the variation of the Trust deed and as a beneficiary Mr AZ ought to have been consulted. The Committee determined there was no need to consult with the beneficiaries.

[25] Having considered all of these matters, the Committee determined to take no further action on Mr AZ's complaints.

Application for review

[26] Mr AZ provided detailed submissions with his review application:

1. "The Committee should not except in the clearest of circumstances to deal with a complaint on the papers. Those circumstances did not exist."¹⁷
2. "Where a lay person has made a complaint and there is a basis for genuine dispute, fairness of process should require the Committee to appoint an investigator to enquire further and elicit information which the lay person may have omitted to set out in the complaint or omitted to respond to."¹⁸
3. The fees charged by Mr BY were not fair and reasonable in that no account was taken of Mrs AZ's age and fragile mental and physical health. The Trust asset, being the property at [Address], was valued at \$425,000, was a leaky building and required remedial work at a cost in excess of \$700,000.
4. It should have been clear to Mr BY that Mrs AZ was never going to be in a position to raise sufficient funds to purchase her husband's interest in the property and pay her legal fees.
5. Mr BY's suggestion that Mrs AZ should have her children assist with raising finance was last minute and "lackadaisical".¹⁹
6. Mr BY should have provided a written summary of the strategy to be adopted and the outcome sought. "If this outcome had been written down or at the very least properly explained and considered it would have been clearly apparent from the outset that this was not achievable".²⁰
7. "Had it been made apparent to Mrs AZ at the onset that her hopes of buying her husband out of his share of the house were only possible if she had some sort of financial assistance, then it seems totally reasonable to assume that she would not pursued [*sic*] this

¹⁷ Letter from AZ to LCRO (12 November 2013) at [2](a)

¹⁸ At [2](b).

¹⁹ At [3](a)(vii).

²⁰ At [3](a)(viii).

course of action without first ensuring that she was able to get a mortgage.”²¹

8. “The outcome negotiated by Mr BY was clearly not achievable and this was later acknowledged by Mr BY... Again, how can it be considered that his fees were fair or reasonable given this totally unachievable outcome.”²²
9. “Mr BY neglected his fiduciary obligations and took advantage of Mrs AZ. She was emotionally and mentally vulnerable and Mr BY seized the opportunity to exploit her.”²³
10. “Mr BY’s treatment of Mrs AZ as a ‘cash cow’ and the impossible outcome he created for her were large factors in the subsequent [deleted] of the matrimonial home by Mrs AZ on [Date] and her eventual loss of life.”²⁴
11. “Mr BY failed to provide appropriate advice on the objectives of litigation, how best to achieve those objectives and failed to refresh that advice as the matter progressed.”²⁵
12. It should also be noted that Mr BY is an Officer of the Court. His non-cooperation with Court processes by assisting Mrs AZ with the delay in final resolution of relationship property is a breach of his obligations and must cast doubt on his integrity and assertions made during the course of this complaint.²⁶

The effect of delaying Court proceedings added significant amounts to the fee that Mr BY charged Mrs AZ for legal advice.²⁷

Review

[27] All material provided to the Standards Committee and to this Office has been carefully reviewed and if any of Mr AZ’s submissions are not specifically addressed in this decision it does not mean they have not been considered.

[28] The review progressed by way of an applicant only hearing in Auckland on 12 June 2017 attended by Mr AZ. Mr BY was not required to attend and did not exercise his right to do so. The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006 (the Act). The LCRO has delegated Mr Vaughan to report to me and the final determination of the outcome of

²¹ At [3](a)(ix).

²² At [3](a)(x).

²³ At [3](a)(xii).

²⁴ At [3](a)(xiii).

²⁵ At [3](b)(i).

²⁶ At [3](6)(iii).

²⁷ At [3](b)(iv).

this review as set out in this decision is made following a full consideration of all matters by me following consideration of Mr Vaughan's report and discussion.

Mr BY's advice/Mr [XX]'s report

[29] In the course of considering Mr AZ's complaint about fees the competence and quality of the advice provided by Mr BY has been brought into focus. A consideration of the issues raised in this regard will address a number of the complaints and consequently I will address this issue as a discrete matter.

[30] Mr [XX] concluded that Mr BY should reduce his fees for several reasons:

1. The failure to provide in writing *clear information and advice* relating to [Mrs AZ's] objectives for the purposes of obtaining informed consent to continued litigation and increased legal expense entitles the client to a further credit to the practitioner's fee of \$78,790.63 for those reasons.²⁸
2. Mr BY had failed to "... ensure the client is informed in writing of the consequences of non-disclosure. *Clear information and advice* cannot be provided for these purposes unless that information and advice is in writing."²⁹
3. Mr BY had failed to advise Mrs BAZ in writing that litigating Mr CX's application to be removed as a trustee would cost more than appointing an independent trustee.

[31] However, whilst Mr XX has been critical of Mr BY for these reasons, he does not question Mr BY's competence. He says:³⁰

This cost assessor does not believe there are any issues of competence arising from the practitioner's files.

The cost assessor is satisfied the practitioner did all of the work personally and there is not any evidence of the invoices being padded in any way.

Similarly this cost assessor believes the practitioner has acted ethically in relation to the execution of the agreement to mortgage and the lodgement of the caveat. That procedure is standard business practice permitted by the Law Society rules.

[32] There is no evidence that would lead to different conclusions. In fact Mr BY achieved the outcome that Mrs AZ sought. She wanted the opportunity to purchase the property and that was achieved by mediation. The memorandum of agreement entered into by Mr and Mrs AZ at the mediation on 7 December 2011 provided for the property to vest in Mrs AZ and required her to make payment to Mr AZ one year later.

²⁸ Letter from XX to New Zealand District Law Society (15 July 2012) at [80].

²⁹ At [59].

³⁰ At [110]–[112].

The agreement settled all relationship property issues including the claim by Mr AZ for more than \$638,000.

[33] However, Mr AZ (the applicant) submits that Mr BY should have canvassed whether his mother was able to raise the necessary funds (\$300,000) to purchase the property and pay her legal costs before she entered into the agreement. He is critical of Mr BY for “allowing” Mrs AZ to enter into an agreement which she had no real prospects of being able to perform.

[34] Mr AZ has however acknowledged that “his mother preferred to litigate and dispute every issue”.³¹ She was also in a fragile state of mind. In terms of the agreement, the property vested in her as at 2 December 2011. This allowed her to remain in the property which is what she desired. It would have been difficult for Mr BY to stand in the way of that and the terms of the agreement meant that Mrs AZ was going to be required in due course to confront the reality that she could not fund the purchase rather than being advised/told by Mr BY that what she was wanting could not be achieved. It also gave her another 12 months to live in the property.

[35] It is fair to Mr BY to place on record that there is no challenge to his competence and the outcome achieved for Mrs AZ met her immediate requirements.

Mr BY's fees

[36] Mr AZ says:³²

- (xii) Mr BY neglected his fiduciary obligations and took advantage of Mrs AZ. She was emotionally and mentally vulnerable and Mr BY seized the opportunity to exploit her.
- (xiii) Mr BY's treatment of Mrs AZ as a 'cash cow' and the impossible outcome he created for her were large factors in the [deleted] of the matrimonial home by Mrs AZ on [Date] and her eventual loss of life.
- (xiv) Mr BY's actions have to be considered a breach of his fiduciary obligations and demonstrate a complete lack of consideration of the best interests of Mrs AZ.

[37] He submits that if Mr BY had provided clear information and advice to Mrs AZ and explored different options with her, she may have recognised the cost to her of pursuing the course that she and Mr BY did. That included non-compliance with Court directions which Mr AZ says put Mr BY in breach of his obligations to the Court. Although Mr BY could have advised Mrs AZ about the possible consequences of non-

³¹ Above n 6.

³² Above n 21, at [3](a)(xii)–(xiv).

compliance, he could not have compelled her to comply with the Court's directions. He also submits that if Mr BY had required Mrs AZ to pay his invoices, rather than extending credit to her, then again, she may have realised the true cost of pursuing the course of action that she was following.

[38] This is a somewhat unusual contention. Mr BY is being criticised for not enforcing payment of his fees. He rendered four accounts over the three and a half year period he acted for Mrs AZ and so she was aware of the cost of his services. Mr AZ points out that it was easy for his mother to continue "litigating and disputing" matters because she was not being required to pay Mr BY's fees. Mr AZ says this was part of Mr BY's exploitative conduct.

[39] That is not a contention which I can accept. Mr BY accommodated Mrs AZ's impecunious state by allowing her to defer payment and to have the benefit of continued legal representation. That is to be commended, not criticised.

[40] Mr AZ also refers to the comment by Mr BY (as reported by Mr XX) that he would have reduced his fees by one half if Mrs AZ had been alive "because of the good relationship with [her]".³³

[41] That was a concession (if Mr XXs report is accurate) that Mr BY would have made to Mrs AZ personally because of the circumstances she found herself in. Again, Mr BY is to be commended for this potential accommodation of Mrs AZ but he cannot be held to that where others are to benefit, and the concession was not an acknowledgement of substandard advice or service.

[42] The Standards Committee noted that the "refund proposed by Mr XX is based upon his finding that Mr BY failed to provide adequate written advice regarding the costs and objectives of litigation".³⁴ It further noted "there is no requirement that such advice be recorded in writing"³⁵ and formed the view that it was "more likely than not that Mr BY did discuss verbally with Mrs AZ the matters referred to by Mr XX, such as non-compliance with discovery obligations and the implications of opposing the appointment of an independent trustee to the [ABC] Trust".³⁶

³³ Above n 27 at [96].

³⁴ Above n 1, at [29].

³⁵ At [29].

³⁶ At [29].

Informed instructions/alternatives to litigation

[43] Rules 13.3 and 13.4 of the Conduct and Client Care Rules³⁷ provide:

Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute.

[44] The relationship property dispute was resolved at mediation and the proceedings brought by Mr CX were resolved at a judicial settlement conference. Mr BY fulfilled the requirements of the rules.

Were Mr BY's fees fair and reasonable?

[45] The only basis on which there can be finding that Mr BY's fees were not fair and reasonable is following a breach of rule 9. Rule 9 sets out the factors that may be taken into account when assessing whether a fee is fair and reasonable and they do not include failing to provide advice in writing. Mr XX's report provides nothing to support a finding that Mr BY's fees were not fair and reasonable after taking into account the rule 9 factors.

[46] Mr AZ contends that his mother did not get value for money. That is a concept that does not necessarily apply to legal advice. In litigation a lawyer's fees are directly affected by the instructions received and the conduct of the opposing parties. The fees rendered by Mr BY were in accordance with the time expended by him which is a common, if not usual, basis for calculating fees. Mrs AZ was aware of the cost of the services being provided by Mr BY and did not herself object to these.

[47] Having considered all of the issues raised by Mr AZ, I concur with the Standards Committee that Mr BY'S fees were fair and reasonable.

The terms of engagement/independent advice/the caveat

[48] Mr BY's letter of engagement issued in May 2008 included the following clause:

³⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

In some circumstances I will require security for payment of fees in which case the annexure to this document will need to be completed.

[49] Mrs AZ signed the letter to confirm her instructions and dated it 30 May 2008.

[50] Mr BY sent further terms of engagement in February 2010 annexed to which was the irrevocable appointment of himself and Mr DV as attorneys to execute all obligations mortgage over the property to secure Mr BY's fees.

[51] Mrs AZ signed both the terms of engagement and the appointment as attorney, and dated them 2 February 2010. The document included the following acknowledgement:

I, **AZ** acknowledge that this clause has been specifically explained to me and I confirm that I have understood the provisions of this clause.

[52] Mr AZ's complaint is that Mr BY did not refer or suggest to Mrs AZ that she take independent advice before providing the authority. He also submits that as her signature was not witnessed it was not an enforceable grant of a power of attorney.

[53] Mr BY responded to this aspect of Mr AZ's complaint:³⁸

- 4.1 The agreement to mortgage makes it clear that AZ had the terms explained to her.
- 4.2 There is/was no legal requirement for there to be separate advice or witness.
- 4.3 I have copied this agreement from a law society form provided to the profession some time ago.

[54] The requirement for a lawyer to either suggest or require a client to take independent advice in these circumstances is found within rule 5.4, which provides::

A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.

[55] The authors of the text *Ethics, Professional Responsibility and the Lawyer*³⁹ state:

The fees a lawyer charges raise ethical issues. The existence of a fee is, at least on the face of it, a source of conflict between lawyer and client [footnote omitted.] It is in the lawyer's interest to maximise the fee, whereas the opposite is true for the client. The existence of such a conflict of interest is an accepted

³⁸ Letter from BY to Lawyers Complaints Service (26 March 2013) at [4].

³⁹ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 315.

incidence of a lawyer's everyday practice, and lawyers are generally regarded as able to be trusted not to generate work needlessly to increase their own fees.

[56] I do not propose to enter into a detailed analysis of the provisions of rule 5.4 (including all of the sub-rules) but as a general observation it is difficult to accept that there is a "conflict" in the usual sense of the word where a fee has been earned and is due and payable and a client is prepared to provide security for payment. A conflict would definitely arise should the lawyer wish to enforce the security but it is questionable whether there is a "conflict" at the time the lawyer accepts security for payment. However, if the rule did apply, a lawyer would not be able to continue to act for the client in circumstances where the client has provided security for the lawyer's fees.

[57] Mr AZ says that Mr BY should have referred his mother for independent advice and informed consent before she signed the annexure. I am aware that it is not unusual for lawyers to request, and clients to provide, security for payment of the lawyer's fees. I am not aware whether or not it is usual for lawyers to require clients to take independent advice before requesting clients to provide security. In any event, whether it is usual or not, does not determine whether or not the rules should apply.

[58] There are no rules that directly apply. There is no question that it would be best practice. However, I am not prepared to establish a requirement to do so where there is no clear applicable rule. It is relevant that the form used by Mr BY was copied from the form produced by the Auckland District Law Society which does not include either a provision for the client's signature to be witnessed or for an attestation by an independent solicitor.⁴⁰ Any rules that could apply do so somewhat obliquely. This is an area where the New Zealand Law Society may consider giving some guidance to lawyers.

[59] This is a situation where the discretion to take no further action on a complaint should be exercised.

[60] That option is also applied to the submission by Mr AZ that there were no grounds to lodge the caveat against the "property" although I observe that caveat was lodged against Mrs AZ "interest" in the property and she did have a legal interest in the property as trustee.

[61] Mrs AZ and her executor had the option of challenging the validity of the caveat through the mechanism provided by the Land Transfer Act 1952.

⁴⁰ As far as I am aware, the form is still produced in the same format by ADLS.

[62] Section 138(1)(f) of the Act provides that a Standards Committee (and this Office) may exercise a discretion to take no further action on a complaint where “there is in all the circumstances an adequate remedy ... that it would be reasonable for the person aggrieved to exercise”. It is appropriate to exercise that discretion on this point.

[63] There is no basis to Mr AZ’s concern that the Committee should not have dealt with his complaint on the papers because the Act and Regulations that govern Standards Committees’ procedures presume a summary hearing on the papers. It is rare for a Committee to proceed otherwise.

Conclusion

[64] Having considered all of the issues raised by Mr AZ in his complaint and on review I reach the same conclusions as the Standards Committee, namely that it is unnecessary or inappropriate to take further actions on Mr AZ’s complaints.

Decision

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

DATED this 22nd day of June 2017

D Thresher
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 AZ as the Applicant
Mr BY as the Respondent
[City] Standards Committee [x]
New Zealand Law Society