

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee 2

BETWEEN

IK

Applicant

AND

SN

Respondent

DECISION

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

Background

[1] Mr IK, his brother IL, and his sister IM inherited a farm property from their parents and were registered as proprietors of the property as tenants in common in equal shares.

[2] The three siblings had agreed that the property was to be sold, but had not been able to effect a sale.

[3] By May 2010, the mortgagee of the property was about to conduct a mortgagee sale due to the inability of the siblings to agree on the terms of a proposed extension of the mortgage.

[4] Mr SM had known IK for a number of years. He also knew IL and IM and was aware of the impending sale. He was also IM's attorney.

[5] Mr SM offered to mediate between the three siblings to enable them to reach agreement as to the terms on which the mortgage could be refinanced and the mortgagee sale averted. He also proposed a course of action which would see the property brought into a saleable condition.

[6] Having discussed matters with the parties, he prepared a draft Agreement which he then delivered to Mr SN with instructions to convert the draft into a formal Deed. Mr SN had previously acted for Mr SM and in circumstances not dissimilar from the present situation.

[7] Mr SN proceeded in accordance with Mr SM's instructions. The Deed recorded Mr SM's obligations in the following way:

To

- a) Arrange a new loan agreement for a period of 12 months, sufficient to cover interest and:
 - i. Meet interest payments due for the next 12 months; and
 - ii. Provide a contingency fund of \$50,000.00 for Mr SM to use for the purposes of carrying out the matters on which he was retained.
- b) Communicate and negotiate with purchasers and agents towards a sale of the property within 12 months.
- c) Arrange and appoint a solicitor to act on an independent basis for the Owners as a group in the achievement of the fundamental objective and all incidental matters to that.
- d) Appoint an accountant to maintain and prepare accounts for all matters to do with the management of the property until such time as it is sold.
- e) Oversee the cleaning and tidying of the house property, back shed, cattle yards and front areas of the farm to bring them to a point where they are in properly saleable condition.
- f) Organise and approve an account for the sale of all cattle and subject to there being reasonable sums released from such sales for the proper management and husbandry of the cattle to ensure that all of the proceeds from the sales are retained in the trust account of the solicitor appointed by [him]

g) Attend to the painting and repair of the house and its environs.

[8] Following preparation of the document Mr SM took it to IK. Mr IK has acknowledged that he read the document thoroughly and had no issues as to its content. He then attended at Mr SN's office to sign the document. He did not meet or discuss the terms of the Deed with Mr SN and his signature was witnessed by a member of Mr SN's staff.

[9] At some stage, IL also attended Mr SN's office and executed the Deed which was dated 4 May 2010.

[10] The intention was that Mr SM would then execute the document himself and as attorney for Ms IM, but this did not occur.

[11] Subsequently however the parties did execute the various documents to enable the loan to be extended as provided for in the Deed and the mortgagee sale was averted.

[12] The auction process which had been commenced by the mortgagee then continued on instructions from Mr SM and a sale agreement was entered into. This document was signed by AU and IL and by Mr SM as attorney for Ms IM. Similarly, the relevant documentation to implement the sale was also signed by the same parties.

[13] Following settlement of the sale on 23 July 2010, a meeting was held at Mr SN's office attended by IL and Mr SM. During the course of that meeting Mr SM had discussions with AU either by telephone or directly. There is some disagreement by AU as to the extent of his contact with Mr SM during the course of that meeting, but that is of limited relevance.

[14] At the meeting, various matters relating to the disbursement of the funds were apparently agreed. Following the meeting, Mr SN was instructed by Mr SM to prepare a Deed recording the agreed terms. He also prepared a spreadsheet showing the proposed distribution.

[15] This Deed was not executed by any of the parties, and AU consulted SL of ACY for advice.

[16] On 27 July 2010, SL made demand of Mr SN on behalf of AU, for one third of the proceeds of sale to be paid to AU. He noted that whilst "there may be problems existing between the three registered proprietors, they were nothing to do with the ownership of the property and the obligations shown on the titles".

[17] Mr SN declined to make payment as demanded and both he and SL communicated with the New Zealand Law Society to seek assistance. In addition, a substantial amount of correspondence passed between Mr SN, SL, and Mr AT who was instructed by IL.

[18] IL specifically instructed Mr SN to continue to hold the balance of the sale proceeds pending agreement between himself and his two siblings. The funds retained by Mr SN represented a potential GST liability and an adjustment for the proceeds of sale of the stock received directly by AU.

[19] The parties have been unable to resolve matters and IK lodged a complaint with the Complaints Service of the New Zealand Law Society.

The Complaint and the Standards Committee decision

[20] The major issue complained of by Mr IK, was the failure by Mr SN to account to him for one third of the sale proceeds. He asserted that he did not believe that Mr SN had any authority to retain any funds from the sale and noted that the Deed dated 4 May 2010 had not been executed by all owners, therefore rendering it unenforceable.

[21] Mr IK also noted that Mr SN had not provided him with the relevant client information as required by the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008.

[22] He also asserted that Mr SN's bills of costs amounted to overcharging.

[23] After conducting a hearing on the papers, the Standards Committee determined pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action with regard to the complaints. It formed the view that Mr SN could not disburse any of the sale proceeds otherwise than in accordance with joint instructions from all three registered proprietors and was therefore unable to deal with the funds other than in the manner he had.

[24] The Committee did not consider that Mr SN's charges were unfair or unreasonable and finally it determined that Mr SN had not breached Rules 3.4 or 3.5 of the Conduct and Client Care Rules by reason of the exception provided in Rule 3.7.

Review

[25] A review hearing was held in Auckland on 1 December 2011 attended by Mr IK, Mr SM and Mr SN.

Failure to account for share of proceeds

[26] Mr SN has declined to pay Mr IK one third of the net proceeds of sale as demanded by him and by SL on his behalf. Instead, he has paid each of the registered proprietors a sum which represents the undisputed payment to each of the owners. He holds the balance of the funds in his trust account.

[27] SL view is quite simply, that as a one third owner of the property as a tenant in common, his client is entitled to demand payment of one third of the proceeds of sale. He argues that the Deed dated 4 May 2010 is not binding as it has not been executed by either Ms IM or Mr SM. He also alleges that by withholding funds, Mr SN is in breach of the Lawyers and Conveyancers Act 2006.

[28] Mr IK also asserts that he did not agree to the matters discussed at the meeting following settlement and as recorded in the Deed prepared by Mr SN following that meeting.

[29] Mr SN on the other hand argues that Mr SM had ostensible authority from all three owners, and that he (Mr SN) acted in accordance with instructions from Mr SM. Mr SN considers that execution of the Deed by Mr IK constituted evidence of his approval of its terms. He takes the view that Mr IK is unable to resile from that position notwithstanding that the document had not been executed by Mr SM and Ms IM.

[30] Mr SN also refers to the views of Mr IL's solicitor (Mr AT). Mr AT refers to the New Zealand Land Law Text (Bennion, Brown, Thomas, and Toomey) (second edition) which records the principle that the division of proceeds of sale between parties must reflect their respective beneficial interests in the property which has been sold, subject to equitable accounting between them, and not simply by reference to the proportions in which they are registered on the title as tenants in common. Mr AT advises that principle had been applied in a number of cases which were cited by him.

[31] The issue at the heart of this dispute is simple:

Is the registered proprietor of an undivided share in a property entitled to require the solicitor who acts on a sale to pay to him or her the equivalent proportion of the proceeds of sale, or can the solicitor only disburse the sale proceeds in accordance with instructions approved by all parties?

[32] This issue has been previously considered by me in *A J v Z Q* LCRO 134/2010. In that case, the solicitor acting on the sale of a property owned by multiple parties as tenants in common had opened a single trust account ledger in the names of those

persons into which he receipted the sale proceeds. Mr SN has adopted the same approach.

[33] As part of the review in *A J v Z Q*, I wrote to the New Zealand Law Society Inspectorate, the body responsible for ensuring that legal firms comply with the Trust Account Regulations. The purpose of the letter was to confirm that the steps taken by the solicitor in that case were correct and that he was not required to open a separate trust account ledger for each of the tenants in common.

[34] Regulation 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 provides as follows:

12(1) every receipt, payment, transfer and balance of trust money must be recorded in a trust account ledger with a separate ledger account for each client.....

12(2) for the purposes of sub clause (1), a joint client must be treated as a single client

12(6) a practice may make transfers or payments from a clients trust money only if –

b) the practice obtains the clients instructions or authority for the transfer or payment and retains that instruction or authority (if in writing) or a written record of it

[35] The intent of my letter to the inspectorate was to ensure that in opening a single trust account ledger for the three registered proprietors, Mr SN had acted correctly. The inspectorate did not respond in writing, but I received a telephone call from Mr M, one of the inspectors, in response to my letter. Mr M confirmed that the use of the term “joint client” in regulation 12(2) was not applied by the Inspectorate in its technical sense where there are tenants in common. He confirmed that the procedure adopted by the lawyer in that case in opening a single trust account ledger in the joint names of the several tenants in common was correct and an acceptable practice to the Inspectorate. I also note that this accords with standard practice in the profession.

[36] Mr SN therefore acted correctly in paying the funds from the sale into a single trust account ledger in the names of the three registered proprietors. The provisions of section 110(1)(b) of the Act and Regulation 12(6) apply to any monies held in that account. Section 110(1)(b) of the Act provides that:

A practitioner who, in a course of his or her practice, receives money for, or on behalf of, any person –

(b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[37] Consequently, any payment out of the Trust Account had to be approved by all three registered proprietors. IL had specifically instructed Mr SN that he was to make no further payments out of the funds held by him following the payment of the undisputed amount to each registered proprietor.

[38] If Mr SN complied with the demands of SL and IK, then he would have placed himself in breach of section 110(1)(b) of the Act and Regulation 12 of the Trust Account Regulations. Such an approach protects the beneficial interests of each of the parties as noted by Mr AT which is not necessarily the same as the share in the property held by each registered proprietor

SL

[39] Pending completion of this decision, SL made contact with this Office, concerned that adverse comment would be made about him as to the part he has played in this complaint. It would appear that he formed this view as a result of comments made to him by Mr SN.

[40] This review concerns the Standards Committee determination in respect of the complaint against Mr SN. Mr SN has indicated in correspondence with the Complaints Service that he intends to lodge a complaint about SL and it is important that I record that I make no observations in this decision as to the role played by SL when representing Mr IK.

Mr SN's Fees

[41] Mr IK has complained about the fees charged by Mr SN in connection with this transaction. The statement enclosed with the complaint records total fees of \$4,400.00 being \$2,700.00 in connection with the sale, and \$1,700.00 in connection with matters following the sale.

[42] The fee of \$2,700.00 does not include attendances relating to the 4 May 2010 Deed and I assume that that has been separately billed. Any of those attendances are not therefore the subject of this complaint.

[43] The Standards Committee did not take the step of referring Mr SN's fees to a costs assessor for review. Instead, the Standards Committee took the view that it was sufficiently satisfied that the members of the Committee, which include practitioners experienced in the type of work carried out by Mr SN, were able to properly form a view as to whether or not the fee represented a fair and reasonable charge as required by Rule 9 of the Conduct and Client Care Rules.

[44] The Committee considered the work carried out by Mr SN and scrutinised the timesheets provided by him. Following such scrutiny it did not see that the fees charged were unfair or unreasonable and I have not noted anything in the materials provided which would cause me to disagree with the Committee's assessment.

[45] I note however that Mr IK has specifically referred to a disbursement of \$150.00 for registration of a discharge of mortgage. A disbursement reflects an amount actually paid by a lawyer and Mr SN will be able to provide evidence of that disbursement to Mr IK. If this is an error then the statement will need to be amended.

Client Information

[46] Rule 3.4 requires that a lawyer must, in advance, provide a client with information in writing on various aspects of client service and Rule 3.5 requires the lawyer to provide certain other information to the client prior to undertaking significant work under a retainer.

[47] Rule 3.7(b) provides that if it is impracticable in the circumstances for a lawyer to provide the information referred to in Rules 3.4 and 3.5, then those Rules do not apply.

[48] The Standards Committee determined that the urgency of the situation may have made it impracticable for Mr SN to have provided Mr SM with the terms of engagement or otherwise complied with Rules 3.4 and 3.5. At the review hearing, Mr SN stated that he could not understand why the Committee came to that view. I have however noted reference to the urgency involved in connection with undertaking the initial work in Mr SN's letter of 29 September 2010 to the Complaints Service in response to Mr IK's complaint.

[49] I am not however convinced that urgency constitutes circumstances which render it impracticable to provide the information required by Rules 3.4 and 3.5. The urgency of a situation may very well mean that the information may not be able to be supplied in advance, or prior to undertaking significant work, but it does not mean that

the Rules do not need to be complied with at all. I do not therefore agree with the Standards Committee determination that no breach of the Rules occurred by reason of the fact that there was some urgency involved in this matter.

[50] I do however accept Mr SN's contention that he provided the relevant information to Mr SM who was the person who provided instructions to him and who had ostensible authority from AU and IL to give instructions to Mr SN. This ostensible authority was confirmed when the Deed which was dated 4 May 2010 was executed by AU and IL. Mr SM held an appointment as attorney for Ms IM.

[51] At the hearing, Mr SM acknowledged that Mr SN may very well have provided the relevant information to him although Mr SN is unfortunately unable to provide evidence that the required information was provided to Mr SM. Lawyers need to be reminded that they should be in a position to positively affirm that the Rules have been complied with.

[52] However, I do not consider that there has been any breach of the Rules other than the fact that the information may not have been provided strictly in accordance with the terms of the Rules and that this is a case where there should be no adverse finding against Mr SN in this regard.

Summary

[53] It follows from the above that the decision of the Standards Committee is confirmed subject only to modification with regard to the comments relating to the provision of the client information as noted in paragraphs [46] to [52] above.

Decision

[54] Pursuant to Section 211 (1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed saved as is modified by this decision.

Publication

[55] This decision concerns a complaint flowing from the expectation of a client to an entitlement of a specific share of the proceeds of sale of a property by a tenant in common. It also includes comment that urgency does not render it impracticable to

provide relevant Client Care information in terms of Rule 3.7(b) of the Conduct and Client Care Rules. For these reasons, I direct that this decision be published with all identifying details removed.

DATED this 21st day of February 2012

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:

IK as the Applicant
SN as the Respondent
Auckland Standards Committee 2
The New Zealand Law Society