LCRO 79/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Manawatu Standards Committee 1
BETWEEN	**SM** Applicant
AND	**ML** Respondent

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

Introduction

[1] SM has applied for a review of the determination by Manawatu Standards Committee 1 to take no further action in respect of his complaints about ML's conduct in carrying out his duties as executor and trustee of the will of SM's mother and as solicitor for the Estate.

Background

[2] ML, a partner in the firm of CBT, was appointed by SN as executor and trustee of her will together with her daughter (SP) and her son (SM). The beneficiaries of the will were SP, SM and their four siblings.

[3] On 8 July 2010 SM and his sister met with MK (the Estates manager for the firm) for a preliminary interview with regard to administration of the Estate. At that meeting MK provided SP and SM with the firm's terms of engagement which included the following:

> 2.6 ... You authorise us:
> (b) to deduct from any funds held on your behalf in our trust account any fees expenses or disbursements for which we have provided an invoice;

[4] The primary asset of SN's Estate was her home which in terms of her will was to be sold and the net proceeds divided equally between the beneficiaries. SM expressed a desire to purchase the property and after discussion with the beneficiaries it was agreed that the Estate would enter into an agreement to sell the property to him. The agreement was conditional on finance being arranged by 12 November 2010 and SM instructed SQ to act on his behalf.

[5] SM advised that funding for the purchase was to come from overseas. After two extensions of the conditional date SM requested a third extension. Although that was agreed by ML and SP they required the agreement to be amended to include:

1. a "cash out" clause; and

2. an agreement that SM step aside from decisions regarding the sale of the house to him.

[6] This latter provision had been suggested in an initial letter from MK to SM.

[7] A variation of the agreement to incorporate the extension and these provisions was prepared and sent to SQ on 16 December 2010. Despite advice from SQ that SM had signed the variation, SM sent an email to MK on 21 December 2010 advising that he was seeking advice on the terms of the variation.

[8] On 22 December 2010 CBT wrote to SQ advising that it was the view of SP and ML that SM was acting deliberately to frustrate the sale process and was in breach of his obligations as an executor. The letter required the variation to be signed and returned to CBT by 4:00 p.m. on 12 January 2011 or the agreement otherwise declared unconditional. The letter advised that if that did not occur there would be an application to the High Court to remove SM as an executor.

[9] On that date SM lodged his complaint by email with the New Zealand Law Society Complaints Service. He followed that with a further letter with more detail of his complaints on 17 January 2011.

[10] Around mid January 2011 SM and his family took up occupation in the house without the consent of the other two trustees.

SM's complaints

[11] SM's emailed complaint on 22 December 2010 was brief and included two letters written by SM, one to ML on 8 October 2010 and the other to MK on 14 October 2010.

[12] In his complaints SM referred to a perceived conflict of interest by reason of the fact that CBT was accepting payment from SN's Estate when ML was an executor of the Estate. In addition he complained that ML was colluding with SP while excluding him from decisions. He suggested that ML was providing advice to SP when she should have been seeking independent advice.

[13] In the letter dated 8 October 2010 that SM had sent to ML, he expressed concerns that SP was directing and giving instructions for the administration of the Estate without reference to or consultation with the other executors. He sought an undertaking from ML that all communications between the three executors would thereafter be in writing.

[14] SM's letter of 14 October to MK was in response to a letter written by her dated 11 October. In that letter MK advised that she acted with ML's authority and that in their view the decision as to whether SM's offer to purchase the property be accepted or not should be made by ML and SP alone. SM complained that it seemed that CBT was consulting only with SP and drew attention to the fact that MK was acting for all three executors rather than acting at the direction of ML alone. He asserted his right to be consulted as one of the three trustees with regard to the sale of the property albeit that the sale was to himself.

[15] In his letter of 17 January 2011 to the Complaints Service, SM alleged that ML:

> ...had shown a breach of ethics and confidentiality in stymieing a sale of one of the Estate assets by a breach of confidence in speaking badly of one of the other trustees of this Estate consequently squashing a cash sale for the family home.

[16] He complained that ML was duplicitous in that he had instructed the real estate agency which had listed the property for sale to return all files to his office. He also complained that fees had been deducted from Estate funds without agreement from all trustees. Finally SM complained about ML's stated intention to apply to have him removed as a trustee.

[17] On receipt of SM's complaints ML advised SM by letter dated 20 January 2011 that CBT could no longer act as solicitors for the Estate and the firm accordingly withdrew its services.

[18] The Standards Committee considered the complaint and ML's response and issued its determination on 24 February 2011. It determined to take no further action in respect of the complaint. The determination records that the decision was made pursuant to section 138 of the Lawyers and Conveyancers Act 2006.

Review

[19] A hearing was held in Palmerston North on 30 October 2012. SM attended by himself and ML was accompanied by MJ, one of his partners.

[20] The following issues require to be addressed in this review:

1. The Standards Committee procedure
2. The alleged conflict of interest
3. The deduction of fees

[21] In his review application SM alleged that the proposal to apply to the Court to remove him as an executor was in response to his complaint. This is not the case. ML had advised SQ in his letters of 22 December 2010 and 14 January 2011 that he and SP would consider taking this step if SM did not sign the variation of the Agreement.

[22] ML was first notified by the Manawatu branch of the Complaints Service of SM's complaints by letter dated 17 January 2011. Consequently, he had already foreshadowed his intention to apply to have SM removed as an executor before he became aware of the complaint.

The Standards Committee procedure

[23] SM sent his email complaint of 22 December 2010 direct to TJ of the New Zealand Law Society Complaints Service. TJ then forwarded that email to be processed at the Manawatu branch of the Complaints Service.

[24] On 17 January 2011 the Manawatu branch acknowledged SM's email of 22 December 2010 and the author of the letter advised SM as follows:

> I expect that when I do respond to you at the direction of the Standards Committee I will enclose a copy of the reply received from the Practitioner for your information.

[25] The letter then went on to advise:

> The Standards Committee may upon receipt of a complaint take one of the following actions:

1. Enquire into the complaint
2. Give a direction under section 143 (negotiation, conciliation and mediation)
3. Decide in accordance with section 138 to take no action on the complaint.

You will be notified at that time concerning the procedures the Standards Committee intends to follow.

[26] This last statement reflects the requirements of section 137(2) of the Act "to advise the complainant and the person to whom the complaint relates of the procedure that the Standards Committee proposes to adopt under subsection (1)."

[27] On the same day (17 January 2011) the Legal Standards Officer sent a letter to ML enclosing a copy of SM's email of 22 December.

[28] SM's second letter dated 17 January was then sent to ML on 18 January and ML provided his response to all matters by way of letter dated 17 February.

[29] The Standards Committee considered the complaint and ML's response and then issued its determination on 24 February 2011. Consequently there was no further correspondence with SM about the procedures that the Standards Committee intended to follow and nor did it forward ML's response to SM for further comment. Instead, ML's response was forwarded to SM at the same time as the Standards Committee determination.

[30] The Standards Committee determination was to take no further action pursuant to section 138 of the Act. The determination does not specify the subsection of the Act pursuant to which the determination has been made. I note however, that the Committee refers to the proposed application to the High Court to remove SM as an executor and that *"[SM] will have an opportunity to raise the matter at that time and seek any remedies that the Court deems appropriate."* This would appear to be a reference to section 138(1)(f) of the Act which provides that a Standards Committee may determine to take no further action if, in the opinion of the Standards Committee "there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise."

[31] However, SM's complaint cannot be determined on these grounds. The Court proceedings proposed was an application by ML and SP to remove SM as an executor. In defending that, SM could not have been provided with any remedy in respect of his complaints about ML's perceived conflict of interest, or deducting fees without authority.

[32] In addition, the section refers to adequate remedies for the "person aggrieved" to exercise. The proposed Court action had not been commenced, and was to be commenced by ML and SP. It was not a remedy available to SM to exercise, and any opportunity to seek a remedy was completely dependent on the proceedings being issued by the other executors.

[33] I suspect that the Committee may have had the provisions of section 138(2) of the Act in mind when it declined to take any further action. However, this option may be exercised only "in the course of the investigation" and therefore an initial decision pursuant to section 137 "to inquire into the complaint" should have been taken and communicated to SM, before making a determination to take no further action. This would have involved at least forwarding ML's response to SM for comment before reaching this decision.

[34] Overall, the procedure followed by the Standards Committee was not in accordance with the procedures required by the Act. However, the defects in the procedure are effectively cured by this review, as in the process of conducting this review, SM has been given an opportunity to respond to MLs' response, and indeed there has been considerable further material provided by both parties as this review has progressed.

Was there a conflict of interest?

[35] SM argues that there is an inherent conflict of interest if a solicitor is to act as solicitor for the Estate as well as being an executor/trustee. He expressed the perceived conflict in his review application in the following way:

> Acting on behalf of the Estate, acting as the solicitor of the Estate, acting as a trustee of the Estate, and giving instructions to an employee of his firm of solicitors as to the administration of the Estate.

[36] He also perceived that ML was advising SP and taking instructions from her only with regard to administration of the Estate.

[37] Lawyers are frequently appointed executors of their clients' wills for a variety of reasons. That is the testator's choice. Sometimes testators will express a preference that the lawyer's law firm be instructed to act on behalf of the Estate, but ultimately it is the executors who must instruct which law firm is to act. Although it is not necessarily the case that the law firm of the lawyer/executor is instructed, that is usually the case for pragmatic reasons.

[38] I do not accept SM's contentions that there is an inherent conflict in a lawyer so acting. If a lawyer acts on instructions from all executors then there can be no conflict of interest. A lawyer's duty as executor and as solicitor coincide and that is to administer the Estate in accordance with the terms of the will. A conflict of interest will only arise if the lawyer offers advice to, or accepts instructions from, an executor in respect of personal interests which are not provided for in the will.

[39] If an executor wishes to challenge the terms of the testator's will, or fails to administer the will according to its terms, or seeks to obtain an advantage to the detriment of the other beneficiaries, then that executor is him or herself conflicted, and should renounce his or her appointment. That is the situation that SM was in. This was recognised by CBT when it was suggested by MK that any decisions with regard to the sale of the property to SM should be made by SP and ML alone. By way of example, SM was conflicted in the following ways:

- The executors' role was to maximise the sale price of the property for the benefit of the beneficiaries. SM's aim as the purchaser was to minimise the purchase price. This was apparent when he pointed out the benefits of selling the property to him as opposed to a sale to a third party and when he identified defects in the property with the objective of reducing the price to be paid.

- It was not in SM's interests to cancel the agreement when his funds could not be arranged whereas the executors had a duty to proceed to effect a sale as soon as possible for the benefit of all beneficiaries.

[40] SM considered that ML was acting in collusion with SP when steps were taken to remove the property from the market. The property had been listed for sale with a real estate agent with the co-operation of SM. However, there is conflicting information from SP and SM as to whether or not he co-operated thereafter to allow potential purchasers to view the property and ML and SP could not proceed with any certainty that SM would co-operate and agree to his contract being terminated should an offer be presented.

[41] It seems that SM may have been under the impression that when the finance condition was not fulfilled and no extension agreed his contract to purchase was terminated. That is not the case and it would be somewhat surprising if SQ had not advised SM as to the status of his contract.

[42] Consequently the executors could not offer the property for sale without advising potential purchasers that the property was already under contract and unless SM signed the variation presented to SQ on 16 December they could not proceed with any certainty that he would agree to his contract being terminated if an offer was presented. Without that certainty, the sale process was compromised.

[43] Consequently, SP and ML determined that it was imprudent to continue with the marketing of the property for sale in those circumstances. Having formed that view, the property was withdrawn from the market as the agent no longer had instructions from all executors. Whether or not it was ML who advised the agent of this was immaterial.

[44] With his complaint, SM referred to a "Lawlink" booklet provided by CBT relating to estate administration. He noted that this booklet states that each trustee should seek his or her own independent legal advice and that trustees are required to act unanimously and in concert. He considers that not only were decisions taken by SP and ML without reference to him but that ML was advising SP personally.

[45] Executors and trustees must act unanimously by reason of the fact that the deceased's Estate vests in them jointly. If there is disagreement then any executor/trustee has the right to apply to the court for directions. A problem arose when SM would not agree as executor to terminate the sale to him. The only option open to SP and ML was to apply to the court for assistance and they opted to apply for an order that SM be removed as a trustee.

[46] ML and SP had a duty to the beneficiaries of SN's will to administer the will in accordance with its terms. SN had directed that the trustees were to sell the property and distribute the proceeds between the six beneficiaries. There was no reference in the will to the sale being deferred so SM could provide a home for his mother's cat nor was there any authority in the will to allow one beneficiary to occupy the home. There was no authority to take these actions as suggested by SM.

[47] SM was conflicted in his role as purchaser of the property and was not co-operative when it was suggested that he should endorse the decisions of SP and ML. They necessarily needed to consider their legal options and ML was able to provide that advice to SP. There was no reason why he should not do so as by then the firm had resigned as solicitors for the Estate.

[48] SM asserts that ML should not have written to him on letterhead and that he was unable to meet with ML while his complaint was being processed. ML is a lawyer and

a partner in the firm of CBT. His appointment as a trustee was by reason of this fact and his firm had prepared SN's will. He was not appointed as a personal friend or relative and I can see no objection to ML writing to SM on letterhead. In addition the trustees were still required to make decisions with regard to the administration of the Estate and had a duty to endeavour to do so notwithstanding that SM had lodged a complaint about ML. ML quite properly sought to meet with SM to discuss Estate matters but SM declined to do so. It would not have been improper for them to meet – indeed they had an obligation to put their differences to one side to attend to Estate administration for the benefit of the beneficiaries of the Estate.

[49] Having considered all of the issues raised by SM, I do not agree that ML was conflicted in acting for the estate, or in applying to the Court with SP to remove SM as an executor of the will.

Deduction of costs

[50] SM's complaint with regard to costs was that CBT had deducted costs from funds held for the Estate without authority. As noted in the background section of this decision MK had provided SM and SP with the firm's terms of engagement which included a provision that costs could be deducted from funds held for a client.

[51] Prior to the review hearing I referred the parties to a decision of this Office (*A v Z* LCRO 40/2009) in which it was held that lawyers may not deduct fees from funds held in trust without direction from their client. In a subsequent communication to the profession by the then President of the New Zealand Law Society it was suggested that the prudent course for lawyers would be to –

- Advise the client in terms of Rule 3.4(a) of the Conduct and Client Care Rules[1] that fees may be deducted from funds held for the client and ensure that the client accepts in writing the terms of engagement; and
- Comply with Regulation 9 of the Trust Account Regulations[2] at the time a fee is deducted.

[52] The decision of the LCRO in *A v Z* has been followed by this Office in a number of cases; see for example *K v E* LCRO 37/2009 EO & EP v VO LCRO 240/2010.

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[53] In the present case it was accepted that the terms of engagement had not been signed by SM and SP. However, SM indicated at the review hearing that he thought that he had signed such an authority. In any event he acknowledged at the review hearing that it was accepted that he and his sister had authorised CBT to deduct the firm's fees from funds held for the Estate and consequently there is no dispute concerning ML's ability to deduct fees from funds held in the firm's trust account.

[54] Only one bill had been rendered by CBT during the period when SM was an executor and that was a bill dated 30 September 2010. At the review hearing ML advised that the bill, together with an accompanying letter, had been sent by email to the addresses provided by SM and SP. ML advised in his response to the Complaints Service dated 17 February 2011 that SM had emailed his firm from that email address on several occasions since his letter of complaint and he also offered to provide a copy of the letter and invoice.

[55] SM asserts that he did not receive the emailed letter and invoice. I am unsure whether or not he requested to sight a copy of the invoice as offered by ML but in any event he had the opportunity to rectify the defect in the process if one existed. In the circumstances, I accept that ML has complied with the requirements of Regulation 9 of the Trust Account Regulations.

[56] The bill was produced at the review hearing and a copy provided to SM at that time. I am unsure whether he has a complaint as to the quantum of the bill. However, that was not his complaint to the Complaints Service and cannot now be part of this review. If SM has a complaint about the amount of ML's accounts he will need to make a further complaint to the Complaints Service.

Summary

[57] There is no inherent conflict created by a lawyer being appointed an executor/trustee in a will as well as acting as solicitor for the Estate. If instructions from the executors are not unanimous then the lawyer as solicitor for the Estate cannot act on the instructions of only some of the trustees.

[58] However a lawyer as executor/trustee is not thereby restricted from discussing with his or her fellow executor/trustees what steps should be taken. If that action involves applying to the court for orders then that action is taken on behalf of the executor/trustees who so instruct him or her and the lawyer should not then remain as solicitor for the Estate.

[59] The only other option for a lawyer in this situation is to resign as a trustee but a lawyer who has been appointed by a testator to undertake this role has a duty to not lightly surrender this obligation.

[60] In the circumstances ML was not conflicted either from the outset or subsequently. He resigned as solicitor for the Estate when he became aware of the complaint by SM and acted properly as a trustee in addressing the issues which confronted him and his co-trustee.

[61] While there was no signed authority to deduct fees SM has acknowledged that it was accepted that CBT had authority to deduct fees from funds held in the firm's trust account for the Estate and other issues raised by SM with regard to the bills of accounts do not form part of this review.

Conclusion

[62] Having considered all of the matters raised by SM I have come to a view that does not differ from that of the Standards Committee. Having conducted an investigation into the complaint the decision to take no further action is taken pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006.

Decision

Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed but modified as provided in the preceding paragraph.

DATED this 22nd day of November 2012

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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:

SM as the Applicant
ML as the Respondent
The Manawatu Standards Committee 1
The New Zealand Law Society