

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 2

BETWEEN

IO
of Auckland
Applicant

AND

SJ
of Auckland
Respondent

DECISION

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

Introduction

[1] Mr IO (the Applicant) made a number of complaints against law practitioner SJ (the Practitioner) concerning his conduct as a Trustee of the H Family Trust (the Trust). None of the complaints were upheld by the Auckland Standards Committee of the New Zealand Law Society and the Applicant sought to have that decision reviewed.

[2] The Standards Committee observed that the Applicant's complaints involved two distinct time frames; conduct prior to 1998 and conduct that had occurred after 2006.

[3] By virtue of section 351 of the Lawyers and Conveyancers Act 2006 (the Act) the Standards Committee was precluding from considering the events that had occurred more than six years ago, and this was explained in the Committee's decision. The Applicant accepted that the historical matters could no longer be investigated, adding that the information had been included mainly to provide a background to his other complaints, rather than being substantive issues.

[4] The second time frame concerned events after the death of the Applicant's father in 2006. At that time the Practitioner was (re) appointed Practitioner as Trustee of the Trust. The Applicant is a discretionary beneficiary of that Trust and the complaints arose out of his concerns about the way the Practitioner was performing his trustee duties. The Practitioner was Co-Trustee with another member of his law firm.

[5] It is not necessary to set out the full detailed background which is somewhat complex and set out in the Standards Committee decision. The Practitioner had been an original Trustee of the Trust. He had resigned in 1998 due to his concerns about the way that the Applicant's father (also a Trustee) was handling the trust property, in particular what he saw as inadequate administration of the Trust.

[6] After the father died in 2006 the Practitioner was reappointed as Trustee. The Practitioner again resigned as Trustee in 2009. The complaints largely arose from events in the 2006 – 2009 timeframe.

[7] The Applicant was Executor of his father's estate and only then became aware about his father's management of the Trust assets in earlier years. Issues arose about the ownership (and related maintenance and tax liabilities) of some properties. The Estate made a claim against some of the Trust assets as did the deceased's widow, Ms G. It appears that administration of the Estate could not be finalised until the property ownership disputes were resolved.

[8] The Applicant wanted an audit to be undertaken of historical property transactions of the Trust. The Trustees' view was that the costs of an audit could not be justified as the Trust had little in the way of funds, and that an audit was unlikely to resolve all matters. Agreement could not be reached between the Practitioner (as Trustee) and the Applicant (as Executor) about the way to resolve the disputes. The Applicant perceived this as obstruction or lack of co-operation on the part to the Practitioner with his proposals. The Applicant's further grievance was that the Trustees did not agree to continue funding his son's school fees from trust funds.

Complaints

[9] These matters led to complaints against the Practitioner. These were listed in the Standards Committee decision as follows:

a) *Substandard service*. The allegations were that the Practitioner:

- had not responded in a timely manner to communications;

- had not reported or when he did that he had failed to provide sufficient information; and
- had frustrated the Applicant's ability to carry out his executor duties;

b) *Unprofessional conduct.* The Applicant alleged that the Practitioner:

- had not followed through, or had reneged on undertakings given, in audit of trust accounts;
- had failed to investigate property transactions of concern;
- had failing to meet a financial obligation to pay school fees;
- acted in a conflict of interest;
- failed to protect the interests of beneficiaries;
- not investigating the concerns of beneficiaries;
- acting in a discriminatory manner; and
- failing to keep beneficiaries informed.

Standards Committee's decision

[10] The Standards Committee discussed the complaints and the evidence in relation to the complaints about the Practitioner's conduct that had occurred after the Practitioner's reappointment as Trustee in 2006. The Committee considered that the Practitioner had adequately explained the difficulties that the Trustees had encountered. Its view was that these were not matters that could be resolved through the complaints process, adding that if any of the beneficiaries did not believe that the Trustees had carried out their duties then any right of recourse was through the Courts. The Committee declined to take any further action pursuant to Section 138(1)(f) of the Act.

[11] This section confers a discretionary power on a Standards Committee to take no further action if 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, and that it would be reasonable for the person agreed to

exercise". The Committee's decision appears to have related to the Applicant's remedies, as beneficiary, under the Trustee Act 1956.

Review Application

[12] The Applicant sought a review because he considered there had been an inadequate investigation by the Standards Committee. He was dissatisfied that the Standards Committee had not given reasons for its decision to take no further action in relation to the nine separate grounds of complaint, despite the Practitioner having admitted to at least one breach and offered his apology to the Standards Committee, but not the Complainant.

[13] His main concern was that the Committee had not explained why it had decided to take no further action in relation to the complaint concerning conflict, which was his particular concern. Noting that the Practitioner had appointed himself as Trustee after having previously resigned from the Trust due to stated concerns that the trust was being mismanaged, the Applicant wrote: *"If the Practitioner had felt conflicted enough to resign in the past then the question of whether a conflict of interest existed when he reappointed himself or at any time thereafter should have been examined and a decision on this conduct arrived at."* He admitted to being uncertain about the details behind the conflict but referred to the history of the Trust's operation, the fact that the Practitioner had resigned as Trustee in 1998, and that he reappointed himself in 2006.

[14] The Applicant particularly questioned the reasons for the Practitioner's refusal to agree to an audit being conducted in respect of earlier property transactions undertaken by the Trust. He wrote, *"It appears that he [the Practitioner] continued to offer advice to my father on trust issues, but not as trustee, and then reappointed himself as Trustee after my father's death ..."* and, *"Having advised my father on trust matters after resigning from the trust and now refusing to investigate the property transactions that occurred during this period he appears to have a conflict of interest as he would need to investigate his own role in these transactions."* He contended that the Practitioner had continued to act for his father and also for the father's widow, Ms G, following his resignation. He noted that the Practitioner held the power of appointment.

[15] The Applicant added that the fact that beneficiaries may have recourse to the Courts in regard to disputed trust property ownership was unrelated to a complaint about professional conduct.

[16] He also objected to the Standards Committee having sought additional information from the Practitioner's Co-Trustee, being of the view that it was inappropriate for the Standards Committee to have obtained information from the Co-Trustee, because the Practitioner's actions as Trustee with the power of appointment formed part of the complaint. He wished to correct any misimpression that the complaint was against the Co-Trustee. He also objected to having been given no opportunity to respond to information provided by the Co-Trustee. In his view the Standards Committee had not sought to get a balance to the Co-Trustees views by seeking further information from other sources.

Review

(a) First review issue - conflict complaint

[17] This review has been conducted on the papers pursuant to Section 206(2) of the Act which allows the Legal Complaints Review Officer to conduct the review on the basis all documents that are available, and in the absence of the parties with their agreement. The Practitioner and the Applicant have agreed to this procedure.

[18] The main focus of the review application is the way that the Standards Committee dealt with the conflict of interest complaint. The Applicant's main concern was that the Committee had not explained how it viewed the conflict matter.

[19] The Standards Committee did not identify and discuss each ground separately, and I agree that the Standards Committee did not specifically deal with conflict of interest as a separate matter. However, its comprehensive decision addressed all matters arising under the different heads. My perception is that many of the complaints overlapped. The Committee took the overall view that the complaints were made by a beneficiary of a trust, and concerned dissatisfaction with the way that the Trust was being administered.

[20] *Appointment of Practitioner as Trustee.* I noted that the Trust Deed gave the power of appointment to the Practitioner and another lawyer. The Applicant questioned the ethics of the Practitioner re-appointing himself as Trustee.

[21] The evidence shows that the Applicant was instrumental in the Practitioner's reappointment in 2006, for reasons of his familiarity with the trust affairs, and also because the deceased's widow, Ms G, then the only remaining Trustee, was perceived to be conflicted as she was making personal claims against trust property. (She was later removed as Trustee). The Applicant did not deny his role in the Practitioner's

reappointment, but says that he did not become aware, until after his father's death, of the reasons for the Practitioner's resignation as Trustee. It appears that the explanations given to him thus far have failed to address the questions he has raised about the breakup of the relationship between the Practitioner and his father.

[22] The issues arose because there are current disagreements between the Trust and the Estate (and Ms G) concerning ownership shares of some properties, in particular the farm. The evidence suggests that at least some of the disputes have been caused by the way that assets of the Trust were dealt with in the past. The Applicant refers to the Practitioner's prior involvement as Trustee and the ongoing professional relationship with the Applicant's father (and Ms G) as the basis of his perception that the Practitioner had some historical involvement with the dealings in Trust property which are now under dispute. He treats with suspicion the Practitioner's refusal to have the transactions audited. He does not accept the reasons given by the Practitioner for not supporting the proposal and attributes pressure on funds to the Practitioner's mismanagement of trust property.

[23] There are clear rules surrounding conflict which lawyers are bound to observe in their professional practice (broadly stated in Chapter 6 of the Rules of Conduct and Client Care), and lawyers must avoid acting in situations involving a conflict of interest. A conflict may arise in a number of different situations and circumstances, including where the interests of the Practitioner may conflict with those of the client. A conflict would certainly arise if a lawyer could not fearlessly pursue the interests of the client in order to protect interests of his own, which appears to be at the centre of the Applicant's allegation.

[24] The Practitioner explained that the reasons for resigning as Trustee in 1998 were related to his disapproval of the father's administration of the Trust. He informed the Standards Committee that the Trust was established as a vehicle for purchasing properties, but that the father had sought to utilise this as a means of funding education. The Practitioner explained that his concerns about the father's inability to focus on proper documentation, and the concerns of another partner in the practice who had felt it was impossible to continue acting for the father, had led to his (the Practitioner's) resignation as Trustee.

[25] The Applicant considered that the Practitioner's letter had been helpful in providing some background to the Trust and family situation, but he had ongoing questions about the Practitioner's involvement with the (original) purchase of properties, in particular the purchase of the farm.

[26] The Standards Committee declined to investigate that part of the complaint concerning the Practitioner's earlier involvement with the Trust, as these matters had occurred over 6 years ago and were thus outside of its jurisdiction. Despite this however, historical events may be nevertheless be pertinent to whether past conflict may be sufficiently material to prevent a lawyer undertaking certain professional work at a later time. I accept it was open to the Applicant to raise this point.

[27] I have considered all of the information available for this review, including such information as exists concerning events of the past. I am unable to see any evidence, and nothing to suggest, that the Practitioner had any involvement in any acts or decisions that might be described maladministration of trust property. The evidence rather suggests that the Practitioner expressed his concerns to the Applicant's father about these matters and that his (the Practitioner's) resignation resulted from the father continuing to deal with the Trust against the advice of the Practitioner.

[28] Nor is there any evidence of the Practitioner having had any involvement in Trust affairs after his first resignation. The Practitioner denied involvement and informed the Standards Committee that following his resignation in 1998 he and the Applicant's father "*had no contact for some years until [the Applicant's father] died on 12 June 2006.*" The Practitioner also denied ever having acted for Ms G as suggested by the Applicant.

[29] I noted that the complaint concerning conflict appears to arise from the Applicant's speculation about the Practitioner's reasons for refusing to agree to an audit of the trust property transactions. The Applicant wrote that the Practitioner would be disinclined to "*... investigate his own role in these transactions.*" However, the evidence shows that the Trustees' did not refuse to agree to the audit, but rather, that they were of the view that timing needed to be considered as well and financial justification. The Practitioner had sent a letter to the Applicant explaining why the Trustees' perceived that an audit would be unlikely to resolve the areas of conflict, the principle one concerning the ownership shares in the farm which was in the partnership of the Trust, Ms G and (now) the Estate. He noted that until the partnership accounts had been completed, and ownership disputes resolved, there was little justification for an audit of the Trust, adding that the cost of any audit should be borne by all partners, and not only the Trust. The Practitioner did not deny that there were delays in finalising the Trust's accounts, and explained to the Committee that completion of the Trust's accounts depended at least some of these issues being resolved.

[30] The Standards Committee had sought comments from the Co-Trustee about these matters, and although the Applicant objected to the Standards Committee having done so, this was an appropriate step for the Committee to have taken, as he was equally answerable for the administration of the Trust. The Co-Trustee wrote a lengthy letter to the Standards Committee with additional background information about the property-related disputes and the conflict between the Trustees and the Applicant concerning the best way to resolve these issues. He explained why the Trustees had declined the Applicant's proposal to be appointed a further Trustee, and further explained that the Trustees had endeavoured to comply with the request for an audit of the Trust's assets, but considered this could not be completed until the issue of ownership was settled, and no information had yet been received as to the basis of claims against the disputed assets. He added that delay in finalising the Trust's accounts was due to information not yet to hand.

[31] The Co-Trustee also enlarged on the historical background that had led to, or contributed to, the disputes surrounding ownership of assets, referring to the possibility of the Trust being labelled a sham because of the way it had previously been administered by the Applicant's father and his wife, Ms G, who at the same time had personal interests in those properties, whether jointly or individually. These explanations either supported, or were consistent with, the Practitioner's responses to the Committee and also consistent with the evidence.

[32] Having considered all of the relevant information I do not find that there was any conflict in this matter. I have seen nothing in the course of my review that ought to have prevented the Practitioner accepting an invitation to be reappointed as Trustee.

[33] The issue for the Standards Committee was whether any actions or omissions on the part of the Practitioner, following his reappointment as Trustee, gave rise to disciplinary concerns. The Committee observed that the complaints related to the Applicant's dissatisfaction with the way that the Trust was being administered, an approach that was supported by the evidence since most of the complaints related to the way that the Trustees were dealing with the solution to the trust property disputes. Delays in resolving the ownership matters also caused delays in the accounts of the Trust being finalised, as well as delays in finalisation of the Estate, and these were included as further heads of complaint. In addition was a further head of complaint concerning the refusal of the Trust to continue paying the school fees for the Applicant's son.

[34] It is clear from the evidence that the majority of the Applicant's concerns related to the way that the Trust was being administered. Although the complaints were directed at the Practitioner, the evidence showed that the Applicant's dissatisfaction related largely to the refusal of the Trustees to co-operate with suggestions or solutions proposed by the Applicant. In these circumstances the Standards Committee was correct to have perceived the complaints in terms of a dissatisfied beneficiary of a trust.

[35] The Committee's decision to take no further action rests on section 138(1)(f) of the Act, a section that applies where a Committee is of the opinion that the Applicant has other remedies that would be reasonable for him to exercise. In this case I accept as correct the Committee's decision to take no further action for the reason that the Applicant had remedies he could pursue in the Court with regard to his dissatisfaction with the Trustees' administration of the Trust.

[36] I also note that the Applicant was legally represented throughout and presumably would have received legal advice on these matters, and what remedies were open to him as a beneficiary. I noted that the Applicant had informed the Standards Committee that "we" (presumably the beneficiaries) were in the process of getting a Court Order to have the Trust audited.

[37] It is regrettable that the Standards Committee did not deal more fully with the conflict matter as it was clear from the Applicant's complaint that this was of paramount concern to him, and underpinned much of the other complaints. I have sought to address this aspect of the complaint in the above discussion.

(b) Second review issue - delay:

[38] The complaints about delay concerned delays in the Practitioner responding to communications he received from the Applicant or his lawyers. This head of complaint attracted little attention on the part of the Standards Committee. The Applicant expressed surprise that the Committee had not made a finding against the Practitioner who, he said, had admitted the failure and apologised.

[39] Chapter 3 of the Rules of Conduct and Client Care 2008 governs the lawyer's relationship and service requirements owed to clients. Rule 3.2 requires a lawyer to respond to a client in a timely manner. However, the Applicant was never a client of the Practitioner and the usual service-related obligations between lawyer and client do not apply in this case.

[40] The Applicant had legal representation from two law firms; one represented the beneficiaries of the Trust; the other acted in the administration of the Estate. Both law firms were in correspondence with the Practitioner in seeking ways forward in resolving the disputes. Copies of the correspondence were on the Standards Committee file, and refer to the authors' dissatisfaction that the Practitioner had not responded to proposals that had been forwarded.

[41] Evidence of delays was before the Standards Committee but the Committee did not specifically address the complaint in terms of delay in replying per se, having evidently perceived the complaint essentially in terms of the Practitioner's failure to have provided the answers or information sought. It appears that the Practitioner also perceived the complaint in this light, when he acknowledged that the Trustees "*may not have reported as fully as they would have liked and he took the larger responsibility for that*" and included an apology, but he did not believe that failure to provide information impeded the Estate or the Trust Beneficiaries.

[42] A complaint about delays in responding to communications is a matter that could have been dealt with within the disciplinary regime of the Act. The Applicant considers that a disciplinary finding should be made against the Practitioner.

[43] An omission by a Standards Committee can be cured on review. I have therefore considered the matter of delayed responses in terms of the Practitioner's duty in terms of Chapter 10 of the Rules of Conduct and Client Care which governs a lawyer's professional dealings. Rule 10.1 imposes an obligation on lawyers to treat colleagues with respect and courtesy. This obligation would certainly extend to situations of inexcusable delays in answering correspondence.

[44] The content of correspondence sent to the Practitioner by other lawyers confirms that there were occasions where the Practitioner did not respond with the degree of diligence that might have been expected. The content of the letters indicate that the frustrations were largely expressed in relation to the lack of progress in resolving disputes, and the delays in the Practitioner's responses appear largely connected to proposals raised by the Applicant concerning administration of the estate and resolving areas of dispute.

[45] I noted the references that were made to telephone contact between the Practitioner and other lawyers. This suggests that the communications between the Practitioner and colleagues were not restricted to written exchanges.

[46] I also considered that in addition to the communications from the Applicant's lawyers, the Practitioner was at the same time receiving communications from the Applicant himself which often concerned the same or similar issues.

[47] The issue is whether the delays by the Practitioner in responding to matters were excessive, repetitive and unjustifiable, such as to amount to a breach of Rule 10.1. In my view it is less than clear that the failure complained of was sufficient to support an adverse finding. The Standards Committee would have been aware of the complaint about delayed responses, and clearly did not consider there was a sufficient degree of professional failure as to justify further enquiry or action. In this context I refer to the Standards Committee's discretionary power (section 138(2)) "not to take any further action on a complaint if, in the course of the investigation it appears to the Committee that, having regard to all of the circumstances of the case, any further action is unnecessary or inappropriate."

[48] In my view it was open to the Standards Committee to take no further action in respect of this part of the complaint. There is no sufficient basis for taking a different view. The application is declined.

Decision

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

DATED this 1st day of February 2012

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

IO as the Applicant
SJ as the Respondent
The Auckland Standards Committee No. 2
The New Zealand Law Society