

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

Ms AH

of Australia
Applicant

AND

Mr ZS

of Auckland

Respondent

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

DECISION

Background

- [1] The Respondent was an Executor of the Wills of Mr and Mrs B, the Applicant's parents.
- [2] Mrs B died in 2005 and Mr B died in 2007.
- [3] The Applicant's brother, Mr GB was a co-executor of both Wills.
- [4] During their lifetimes, Mr and Mrs B had each established Trusts. The Respondent and Mr GB were Trustees of each Trust.
- [5] Following the death of Mr B, the Trustees proposed that the assets of the Trusts be distributed equally between Mr GB and the Applicant to give effect to the wishes of Mr and Mrs B as expressed in their Wills.

[6] The Applicant had been adjudged bankrupt, and the Respondent and Mr GB wished to be satisfied that any distribution to the Applicant would not be subjected to “claw-back” by the equivalent in Australia of the Official Assignee in Bankruptcy.

[7] They also requested that the proposed distribution be consented to by the Applicant’s family, who were also discretionary beneficiaries under the Trusts.

[8] A deed was prepared by the Respondent with regard to the proposed distribution, which included an acknowledgement of the proposed distribution and an indemnity in favour of the Trustees.

[9] The Applicant requested various pieces of information with regard to the administration of both the Estates and the Trusts from the Respondent, which were eventually supplied to her.

[10] The Applicant was unhappy with the content of the information provided and lodged a complaint with the Complaints Service of the New Zealand Law Society.

[11] The complaint as noted in the Standards Committee’s decision was that:

1. The Applicant did not accept the figures provided by the Respondent with regard to administration of the Trusts.
2. She did not accept the fees.
3. That no interest had been paid in respect of loans to Trusts established by her brother and members of his family.
4. There were discrepancies in payments to the IRD.
5. “Controlled money” transactions.
6. There had been no accounting for interest received on term loans.

In addition, her complaint related to the difficulties which she had encountered in obtaining the documents and information from the Respondent.

[12] It must be noted at this stage that the Standards Committee made no specific reference to the complaint concerning “controlled money transactions” and I am unable to discern from the file exactly what the Applicant is referring to in this regard. Consequently, this aspect of the complaint has not been considered by me, but in the overall context of the complaint, I consider that this does not affect the outcome of this review.

The Standards Committee decision

[13] A significant portion of the Standards Committee file and investigation was taken up with the complaint about costs.

[14] The Committee was required to consider the jurisdictional issue as to whether the Applicant was a person who was entitled to lodge a complaint concerning costs pursuant to section 160 of the Lawyers and Conveyancers Act 2006 (the Act).

[15] The outcome of these deliberations was that the Committee determined that the Applicant did fall within the class of persons who could complain about a lawyer's bill of costs pursuant to section 160.

[16] A costs assessor (Mr S) was appointed by the Committee, and following the determinations referred to in paragraphs 14 and 15, Mr S submitted his report.

[17] The Committee then proceeded to consider that report together with all of the material before it and formed the view that the threshold provisions of section 351(1) of the Act had not been reached in respect of the costs and conduct issues that arose prior to 1 August 2008.

[18] In relation to the matters complained of in respect of conduct after 1 August 2008, the committee formed the view that any further action was unnecessary and resolved to take no action pursuant to the provisions of s 138(2) of the Act.

Application for review

[19] The Applicant has applied for a review of that decision.

[20] The substance of the application is set out in a letter dated 26 May 2010 from lawyers instructed by the Applicant in Australia, (H Lawyers). In that letter, H Lawyers allege breach of fiduciary duties as a Trustee by the Respondent in failing to provide "a just and true statement of the monies received on behalf of the Trust and how [the Respondent] has paid out those monies."

[21] This allegation of breach of fiduciary duties, is extended to an allegation of a failure to act professionally in the administration of the Estate, or that monies have been misappropriated.

[22] These allegations are somewhat broader than the original complaint, and it must be recognised that the role of the LCRO is to review decisions of the Standards

Committees. As such, the review is restricted to matters raised in the original complaint.

[23] In general terms, the Applicant requests a general review of the file and the Standards Committee's decision.

[24] The outcome sought by the Applicant is:

1. "That the Respondent provide a just and correct statement of his administration and distribution of the [Applicant's] parents' Estate and the Discretionary Trusts".
2. That the Respondent attend to finalisation of the Estates and winding up of the Discretionary Trusts within 60 days.
3. The amount of legal costs charged by the Respondent be reviewed.

The applicable law

[25] The Act came into force on 1 August 2008.

[26] The conduct complained of by the Applicant took place both before and after that date.

[27] In respect of conduct which took place prior to 1 August 2008, section 351 of the Act provides that complaints may be made to the Complaints Service established by the New Zealand Law Society only if the conduct complained of is conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

[28] The Costs Revision process established under the Law Practitioners Act 1982 is by virtue of the repeal of that Act, no longer available. Consequently the issue to be determined in respect of bills rendered prior to 1 August 2008, is whether the practitioner can be accused of gross or dishonest overcharging, and therefore conduct unbecoming, as noted by the Standards Committee.

[29] With regard to other matters of conduct complained of, the conduct complained of must therefore be capable of being considered as being either misconduct, conduct unbecoming, or negligent or incompetent to the requisite degree, before the Applicant can face disciplinary charges.

[30] The Act introduced a new category of unsatisfactory conduct. This is defined in Section 12 of the Act as being:

- (a) Conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) Conduct that would be regarded by lawyers of good standing as being unacceptable including:
 - (i) Conduct unbecoming; or
 - (ii) Unprofessional conduct;
- (c) Conduct consisting of a contravention of the Act or any Regulations or Practice Rules made under the Act; or
- (d) Conduct consisting of a failure on the part of a lawyer to comply with a condition or restriction to which a practising certificate held by the lawyer is subject.

[31] In general, unsatisfactory conduct will be conduct which is not so egregious as to amount to misconduct, but is still deserving of being marked out as falling below the standard of conduct or behaviour that clients and the public are entitled to expect.

[32] The definition provided in Section 12(a) of the Act introduces a “reasonable consumer test” as to whether or not a practitioner is guilty of unsatisfactory conduct, and moves the examination to what a reasonable consumer is entitled to expect from a reasonably competent lawyer.

Review

[33] From the outset, it must be observed that the difficulty which the Applicant faces with regard to this complaint, is that her complaints about the lack of information being provided to her by the Trustees of her parents’ Trusts, and/or breaches of fiduciary duties owed to her by the Trustees, relate to the conduct of the Respondent as a trustee.

[34] The Applicant is seeking to use the complaints and disciplinary process to have the Complaints Service carry out an audit and investigation of the Trusts’ affairs, and to produce the information required by the Applicant.

[35] The major difficulty is that she is not the Practitioner's client. The Respondent's clients are the trustees. Notwithstanding that the Respondent is one of those trustees, once decisions are made by him and the other trustee, he must, in his role as solicitor for the trustees, act in accordance with his instructions.

[36] The roles of a solicitor acting in the administration of an Estate, and those of a solicitor as an Executor or Trustee, are distinct: *Hansen v Young* (2004) 1 NZLR 37.

It is only where the conduct complained of strays into the area of a breach of professional duties, that the disciplinary processes can be invoked.

Costs

[37] The Standards Committee appointed a Costs Assessor (Mr S) to consider the accounts rendered by the Respondent.

[38] The Costs Assessor was originally requested by the Standards Committee to consider four accounts only, being those accounts which were rendered less than two years prior to the date of the complaint. These were the invoices dated 29 January 2008, (\$3,296.25), 24 April 2008 (\$2,969.13), 31 May 2008 (\$173.25) and 12 December 2008, (\$5,054.75).

[39] Subsequently, the Costs Assessor was instructed to consider all invoices rendered by the Respondent as the restriction on considering bills of costs more than 2 years prior to the date of the complaint, does not apply to bills rendered prior to 1 August 2008.

[40] The Costs Assessor subsequently reported to the Law Society and in his report dated 26 April 2010, he makes reference only to the four invoices originally referred to.

[41] I was concerned to ensure that the Committee had not proceeded on the basis that it was only these four invoices which were to be considered in its deliberations. In my letter dated 17 November 2010, I therefore sought clarification from the Committee as to whether or not the Assessor had indeed considered all of the Respondent's invoices as instructed.

[42] The Standards Committee responded by letter dated 7 December 2010 and a copy of this letter has been provided to the parties. In that letter, the Committee has confirmed that whilst it had regard to the Costs Assessor's Report, that report was not in itself the determinative. The decision reached by the Committee was made on the

basis of all materials provided, which included the accounts rendered by the Respondent prior to 1 August 2008.

[43] In its response to me the Committee pointed to the relevant section of its decision, as follows:-

“Having given due consideration to all the material before it, the Committee noted the Costs Assessor’s preliminary view that the four bills charged by [the Respondent] were fair and reasonable in the circumstances.

The Committee was of the view that no further assessment of the costs was required and that there were no other issues raised in the complaint that would have justified the commencement of proceedings of a disciplinary nature under the Law Practitioners Act 1982.

Accordingly, the Committee did not believe the threshold provisions of Section 351(1) of the Act had been breached and accordingly resolved to decline jurisdiction to consider the costs and conduct issues that arose prior to 1 August 2008.”

[44] In addition, the Committee referred the matter to Mr S for further comment. He confirmed, that while he had not specifically reported on the other bills of costs, that, had he done so, applying the test in the Law Practitioners Act 1982 of ‘gross or dishonest overcharging’, he would have confirmed the fees as reasonable.

[45] As noted, the process under the Act is not a cost revision process as was the case under the Law Practitioners Act 1982. The question to be considered by the Committee with regard to costs is as recorded in its decision, namely in respect of the pre-1 August 2008 accounts, whether they constituted gross or dishonest overcharging, and in respect of the post-1 August 2008 accounts, whether there has been a breach of Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008), thereby constituting unsatisfactory conduct. Serious cases of overcharging constitute misconduct in terms of Section 7(1)(a)(iv) of the Act.

[46] Having considered all of the factors relating to the review of the costs, I am satisfied that the Committee has addressed itself to all of the material facts and information and come to its decision after a proper consideration of these.

[47] There is no reason for me to alter that decision.

Other matters

[48] In addition to the complaint in respect of the practitioner’s costs, the Applicant’s complaint included the matters identified in paragraph 11 above.

[49] The Applicant complained that during the five months preceding her complaint, she had sought from the Respondent copies of her deceased parents' Wills, Trust Deeds and Deeds of Appointment, together with a statement of administration of the Trust.

[50] The Applicant had been a bankrupt, and the trustees were concerned to ensure that any distribution made to the Applicant was not subject to any claw-back by the Australian equivalent of the Official Assignee in Bankruptcy.

[51] The Respondent and Mr GB required the Applicant to seek legal advice to ensure that this would not occur. However, the Applicant complains that the Respondent and Mr GB refused to provide her with copies of the Wills and Trust Deeds until she took this step.

[52] The Applicant was a beneficiary of her parents' wills. Regardless or not of whether or not there were any assets in the Estate, she was entitled to receive a copy of the will and to receive reports from the Executors as to what constituted the assets of the Estate.

[53] The Applicant had also been presented with a Deed of Release and Indemnity, to be signed before any distribution was made. The draft Deed included a discharge of the Trustees from all obligations in respect of the administration of the Trust. Before executing this document, the Applicant wished to satisfy herself that the administration of the Trusts had been properly and fairly carried out.

[54] The difficulty with this aspect of the complaint, however, is whether the initial refusal by the Respondent to supply the documents, and subsequently to provide answers relating to administration of the Trust, constitutes conduct to be considered in the context of a professional conduct complaint.

[55] The Respondent has answered the queries of the Applicant in the manner he sees fit and as instructed. These responses are subject to scrutiny by the Court if he has failed in his duty as a trustee. It is not however the function of this office or the Standards Committee, to undertake the Court's role where a beneficiary remains dissatisfied with the answers provided.

[56] When discharging the functions of an Executor or Trustee, the Respondent was acting in that capacity, and not as a solicitor. In general terms, therefore, the Applicant needs to pursue her claims through the Court. In this regard, the provisions of s 138(1)(f) of the Act apply. That section provides that the Committee may exercise a

discretion to take no further action if, in all the circumstances, there is an adequate remedy that it would be reasonable for the person aggrieved to exercise. Consequently, the Committee's decision could equally have been made in reliance on this section.

[57] Part of the conduct complained of took place after 1 August 2008, and I have considered whether such conduct could be considered unsatisfactory conduct in accordance with the definition of Section 12(a) of the Act. I have given this matter careful consideration and corresponded further with the Respondent in this regard. I have, however, come to the conclusion that in the circumstances, i.e., where the Respondent was one of two trustees, to act contrary to the instructions of his co-trustee would have exposed the Respondent to a complaint from his co-trustee for acting contrary to instructions. Consequently, I concur with the decision of the Standards Committee that such conduct was not conduct which could properly be considered to be the subject of disciplinary charges.

[58] In all of the circumstances, I have concluded that none of the conduct complained of, either before or after 1 August 2008, raises issues of professional shortcomings. The Applicant will need to pursue other remedies available to her if she wishes to have the Respondent's conduct in his capacity as a trustee reviewed.

Decision

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

DATED this 10th day of February 2011

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:

Ms AH as the Applicant
Counsel for the Applicant
Mr ZS as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society