

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 88

Ref: LCRO 186/2019

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

ZU

Applicant

AND

FD¹

Respondent

DECISION

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

Introduction

[1] Mr ZU has applied for a review of the determination by [Area] Standards Committee [X] in which the Committee determined that Mr ZU's conduct constituted unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) by reason of a breach of r 3 of the Conduct and Client Care Rules.²

¹ At various times the Standards Committee file includes Ms WD as a complainant. The two costs assessors' reports also include her as a complainant. Ms WD has lodged a separate complaint about Mr ZU. This review is a review of the determination of Mr FD's complaints only.

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Background³

[2] “Mr [ZU] is an executor and trustee in the estate of the late [GD] ... He is also the solicitor for the estate.”⁴

[3] The executors of [GD]’s will are Mr ZU (the applicant), and one of GD’s children, RD. The beneficiaries of GD’s will are her three children, RD and FD (the complainant), and their sister, WD.

[4] The relationship between the siblings has been described as ‘dysfunctional’⁵ and this is evident from the materials provided by the parties. There was significant disagreement between the beneficiaries as to the distribution of their father’s regalia as well as many other matters arising out of the Estate.

[5] In addition, a file note from one of Mr ZU’s staff members⁶ described an encounter with WD, where she was “berated, taunted, mocked, snarled, screamed and yelled at” by WD. This took place at a time when the staff member was supervising distribution of the chattels in GD’s home, which had been allocated after a tender process, as the beneficiaries could not otherwise agree amongst themselves.

[6] Sometime prior to May 2017, Mr ZU had prepared a document⁷ for signature by each of the beneficiaries. This provided for each beneficiary to:

1. approve and admit the correctness of the attached Statement of Account prepared by [Law firm 3]; and
2. declare that I am not aware of any outstanding debt or claim on the estate of **[GD]** other than the entitlements of the beneficiaries pursuant to the terms of the will and confirm my acceptance of, and agreement to, the distributions.

[7] This document was signed by RD on 13 May 2017.

[8] On 24 July 2017, Mr FD sent an email to Mr ZU in which he advised that he had made a complaint to the Lawyers Complaints Service and advised that he would not “sign the indemnity whilst the Law Society is looking into these issues”.

[9] RD describes developments from there:⁸

³ Background detail is limited to matters which relate to the finding of unsatisfactory conduct.

⁴ Standards Committee determination (26 November 2019) at [1].

⁵ Mr JV and Mr KM, second costs assessment report (9 September 2019) at p6.

⁶ Handwritten file note (28 July 2016).

⁷ The document on the Standards Committee file provides for signature only by RD. It is assumed that Mr ZU had prepared similar documents for signature by the other beneficiaries.

⁸ RD, letter to Mr ZU (21 August 2018). The facts in this quotation are verified by reference to the material supplied to the Lawyers Complaints Service.

... During the latter half of 2017 and early 2018, despite requests from [Law firm 3], we did not get substantive feedback from either FD or WD, with WD suggesting she would not respond until FD had agreed or signed.

Against this stalled environment, and notwithstanding the ongoing Law Society process, the Executors agreed that matters had to continue to be expedited, and appointed [HG] of [Law firm 1] to advise as to the Executor's options. The Executors were in the process of implementing an agreed strategy, when we were persuaded by HD's legal adviser, BH, that WD would shortly sign the Deed, and (presumably after a discussion with FD or TB?) that he, BH, understood that FD would do so as well, subject to some minor amendments. Regrettably, FD's legal adviser, TB, responded with significant and unacceptable amendments to a document that had been distributed six months earlier.

[10] On 7 December 2017, Mr ZU prepared settlement deeds and forwarded this for signature to the beneficiaries. Later, when it became apparent that all beneficiaries would not sign the deed, Mr ZU sought advice from [Law firm 1] and Mr AK. Mr AK is described by Mr ZU's counsel (Mr PL QC) as being "a very senior and respected practitioner with long and extensive trust and estate experience who was frequently appointed by the courts in difficult trust or estate situations".⁹

[11] The essence of the advice from both [Law firm 1] and Mr AK was that the executors could not, and should not, distribute the estate in the face of considerable disagreement between the beneficiaries.

Mr FD's complaints

[12] Mr FD lodged his complaints in July 2017. The Legal Services Officer distilled the complaints from Mr FD's letter as being:¹⁰

Whether Mr ZU:

- Charged fees that were unfair and unreasonable and, if so, whether he breached Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- Failed to respond to requests for information from Mr [FD] (in his capacity as beneficiary of and advisory trustee to the Estate) concerning payments made on behalf of Mrs GD.
- Failed to release jewellery and other personal items to the beneficiaries.
- Refused to distribute the Estate until such time as the beneficiaries had signed indemnities in his favour.

⁹ Mr PL, letter to LCRO in response to [Law firm 2] submissions (16 June 2020) at [4]. Mr AK is now deceased.

¹⁰ LCS, letter to Mr ZU (4 August 2017).

Mr ZU's response

[13] Mr ZU responded to Mr FD's complaints.¹¹ He said:

The extensive amount of time incurred on the estate is attributable to five factors:

1. The amount of estate administration activities undertaken and difficulties in dealing with the beneficiaries;
2. A protracted tender process with the chattels;
3. Supervising distribution of the chattels and clearing out the property;
4. A dispute over the provision of information relating to a confidential settlement;
5. Allocation of estate jewellery and a dispute over the [redacted] and [redacted].

[14] He then provided further comments relating to the work that he and his staff had been required to undertake in the administration of the estate, which included a protracted tender process to allocate family chattels, and then supervising their distribution. His staff were also required to clear out GD's home.¹² Mr ZU's staff also were required to clean the premises over a period of four days.

\$50,000 payment

[15] Mr FD has complained that Mr ZU would not disclose details of "significant requests" by Mr ZU's firm, [Law firm 3], for payment of funds. In his response to the complaint, Mr ZU refers to the payment as being made in satisfaction of a promissory note, the details of which were confidential.

[16] Mr FD had obtained an authority from his mother to authorise Mr ZU to provide details of the payments to him. However, Mr ZU doubted that GD had sufficient capacity at the time she signed the authority and declined to comply.

Allocation of jewellery and regalia

[17] Mr FD asserted that his father had given him all his [redacted] memorabilia and medals. He had not provided any evidence to support this claim and a dispute arose as to whether or not they fell to be disposed of pursuant to GD's will, or were the property of Mr FD.

¹¹ Mr ZU, letter to LCS (22 August 2017).

¹² The property belonged to the estate of the late ND whose will provided his wife with a life interest in the property.

Letters of indemnity

[18] Mr FD complained that Mr ZU had been “wrong and deceitful” when he advised that Ms WD and RD were satisfied with the proposed distribution and would sign the acknowledgement prepared by Mr ZU.

[19] Mr FD also said that he had been advised that Mr ZU was required to have invoices in excess of \$20,000 authorised for payment by the Court.

[20] Mr ZU responded that he was seeking advice from a barrister with regard to this matter.

The Standards Committee process and determination

[21] The Standards Committee identified the following issues to be addressed:¹³

- (a) Whether, in relation to the administration of the Estate, Mr ZU charged more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard to the factors set out in Rule 9.1 of the Lawyers & Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (“RCCC”);
- (b) Whether Mr ZU acted appropriately in instructing [Law firm 1] to make an application to the High Court on behalf of the executors;
- (c) Whether Mr ZU was entitled to charge the Estate for his services as executor in the absence of a charging clause in the will;
- (d) Whether Mr ZU was required to provide information to Mr [FD] (in his capacity as a beneficiary and advisory trustee to the Estate) concerning “confidential” payments made on behalf of GD, or whether he was constrained by a duty of confidence in accordance with Rules 8 and 8.1 of the RCCC;
- (e) Whether Mr ZU acted in a timely manner in relation to the distribution of the Estate, or whether he is entitled to refuse to distribute the Estate until such time as the beneficiaries have signed a waiver of rights and/or deed of settlement.

[22] At a meeting in November 2017, the Committee resolved to appoint a costs assessor to undertake an assessment of the fees rendered by Mr ZU. In the letter of appointment, the costs assessor (Mr ET) was also asked to provide “comments about anything else arising out of [his] enquiry which might assist the Standards Committee in reaching a properly informed decision about the fee aspects of the complaint”.¹⁴

¹³ Standard Committee determination at [9].

¹⁴ LCS, letter to Mr ET (21 December 2017) at p2.

[23] On 17 December 2017, the Committee wrote to Mr ZU and expressed its concern that distribution of the estate had not taken place, and questioned whether he was “entitled to require the beneficiaries to approve the accounts prior to distribution”. It took the view that “this would usually be a matter for the executors”.

[24] Mr ET’s report is dated 28 March 2018. He made no comment about delays in distributing the estate and apart from an uplift on one invoice, he considered the fees rendered by Mr ZU to be fair and reasonable.

[25] The Committee formed the view that “it may be appropriate to investigate some form of alternative dispute resolution” and suggested to the parties that a mediation take place (at no cost to the parties) to reach agreement on the various issues arising.

[26] For various reasons, the mediation did not proceed. One of the reasons, was that the complainant, FD would not attend if Mr ZU’s co-executor, RD, was going to be at the mediation. There was also an objection to Mr ET being appointed as the mediator.

[27] On 20 September 2018, the Committee issued a Notice of Hearing to take place on 8 November 2018, conducted on the papers.

[28] Following the hearing, the Committee wrote to Mr ZU¹⁵ and advised that “the Committee questioned whether a competent lawyer would have stepped aside and required the beneficiaries to resolve these matters amongst themselves”. This impacted on the Committee’s consideration of the complaint about Mr ZU’s fees as well as the decision to seek advice from [Law firm 1].

[29] The Committee afforded Mr ZU the opportunity to provide further submissions.

[30] Mr ZU’s partner, Mr LY, responded¹⁶ on behalf of Mr ZU and the firm.

[31] The Standards Committee met again on 14 February 2019 and advised:¹⁷

(a) ... The Committee decided to seek a further costs assessment by a senior practitioner experienced in estate administration, and to appoint the same practitioner to act as investigator pursuant to section 144 of the Lawyers and Conveyancers Act ... to investigate whether Mr ZU has acted competently in the administration of the Estate so as to justify the level of fees recorded.

(b) *Provision of information concerning “confidential” payments made on behalf of the deceased*

The Committee determined that Mr ZU was restrained by confidentiality and was not obliged to provide the information to Mr FD. Accordingly, it determined that it would take no further action in relation to this issue

¹⁵ LCS, letter to Mr ZU (19 November 2018).

¹⁶ Mr LY, letter to LCS (10 December 2018).

¹⁷ LCS, letter to Mr ZU (21 February 2019).

pursuant to section 152(2)(c) of the LCA. Full reasons will be provided in a notice of determination which will be issued when all matters have been dealt with.

(c) *Distribution of the Estate*

The Committee considered that Mr ZU had not acted in a timely manner in the distribution of the Estate and, accordingly, that he had breached Rule 3 of the RCCC. Accordingly, it determined that there had been unsatisfactory conduct on the part of Mr ZU in terms of section 12(c) of the LCA. Full reasons will be provided in a notice of determination which will be issued when all matters have been dealt with.

It was noted that Mr ZU still had not distributed the Estate despite all three beneficiaries having agreed to sign the deed of settlement. Mr ZU is asked to immediately circulate the deed of settlement attaching a pro forma draft distribution statement and to immediately attend to distribution once this has been signed.

(d) *The appropriateness of instructing [Law firm 1]*

This is a matter which will be considered by the investigator appointed as per item (a) above.

(e) *The absence of a charging clause¹⁸*

This is also a matter which will be considered by the investigator appointed as per item (a) above.

[32] The Committee then appointed Messrs JV and KM to undertake this task. The Committee's instructions were to:

1. Review the lawyer's files and costing records;
2. Request further information from the complainant or the lawyer as might be necessary for the purpose of your assessment;
3. To contact Mr ZU and the complainant, Mr FD, to discuss the costs aspects of the complaint and any other matters you consider to be relevant to your assessment;
4. To contact the previous costs assessor, Mr [ET], to discuss the costs aspects of the complaint and any other matters you consider to be relevant to your assessment;
5. Prepare a report for the Standards Committee which should include:
 - a. Your comments on the fee itself and whether you consider it is a fair and reasonable fee for the services provided in terms of Rule 9 of the *Rules of Conduct and Client Care for Lawyers*;
 - b. If you consider that the fee is not fair and reasonable, you should specify what you consider to be a fair and reasonable fee, or, if you think it appropriate to do so, express a range within which you would consider a fee to be fair and reasonable; and

¹⁸ GD's will did not include a usual clause authorising the executor of the Estate be remunerated by the Estate.

- c. Your comments about anything else arising out of your inquiry which might assist the Standards Committee in reaching a properly informed decision about the fee aspects of the complaint.

[33] The costs assessment was to include further invoices that had been issued by Mr ZU since the commencement of the complaints process.

[34] The costs assessors conducted a thorough investigation, including an examination of Mr ZU's files. In completing the report, the assessors took note of the Committee's determination of unsatisfactory conduct¹⁹ and delivered their report on 9 September 2019. The report included comments that the Estate was "seemingly very simple and straightforward" and "why was it not dealt with simply and quickly?". Further relevant comments include:

"The files disclose a considerable number of reasons.

1. The dysfunctional family members.
2. A failure of the executors to meet with the family at the outset (FD and WD) notwithstanding their longstanding breach of relationship. A meeting at the outset may have avoided some of the endless number of emails over the next 3 years.
3. The fact that FD and WD were not informed for a considerable period that their actions were costing the Estate a large sum of money.
4. The method for selecting items of furniture and furnishings from the house.
5. The dispute over the regalia FD had uplifted from the house.
6. The failure by the executors to carry out the requirements of the Will. In particular not dealing with the jewellery as required by clause 6.10."²⁰

"In our view, the majority of the legal services in relation to this Estate took place during the first few months after the death of GD. Thereafter the Estate was largely a battle between the family during which the executors endeavoured to please all parties and succeeded in satisfying no-one."²¹

"The time spent on an indemnity delayed distribution for a long period and should not have been insisted upon."²²

"RD is both a beneficiary and executor. He has fully supported Mr ZU in the fees rendered and approved them all. We have taken his comments into consideration but do not believe his reasoning is sound in terms of estate administration."²³

[35] The Committee issued its decision on 26 November 2019 in which it determined:

¹⁹ Second costs assessment report, above n 5 at p11.

²⁰ At p6.

²¹ At p9.

²² At p10.

²³ At p10.

- (a) To refer the issues set out in [21](a)–(c) above to the Lawyers and Conveyancers Disciplinary Tribunal; and
- (b) that the delay in distribution was unacceptable and, as a result, Mr ZU had failed to act in a timely manner in relation to the distribution of the Estate. As such Mr ZU breached Rule 3 of the Conduct and Client Care Rules and that this constituted unsatisfactory conduct pursuant to s 12(c) of the Act.

[36] By way of penalty, Mr ZU was ordered to pay a fine of \$1,500, and costs in the sum of \$1,000.

Mr ZU's application for review

[37] Mr ZU has applied for a review of the Committee's determination and instructed Mr PL QC to act on his behalf.

[38] The application for review is confined to the finding of unsatisfactory conduct. Mr PL says:²⁴

- 2.1. As to Mr ZU being prevented from distributing the estate, the papers on the Standards Committee file should clearly establish that the co-executor would not agree to distribution. If further confirmation is required, please advise.
- 2.2. As to the advice Mr ZU received, the first advice was from [Law firm 1] (HG, a published author and recognised expert on trust obligations) and the detail of that should be on the Standards Committee file. The second advice being from a "senior and respected practitioner" was Mr [AK], a consultant at [Law firm 4] and a member of the Disciplinary Tribunal.

[39] Mr ZU submits that the determination of unsatisfactory conduct is wrong for two reasons. He says:²⁵

Firstly, I was actually legally prevented from distributing the estate because for the period at issue in the determination my co-executor would not agree to distribution.

Secondly, I sought and followed the advice of firstly, a major law firm, and secondly, a very senior and respected practitioner on the issue of distribution.

[40] Mr ZU had intended to provide correspondence which supported these submissions, but these were unfortunately omitted. However, they were provided following the review hearing.

²⁴ Mr PL, letter to LCRO (9 December 2019).

²⁵ Application for review, supporting reasons.

Mr FD's response

[41] Mr MP²⁶ responded on behalf of Mr FD. He says:²⁷

5. ... Mr ZU has advanced various excuses for his delay, but this appears to be the first time he has asserted that RD, as executor, refused to agree to distribute.
6. Throughout this lengthy process RD has offered various views on the reasonableness or otherwise of actions taken by FD, WD, or their respective counsel. However, as far as I am aware, at no stage did he go so far as to refuse to make any distribution from the Estate. My predecessor, Mr TB, is also unaware of any such occasion.

[42] Mr MP confirmed that "FD's complaint and the Standards Committee determination relates to Mr ZU's separate and distinct role as the solicitor for the estate and his failure to act in a timely manner in execution of the same".

[43] He submits that the correspondence referred to by Mr ZU and Mr PL (the correspondence with [Law firm 1] and Mr AK) should be provided to this Office and they be given the opportunity to review it and provide comments.

Jurisdiction

[44] An initial matter for consideration arises out of the manner in which the Standards Committee proceeded with this complaint. On 21 February 2019, the Standards Committee advised the parties of its initial determinations:²⁸

1. To appoint another costs assessor to provide a second report as to the quantum of Mr ZU's fees. The costs assessor would also be appointed as an investigator pursuant to s 144 of the Act.
2. To take no further action on the complaint that Mr ZU had declined to release information about payments made on behalf of GD.
3. That there had been unsatisfactory conduct on the part of Mr ZU by not acting in a timely manner to distribute the estate.
4. The complaint concerning instruction of [Law firm 1] would be investigated by the costs assessor appointed.

²⁶ Mr MP is a senior associate in [Law firm 2].

²⁷ Mr MP, letter to LCRO (31 January 2020).

²⁸ This process is somewhat unusual in that it communicates the Committee's decision but advises reasons would be provided when all matters had been dealt with. There is no reason why these determinations could not have been fully disposed of at this stage.

5. The issue as to whether or not Mr ZU was able to charge for the time spent acting as an executor in the absence of a charging clause in the will would be referred to the Tribunal.

[45] The jurisdictional issue that arises on review, is whether or not the determination of unsatisfactory conduct, the decision to refer the issue concerning the lack of a charging clause to the Lawyers and Conveyancers Disciplinary Tribunal, and the decision to take no further action on other complaints, constituted a “Notice of Determination” in terms of the Lawyers and Conveyancers Act 2006. If it did, then Mr ZU’s application for review would be well out of time and there would be no jurisdiction for this Office to conduct the review.

[46] In this instance I have decided that the potential jurisdictional issue will not prevent this review from continuing. This decision is made for the following reasons:

1. Section 158 of the Lawyers and Conveyancers Act provides that a notice of determination must:
 - (a) include reasons;
 - (b) specify orders consequent on the finding; and
 - (c) describe the right of review and state the period within which an application for review must be lodged:
2. The respondent has not taken the point; and
3. Section 200 of the Act requires a review to be conducted with as little formality and technicality as permitted and Mr ZU should not be denied the right to apply for a review because of the unusual process adopted by the Committee.

Review

An indemnity or an acknowledgement?

[47] Throughout the Standards Committee discussion and decision, and the report prepared by the costs assessors, the documents prepared by Mr ZU for signature by the beneficiaries have been referred to as an “indemnity”. An indemnity is defined in Black’s

Law Dictionary as “a contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur”.²⁹

[48] The inference to be drawn from the use of the word “indemnity”, is that the complainant and the Committee have proceeded on the basis that the primary reason for the document was to indemnify the executors from any liability arising out of the administration of the estate – in other words, something for their own benefit.

[49] None of the documents prepared by Mr ZU contained a specific indemnity clause. The document prepared by Mr ZU in December 2017 included the following:

- A. ... This deed settles disputes relating to her estate.
- ...
- G. The Parties have agreed to settle all matters relating to the Estate (save for the matters encompassed in the Law Society Complaint), on the terms set out in this deed (“Deed”).
- ...
- 1. The Executors will distribute the Estate in accordance with the paragraph 10 of the letter of the Executors to the Beneficiaries dated 7 December 2017.
- 2. The Parties agree that the distribution of the Estate is to be made without any admission of liability or wrongdoing on the part of any of the Parties.
- 3. ...this Deed is in full and final settlement of:
 - (a) any claim to ownership of any item of the [redacted] that the Beneficiaries may have apart from through the allocations provided for by clause 1;
 - (b) any claim that the Beneficiaries may have regarding access to the Confidential Documents;
 - (c) all matters arising in connection with the administration of the Estate by the Executors, including any claim that the Beneficiaries may make against the Executors regarding the distribution of the [redacted] or the residue of the estate.

[50] In my view, the term “Settlement Deed”³⁰ more accurately reflects the nature of the documents prepared by Mr ZU, in that they record settlement of issues between the beneficiaries, rather than being an indemnity for the benefit of Mr ZU and his co-executor. This allows for a more objective approach to the matters on which the finding of unsatisfactory conduct is based.

²⁹ Bryan Garner (ed) *Black’s Law Dictionary* (9th ed, West, St Paul, 2009).

³⁰ As used by Ms WD’s lawyer, Mr BH.

Was Mr ZU providing regulated services?

[51] The Committee determined that Mr ZU had breached r 3 of the Conduct and Client Care Rules. The finding of unsatisfactory conduct was made pursuant to s 12(c) of the Act.

[52] Rule 3 only applies if refusal to distribute the estate until the deed was signed, is considered to be conduct in Mr ZU's capacity as a lawyer, i.e. when providing regulated services.

[53] Mr ZU had sought advice from [Law firm 1] and Mr AK. The advice sought was clearly legal advice, and assuming that Mr ZU then advised RD, he was, ipso fact, providing regulated services.

[54] Mr MP has requested that the advice received from [Law firm 1] and Mr AK be passed to him and his client, to provide them with an opportunity to comment.

[55] The only documentation I can discern from the material received, is a handwritten record of a telephone conversation with Mr AK, and a 3½ page memorandum from Mr ZU and a member of his staff to Mr HG,³¹ setting out the background and the matters on which Mr ZU required advice.

[56] This material has not been provided to Mr MP and his client, because this review cannot involve a discussion as to whether or not the advice was correct. The only relevance of the documentation is to support a finding that Mr ZU was providing regulated services, and I proceed on that basis.

Did Mr ZU provide competent advice?

[57] Mr FD's complaints reduce to a consideration of whether or not Mr ZU provided competent advice to RD that distribution should not be effected until the settlement deed was signed by all beneficiaries. If the advice was competent, then, it follows that distribution needed to be deferred until the beneficiaries acknowledged that it was in order to proceed as proposed.

[58] If that is accepted, then the finding that Mr ZU had not acted in a timely manner, cannot stand.

³¹ Mr HG was the lawyer at [Law firm 1] with whom Mr ZU consulted.

[59] The Committee addressed this issue by considering whether or not Mr ZU was “entitled to refuse to distribute the Estate until such time as the beneficiaries have signed a waiver of rights and/or deed of settlement”.³²

[60] It said:³³

The Committee did not accept that Mr ZU was entitled to hold up distribution in this manner. Execution of a deed cannot be insisted upon as a precondition to distribution.

[61] The topic of chapter 3 of the Legal Practice Manual,³⁴ is, the Administration of Estates. It includes a section on deeds of release, clearances and other protection for personal representatives.

[62] Mr Rondel says:³⁵

[You] may well have been taught that a personal representative cannot insist on a deed of release, or other like clearance, before distributing an estate. One will appreciate how very easily doubts as to various matters pertaining to [an] administration can arise. It is not an unreasonable personal representative who asks for the protection of a deed of release. Many probate practitioners recommend such a clearance as a matter of course. In simple cases, an agreement that the administration has been approved, is just as adequate. Beneficiaries will seldom object to such documents, and, when they do, the reason for objection normally reveals something which needs clarifying or attention before the distribution proceeds.

[63] He continues:³⁶

It is generally considered that a deed of release that exhibits and expresses approval of the estate financial statements, or at least approval of a distribution account, is highly preferable to one that is a bare expression of discharge. ...

...

If the administration has been perfectly straightforward and one can find no basis on which a claim could be substantiated, then, unless the beneficiary relents, the personal representative will probably have to go without [their] release.

[64] Mr Rondel says that where there is doubt as to how the distribution is to be made, or, as in this case, there is opposition from the beneficiaries, then the executors should consider applying to the Court for directions.

³² Standards Committee determination at [9](e).

³³ At [17].

³⁴ Robert Rondel “Administration of Estates” in *Legal Practice Manual* (5th ed, Auckland District Law Society, Vol 6, 2005).

³⁵ At [5.1].

³⁶ At [5.3] and [5.4].

[65] Mr ZU sought advice from [Law firm 1] and Mr AK about whether he should, or needed to, make an application to the Court.

[66] Mr Rondel acknowledges that:

... If the administration has been perfectly straightforward and one can find no basis on which a claim could be substantiated, then, unless the beneficiary relents, the personal representative will probably have to go without [their] release.

[67] The administration of GD's estate cannot be described as "perfectly straightforward". By not proceeding to distribute the estate in the face of serious disagreement from, and between, the beneficiaries, it cannot be said that Mr ZU has provided incompetent advice.

KB v JR LCRO 246/2012

[68] The Committee has cited this decision in support of its finding that "execution of a deed cannot be insisted upon as a precondition to distribution".³⁷ The circumstances giving rise to the complaints in that decision differ from those addressed in the present review. In that decision, I said:

[26] It was not until Ms JR obtained execution of the deed of release and indemnity by Mr CG personally, on 10 August 2012, that distribution was finally effected. The Standards Committee determined:

that the decision as to whether or not to request a deed of final release and indemnity is a judgement call for a practitioner to make with reference to the circumstances of a particular retainer and is indeed common practice among some solicitors.

Whilst I agree that this statement is correct, particularly where the solicitor is the executor/trustee, I do not agree that execution of the deed can be insisted upon as a precondition to distribution.

[69] The significant difference in that review was that Ms JR was the sole executor of the will. Mr ZU was one of two executors. The relevance of that is discussed in the next section of this review.

Mr ZU's instructions from his co-executor

[70] Mr ZU declined to distribute the estate until the settlement deed had been executed by all parties. He says that RD would not agree to distribute the estate until all

³⁷ Standards Committee determination at [17].

beneficiaries had agreed the basis on which distribution was to proceed as set out in the deed prepared by Mr ZU.

[71] Mr MP says this is the “first time [Mr ZU] has asserted that RD, as executor, refused to agree to distribute”.³⁸

[72] Mr PL has provided copies of communications that demonstrate RD’s refusal to agree to distribution and Mr ZU’s desire to distribute the estate as soon as possible. A sample of this correspondence is:

- RD, email to Mr ZU (19 December 2017):
I am not in any way inclined to make a partial distribution whilst we are confronted with this situation and dialogue ...
- Mr ZU to Mr BH (30 August 2018):
Please be assured it is a top priority for me to finalise the estate distribution between the three children of GD.
- RD, email to Mr ZU (26 September 2018):
Think we also need to advise FD and WD that executors do not intend to finalise matters until LS process concluded.
- Mr ZU to RD (2 October 2018):
As you will appreciate I would like to forward the deed to the beneficiaries as soon as possible. I record your advice that you will not sign this until the LS process is finalised.
- Mr ZU, email to RD (1 March 2019):
...I would like to get a draft to beneficiaries (including yourself) for consideration and hopefully finalising as soon as possible.

[73] Also relevant is a handwritten note of a staff member who recorded the content of the discussion between RD and Mr ZU on 28 September 2018, a portion of which is reproduced below:

- Listened to conversation between [ZU] and [RD].
- RD does not want to settle estate until Law Society matter settled – 12 October 2018.
- [ZU] trying to encourage RD to be proactive and settling distribution of personal items.

³⁸ Mr MP, letter to LCRO (31 January 2020).

- RD seems to want to link the Law Society matter and distribution of the estate together and will not settle one without the other.
- RD happy for deed of settlement to be circulated but is not happy to sign at this stage.

[74] Confirmation of RD's position was provided in a letter from Mr LY (Mr ZU's partner) to the Lawyers Complaints Service:³⁹

As we believe has been made clear to the Society already, Mr FD has expressed strong views in his capacity as co-executor declining to make a final distribution of the Estate until such time as the Deed of Settlement has been signed by all residuary beneficiaries. I have taken the opportunity to make enquiries of the co-executor who has confirmed his position on the matter.

[75] Consequently, whilst this may well be the "first time" Mr ZU has given this as a specific reason for not distributing, it represents a valid reason for not doing so. Mr ZU could not make a unilateral decision to distribute against RD's wishes.

Summary

[76] To sum up, the decision I have reached is:

1. Mr ZU was providing regulated services when advising that the estate could not be distributed until the settlement deed was executed by all beneficiaries;
2. Mr ZU's advice not to distribute until the settlement deed was signed was competent advice and supported by advice from independent lawyers.
3. Mr ZU's co-executor did not agree to distribution until the settlement deed was executed by all beneficiaries;
4. Mr ZU could not make a unilateral decision to distribute;

[77] Having come to those decisions, the determination of the Standards Committee must be set aside.

Decision

[78] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee that Mr ZU's conduct constituted unsatisfactory conduct, is reversed, and the consequent orders fall away.

³⁹ Mr LY, letter to LCS (10 December 2018) at [12].

Publication

[79] This decision contains a discussion concerning the difficult area where a lawyer is appointed executor of a will and the application of the Conduct and Client Care Rules. Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, this decision will be published in an anonymised format on the website of this Office.

DATED this 15th day of June 2021

O 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:

Mr ZU as the Applicant
Mr PL QC as the Applicant's Representative
Mr FD as the Respondent
Mr MP as the Respondent's Representative
[Area] Standards Committee [X]
New Zealand Law Society