

LCRO 02 /08

**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** **COMPLAINANT A** of Auckland

Applicant

**AND** **LAWYER X** of Auckland

Respondent

### **DECISION AS TO PENALTY AND COSTS**

*Identifying details of this decision are to remain confidential*

#### **Background**

[1] In a decision of 20 February 2009 I found that Lawyer X was guilty of misconduct in his professional capacity in that he assisted in the execution of a will in the knowledge of the incompetence of the testatrix. I found also that this was compounded by the subsequent action of Lawyer X in purporting to assume the role of trustee and executor under that will on the death of the testatrix. Since that date Lawyer X has had the opportunity to make submissions in respect of penalty and costs. That opportunity was exercised on his behalf by Mr W. The New Zealand Law Society was also invited to comment on the costs it incurred in investigating this matter.

[2] This matter concerned conduct which occurred prior to 1 August 2008 and as such the applicable rules are those in force at that time. In particular, s 352 of the Lawyers and Conveyancers Act 2006 states that any penalty imposed in respect of conduct that occurred prior to 1 August 2008 must be a penalty that could have been imposed in respect of that conduct at the time when that conduct occurred. I signalled in the decision of 20 February 2009 that I considered that this was a matter which

would have been considered by a District Disciplinary Tribunal under the pre 1 August 2008 system. Accordingly the penalties that may be considered are those found in s 106 of the Law Practitioners Act 1982.

[3] I observe the functions of penalties in a professional context as recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- to punish the practitioner;
- as a deterrent to other practitioners; and
- to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[4] The conduct in question in the case was assisting in the execution of a will knowing that the testator was not competent to execute the will. The will in question changed the effect of an earlier will only insofar as it removed the daughter of the testatrix as executrix and trustee and replaced her with Lawyer X.

[5] In his explanation Lawyer X referred to tensions within the testatrix family and said that he wished to "put the cat amongst the pigeons". The inference was that this new will would crystallise matters and force the family to address the issues in relation to the care of the testatrix. The existence of the new will did not bring matters to a head. It appears that the family did not become aware of the existence of that will until after the testatrix's death. On that date Lawyer X wrote to inform her that he held a will and that he intended to take steps to complete the administration of the estate. That letter and the expressed intention to treat the will as valid and commence administration is concerning in light of his acknowledgement that he knew that Complainant A's mother did not have the mental capacity to execute the will at that time. I have earlier found that in light of this the suggestion that the purpose of the will was to "put the cat amongst the pigeons" while Complainant A's mother was alive is not convincing. Lawyer X only desisted in his efforts to administer the will when a solicitor acting for another family member raised the fact that the later will held by Lawyer X was invalid.

[6] Other matters raised by Mr W in mitigation of Lawyer X's conduct are his standing in the professional community and the fact that he frequently undertakes work on a low-fee or no-fee basis. This is accepted.

[7] Mr W also notes that Lawyer X is not pursuing his fee in this matter (having consented to an order that the bill be cancelled). He argues that this should be taken into account and that the non-recovery of his fees is in itself an appropriate penalty.

[8] This submission is not accepted. Lawyer X maintained his claim to the fee in this matter until the hearing itself. In light of my finding that the testatrix was not mentally competent and that this was known by Lawyer X (by his own admission) means that there was never any legitimate claim to be paid in respect of the instructions taken. It is no penalty for Lawyer X to forgo a benefit to which he was never entitled.

[9] Mr W also states that Lawyer X was not primarily motivated by the earning of fees in this matter but in order to “assist an elderly woman who appeared upset at her circumstances”. It is accepted that this was in part Lawyer X’s motive. However, the fact that the claim for payment was maintained throughout, and that he attempted to administer the will knowing that it was invalid suggests that his motives were not entirely altruistic. I note also that because Lawyer X witnessed the will the clause permitting him to charge for his services would have been ineffective: s 13 of the Wills Act 2007. I am not persuaded that Lawyer X was aware of this. Neither am I persuaded that he did not intend to charge for his services in administering the will.

[10] Mr W, anticipating the making of an order of costs, suggested that the costs would, of themselves, be a sufficient penalty. It is accepted that in some cases where the breach is not serious, or where financial hardship exists, the imposition of a costs order may be taken into account and it may sometimes be appropriate that no other orders be made. However, it should be noted that the function of a costs order is to ensure that the cost of discipline falls on the wrongdoer and not on his or her professional peers. There is no punitive element in costs. This is reflected in the fact that their jurisdiction to impose costs even though no professional breach exists (s 210(3) Lawyers and Conveyancers Act). In this case the imposition of a costs order alone would not serve the functions of professional discipline.

[11] In the absence of submissions to the contrary it is assumed that Lawyer X is in a position to meet any financial penalty imposed.

[12] I am of the view that this offence is at the upper end of the offending capable of being dealt with by the District Disciplinary Tribunal (under the former regime) and shows a concerning failure to appreciate the importance of meaningful consent to testamentary instruments. While I do not find that there has been outright dishonesty in this case, there is a lack of fidelity which is inconsistent with the obligations of a lawyer. I note that in *Bolton v Law Society* [1994] 2 All ER 486 it was stated that:

If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such cases, but it may well.

In fact in that case the lawyer in question was (effectively) suspended in respect of reckless dealing with funds advanced by a financier. The approach in *Bolton* was accepted in New Zealand in *Sidney v Auckland District Law Society* [1996] 1 NZLR 431, 434.

[13] Against that background and taking into account the matters raised on Lawyer X's behalf. I impose the following penalty:

- Lawyer X is ordered to pay a fine of \$1500 pursuant to s156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society.

I note that that is a fine which could have been imposed for this conduct prior to 1 August 2008 pursuant to s 106(4)(a) of the Law Practitioners Act 1982.

### **Costs**

[14] It is appropriate to impose an order in respect of the costs of the investigation of the New Zealand Law Society. The New Zealand Law Society provided a schedule of costs. No issue has been taken with that schedule. Accordingly pursuant to s 210(3) of the Lawyers and Conveyancers Act the following order is made:

- Lawyer X is to pay to the New Zealand Law Society the sum of \$500 in respect of the costs of the investigation of the Society.

[15] It is also appropriate that an order be made in respect of the costs of this review. I note that the review itself was conducted relatively efficiently. Section 210(1) of the Lawyers and Conveyancers Act empowers me to make such order as to the payment of costs and expenses as I see fit. That power is further particularised in s 210(3) which provides that an order against the lawyer complained about may be appropriate. Section 210(4) provides that expenses included such amounts in respect of salaries of staff and overhead expenses as are considered properly attributable to the proceedings.

[16] In light of that I have reviewed the time taken in the conduct of this matter. I note that I have attributed a cost (including overheads) of \$60 per hour for the work of

case managers and \$100 per hour for my own time. Applying these principles an estimated cost somewhat in excess of \$1100 results. In all of the circumstances I consider it appropriate to make the following order:

- Lawyer X is to pay to the New Zealand Law Society the sum of \$1000 in respect of the costs of the Legal Complaints Review Officer incurred in the conduct of the review.

### **Publication**

[17] I note that the question of publication of name was not put to Lawyer X and understandably there have been no submissions made on it. In light of that it would be inappropriate for me to consider publication of this decision (or the earlier decision as to culpability) under s 206(4) of the Lawyers and Conveyancers Act. Consequently any identifying details of this decision are to remain confidential.

### **Orders**

[18] Accordingly the following orders are made:

- Lawyer X is ordered to pay a fine of \$1500 pursuant to s156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society.
- Lawyer X is to pay to the New Zealand Law Society the sum of \$500 in respect of the costs and expenses of the investigation of the Society.
- Lawyer X is to pay to the New Zealand Law Society the sum of \$1000 in respect of the costs and expenses of the Legal Complaints Review Officer incurred in the conduct of the review.

**DATED** this 30th day of March 2009

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Duncan Webb  
**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:

Complainant A as Applicant  
Lawyer X as Respondent  
The Auckland Standards Committee 2  
The New Zealand Law Society