

LCRO 226/2015

CONCERNING

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

AND

CONCERNING

a determination of the Wellington Standards Committee [X]

BETWEEN

GZ

Applicant

AND

QP

Respondent

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

DECISION

Introduction

[1] Ms GZ has applied for a review of a decision by the Wellington Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning Mr QP's conduct. That decision is dated 8 October 2015.

[2] The Committee's decision was made pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) which provides for a Committee to take no further action on a complaint if to do so is not necessary or appropriate.

Background

[3] Ms GZ's complaint relates to \$20,000 (the money) held in Mr QP's trust account. Ms GZ says the money is her money, Mr QP is holding the money on her behalf, she has instructed him to release it to her, and he has failed to comply with her instructions.

[4] Mr QP says he received joint instructions from Ms and Mr GZ, her father, to receive the proceeds of sale of a property owned jointly by Ms and Mr GZ (the property), to disburse the sale proceeds according to the share each of them owned in the property and to retain \$20,000 from Ms GZ's share in his trust account. He says he has paid Ms GZ's share of the proceeds of sale to her, and holds the \$20,000 pending receipt of further joint instructions.

[5] Ms GZ has provided a document headed [Agreement] (the agreement). The parties to the agreement are respectively Ms GZ's brother AA and her parents. It appears to have been signed by each of them, and is dated 19 July 2011. Ms GZ and her brother BB are not named as parties to the agreement, and are not signatories to it.

[6] Mrs GZ, Ms GZ's mother, passed away in 2014. Before she did so, she transferred half of the share in the property she owned jointly with Mr and Ms GZ to Ms GZ. Mr QP was involved at that time, and had also been involved when Ms GZ originally took a share in the property in 2005 of $\frac{45}{98}$, and entered into a property sharing agreement with her parents. With the transfer from Mrs GZ in 2014, Ms GZ's share increased to $\frac{71}{98}$. Her father retained his $\frac{27}{98}$ share.

[7] In 2015 Ms GZ served a "Termination Notice" on Mr GZ, referring to the property sharing agreement and indicating she intended to sell her share in the property. When it was sold, Mr QP's firm acted for Ms and Mr GZ jointly on the conveyancing aspects of the transaction as a result of which the money arrived in his trust account as part of the proceeds of sale of the property.

[8] Mr QP has provided some evidence of his involvement in discussions between Ms GZ and her parents about the conditions to which the transfer from her mother was subject in 2014, and his observations on the effect of the agreement.

[9] Based on his observations, Mr QP's views are that Ms GZ:

- (a) Has breached obligations to her father arising from discussions leading to the agreement to transfer of her mother's share in the property to her; and
- (b) Has contracted to pay \$20,000 to her brother BB under the agreement from the sale proceeds of the property.

[10] Both of those views are central to Mr QP having retained \$20,000 in his trust account, despite Ms GZ clearly instructing him to pay the money to her. On the basis of

the agreement and what he knows about the family's affairs, Mr QP's view is that Ms GZ "needs to take steps to resolve matters with her father and also with her brother".

[11] As a consequence of an apparent stalemate between Ms GZ and their father, and presumably BB, Mr QP does not consider he is holding the money on her behalf. He therefore considers she cannot authorise him to pay the money out, and he cannot act on her instructions without Mr GZ's authority, which he has not provided.

[12] Ownership of the money is contingent on arguments about who may be lawfully entitled to the \$20,000 held in his trust account: Ms GZ, Mr GZ, or BB. BB and Mr GZ are not parties to this review, although to an extent Mr QP has taken their part.

[13] None of the family members appear to have taken any steps to mount argument in a forum where any dispute over the money can be determined. Beyond observing that the money was paid into a trust account client ledger held by Mr QP's firm in the names of Ms and Mr GZ as a joint client (the GZs' account), ownership of it is not a matter over which this Office exercises jurisdiction.

[14] The jurisdiction of this Office extends to consideration of whether Mr QP has met his professional obligations, including those that arise pursuant to s 110 of the Act, and reg 12 of the Trust Account Regulations.

[15] The difficulty for Mr QP is the discord between what Ms GZ now says, and the instructions he received in 2015 from the GZs jointly, and from Ms GZ's lawyers. Those instructions establish the basis on which Mr QP effected settlement of the sale of the property, and received funds into his trust account.

[16] It appears that settlement of Ms GZ's new property on 12 June 2015 was contingent on her receiving her share of the sale proceeds from the property. Ms GZ had separate legal representation from [Law firm]. As Ms GZ was in receipt of independent advice in 2015, she is taken to have understood the implications of acquiescing to Mr QP holding the money at the time.

[17] Mr QP's evidence is that he was instructed by Mr GZ that Ms GZ had created a situation whereby Mr GZ had to acquiesce to the sale of the property because he could not afford to buy out Ms GZ's share. Selling the property was her choice, not his.

[18] In advance of settlement Mr QP's firm prepared two draft settlement statements. The first was dated 9 June 2015 and is addressed to Ms and Mr GZ (the joint statement).

The joint statement recorded anticipated receipts into the trust account of the deposit of \$47,172.50 and settlement funds of \$630,103.91. The deposit was to be paid to Ms and Mr GZ calculated in accordance with their shares in the property. Deductions were to be made from the settlement funds for a special water meter reading, rates, and two of the firm's accounts, one for the sale of the property, the other for the 2014 transfer of Ms GZ's mother's share to Ms GZ. The joint statement also accounts for a payment to Mr GZ of his share to the value of \$172,631.25, and Ms GZ's share to her of \$453,956.26. The joint statement also refers to a "(statement showing Ms GZ's payments attached)" (Ms GZ's statement).

[19] The second draft settlement statement is dated 12 June 2015 and is addressed to Ms GZ (Ms GZ's statement). Ms GZ's statement records receipt of her share of the sale proceeds: \$453,956.26, two deductions, and a balance payable to Ms GZ. The deductions are to repay a mortgage to [Bank] and a deduction of \$20,000, recorded as "Payment to BB". The balance of \$265,659.02 is recorded as "available to you paid to [Law firm] Lawyers".

[20] In her complaint, Ms GZ says Mr QP "was insisting that I pay this to BB". She refers to her assumption that the payment was on behalf of her parents and does not consider that she has ever agreed to pay it herself.

[21] Ms GZ instructed [Law firm] to write to Mr QP challenging the \$20,000 deduction shown on his statement which the firm did on 10 June 2015. On behalf of Ms GZ, [Law firm] contended BB should seek repayment directly from his father or from his late mother's estate, but not from her. The letter records Ms GZ's position that she was not involved in the loan transaction in 2011 other than as the conduit for the payment of AA's debts, so received no benefit from the \$20,000 herself.

[22] Ms GZ says that [Law firm]'s intercession prevented payment being made to BB, but that she agreed to the \$20,000 "not being disbursed to BB without mine and [Mr GZ's] joint authority to stop the payment". She says Mr QP was "threatening to hold all of the money until this was resolved and this was only way we could get my share of the money to purchase my new property". Ms GZ expresses the view that Mr GZ should have no say in regards to this money" because it only came out of her share. That is inconsistent with the instructions to Mr QP in 2015.

[23] There is no evidence of Mr GZ objecting to Mr QP retaining the \$20,000. He appears to have instructed Mr QP jointly with Ms GZ before settlement to hold the

\$20,000 pending resolution of the dispute. Mr QP refers to that as an “agreement with Ms GZ’s lawyer that [he] can only act on joint instructions”.¹

[24] On the basis of Ms and Mr GZ’s joint instructions, settlement funds were received into the GZs’ account, and except for deductions for the mortgage and the \$20,000, Ms GZ’s share was paid to her. An email from OX at Mr QP’s firm dated 12 June 2015 says she “held the \$20,000 on interest bearing deposit pending resolution of the dispute”.

[25] Ms GZ’s complaint, refreshed on review, is that she does not want Mr QP to retain the money. She argues that the money is hers, and therefore cannot be the subject of a joint instruction with her father, regardless of any dispute that may or may not be raised. Her position, as already mentioned, is that she has directed Mr QP to pay her money to her, he has failed to do so and this Office should direct him to pay her the \$20,000, or “at least \$10,000.00 as [Mr GZ is] not liable for the entire, if any of the amount”.²

The complaint and the Standards Committee decision

[26] Ms GZ complained that Mr QP refused to act on her direction to pay her all or part of the money, or interest. She maintains that she was only a “transit point” for the transfer of money from BB to pay AA’s debts. She considers BB’s loan should not be repaid from her share of the sale proceeds.

[27] Mr QP’s response to the complaint was conveyed in a telephone discussion with the Lawyers Complaints Service. He says that, in accordance with [Law firm]’s 10 June email to him, he was obliged to act on the joint instructions of Mr GZ and Ms GZ. He says that until he receives joint instructions to the contrary he is obliged to retain the funds in his trust account.

[28] The Committee noted the terms of the email from [Law firm] to Mr QP, and concluded that he had no choice but to continue to hold the money until such time as Ms and Mr GZ reach agreement about what was to be done with it.³ The Committee noted that Ms GZ agreed to his course.⁴

[29] The Committee decided to take no further action on the complaint pursuant to s 138(2) of the Act.

¹ NZLS file note (23 September 2015).

² Application for review (28 October 2015).

³ Standards Committee decision (8 October 2015) at [13] and [14].

⁴ At [15].

[30] Ms GZ disagrees and has applied for a review.

Application for review

[31] The principal concern expressed by Ms GZ in her application for review is that the money should not be deducted from her share of the sale proceeds. She contends that at the very least she and her father should pay \$10,000 each, so she should receive \$10,000 of the money held in Mr QP's trust account. Ms GZ says that she was not a party to the agreement, which was between her parents and AA. She was merely the conduit for repaying AA's debts.

[32] Ms GZ acknowledges that [Law firm], on her behalf, agreed to Mr QP retaining the \$20,000 in his trust account until she and her father reach agreement over who should repay the loan from BB.

Practitioner's Response

[33] Mr QP's response to the application for review includes the following:

- (a) At the time Mrs GZ transferred her interest in the property to Ms GZ, Ms GZ undertook to "look after" her father, as an acknowledgment that she would own a greater share of the property than her father. By forcing a sale of the property after her mother died, Ms GZ breached that undertaking.
- (b) The agreement provides that Ms GZ is to reimburse BB for the loan to his parents from the proceeds of sale of the property.
- (c) Mr QP has no choice but to continue to hold the funds until Ms and Mr GZ resolve their dispute.

Review on the papers

[34] The parties agreed to the review being dealt with on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct a review on the basis of all the information available, if the LCRO considers that the review can be adequately determined in the absence of the parties. That is the case here.

Nature and Scope of Review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁵

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason

[36] More recently, the High Court has described a review by this Office in the following way:⁶

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[37] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Review Issue

[38] The issue Ms GZ's application for review raises is whether Mr QP's conduct falls below the professional standards set by s 12 of the Act.

Discussion

⁵ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

⁶ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

The Act

[39] Complaints and applications for review are determined within the framework of the Act, and in light of its purposes. Those include maintaining public confidence in the provision of legal services, consumer protection and recognising the status of the legal profession.

[40] The status of lawyers is recognised by certain privileges, one of which is that lawyers operate trust accounts. That privilege is regulated by provisions in the Act, including s 110. Section 110 imposes obligations on lawyers who receive money into their trust accounts, and prescribes serious consequences for any contravention of those obligations. Section 110 relevantly says:

- (1) A practitioner who, in the course of his...practice, receives money for, or on behalf of, any person -
 - (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of –
 - (i) the practitioner; ...
 - (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.
- ...
- (4) A person commits an offence against this Act and is liable on summary conviction to a fine not exceeding \$25,000 who knowingly acts in contravention of subsection (1) ...

The Regulations

[41] The operation of lawyers' trust accounts is also regulated by the Lawyers and Conveyancers Act (Trust Account Regulations) 2008 (the regulations). Amongst those is reg 12 which regulates lawyers' receipt and payment of trust money in the following way:

- (1) Every receipt, payment, transfer, and balance of trust money must be recorded in a trust account ledger with a separate ledger account for each client and–

...
- (2) For the purposes of subclause (1), a joint client must be treated as a single client.

...

- (6) A practice may make transfers or payments from a client's trust money only if –

...

- (b) the practice obtains the client's instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it; ...

[42] So, according to his joint instructions from Ms and Mr GZ, including those conveyed by Ms GZ's lawyers, Mr QP was to receive money for or on behalf of Ms and Mr GZ, and potentially BB, pursuant to s 110. Ms GZ is taken to have conceded that there was at least a potential dispute by agreeing before settlement to Mr QP holding the money in his trust account "pending resolution of the dispute".

[43] Ms GZ raises the question of what happens if the dispute outlives her father. She can seek legal advice on that if she needs to. In the meantime, until a joint instruction is given, Mr QP must hold the money, or ensure that the money is held, exclusively for whomsoever he is holding it "for and on behalf of".

[44] Failure to do so could result in Mr QP committing an offence against the Act and being liable on summary conviction to a fine not exceeding \$25,000, for knowingly acting in contravention of s 110(1).

[45] In the circumstances the Act and regulations operate to prohibit Mr QP from acting on Ms GZ's direction, without a joint direction from Mr GZ, which Mr QP says he has not received.

[46] This Office has no power to direct Mr GZ to agree to Ms GZ being paid, or to direct payment out of Mr QP's trust account in the circumstances described by Ms GZ in her complaint and application for review.

[47] In the circumstances it is not necessary or appropriate to take any further action in respect of her complaint or application for review.

Decision

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

DATED this 2nd day of September 2016

D Thresher
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 GZ as the Applicant
Mr QP as the Respondent
Wellington Standards Committee [X]
The New Zealand Law Society