

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

NT and YR

Applicant

AND

HV

Respondent

DECISION

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

Introduction

[1] Mr NT and Mr YR (the complainants) have applied for a review of a decision by the [Area] Standards Committee [X], which decided further action was not necessary or appropriate in respect of their complaints concerning Mr HV's conduct, service and the fees he charged the estate he was engaged to administer.

Background

[2] Mrs YR appointed the complainants to administer her estate under her will. Mrs YR passed away on 23 October 2015. The will came into effect. The complainants instructed Mr HV, who had acted for Mrs YR and her husband while they were alive, to act for them in the administration of estate.

[3] Mr HV took instructions promptly and advanced the administration of the estate in general accordance with the complainants' instructions over several months. From the complainants' perspective, two particular issues arose. First, Mr HV wrote to

two charities that were major beneficiaries. He received no immediate response. Mr YR contacted the charities and obtained the necessary information with little difficulty. The complainants consider Mr HV's conduct in that regard was dilatory. The second major issue for the complainants relates to Mr HV's response to their concerns over how best to address the entitlements of two beneficiaries who were minors. Responsibly, the complainants wanted to ensure the inheritances were not frittered away. They consider the fact that Mr HV did not identify all of the options that were available to them demonstrates a lack of competence on his part.

[4] As time went by and costs began to escalate the complainants became concerned because the fees surpassed the budget they had set for themselves. They arranged a meeting with Mr HV in early April 2016 which he cancelled when it became apparent that the complainants did not want to pay Mr HV for his attendance at that meeting. Mr HV's view was that the complainants wanted to unilaterally vary the terms of his engagement in a manner he was unwilling to accept.

[5] Unable to resolve the situation with Mr HV directly, the complainants laid a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[6] The complainants say Mr HV caused unreasonable delays in administering the estate, made mistakes, did not follow up when progress was slow, provided incomplete information and advice, did not reply to correspondence and cancelled the April meeting with "little notice and no concrete reason". They say Mr HV failed to comply with their direct and reasonable requests and instructions on multiple occasions, and he charged too much.

[7] The complainants say Mr HV provided a verbal estimate of \$4,000 at the beginning of the retainer, and amended that to \$6,000 then provided a draft invoice for fees of over \$10,000. The complainants take issue with the amount charged for a number of individual entries on Mr HV's timesheet, say his fees are unjustified, and they are unsure who did the work.

[8] The complainants wanted Mr HV to revise and reduce his fees in line with his original estimate of \$4,000. They also wanted to see a statement of the estate's accounts. They consider that administration of the estate was a simple matter and Mr HV should have finalised it quickly and cheaply.

[9] Mr HV provided a fulsome response to the complaint.

[10] The Committee noted the timeline Mr HV had provided which set out the steps he had taken in administering the estate, and his comprehensive replies to the issues raised by the complainants.

[11] The Committee considered the materials to ascertain whether they disclosed evidence of any professional failing on Mr HV's part, on the basis that the complaints were about his service, failure to comply with instructions and his fees. The Committee was careful not to criticise the complainants, noted the timeline Mr HV had provided, and considered Mr HV had carried out his instructions in a timely manner. It was not persuaded that Mr HV's advice about the minor beneficiaries had been incomplete, or that he had cancelled the meeting without good reason. The Committee's view was that the complainants had reached an impasse with Mr HV such that he was not obliged to act on their instructions because they had said they would not pay him, and he was not obliged to hand his files over because he had the right to claim a lien to protect himself against non-payment.

[12] The Committee considered Mr HV's fees, and factors that were relevant to the calculation of those fees, and concluded the fees were fair and reasonable. Its view was that the complainants' remoteness from one another and Mr HV had added to the costs and delays.

[13] Overall the Committee determined the complaint on the basis that it would take no further action on any aspect of it.

Application for review

[14] The complainants applied for a review.

[15] Neither complainant accepts that their remoteness from one another and from Mr HV in any way diminished their ability to work together or added to delay or cost. The complainants say they would have taken a different and more economical approach to estate administration than Mr HV did. They say that in some cases the cost of recovering estate assets exceeded the value of the asset. They observe that Mr HV's refusal to accept part payment from them towards his fees cost the estate interest of nearly \$400.

[16] Mr HV says in reply that he has little to add to the information he provided to the Committee. He considers any delay in administering the estate was a result of the complainants' action or inaction, failures to meet between themselves and with him, scarcity of trustee resolutions and the circumstances that prevented him from completing the retainer and having to terminate it.

[17] Mr HV also confirmed that in reliance on the Committee's decision and his terms of engagement he deducted his fees of \$10,335 from estate funds before transferring the matter to the complainants' new lawyer. He says he is prepared to let the fees rest there unless the question of whether his fees are fair and reasonable is revisited on review.

Review hearing

[18] The parties attended a review hearing by telephone on 13 December 2017. Mr HV was represented by counsel, Mr SN.

Nature and scope of review

[19] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[20] More recently, the High Court has described a review by this Office in the following way:²

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.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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

Analysis

[21] The short point is that there is no evidence of any conduct on Mr HV's part that falls within any of the definitions of unsatisfactory conduct in s 12 of the Act.

[22] Except to say it is far easier for a lawyer to know that executors are in agreement if they provide resolutions signed by them both, or are in the same room as the lawyer, the complainants' remoteness is not particularly relevant to whether Mr HV carried out his instructions in a competent, diligent and timely way.

[23] Except where his instructions from the complainants may not have coincided with his view of where the estate's best interests lay, Mr HV did what he was instructed to do when he was instructed to do it. More importantly, he did what was required to advance the position of the estate. The complainants' view that their different and more economical approach to estate administration demonstrates a failure to properly appreciate the benefits of Mr HV doing the work for the estate in the careful and diligent way that he did.

[24] While the cost of recovering some of the estate assets may well have exceeded the value of the asset, the complainants do not say how else the assets should have been dealt with. As I understand the position, it is necessary to properly account for all of the deceased's assets and liabilities in administering an estate. While there may be a line between cost and benefit, a failure to realise realisable assets can have implications for executors and the lawyer concerned.

[25] It is accepted that Mr YR was able to obtain information quickly and easily that had not been provided to Mr HV by the charities. Why the charities involved did not respond promptly is something of a mystery, given the bequests to them were substantial. The point is that Mr HV made an initial inquiry. There is no reason to believe he would not have followed up and obtained the information in due course, but he did not need to because Mr YR obtained and provided it.

[26] It is accepted that Mr HV did not suggest to the complainants that they could open a bank account in the name of the minor beneficiaries and themselves so they could retain a degree of control over the minors' inheritances. Mr HV says he has given advice to that effect to other clients and seems to think it was a sensible idea. The complainants say all Mr HV did was caution them about proposals that he considered lacked merit, and criticise the joint bank account approach.

[27] While perhaps frustrating for the complainants, the fact that another lawyer came up with an option that Mr HV did not suggest is not sufficient to constitute a professional standards issue in the circumstances described.

Fees

[28] Mr HV provided an estimate, which he revised and exceeded. Mr HV provided draft invoices, one dated 18 November 2015 indicated a fee of \$256, another dated 18 December 2015 indicated a fee of \$7,270. Thus, Mr HV kept the complainants informed of his costs as administration of the estate proceeded.

[29] Mr HV issued an interim invoice dated 14 March 2016 for a fee of \$8,758, and another on 25 May 2016 for a fee of \$1,577. Thus, Mr HV charged the estate a total of \$10,335 plus GST and disbursements for the services he had provided.

[30] Mr HV held estate funds in his trust account without deducting his fees. When he received the Committee's decision confirming the Committee's view was that his fee was fair and reasonable, he deducted his fees in accordance with his invoices and terms of engagement, and passed the file on to the complainants' new lawyers.

[31] It is not a simple exercise to calculate the amount to charge for a fair and reasonable fee. There is no simple formula. Fee setting requires the exercise of professional judgement. Mr HV had to exercise some caution. He was obliged to act in the best interests of the estate, and to administer the estate in accordance with the will. He was answerable to the beneficiaries and to the complainants for his fees; either could have made a complaint to NZLS.

[32] Further, a lawyer in Mr HV's position cannot know what the total cost will be to the estate, as opposed to the executors appointed under the will, without having due regard to his or her fiduciary obligations to the client, in this case, the estate.³ Lawyers, like executors, are replaceable. For the estate lawyer, it is not simply a question of terminating the retainer and doing no more work just because the executors have expressed an unwillingness to pay.

[33] Mr HV maintained a timesheet. Not all professional attendances were recorded on the timesheet, for example Mr HV's legal executive did not record all of the time she spent attending to the estate administration. Not all of her time was billed to the estate. Legal secretaries' time is often not recorded or captured in any other visible way to be billed. Cost of that type could readily be considered to be an aspect of the

³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 4.2.3.

reasonable costs of running a practice.⁴ The fact that some employees' time is not captured on a timesheet does not mean they did no work, or that the estate received no value for the work that was done. Mr HV's evidence on this point is accepted, he delegated and the estate received some benefit from that.

[34] The starting point for calculating fees is generally the time and labour expended in attending to the matter.⁵ Mr HV explained his charges by breaking down the estate administration into discrete tasks and apportioning an amount for progressing or accomplishing each task in a clear and transparent way. That is a sensible approach.

[35] Mr HV has considerable experience in estate administration, which is an area of legal practice that requires a reasonably high level of skill, specialised knowledge and responsibility.⁶ The fact that an estate lawyer's responsibility extends beyond the client, in the sense of the instructing executors, and on to the beneficiaries, tends to suggest an uplift may be warranted on a fee.

[36] Mr HV has offered some evidence that he has a good professional reputation in the locality in which he practices. The available evidence provides no reason to doubt his ability.⁷ No doubt his experience is reflected in his hourly rate, which is not out of line with that of other lawyers practicing in estate administration.

[37] Administration of the estate was important⁸ to the complainants and to the beneficiaries. Although Mr HV's retainer ended before the estate was distributed, the fact that most of the estate's assets were held in his trust account within only a few weeks cannot be said to have been a bad result. Mr HV could have increased his fee beyond time/hourly rate on that basis.

[38] Although the complainants wanted to make a final distribution as soon as possible, there were good reasons not to rush to that point. Mr SN referred to the statutory protection afforded to trustees by delaying 6 months before finally distributing an estate. Given the risk to the complainants in distributing the estate too quickly, although timeliness was important, there was no real urgency in the matter,⁹ and therefore no reason to increase the fee on that basis.

⁴ Rule 9.1(l).

⁵ Rule 9.1(a).

⁶ Rule 9.1(b).

⁷ Rule 9.1(g).

⁸ Rule 9.1(c).

⁹ Rule 9.1(d).

[39] There was no particular risk¹⁰ to Mr HV beyond the usual associated with estate administration, and the matter does not appear to have been unduly complex, difficult or novel.

[40] Mr HV provided an estimate, amended that, and kept the complainants apprised of fees as they increased. There is no evidence to suggest the estimate was a binding estimate or quote, so the estimate lacks any real relevance to fee setting.¹¹ The fee agreement set out the basis on which Mr HV would charge fees. He adhered to that, and charged accordingly.¹²

[41] None of the other fee factors in r 9.1 appear to be relevant.

[42] Rules 9 and 9.1 require Mr HV to charge a fair and reasonable fee for the services provided. When the relevant factors discussed above are applied to Mr HV's fee, it is difficult to see how it could be challenged on the basis that it is somehow not fair and reasonable. The matters the complainants raise are not sufficient to warrant a reduction, or the adverse disciplinary finding that would have to be made to order a reduction.

[43] In the circumstances the Committee's decision that further action is not necessary or appropriate is confirmed.

Summary

[44] None of the issues raised by the complainants warrant a disciplinary response. The evidence indicates that Mr HV attended to his retainer in a competent, diligent, timely, professional manner and billed a fair and reasonable fee. There is no evidence of conduct on the part of Mr HV that contravenes any conduct rule or that would be regarded by lawyers of good standing as being unacceptable. There is no reason to modify or reverse the Committee's decision or to return the complaint to the Committee for it to reconsider. The only proper response to the application for review is to confirm the Committee's decision.

Decision

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

¹⁰ Rule 9.1(e).

¹¹ Rule 9.1(j).

¹² Rule 9.1(k).

DATED this 18th day of December 2017

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:

NT and YR as the Applicants
HV as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society