LCRO 100/2010
LCRO 92/2011
LCRO 153/2012

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 2
BETWEEN	**TE** Applicant
AND	**WELLINGTON STANDARDS COMMITTEE 2** Respondent (in respect of LCRO 100/2010 and LCRO 92/2011)
AND	**NT** Respondent (in respect of LCRO 153/2012)

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

Introduction

[1] TE is the executor/trustee of the late NR's Will. NT is NR's daughter and is a beneficiary of his Estate. Her complaints relate to TE's conduct in administering the Estate, and in particular the action taken by TE in attempting to sell the business previously owned and operated by the late NR. NT has also complained about the fees charged by TE.

The Standards Committee determinations

[2] The Standards Committee has issued three determinations in respect of NT's complaints.

The determination dated 6 May 2010

[3] On 20 October 2009, NS lodged a complaint with the New Zealand Law Society Complaints Service on behalf of NT about TE's conduct in administering the Estate of the late NR and about TE's bill of costs dated 25 September 2009.

[4] At the commencement of its determination, the Standards Committee recorded six aspects of the complaint by NT, one of which related to the fees charged by TE. The Committee recorded its determination in the following manner:

> The Standards Committee considered this complaint at its meeting on 17 December 2009, held a hearing on 22 April 2010, and formally determined on 6 May 2010 to accept the Costs Assessor's report and, pursuant to section 152(2) of the Lawyers and Conveyancers Act 2006 that the complaint be considered by the Disciplinary Tribunal.

[5] TE applied for a review of this determination on 16 June 2010.

[6] On 18 June 2010, the Standards Committee issued a certificate pursuant to section 161(2) of the Lawyers and Conveyancers Act in which it certified that the amount due by the Estate to TE on account of the bill, was $10,844.11, being the amount assessed by the Costs Assessor as being a fair and reasonable fee (including GST and disbursements).

[7] Upon receipt of the application for review of that determination, this Office sought clarification from the Standards Committee as to whether the determination to refer the complaint to the Tribunal included the complaint about conduct as well as the complaints about TE's costs.

[8] The Standards Committee replied by advising that the determination to refer TE to the Tribunal related only to the complaint about costs and further advised that the complaints about conduct would be considered at the Committee's next meeting.

[9] Accordingly, this Office deferred progress of this review application until the Committee had issued its determination with regard to the conduct issues complained of by NT.

The determination dated 2 March 2011

[10] The Standards Committee issued its determination concerning TE's conduct on 22 March 2011. That determination addressed the matters raised by NT in her submissions dated 23 August 2010 which she had provided in response to the Notice

of Hearing issued on 12 August 2010. These submissions were received by the Complaints Service on 27 August 2010 (although the determination refers to the letter as being dated 27 August 2010).

[11] The Committee recorded its determination in the following way:

> Having decided to inquire into this complaint and considered it at hearing dates on 28 October 2010 and 17 February 2011, the Standards Committee formally determined on 22 March 2011 to lay charges against [TE] pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006.
>
> The Committee was of the view that [TE's] alleged conduct in relation to the administration of the estate of the late [NR] was of sufficient gravity, if proven, to meet the threshold test for misconduct in s7 of the Lawyers and Conveyancers Act 2006.

[12] TE lodged an application for review of this determination on 2 May 2011.

The determination dated 8 June 2012

[13] At the same time as providing submissions for the hearing as to conduct, NT lodged a further complaint about two bills of costs rendered by TE on 25 February 2010. Following consideration of the report from a Costs Assessor (who was different from the assessor appointed in respect of the first bill of costs) the Committee determined that TE's conduct amounted to unsatisfactory conduct and made the following orders:

> That [TE]:
>
> 1. Refund to the estate the amount of the bill of costs dated 25 February 2010 for the sale of the late [NR's] business for $5,547.36 – s156(1)(g);
> 2. Reduce the bill of costs dated 25 February 2010 for estate administration to $1,800.00 plus GST and disbursements – s156(1)(e);
> 3. Be censured – s156(1)(b);
> 4. Pay to the New Zealand Law Society a fine of $1,500.00 – s156(1)(i);
> 5. Pay the Standards Committee's costs of $500 – s156(1)(n)."

[14] TE lodged an application for review of this determination on 5 July 2012.

Background

[15] In 2004 NR signed a will prepared for him by a solicitor employed by TE in which he appointed TE as sole executor and trustee. TE advises that he had acted for NR for some 30 years, but this is disputed by NT, who nevertheless concedes that TE had acted for her father for as long as 15 years.

[16] NR was the sole shareholder and director of a company known as “CCA” which had been established in Wellington in the mid-90s. In 1998, NR relocated the company to Auckland and continued to operate there until his death in May 2009.

[17] The company developed and manufactured shelving systems as well as marketing a range of utility furniture.

[18] In his will, NR left all of his shares in “CCB” to his trustee to hold on trust for his two children, NT and her brother, NQ. The residue of his Estate was to be held by his trustee to pay all debts and the remainder was then to be held for his two children in equal shares.

[19] At the time of his death, NR’s assets comprised a life insurance policy for approximately $31,000.00 and his interest in the business. There were also shareholder advances to the company in the sum of $71,897.00 as at 31 March 2009. In the same year, NR had drawn a total gross salary of $8,005.00. The company had no borrowings or creditors and operated out of premises in South Auckland on a monthly tenancy.

[20] TE states that NR had advised him not long before his death that he had modularised the shelving concepts and developed a new website allowing for online sales. He states that NR expressed the view that the business was worth between $400,000 and $500,000.

[21] In his response to the complaint, TE advised the Standards Committee that NR had expressed a desire that in the event of his death, TE was to sell the business and to continue to operate it for as long as was required to obtain the best possible price.

[22] Following NR’s death, TE arranged in conjunction with NT, for the company to engage a manager to continue to operate the business until it could be sold, although NS states that the function of the manager was only to enable orders existing at the date of NR’s death to be fulfilled.

[23] Notwithstanding the direction in the Will that the shares in the company (referred to in error as “CCB”) were to be transferred to NT and her brother, TE declined to do so. In his reporting letter to the beneficiaries dated 22 September 2009 he advised that the company continued to trade to enable the best possible price to be achieved which he stated was in accordance with the verbal instructions given to him by NR prior to his death.

[24] In a letter dated 9 October 2009 to the beneficiaries, and in response to a direct request from NT to have the shares transferred to her and her brother as provided in the Will, TE advised that in his view the gift of the shares as recorded in the Will failed as there was no company with the name of "CCB" (the company's name was "CCA").

[25] TE advised that in his view therefore, the shares in the company fell into the residue of the Estate which effectively would be what was realised from the sale of the business. In his letter of 9 October TE acknowledged that it was possible for the beneficiaries to have the shares transferred to them as part of the distribution, of the residue, but noted that NT had instructed him when she was in New Zealand that she did not want to have anything to do with her brother in terms of running the business. He therefore took the view that it was best for him to press forward to arrange the sale of the business as soon as possible.

[26] TE instructed the company accountants to prepare accounts for the period ending at 30 September 2009 and advised that he was arranging for a valuation of the business based on the accounts available at the time. He expressed the view that the company was capable of continuing to operate as a viable business in the hands of a competent operator with knowledge of joinery and small business capabilities. His intention was to prepare an Information Memorandum to enable the business to be listed with a business broker and on TradeMe.

[27] With his letter of 22 September 2009, TE also rendered his first account which was for $22,150.00 plus GST and disbursements.

[28] NT's complaint was lodged on 20 October 2009.

[29] On 25 February 2010 TE reported again to the beneficiaries. He advised that the business had been listed for sale during October and November 2009 but no offers for the business as advertised had been received. The only formal offer received was from a party who wished to take a transfer of the intellectual property of the business (mainly the website) with the intention of establishing franchises for sale. The terms of the offer were that no payment was to be made by the purchaser but NT and her brother were to be ten percent shareholders in this business. TE advised that this offer had been accepted by him.

[30] The purchaser did not want the company's plant and equipment and the costs of clearing the premises exceeded the amount realised from their sale. The net result

was that after including the two accounts rendered on 25 February by TE, there was a shortfall in the Estate of $17,076.96 which TE noted he would be obliged to write off.

[31] The end result was that the life insurance policy in the sum of $30,936.00 was realised and after deducting funeral expenses of $10,431.33, the balance of $20,504.67 had been applied to TE's costs. He noted that the remainder of his fees would have to be written off.

[32] The fees payable as ordered by the Standards Committee are:

$10,844.11
+ $ 2,253.92
$13,098.03

[33] If the Standards Committee determinations were to be upheld, there would therefore be a credit balance to be distributed between the beneficiaries.

Review

[34] Following submissions from TF, Counsel for TE, it was agreed that all reviews would be dealt with at the same time and a hearing was held in Wellington on 25 September 2012. At that hearing, TF advised that he was not in a position to present full submissions for his client at that time and consequently further submissions were received from him on 4 December 2012.

[35] Before considering each of the determinations in detail, it is necessary to address some general issues.

The solicitor as executor/trustee

[36] TE's decision to endeavour to sell the business and the need to maintain it as a going concern in the meantime resulted in administration of this Estate becoming more involved and time consuming, consequently increasing the costs.

[37] NR's only asset other than the business was a life insurance policy which would have been readily realised. NR's Will provided that the shares in the company were to be transferred to his children. Regardless of the error in the Will as to the name of the company, NR's intentions as expressed in the Will were clear and whether the shares were transferred pursuant to that specific clause, or to NT and her brother as residuary

beneficiaries, was immaterial. All that was required was for the shares to be transferred to them.

[38] Whichever course he took, TE held the shares on trust for the beneficiaries as expressed in the Will. As such, it was necessary for him to consult with them as to the steps to be taken.

[39] In her email of 8 October 2009 to TE, NT specifically required the shares to be transferred to the beneficiaries. In his reply of 9 October, TE referred to the error in the name of the company in the Will and recorded his view that the gift of the shares failed and that therefore they fell to be dealt with in accordance with the provisions of the Will relating to the residue of the Estate.

[40] TE then advised that in his view the best option was to continue with his attempts to sell the business and that required the company to be kept operating in the meantime.

[41] TF submits that these decisions were made by TE in his capacity as trustee, and further submits that decisions made in that capacity are subject to scrutiny by the Court, and not the disciplinary regime.

[42] He refers to a decision of this Office, *Shrewsbury v Rothesay*[1]. In that case, the lawyer was also the sole executor and trustee of his client's will and Estate. The assets of the deceased included significant holdings in securities, but unlike the present situation, there was no specific bequest of those securities in the will. All but one of the beneficiaries of the Estate made several requests for the securities to be transferred to them, but the lawyer/executor resisted that request on the basis that there would otherwise be insufficient funds to meet a specific monetary bequest, and also on the grounds that as one of the beneficiaries had given notice of a claim against the Estate, no distributions could take place in the meantime.

[43] The same issue argued by TF was argued before the LCRO in that case - namely, that the lawyer's conduct as executor was not properly the subject of professional proceedings because he was acting as the executor and trustee of the Estate and was not therefore providing legal services.

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[1] LCRO 99/2009.

[44] The relevance of this issue in the present instance is that the Standards Committee has determined to lay charges against TE before the Tribunal in respect of his conduct. Those charges have not yet been formulated, but it is assumed that the Committee contemplates laying a charge of misconduct against TE.

[45] Misconduct is defined in section 7 of the Lawyers and Conveyancers Act, and the definitions in section 7(1)(a) require that the conduct takes place at a time when the lawyer is providing regulated services. I accept TF's submission that there is nothing in the Standards Committee determination or any material on the file that indicates that section 7(1)(b) has any relevance to the determination.

[46] In *Shrewsbury v Rothesay*, the LCRO discussed the provisions in Australian jurisdictions parallel to the Lawyers and Conveyancers Act and also considered the purposes of the Act, being to protect consumers of legal services and to provide a more responsive regulatory regime in relation to lawyers and conveyancers. At paragraph [30] of that decision he noted: -

> It would defeat that purpose [of consumer protection] if the legislation were interpreted to exclude from its scope functions which a lawyer routinely undertakes alongside the provision of legal services but these were not considered to be regulated services.

[47] In the following paragraph he concluded: -

> [W]here the services provided by a lawyer are services of a type that is usual for a lawyer to provide, and they are provided in conjunction with legal work (as defined by paragraphs (a) to (c) [in section 6] of the definition of that term) they are properly considered to be incidental to that work and also "legal work". In light of this the work of an executor/trustee who also acts as a solicitor for an estate will be regulated services.

[48] TF disagrees with that decision for the following reasons: -

(a) Estate administration stands as a separate and discrete and substantial discipline of its own.

(b) The foregoing is reflected in the Court of Appeal decision of *Hansen v Young* [2004] 1 NZLR 37 at paragraphs [33] to [36]. At paragraph [34], the Court of Appeal referred to the House of Lords decision in *Dubai Aluminium Company Limited v Salaam* [2003] 1 All ER 97 where Lord Millett at paragraph [134] when discussing what might be expected by a client from a solicitor/trustee "...observed that it was part of the solicitor's business *to advise* whether (for example) trust money may lawfully be invested in an overseas hedge fund or used to pay a discretionary beneficiary's school fees but that it was not part of the solicitor's business to make *the decision* whether to do so or not."

(c) Further on a eiusdem generis analysis, the first four definitions of "legal services" do not fit the notion of decision making in respect of the administration of estate.

(d) Putting the matter in proper context, legal services may be an incident of estate and trust administration, but not the reverse.

(e) Ultimately, the supervision of the administration of an estate or a trust lies with the High Court. There would have to be a very clear statement that Parliament intended the disciplinary processes governing legal practitioners should cut across that supervision of the High Court.

(f) Although excluded from legal services and therefore section 7(1)(a), misconduct in the administration of an estate by a legal practitioner, might be misconduct covered by section 7(1)(b).

[49] I agree that TF's arguments may have some merit where the conduct complained of can quite clearly be identified as conduct undertaken in the lawyer's capacity as executor/trustee. Conduct that would fall into this category would be conduct undertaken with regard to disposal of the deceased's body, and (as occurred in the case considered in *LV v VJ* [2]) distribution of a deceased's personal effects.

[50] However, much of what a lawyer does in the administration of an estate when acting in the dual capacity of solicitor and executor/trustee can be considered to be conduct in either capacity, or can readily be identified as conduct in the capacity of lawyer for the Estate.

[51] A helpful approach when categorising the conduct would be to consider the conduct as being undertaken by two separate persons, and to then determine whether the conduct in question could be considered to be conduct of a lawyer acting for the Estate. If the conduct in question is conduct that a lawyer acting for the Estate would be responsible for, then it can be considered that the lawyer in that instance is providing regulated services and therefore subject to the disciplinary regime.

[52] It is therefore necessary to consider each of the matters complained of by NT and to determine whether the conduct in question was taken by TE in his capacity as a lawyer, or whether he was exercising discretion as executor/trustee only.

[53] In summary therefore, I do not necessarily disagree with the LCRO in *Shrewsbury v Rothesay* but in the present instance, I address the issue more directly to determine whether or not the matters complained of constitute conduct in the course of providing regulated services.

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[2] LCRO 81/2011.

Orlov v New Zealand Law Society

[54] Since the Standards Committee issued its determination of 22 March 2011 to lay charges before the Tribunal, the decision in *Orlov v NZLS*[3] has been issued. In that decision Heath J held that the threshold test which he identified in the judgment should be applied separately to each specific complaint, unless it is proposed to lay a single charge based on "repeat negligence or incompetence" as referred to in [105] of his judgment. The threshold test identified by Heath J is whether the matter complained of is of "sufficient seriousness to justify referral to the Tribunal".[4]

[55] The Standards Committee will need to be mindful of this decision when formulating its charges and supporting particulars. This decision, and previous decisions of this Office,[5] reinforces the obligation on Standards Committees to particularise the matters which it considers are to be referred to the Tribunal. It is unreasonable that a Practitioner should be left in a position where he or she must guess at the matters which are to be referred or, as in this case, be obliged to refer to extraneous material such as Committee Minutes to identify what matters are to be the subject of charges.

The approach by the LCRO to decisions to lay charges

[56] In numerous decisions this Office has adopted a cautious approach to interfering with the discretion of Standards Committees to lay charges before the Tribunal (see for example *Poole v Yorkshire* LCRO 133/2009 and *CN v AKSC1* LCRO 106/2010). In *Poole v Yorkshire* the LCRO noted at [21] that "[i]t must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review." The LCRO then identified 4 situations in which a decision to prosecute may be revisited. These situations were identified in *Kumar v Immigration Department*[6] and in *Polynesian Spa Limited v Osborne.*[7]

[57] At [21] in *Poole v Yorkshire*, the LCRO noted that:

> The cases cited...indicate the kinds of basis upon which a decision to prosecute might be revisited. They include situations in which the decision to prosecute was:

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[3] [2012] NZHC 2154.
[4] Paragraph [114].
[5] For example *CN v AKSC1* LCRO 106/2010.
[6] [1979] 2 NZLR 553.
[7] [2005] NZAR 408.

(a) significantly influenced by irrelevant considerations,

(b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process),

(c) exercised in a discriminatory manner,

(d) exercised capriciously in bad faith, or with malice**.**

[58] This approach was reinforced by the comments of Winkelmann J in *Deliu v Hong*[8] where she noted that "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 judgement without good reason".

[59] It is appropriate therefore in this review for me to adopt an approach consistent with these comments.

The determination dated 6 May 2010

[60] It was accepted by the Standards Committee that this determination related only to TE's bill of costs dated 22 September 2009. The difficulty with regard to this determination is that on the one hand it would seem that the Standards Committee has determined that this matter should be referred to the Tribunal, but on the other hand it has then issued a certificate pursuant to section 161(2) of the Lawyers and Conveyancers Act certifying the amount due to TE in respect of this bill.

[61] Section 161(2) of the Act provides: -

> Where a Standards Committee makes a final determination on a complaint made under section 132(2), it must certify the amount that is found by it to be due to or from the practitioner...in respect of the bill and under the determination.

[62] Section 161(3) then provides: -

> The certificate of the Standards Committee...is final and conclusive as to the amount due.

[63] The issue of a certificate pursuant to section 161(2) is incompatible with a reference to the Tribunal. The Committee has not made a final determination in which it has specified the amount due to or from the Practitioner. Instead, the Committee has referred the matter to the Tribunal. One of the orders that the Tribunal may make following the hearing of a charge relating to a bill of costs, is to order the bill of costs to

[8] [2012] NZHC 158, 41.

be reduced or cancelled. Consequently, it cannot be considered that a reference to the Tribunal amounts to a "final determination" for the purposes of section 161(2).

[64] In addition, a Standards Committee can only make an order reducing or cancelling a bill of costs following a finding of unsatisfactory conduct and it is not open to the Committee to make a finding of unsatisfactory conduct as well as referring the matter to the Tribunal.

[65] TF has argued that the only determination that can be the subject of review is the determination to reduce TE's fees; he then subsequently argues that determination is not correct. The Committee made a clear determination that the matter of costs was to be put before the Tribunal. However, by recording that it accepted the report by the Costs Assessor, and then issuing a certificate pursuant to section 161(2), it could be considered that the Committee intended to make a finding of unsatisfactory conduct with regard to costs and that the reference to the Tribunal was in respect of other matters referred to in the determination.

[66] The uncertainty is such that I consider the best course of action for me to take is to reverse this decision and to refer the matter back to the Standards Committee to reconsider the matter and issue a fresh decision. In this regard, the Committee will be assisted by its subsequent decision dated 22 March 2011 and the outcome of this review. As a consequence of this, the certificate issued pursuant to section 161(2) will be invalid.

The determination dated 22 March 2011

[67] The Standards Committee determination is that "[TE's] alleged conduct in relation to the administration of the Estate of the late NR was of sufficient gravity, if proven, to meet the threshold test for misconduct in section 7 of the Lawyers and Conveyancers Act 2006."

[68] TF refers to the Minutes of the meeting on 17 February 2011 which resulted in the determination dated 22 March. That Minute refers to "... [TE's] actions in administering estate; transferring shares to himself as executor; continuing to operate business; not in accordance with will".

[69] In his submissions, TF refers to the "three matters" recorded in the Minute and submits that all matters are matters of judgement by TE in his capacity as executor/trustee. I do not accept that this is the case. TE took the view that the

bequest of the shares had failed, and then ignored the specific request of at least one of the beneficiaries to have the shares transferred to her, notwithstanding that this was an option, given that NT and her brother were the residuary beneficiaries. These decisions required TE as solicitor to consider the terms of the Will and form an opinion as to what options were available to him as executor. A layperson acting as executor would seek advice from the solicitor acting for the estate as to the effect of the error in the Will and what options were open to him or her. It did not involve the exercise of a pure discretion as trustee.

[70] The result of TE's decisions, is that he continued to operate and be actively involved in running the company and attempted to sell the business, all of which he billed for.

[71] If TE had implemented the bequest recorded in the Will, any services provided by him thereafter would have been at the direction of the beneficiaries and chargeable to them. Instead, he continued on his own instructions against the wishes of at least NT, which has resulted in all of the proceeds of the insurance policy being exhausted by TE's fees. In addition, there are question marks around the "ultimate sale" of the business to an acquaintance of TE's which did not include any of the plant and equipment, of which the costs of disposal exceeded the sums recovered.

[72] This is all conduct that can properly be considered to be conduct in his capacity as a lawyer. Necessarily, those actions can also be portrayed as actions by TE as executor/trustee, but not exclusively so. Consequently, I consider that TE was providing regulated services in connection with this conduct and therefore may be the subject of charges of misconduct.

[73] Other matters complained of by NT which are inherent in the reference to "administration of estate" (and therefore the Minute refers to four aspects not three) include:

- Failing to report;
- Failing to provide interim bills and estimates of costs;
- Misleading and deceptive behaviour;
- Failing to disclose relationship with purchaser; and

- Refusal to provide access to financial records.

[74] These matters too can be categorised as being conduct by TE as a lawyer, and therefore provided by him in the course of providing regulated services. I consider that each of these matters may be conduct of sufficient gravity which, if proven, meets the threshold test of misconduct.

[75] It will be noted that I have not included the following aspects of the complaint referred to in the determination: -

- Disposal of personal property; and
- Request for reimbursement of direct costs.

[76] It does not seem to me that these matters could be the subject of charges before the Tribunal and in this regard I refer to my comments in [55] in which I have indicated that it behoves Standards Committees to particularise the matters which it intends to place before the Tribunal. However, given that the Committee has yet to formulate the charges, and TE will have the opportunity to challenge those charges before the Tribunal, I do not consider that the lack of particularity is such in these circumstances to warrant reversal of the decision for this to be corrected. In the circumstances, the decision of the Standards Committee to refer the matters to the Tribunal will be confirmed.

The determination dated 8 June 2012

[77] This determination relates to two bills of costs issued by TE on 25 February 2010. One bill purportedly relates to work carried out by TE for Estate administration but includes a significant amount of attendances relating to the continued operation of the company. The second bill of costs relates to the proposed sale of the business.

[78] TF submits that as this determination should only relate to a fee assessment and "in any event is not a misconduct complaint nor a reference to the Disciplinary Tribunal"[9] and as there were no complaints before the Committee alleging misconduct or unsatisfactory conduct, the Committee could not therefore reach a finding of unsatisfactory conduct.

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[9] Para 34.3 of submissions dated 4 December 2012.

[79] He further submits that "[i]t is long bow to draw to say that by a determination that a fee was not fair and reasonable a practitioner was guilty of unsatisfactory conduct. What is fair and reasonable is subjective and before any issue of conduct arises, the practitioner must be given the opportunity to meet the assessment arising from a costs enquiry."[10]

[80] It seems to me that TF and TE may be labouring under the misapprehension that the costs revision process that existed under the Law Practitioners Act remains in place. That is not the case. A complaint about costs is treated in the same way as any other complaint about a lawyer. Having determined to inquire into a complaint, a Standards Committee may determine to either, refer the matter to the Tribunal, determine there has been unsatisfactory conduct, or determine to take no further action.[11]

[81] The Standards Committee does not have jurisdiction to reach a finding of misconduct - that is a charge that may only be brought before the Tribunal.[12]

[82] A finding by the Standards Committee that a bill of costs is not fair and reasonable constitutes a breach of rule 9 of the Conduct and Client Care Rules.[13] The term "unsatisfactory conduct" is defined in section 12 of the Act and includes by reason of section 12(c) "conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act..." The Conduct and Client Care Rules are practice rules made pursuant to sections 94 and 95 of the Act. Consequently, any breach of the Rules, including a breach of Rule 9, constitutes unsatisfactory conduct by virtue of section 12(c). There is no requirement for a complainant to specifically allege unsatisfactory conduct before the Standards Committee reaches this finding - it is the role of the Standards Committee to investigate the conduct complained of and make findings accordingly.

[83] Any cancellation or reduction of a lawyer's bill of costs may only be made by an Order pursuant to section 156(1)(e) or (f) of the Act and such Orders may only be imposed following a finding of unsatisfactory conduct. There is no other means by which a lawyer's bill may be reduced or cancelled and there is no costs revision process such as previously existed under the Law Practitioners Act.

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[10] Para 33.4 of submissions dated 4 December 2012.
[11] Section 152(2) Lawyers and Conveyances Act 2006.
[12] Section 241(a) Lawyers and Conveyances Act 2006.
[13] Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008.

[84] Following a finding of unsatisfactory conduct pursuant to section 152(2)(b) of the Act, a Standards Committee may make any one or more of the Orders set out in section 156(1). The censure, fine and costs orders made by the Committee in this case followed the finding of unsatisfactory conduct.

[85] The issue to be considered is whether the Orders made by the Committee in respect of the costs should be confirmed, reversed or modified by this review.

[86] Both bills of costs were considered by a Costs Assessor whose views the Committee accepted. The cancellation of the bill of costs relating to the sale of the business was based on the view of the Costs Assessor that TE's decision to continue to operate the company and to effect a sale rather than transferring the shares to the beneficiaries was in breach of TE's duty as executor. The Assessor therefore came to the view that TE was unable to charge the fees in connection with that.

[87] The Assessor has also noted[14] that "all the bills rendered should be considered in their totality, not just the two considered by" the Assessor. Nevertheless, the Assessor then made recommendations to the Committee in respect of the two bills of costs dated 25 February 2010 and the Standards Committee adopted these recommendations.

[88] The fairness and reasonableness of these bills of costs can only be determined once a decision is made as to the correctness of TE's conduct in continuing to operate the business and to endeavour to effect a sale. These are included in the matters to be put before the Tribunal. It would therefore seem to me to be logical that the issue of costs should also be put before the Tribunal. However, I do not intend to direct the Committee to take this step, as to some extent the decision with regard to these two bills of costs is linked to the decision to be made with regard to the first bill of costs.

[89] In the circumstances, I intend to reverse this Order and refer the matter back to the Standards Committee for consideration at the same time as reconsidering its determination with regard to the first bill of costs.

Summary

[90] In summary therefore: -

[14] Costs Assessor's report to the Standards Committee (25 November 2011) pg. 7, para 2.

a) The first determination is to be reversed and referred back to the Committee for reconsideration

b) The second determination is confirmed; and

c) The third determination is reversed and referred back to the Standards Committee for reconsideration

Decision

1. Pursuant to section 211 (1)(a) of the Lawyers and Conveyancers Act 2006 the determination dated 6 May 2010 is reversed. Pursuant to section 209 of the Act the Standards Committee is directed to reconsider all of the matters contained in that determination and issue a fresh determination in respect thereof.

2. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination dated 22 March 2011 is confirmed.

3. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination dated 8 June 2012 is reversed. Pursuant to section 209 the Standards Committee is directed to reconsider the complaints in respect of the two bills of costs referred to in this determination and to issue a fresh determination in respect thereof.

DATED this 1st day of February 2013

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O W J 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:

TE as the Applicant
TF as the Applicant's Representative
NT as the Respondent
NS as the Respondent's Representative
The Wellington Standards Committee 2

The New Zealand Law Society
Secretary for Justice