LCRO 107/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City]Standards Committee [X]
BETWEEN	**BD** Applicant
AND	**EG** Respondent

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

DECISION

Introduction

[1] Ms BD has applied for a review of a decision by the [City] Standards Committee [X] in which a finding was made that by charging a fee that was not fair and reasonable Mr EG's conduct contravened rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 (the rules) and fell within the definition of unsatisfactory conduct in s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] In 2011 Ms BD instructed Mr EG to amend clause 2 of a will she had made in 2004. The 2004 will made no provision for Ms BD's adult son, HH, who lacks capacity to care for himself and his own needs. There is a difference between the parties as to the scope of the retainer. The letter of engagement Ms BD signed indicates that Mr EG expected to be providing her with:

> Professional legal services in acting for and advising you in respect of preparing your new Will including but not limited to meeting with you to obtain your instructions, drafting and preparing your new Will, attending on you in respect of your execution of your Will in final; and
>
> All incidental and related professional attendances and services arising from or in respect of these matters.

[3] Mr EG's position is that Ms BD's instructions called for him to prepare a completely new will. His position is consistent with the terms of engagement Ms BD signed, as well as Mr EG's file notes, and the correspondence he wrote at the time.

[4] On 14 July 2011 Mr EG's file note says that Ms BD had come to see him because she "would like to make specific changes to her will". His note records the results of title searches he carried out for her, and her instructions to him regarding her family, and asset position.

[5] Mr EG's file notes record a phone conversation he had with Ms BD on 18 July 2011 explaining he had concerns about the 2004 draft, and the lack of clear provision for HH. He recorded his concerns, including the absence of a guardian appointed for HH under clause 3, and said that he is "to look into this matter further", given the instruction that HH will need to be taken care of when Ms BD no longer can, and her desire that his siblings do that.

[6] Mr EG says Ms BD agreed that HH should have a life interest in some of her property, and should receive the benefit of interest and capital on investments. Mr EG's file notes record their discussions over how her choices could be implemented, and her selection of the option she preferred to achieve her objective.

[7] Mr EG's time records show that he set about drafting a will according to Ms BD's instructions on 21 July, and spent some time in discussions with his supervising partner, being guided. The time record indicates he carried out some research and drafted a long letter of advice to Ms BD dated 29 July 2011. The letter includes the following advice regarding HH's guardianship:

> In your previous Will you appointed JJ and KK as "guardians" of HH for as long as HH lives. Under the Care of Children Act 2004, guardianship automatically ends when a child turns eighteen years of age. Based on your advice that HH is aged thirty-six years of age this provision in your previous Will is invalid.
>
> We note your advice to the writer that notwithstanding that HH is thirty-six years of age, he will never be in a position to care for himself due to his physical and mental disabilities and he will need the help of his siblings to look after him. JJ and KK would have to apply to the Court under the Protection of Personal and Property Rights Act 1988 ("the Act") in order for them to be legally appointed

> HH's welfare guardian or the Manager of his affairs. We note your advice that presently no such application has been made either by yourself, JJ or KK.
>
> Accordingly, based on your instruction to the writer that you would like JJ and KK to look after HH we can only draft this as an expression of your wish, that they do so. The expression of this wish is not legally binding on either JJ or KK. In addition, we have included in this clause, in light of the facts that at present HH does not have a court-appointed welfare guardian or Manager, further provisions that JJ and KK do all things legally possible to be appointed HH's welfare guardian under the Act and for one of them, if required under the Act, to administer the life interest you wish to grant HH in your will, as discussed in paragraph 13 below.
> …
>
> Pursuant to your instructions HH has been left a life interest in the net annual income earned on the property that you own at Apartment [XX], [XXX] [X]Road. Your Trustees (who are JJ and KK) are to pay the net annual income earned from the properties to HH during his life for his maintenance, education, and advancement or benefit. We discussed if this income was sufficient to meet the cost of HH's care for the remainder of his life and we note your advice to us that you believe that it was.

[8] Mr EG identified what he considered to be other deficiencies in, and omissions from, the 2004 will in his letter to Ms BD. He covered a range of matters that he believed may present practical and legal problems for JJ and KK, who would be left to look after HH's personal care and welfare, as well as his property, but without legal status.

[9] Mr EG drafted a completely new will in response to his instructions from Ms BD. It included provision for a life interest for HH and expressed Ms BD's wishes that HH's siblings care for him into the future. It did not, and apparently could not, purport to appoint them as HH's guardians. However, it emphasised Ms BD's wishes that they care for HH's interests and welfare and, if necessary, be formally appointed as HH's welfare guardians and obtain relevant orders from the Court.

[10] Mr EG contacted Ms BD and told her the will was available for her to collect. She advised that she intended to seek more specialist advice elsewhere, and requested a bill, which Mr EG provided. The invoice rendered includes a fee of $2,700 for work done to 31 August 2011, which was slightly reduced before Ms BD paid it.

[11] Ms BD then laid a complaint to the New Zealand Law Society (NZLS) about Mr EG's conduct, and the fee she had been charged.

Standards Committee process

[12] The nub of Ms BD's complaint is her belief that Mr EG billed her for preparing a will that he said dealt with adult guardianship issues, but that it was impossible for a will to do that. She says the extent of the work Mr EG did significantly exceeds the scope of

her instructions to him, and that he lacked the necessary expertise to do the work. Ms BD says Mr EG acted incompetently, without her instructions, and then charged her for having done so.

[13] In response, Mr EG, and Mr LM, a partner in the firm that employs him, denied the allegations, and asserted that the fee was a fair and reasonable one.

[14] The Committee considered all of the information before it, including a letter from Mr EG's employers, and formed the view that, on Mr EG's behalf, the firm had admitted that he acted in error and found that he had over-charged Ms BD. In the Committee's view, the fee charged overall was not fair and reasonable, and Mr EG had contravened rule 9. On that basis the Committee made a finding of unsatisfactory conduct against Mr EG pursuant to s 152(2)(b) of the Act.

[15] Mr LM's submissions included an offer, in the event a finding of unsatisfactory conduct was made, to refund the difference between what Ms BD had paid, and what the Committee considered to be a fair fee. Apparently on that basis, the Committee reduced the fee component of the invoice to $1,000. The Committee otherwise imposed no penalty and no other orders under s 156(1) of the Act.

[16] Ms BD was dissatisfied with the decision and applied for a review.

Review Application

[17] In her review application, Ms BD says she wants to "cancel the contract" and requests a refund of the whole of the fee on the basis of the Committee's finding that Mr EG made a genuine mistake, and because she has not signed the will, the work has no value to her. She refers to the Consumer Guarantees Act saying Mr EG's conduct has caused delays, she still has no will, and no prospect of appointing a guardian for HH.

[18] Ms BD says Mr EG was incompetent because he should have known that only a court of competent jurisdiction can appoint a guardian for an adult, but he did not tell her that and drafted her will to indicate her preference, which, just like the similar provisions in the 2004 will, is not binding on anyone, and is not what she wanted to achieve. She says he pressured her into signing his terms of engagement.

Review Hearing

[19] The parties attended a review hearing on 4 August 2015. Mr LM attended as counsel for Mr EG and in his capacity as a partner of the firm that employs Mr EG. It appears that the Registry did not advise Ms BD in advance of the hearing that Mr EG

would be accompanied. I am satisfied that no prejudice was caused to her as a result of Mr LM's appearance. Furthermore, I consider that Mr LM's participation as a partner in the employing firm was materially helpful in resolving the fee aspect of Ms BD's complaint.

Role of LCRO on Review

[20] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.[1]

Scope of Review

[21] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Issue

[22] The issue on review is whether there is good reason to interfere with the Committee's decision. For the reasons that follow, the answer to that question is yes. The finding that Mr EG's conduct was unsatisfactory is reversed, and no further action is taken with respect to the conduct allegations or the fee component of Ms BD's complaint, pursuant to ss 211(1)(a), (b) and 152(2)(c) of the Act.

Reasons

[23] First, the Committee made an error of fact. The "admission" referred to in the decision is not an admission. It is a minor premise supporting Mr LM's arguments in his written submissions to the Committee as to the consequences that might flow from an unsatisfactory conduct finding, if the Committee were to make one, which he says it should not. Read as a whole, his paragraph cannot be taken as an admission, but is part of his hypothesis. At the review hearing, Mr LM confirmed it was not his intention

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

that his paragraph be read as an admission. There is no good reason to believe that an admission was intended.

[24] Second, there is no evidence of the Committee having followed the process set out in paragraph 10.11 of the NZLS LCS Practice Note. That section refers to fee complaints. The purpose is to identify the lawyer who is responsible for setting the fee. The section calls for committees to give careful consideration as to who is the subject of a costs complaint. Committees are directed to exercise caution in addressing the fees aspect of a complaint in relation to an employed solicitor, such as Mr EG. There is no evidence of the Committee having given consideration to that aspect of its procedure.

[25] At the review hearing Mr EG's evidence was that he did not set the fee. His role was to provide information to his supervising partner to inform the partner's billing decision. Mr EG says the usual process is for him to provide his supervising partner with a draft bill and supporting documentation, and provide an indication of factors that may affect the final fee. He says his supervising partner considers the information he provides, they may have a discussion, the partner then considers the reasonable fee factors in rule 9, and makes a global assessment of what a fair and reasonable fee should be. The fee information is then channelled back through the administrative billing process, and a final invoice provided to Mr EG for him to send out.

[26] Mr EG says that is the process that was followed on this occasion. The invoice was generated including the fee determined as fair and reasonable by his supervising partner, and returned to him. Mr EG attached a covering letter to the invoice and sent both to Ms BD. While an employed lawyer is bound by rules 9 and 9.1, the Practice Note recognises that it is important for a committee to investigate who is responsible for setting the fee that is charged. If more than one lawyer is involved, it may be appropriate for a committee to consider how responsibility is allocated, before making a finding that an employed lawyer has breached professional standards by charging a fee that is not fair and reasonable.

[27] While the process followed by Mr EG's firm was unobjectionable, there is always the possibility that, objectively, a different view can be taken of the fee charged, which is what happened in this case. The Committee's view was that a reasonable fee for the work done was $1,000. I cannot, however, discount the probability that the Committee's view was tainted by its misapprehension that Mr EG had admitted wrongdoing, when in fact, he had not.

[28] In the circumstances, the decision that Mr EG's conduct was unsatisfactory is unsafe, and is reversed. The question is what should happen next.

New Information

[29] It is relevant to note that the subject matter of Ms BD's complaint arose in 2011. At the review hearing, Ms BD said that over the intervening time she has not advanced her situation, and her 2004 will remains in place. She said she has been awaiting the outcome of this process before taking any further steps. She was unable to pinpoint any real deficiency in the will other than that it did not perform the seemingly impossible task of appointing a guardian for her adult son. She also explained that she was unwilling to sign the will because she had no trust and confidence in the lawyers. She expressed the view that she did not want her children to have to deal with the lawyers when it came time to implement it.

[30] The lawyers confirmed that they were not trustees or executors in the will, and need have no further involvement in it. They confirmed that Ms BD could sign the will and take away, give it to another lawyer, keep herself, and generally do with it as she wants.

[31] The parties were encouraged to consider whether they may be able to reach agreement over the fee component of Ms BD's complaint, and advised this Office shortly after the review hearing that they had done so.[2] On 18 August 2015 Mr EG's office provided copies of the amended all inclusive invoice for $1,230, a statement recording the refund given to Ms BD and which she confirms she has received, and a credit note to complete the proper accounting.

[32] Regulation 29 of the Lawyers and Conveyancers (Lawyers: Complaints Service and Standards Committees) Regulations 2008 precludes consideration of a fee of less than $2,000 unless there are special circumstances that would justify otherwise. In this case I consider there are no such circumstances. However, if I am wrong in that, my view is that a fee of $1,230 for the work Mr EG did for Ms BD is fair and reasonable for the services he provided overall, and taking into account the reasonable fee factors set out in rules 9 and 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which regulates the fees lawyers can legitimately charge to clients.

[2] Correspondence between the parties and LCRO (12-18 August 2015).

[33] It is also important to note that there has been no contravention of rule 9 or 9.1 by Mr EG. He was not responsible in any meaningful way for setting the fee, and it would be unjust for his professional record to be tarnished with an unsatisfactory conduct finding in the circumstances. As no proper purpose could be served by taking any further action with regard to the fee aspect of Ms BD's complaint, no further action will be taken in that regard.

Conduct

[34] There is no evidence that persuades me that Mr EG lacks competence, that his conduct was unsatisfactory or that he pressured Ms BD into signing terms of engagement from which she could simply have walked away.

[35] Ms BD's main focus is on the allegation that Mr EG told her she could appoint guardians for her adult son under her will. However, Mr EG's written advice to Ms BD of 29 July 2011, set out above, was clearly to the effect that any attempt to appoint a guardian under her will would be invalid. The will he drafted for her appears to express her wishes as clearly as is possible in the circumstances.

[36] Ms BD wants her other children to take care of their older brother. She cannot force them to do that, and says there is no need to do that. Ms BD says she is very certain that her younger children completely understand they owe moral obligations to their older brother in that regard. All she can do is express her wish that it be so. The will Mr EG drafted conveys those wishes in circumstances where, as he told her earlier, she cannot appoint guardians for her adult son under her will.

Outcome

[37] In the circumstances, pursuant s 211(1)(a) of the Act, the decision of the Standards Committee is reversed. Further inquiry is unnecessary because the substance of the fee complaint has been resolved with agreement. There is no satisfactory evidence that Mr EG's conduct fell below proper professional standard, and no issues of public interest arise. Pursuant to ss 211(1)(b) and 152(2)(c) Ms BD's complaint is determined on the basis that this Office will take no further action.

Decision

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

[2] Pursuant to ss 211(1)(b) and 152(2)(c) Ms BD's complaint is determined on the basis that this Office will take no further action.

DATED this 26th day of August 2015

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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 BD as the Applicant
Mr EG as the Respondent
Mr LM as a related person as per section 213
The [City] Standards Committee [X]
The New Zealand Law Society