

CONCERNING

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

AND

CONCERNING

a determination of Standards Committee

BETWEEN

VL

Applicant

(and Cross Respondent)

AND

SB

Respondent

(and Cross Applicant)

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

Introduction

[1] Mr VL has applied for a review of the determination by Standards Committee that his handling of the sale of an estate property was incompetent and therefore constituted unsatisfactory conduct. The Committee imposed a fine and made a costs award against Mr VL.

[2] Mr SB has also applied for a review of the same decision. He submits that the Committee was wrong not to uphold other aspects of his complaint, and not to award compensation to him.

Background

[3] Mr VL and another were appointed executors of the will of Mr SB's father who died in 2008, and the will of Mr SB's mother, who died in 2012. Mr SB's father left his wife a life interest in his interests in various properties owned as tenants-in-common with her. The residuary estate was to be divided equally between Mr SB and his two sisters.

[4] A dispute between Mr SB and one sister, and the other sister, was resolved by mediation in April 2013. The agreement reached was recorded in a Deed of Family Arrangement.

[5] Mr SB became unhappy with Mr VL's administration of the estates and lodged a complaint with the Lawyers Complaints Service.

The complaints and the Standards Committee determination

[6] The Standards Committee recorded Mr SB's complaints as being:¹

- (a) Unbecoming conduct in relation to the manner in which Mr VL administered the two estates;
- (b) Mr VL failed to keep him apprised as to progress on the estates;
- (c) Mr VL failed to actively manage the estates;
- (d) Mr VL failed to respond to enquiries and provide information;
- (e) Mr VL was rude and uncooperative;
- (f) Mr VL's conduct caused Mr SB to incur additional costs;
- (g) Mr VL acted in contravention of a Mediation Agreement;
- (h) Mr VL failed to treat the residuary beneficiaries of the estates separately; and
- (i) Mr VL acted incompetently and/or breached professional standards in relation to the marketing and sale of two forestry blocks belonging to the estates (in particular, the question of whether Mr VL accepted a lower offer for one of the forestry blocks despite a higher offer having already been made).

[7] Mr VL denied the allegations and provided a detailed response. Mr VL's counsel, Mr TI, provided submissions in support of Mr VL. These focused on the allegation in relation to the marketing and sale of the blocks of land.

[8] The Standards Committee delivered its decision on 27 May 2014. It distilled the issues for consideration as follows:

¹ Standards Committee decision (27 May 2014) at [1].

- Whether Mr VL acted incompetently in relation to the management of the estates, and/or thereby breached any professional standards.
- Whether Mr VL failed to keep Mr SB apprised as to progress on the estates.
- Whether Mr VL failed to actively manage the estates.
- Whether Mr VL failed to respond to Mr SB's inquiries and provide information.
- Whether Mr VL was rude and uncooperative.
- Whether Mr VL's conduct caused Mr SB to incur additional costs.
- Whether Mr VL acted incompetently and/or breached professional standards in the marketing and sale of two forestry properties belonging to the estates; and in particular whether Mr VL accepted a lower offer for one of the blocks despite a higher one having already been made.

[9] It dealt with the issues in the following manner:

- *Acting incompetently in administering the estates and/or breaching professional standards, and failing to actively manage the estates:*

The essence of this complaint was that Mr VL should have been more involved in managing the estates' assets and maintaining their value. Mr VL denied any failing in this regard, and referred to the problems he faced in dealing with Mr SB and his sister. The Committee considered that [Mr SB's mother] had been capable of managing her own affairs following her husband's death and that there was therefore no requirement for the executors and trustees to do anything during her lifetime other than preserving the ownership of her late husband's half of the estate for the children. It found no breach of professional standards and decided to take no further action.

- *Failing to keep Mr SB apprised as to progress, failing to respond to enquiries and provide information, and being rude and uncooperative:*

The Committee carefully considered the documentary evidence and Mr VL's response to these allegations, taking note of the fact that Mr SB was not Mr VL's client. After referring to a lawyer's professional obligation to conduct dealings with third parties with due respect and courtesy, the Committee

found that in dealing with the beneficiaries Mr VL went beyond his obligations and also concluded that there was nothing to suggest he had been rude or uncooperative. Accordingly, the Committee found no breach of professional standards and decided to take these matters no further.

- *Mr VL's conduct caused Mr SB to incur additional costs:*

Mr SB complained that he and his sister incurred significant costs in preparing for the family mediation because Mr VL had failed to provide information. This was denied by Mr VL. The Committee was satisfied that there was no evidence to support the allegation. It formed the view that Mr VL was open and transparent with the beneficiaries and noted that he had made his files available for inspection by counsel for the beneficiaries. Again, the Committee found there had been no breach of professional standards.

- *Acting in contravention of the mediation agreement (not included in the specific issues listed above but raised by Mr SB in his complaint):*

This complaint referred to a provision in the Deed of Family Arrangement recording the agreement reached at mediation whereby Mr SB's sister, was to receive an extra \$70,000 "from the estate at final distribution in recognition of health care services rendered (by her to her late parents)".² Mr SB claimed that Mr VL had breached this term of the deed by paying the money to his sister soon after the mediation rather than on final distribution of the estates, which had not occurred. In response, Mr VL stated that Mr SB had misinterpreted the deed and that he was fulfilling its terms in making the payment. The Committee was satisfied with the explanation and concluded that there was no breach of professional standards.

- *Treating the beneficiaries differently:*

The payment to [Mr SB's sister] was included among a list of examples of conduct supporting the allegation, which was denied by Mr VL. Again the Committee rejected this part of the complaint, finding that it was "clear that [Mr VL] endeavoured to involve... all [beneficiaries] from the outset and that he [had] been impartial during the process of the administration of the

² Deed of Family Arrangement (24 April 2013) at [1].

estate”.³ Accordingly the Committee found no breach of professional standards.

The finding of unsatisfactory conduct

[10] The allegations which lead to the finding of unsatisfactory conduct was in respect of the complaint that Mr VL had acted incompetently and/or breached professional standards in relation to the marketing and sale of the two forestry blocks.

[11] It had been agreed at mediation and recorded in [6] of the deed that the two forestry blocks were to:

...be marketed for sale forthwith by the executors provided that if a sale could not be achieved with a net return to the estate of \$225,000 for each block within 12 months then certain provisions were to apply.

[12] The Committee identified six specific areas of concern to Mr SB in relation to the sale of the properties (although most seem directed at the sale of one of the blocks referred to as the [X Road] property). They were:

- (a) The properties were not marketed properly.
- (b) Mr VL failed to use reasonable efforts to get the best price (including through his GST treatment of the transaction).
- (c) One purchaser was preferred over another potential purchaser to the cost of the estates.
- (d) The beneficiaries were misled about a supposed “option” that the successful purchaser held in respect of the land.
- (e) Having sought approval from the beneficiaries for the sale, Mr VL then proceeded without it.
- (f) Mr VL’s co-executor lacked capacity to sign the agreement for sale and purchase of the property, and whether he actually did so.

Marketing

[13] Mr SB was not aware of any formal marketing of the properties nor the use of land agents or advertisements in local newspapers. Mr VL engaged only with people who became aware by word of mouth that the properties were for sale. Mr VL’s response was that at the time, properties like those owned by the estates, were

³ Above n 1, at [45].

extremely difficult to sell, being of interest only to owners of neighbouring properties. The [X Road] property had been leased to a neighbour who Mr VL says had been granted an option to purchase the property if it was ever for sale. Mr VL submits that the decision to sell was a joint decision of the executors, who considered they were obliged to comply with the option granted to the lessee.

The failure to get the best price, and the GST issue

[14] Mr VL had arranged for both estates to become deregistered for GST purposes. As the estates were not at the time of sale registered for GST, it meant that there was no liability to pay GST on the sale of the properties.

[15] Mr SB argues that Mr VL should have recognised that any buyer of the properties would be registered for GST and therefore be able to claim back any GST paid.

[16] In preparing the Agreement for Sale and Purchase, Mr VL recorded the price (\$250,000) followed by the printed form (and recommended) terminology, of “plus GST”. The other interested party (Mr GG) had advised Mr SB that he would have increased his offer for the property to \$287,500 inclusive of GST, on the basis that he could then have applied for a refund of the GST, but because the estates were not registered for GST that would have meant a greater return for the estates.

The Committee decision

[17] The Committee considered the complaints and determined to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) on Mr SB’s complaints, other than the allegation that Mr VL acted incompetently and/or breached professional standards in relation to how he marketed the sale of the [X Road] block. On this matter the Committee concluded that Mr VL had acted incompetently and therefore there had been unsatisfactory conduct on his part (s 152(2)(b)(i) of the Act). He was ordered to pay a fine of \$2,000 and costs of \$1,000.

Application for review

[18] Mr VL filed an application for review of the determination and challenged the Committee finding that his handling of the sale of the [X Road] property was incompetent. He sought a reversal of that finding, and the Orders imposed following that finding.

[19] He submitted:

- (a) The Committee was in error regarding the sale because:
 - (i) the trustees were entitled to rely on the agreed minimum sale price in the Deed;
 - (ii) although no consent to sell at a higher price was needed, the beneficiaries agreed to a sale at \$250,000 as soon as possible; and
 - (iii) the trustees were bound by the option granted to the lessee.
- (b) The Committee erred because it did not have jurisdiction over the co-trustee, and any issue of alleged negligence was subject to the High Court's jurisdiction.
- (c) Mr VL did not have a duty of care to the trustees and did not breach same.⁴
- (d) The Committee erred by not "disclosing all material from or on behalf of the Tribunal to him before making its decision".⁵

[20] Mr SB's response was to file his own application for review. The reasons provided in support of his application were that the Committee had erred:

- (a) in finding no breach in Mr VL's alleged failure to respond to letters of enquiry from Mr SB;
- (b) in finding Mr VL did not breach the terms of the Deed and holding that Mr SB had not adduced any evidence to suggest Mr VL had contravened the terms of the Deed. He says that all that is required was the wording of the Deed itself, and the timing of the distribution;
- (c) by not awarding compensation;
- (d) in finding that Mr VL had no duty to him, that he had no duty to get the best sale price for the "estate assets", and that (in other words) the "option" ("such as it is") to the successful purchaser entitled that purchaser to "an advantage".

[21] Mr VL, through counsel, opposed the grounds sought for the review provided by Mr SB.

⁴ I have assumed this is an error and should be a submission that Mr VL did not have a duty of care to the beneficiaries.

⁵ VL application for review (19 June 2014) at Part 7. The reference to the "Tribunal" is presumably a reference to the "Standards Committee."

Review on the papers

[22] These reviews have been undertaken on the papers pursuant to s 206(2) of the Act, which allows me to conduct reviews on the basis of all the information available if I consider the review can be adequately determined in the absence of the parties. The parties have consented to this, as required by s 206(2)(b) of the Act.

Review

[23] On 2 October 2014 I forwarded to the parties a paper presented by Ms S Clapham in the ADLS Cradle to Grave Conference⁶ earlier that year. I also referred the parties to a discussion by me in *TE v Wellington Standards Committee 2*⁷ of the approach taken by this Office to complaints of this nature. I suggested that much of the conduct complained about involved Mr VL's actions as executor (as distinct from conduct in his capacity as lawyer for the estates) and invited counsel for each party to consider each aspect of the complaint and to present arguments as to why each matter came within the jurisdiction of this Office, rather than the Court. I should of course have added to that, by acknowledging that the arguments presented could equally have included reasons why this Office did not have jurisdiction, but Mr TI was alert to that alternative.

TE v Wellington Standards Committee 2

[24] In this review, the lawyer occupied the dual role of executor of the will of the deceased, and also acted as solicitor for the estate, having acted for the deceased for many years. The will of the deceased included a provision that the shares held by the deceased in a company through which the deceased operated a business, were to be transferred to the deceased's children. Instead of doing this, the lawyer continued to run the business so that it could be sold as a going concern, justifying this decision on the grounds that the company had been wrongly named in the will (and therefore the provision in the will could not be fulfilled) and that the deceased had verbally directed the lawyer to do this immediately prior to his death.

[25] The Standards Committee had determined to lay charges against the lawyer before the Lawyers and Conveyancers Disciplinary Tribunal in respect of a number of aspects of the lawyer's conduct, which was opposed by the lawyer and his counsel, on the basis that the lawyer's conduct was conduct in his capacity as a trustee, and

⁶ Sonja Clapham "Executors, solicitors and entitlements – roles and remuneration" (paper presented to ADLS Cradle to Grave Conference, April 2014).

⁷ *TE v Wellington Standards Committee 2* LCRO 100/2010, 92/2011 and 153/2012.

therefore subject to scrutiny by the Court, and not the Tribunal. It was also assumed, that the charges (which had not been laid) would include a charge of misconduct, which by reason of s 7(1)(a) of the Lawyers and Conveyancers Act, can only be brought in respect of conduct which occurs when the lawyer is providing regulated services.

[26] I agreed that the submission on behalf of the lawyer did have some merit but noted:⁸

... 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 to assist in identifying in what capacity the conduct of the lawyer was undertaken, I suggested the following approach:⁹

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.

[27] Applying that approach, I considered it was necessary then to consider each of the matters complained of to determine whether the conduct in question was conduct by the lawyer in his or her capacity as a lawyer, or as an executor/trustee. Some conduct is of course regulated by the Conduct and Client Care Rules¹⁰ notwithstanding that it does not take place in the course of providing regulated services.¹¹

[28] The difference between conduct of a lawyer in his or her capacity as a lawyer, as distinct from conduct in his or her capacity as executor/trustee, was also traversed in some depth in the paper by Sonja Clapham presented to the Cradle to Grave Conference.

[29] Counsel for both parties have responded to my invitation to comment on the conduct complained about against this test. Mr TI responded, and with regard to the complaint upheld by the Standards Committee, (that Mr VL acted incompetently in respect of the sale of the [X Road] Block) submitted that the Standards Committee should not have accepted jurisdiction for the reason that the conduct complained of was conduct by Mr VL in his capacity as an executor/ trustee. Mr CP (for Mr SB)

⁸ At [50].

⁹ At [51].

¹⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹¹ See *EA v ABO (Ms VY)* LCRO 237/2010.

submits that Mr VL was acting in the capacity as a lawyer when interpreting the rights of the lessee (Mr MM) to whom the property was sold.

[30] I agree with both counsel. Mr VL has referred to Mr MM having a right of first refusal in his lease documentation. That was but one factor weighed up by the executors when deciding to accept the offer from Mr MM. In a letter to Mr SB's lawyer (Mr AD),¹² Mr VL also identifies the other factors supporting the sale to Mr MM: Mr MM was already in possession- he was prepared to settle immediately and his offer was unconditional. Elsewhere in correspondence with the Complaints Service, Mr VL makes the point that the beneficiaries had agreed at mediation that a sale price of \$250,000 was acceptable. He noted that sales of such properties were difficult, with most sales being to neighbouring owners. He also points out that he was one of two executors, and the other executor (Mr HJ) participated in the sale process. I acknowledge the assertions by Mr SB that Mr HJ may have been compromised in his ability to fulfil his obligations as executor, but the evidence in that regard is contradictory, and whether Mr HJ was able to participate fully in the decision-making process does not alter the issue insofar as it relates to the complaint about Mr VL. Finally, it would seem that the potential sale to Mr MM was in danger of being disrupted with claims by other parties claiming rights through Mr KO (the husband of one of Mr SB's sisters).

[31] Other than interpreting the lessee's rights under the lease documentation, all of the other factors to be taken into account when assessing the offer from Mr MM, are factors which do not involve an assessment of legal issues. I therefore consider that the decisions taken by Mr VL were taken in his capacity as executor, and in any event, the issue as to whether or not Mr MM had an option or right of first refusal, would not have been determinative of the decision. Taking all of the factors into account, it was not open to the Standards Committee to determine that Mr VL acted incompetently in relation to the sale and marketing of the forestry block. Even the use of the words "marketing and sale" in themselves, are clear indicators that the conduct complained about does not involve legal advice.

[32] Before leaving this matter, I must address the fact, that Mr GG (the alternative purchaser) supposedly indicated to Mr KO that he would have increased his offer to \$287,500 inclusive GST. There are several points to be made here:

¹² Letter VL to AD (16 May 2013).

- I have not seen any formal offer from Mr GG on this basis - his offer would have been conditional on him being able to obtain a refund of the notional GST;
- that offer eventuated after he was told that the estate was required to receive \$250,000 net.
- There are enough question marks around this offer, such that there is no foundation for describing Mr VL's conduct as "incompetent" when deciding to accept the unconditional offer on the table, with almost immediate settlement.

Other complaints

[33] The Standards Committee determined to take no further action in respect of Mr SB's other complaints, and it is incumbent on me to consider these complaints in completing this review. The complaints were correctly identified by the Standards Committee and recorded in [6] above. Other than the issue with regard to the sale of the property, there are six other matters identified. Of these, at least two relate to complaints that Mr VL did not provide full and detailed reports to Mr SB. This complaint can be simply disposed of, by noting that Mr SB was not Mr VL's client, and there is no professional obligation (as a lawyer) on Mr VL to report to the degree Mr SB expected. However, I also note that Mr VL did communicate extensively with the beneficiaries and their lawyers, even going to the extent of making his files and computer records available for inspection.

[34] It was Mr SB's decision to instruct Mr AD to act on his behalf, and to incur Mr AD's costs. Mr VL is not responsible for that.

[35] The complaint that Mr VL did not actively manage the estates, is a matter which sits squarely within the jurisdiction of the Court.

[36] Finally, I see no evidence to the required degree, which supports the accusation that Mr VL was rude and uncooperative. He found himself in a situation which commonly arises where lawyers are involved either as an executor or not, in administering an estate. Dissatisfaction of beneficiaries that matters are not being dealt with as they would like, and inter-family disagreements, often result in complaints by an aggrieved party against the lawyer involved in administering the estate. In these instances, it often seems that the lawyer becomes the lightning rod for the

dissatisfaction, but when the conduct complained about is examined in depth, the issues more often than not, do not involve breaches of professional standards.

[37] This is such a case, and, having found that Mr VL's conduct in relation to the sale of the property did not constitute unsatisfactory conduct, the outcome of this review will be to reverse that finding by the Standards Committee, but otherwise to confirm all other determinations.

[38] To the extent that I have not made specific comment on any other aspect of Mr SB's complaints, I confirm that I have read all of the material and reached the same conclusion as the Standards Committee. For completeness, I adopt the Standards Committee reasons for such decision, and incorporate them into this decision.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the finding of unsatisfactory conduct against Mr VL is reversed (and hence the orders made following that finding drop away), but all other determinations are confirmed.

DATED this 12th day of October 2015

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:

Mr VL as the Applicant/Cross Respondent
Mr SB as the Respondent/Cross Applicant
Mr TI as Mr VL's Representative
Mr CP as Mr SB's Representative
Standards Committee
New Zealand Law Society