

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

GF
of [North Island]

Applicant

AND

UH
of [North Island]

Respondent

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

DECISION

Background

[1] UH (the Practitioner) acted for GF (the Applicant) in relation to a claim against ACC on behalf of her late husband's estate. GG had suffered from asbestosis which would have entitled him to seek a lump sum payment from ACC. However, the diagnosis was not made until after GG's death when an autopsy was done.

[2] After the death of GG the estate filed a claim with ACC for the lump sum payment. This was declined on the basis that entitlement depended on a claim being made in GG's lifetime.

[3] The Applicant took steps to review the ACC decision with the DRSL and instructed UG in relation to this. With the consent of the family UG referred the matter to the Practitioner who is known to have considerable experience in ACC legislation and related issues.

[4] The Practitioner did not pursue the review application but pursued other entitlements for the Applicant. The ACC review application was withdrawn by him a short time after a mediation meeting attended by ACC and the Applicant (with members of her family) and the Practitioner. This mediation led to several financial benefits being approved by ACC, but not a lump sum payment as had originally been sought.

Complaint

[5] The Applicant's complaint against the Practitioner was that he had failed to take all reasonable steps to pursue the application for review of ACC's refusal to pay the lump sum.

[6] In his response to the complaint the Practitioner informed the Standards Committee that the application for review of ACC's decision had been withdrawn because it had no prospect of succeeding. He said that the Applicant was aware of the legislative barrier to pursuing the claim and he had therefore focused on other benefits that she could be entitled to. He contended that the Applicant had consented to withdrawing the review application after being informed that the estate did not qualify for the lump sum payment as GG had not made a claim prior to his death.

[7] The Practitioner forwarded the Standards Committee a copy of the Mediated Agreement. He referred to clause 6 as evidence of the Applicant's agreement to the withdrawal of the ACC review. This provided that advice about withdrawing that application was to be made by a certain date. The Practitioner explained that this time frame was agreed so that he could ascertain that no claim had in fact been made by GG in his lifetime, before formalising the withdrawal.

[8] The Standards Committee accepted the Practitioner's explanation despite the Applicant disputing that she had authorised the Practitioner to withdraw the review application.

[9] The Committee appears to have accepted that the application could not succeed on any ground, and also noted that UG (in his letter to the Practitioner) had also doubted that the application could succeed. The Standards Committee acknowledged that the Practitioner had recognised this and focused on obtaining other entitlements for the estate, achieving a very good result.

[10] In particular the Standards Committee accepted the Practitioner's submission that he was authorised to withdraw the ACC review application. The Committee noted

that clause 6 of the Mediation Agreement recorded the action agreed upon by the Practitioner, and also noted that the Applicant had attended the mediation as had members of her family.

Review

[11] The Applicant was dissatisfied with the Standards Committee decision and sought a review. Her review application focused largely on disputing that she had authorised the Practitioner to withdraw the ACC review. She considered that the Standards Committee was mistaken in its interpretation of clause 6, and wrote that this did not give the Practitioner “carte blanche” to withdraw from any review with regards to a lump sum compensation for her husband’s death. She denied ever having agreed to withdraw her application for review of ACC’s decision. In her view the Practitioner’s withdrawal of the review application has denied her the right to due process and the legal avenues open to her in ACC legislation for the lump sum payment.

[12] The parties have agreed to this review being conducted ‘on the papers’ pursuant to Section 206 of the Lawyers and Conveyancers Act 2006. Under that section parties can consent to a review being conducted on the basis of all of the information on the file and that provided for the review if the LCRO considers that the review can be adequately determined in the absence of the parties, their representatives, or witnesses. The statutory requirements have been met in this case.

Considerations

[13] ACC declined the application by GG’s estate for the lump sum, and had informed the Applicant that any claim to a lump sum payment for asbestos related diseases needed to be made during a claimant’s lifetime.

[14] ACC relied on clause 54 Schedule 1 of the Accident Compensation Act 2001. This section requires a claimant to be alive when assessed under Clause 59. It is clear that no claim for a lump sum claim can be made after the death of a claimant. It is undisputed that GG had not made a claim for a lump sum prior to his death.

[15] The Applicant sought a review of the ACC’s decision declining the application for a lump sum payment. She was entitled to seek a review and she instructed UG. He in turn, who, knowing of the Practitioner’s reputation in ACC-related matters, arranged for the Practitioner to deal with the file.

[16] The disputed issue which is the focus of this review concerns whether, in withdrawing the review application, the Practitioner acted with the consent of the Applicant.

[17] Lawyers have a professional obligation to act in the interest of the client and perform the work for which they are engaged. In this case the work referred to the Practitioner concerned the ACC review.

[18] The Practitioner contended that the Applicant was made aware that the ACC review could not succeed because it was barred by the law, and that she had agreed that the review application should be withdrawn. The Practitioner agrees that the mediation meeting did not spend any significant time discussing this particular issue. He points to the Mediation Agreement as reflecting the issues that were covered at the mediation, including the fact that the review application would be withdraw.

[19] The participating parties, which included the Applicant, consented to entering the mediation process on 30 June 2008.

[20] I have read the Mediated Agreement which is a one page document with six clauses. It is headed, "*Understandings and Agreements reached at Mediation*". ACC was represented by L. Clause 1 provides that certain information will be provided to ACC about GG's illness in relation to progressing claims.

[21] By Clause 2, L agrees to use that information:

... in making decisions about three of the five issues identified by (the Practitioner) apart from the lump sum issue: weekly compensation, attendant care, reimbursement for (x), treatment costs for items paid for by (the deceased's) family which may qualify for ACC assistance.

[22] Clauses 3, 4 and five enlarge on specific payments and are not material to this review.

[23] Clause 6 reads:

Application for Review No. Xxxxxx: the hear by date is waived and (the Practitioner) will advise DRSL whether this can be withdrawn within 2 months, that is by 14 July 2008.

[24] It is clear from the above document that withdrawal of the review application was anticipated, and that a time frame for advising this was included in the Agreement. I do not accept that this would have been stated in this way had it been intended that the

review application should not be withdrawn. Nor do I accept that the Practitioner would have been mistaken about this since his original instruction was to pursue the review application. It is wholly unlikely that this objective would have accidentally fallen by the wayside.

[25] The fact that the lump sum issue was not progressed at the mediation meeting is further evidence of acceptance by everyone involved in this matter that there was no prospect of a lump sum being paid and so the focus was on other potential claims. This further supports the Practitioner's about his advice to the Applicant, her acquiescence concerning the futility of pursuing that review, and reflects agreement that other avenues of financial support should be explored.

[26] In retrospect it would have been useful if there had been an explicit record documenting these matters, but I also note that there is no specific record of the Practitioner having been instructed to pursue other benefits for the estate, and it is not suggested by the Applicant that the Practitioner acted against her instructions in taking those steps which led to successful outcomes.

[27] There is no basis for challenging the Practitioner's interpretation of the applicable law. It is not expressly suggested by the Applicant that the Practitioner's interpretation of the law (or that of ACC) is wrong. It appears that her grievance concerns the fact that the withdrawal of the review resulted in no review having been conducted, and from this she proceeds to suggest that the estate of her late husband has been deprived on \$110,000, a loss she places at the feet of the Practitioner.

[28] If it is the Applicant's contention that the estate has missed out on a lump sum payment from ACC due to the Practitioner's action, I cannot agree. The law is clear in its terms. A lump sum payment did not depend on the exercise of a discretionary power; the criteria for a lump sum payment is clearly set out in the Act and requires claimants to make an application in their lifetime. This requirement was not met by GG prior to his death, and could not be met thereafter.

[29] It was not only the Practitioner who accepts this as a correct interpretation of the law since the same view was expressed by UG who wrote of the ACC review application:

I am not at all confident that the review approach can succeed. It may in fact need to be abandoned. I say so on the basis that it is now my understanding that in fact no application for compensation was made by [GG]- during his life.

[30] The fact that GG did not apply for a lump sum prior to death means that as a matter of law there was no basis on which such an application could succeed after his death. The fact that the asbestosis was only discovered after his death makes no difference, although one can readily understand the sense of injustice that the Applicant must feel. This was also acknowledged by UG when he wrote:

Ironically, it is only upon his death that the position was confirmed. But once deceased he is unable to make an application. The unfairness of this is self-evident.

[31] Despite the absence of a record of instruction, there is the ample evidence of the actions of the parties to indicate what those instructions were, and I accept as correct the Standards Committee view that the Applicant was aware of the steps being taken by the Practitioner and the reasons for it.

[32] In the circumstances it was open to the Standards Committee to decide that any further action was unnecessary or inappropriate pursuant to Section 138 (2) of the Lawyers and Conveyancers Act 2006.

[33] Having reviewed the Standards Committee file, and considered the application for review of that decision, I see no basis for coming to a different view than that reached by the Standards Committee.

[34] The review application is declined.

DATED this 2nd day of November 2011

Hanneke Bouchier
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:

GF as the Applicant
UH as the Respondent
Wellington Standards Committee 2
The New Zealand Law Society