LCRO 180/2012, 184/2012, 189/2012 and 190/2012

CONCERNING	applications for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	determinations of Standards Committee
BETWEEN	**WC** (189/2012 and 190/2012) **VB** (184/2012) **UA** (180/2012) Applicants
AND	**WC** **VB** **UA** Respondents

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

Introduction

[1] Mr WC has applied for a review of the determination by the Standards Committee in which the Committee made a finding of unsatisfactory conduct against Mr WC. The Committee censured Mr WC, imposed a fine of $1,000 in respect of each complaint, and ordered him to pay $1,000 costs to the New Zealand Law Society in respect of each complaint.

[2] The Committee declined to order Mr WC to pay compensation to the complainants and did not order publication of his name.

[3] The Standards Committee determination dealt with two identical complaints by Ms UA and Ms VB, in which they each sought compensation from Mr WC for his failure to have their elderly, frail and infirm, aunt sign a will before she died 25 days after he received instructions.

[4] Both Ms UA and Ms VB have also applied for a review of the determination. Both review applications were the same and the applicants again seek compensation from Mr WC for the amounts that they would otherwise have received pursuant to the proposed will.

Background

[5] On 6 August 2009 Ms UA telephoned Mr WC's office and advised the firm's receptionist that her aunt (AB) was in hospital and wanted to change her will.

[6] Mrs AB had made a will dated 26 October 1989 under which she left her estate equally to her nieces, Ms UA, Ms XD and Ms CD.

[7] The message from Ms UA was referred to Mr WC although it was a message for Mr ZF who was not in the office on that day, was semi-retired and lived in [AA Town].

[8] Mr WC attended upon Mrs AB at the hospital in the afternoon of the same day (6 August 2009). He advises that she was physically weak and although she was asleep, she appeared to him to be "reasonably coherent"[1] when she awoke.

[9] Mr WC advises that after discussing the existing will, Mrs AB told him that she now wished to appoint Ms UA as her executor and leave half of her estate to her. The other half was to be divided equally between Ms VB and her husband who was Mrs AB's nephew. Mr WC further advises that following inquiry by him, Mrs AB indicated she did not have a significant estate.

[10] Mr WC advises that he drafted the new will and powers of attorney that he had also been instructed to prepare, within a day or so of attending on Mrs AB. He then referred the matter to his secretary to arrange a convenient time for him to attend the hospital with a member of his staff (who could act as one of the witnesses to the will) to have Mrs AB sign her will.

[11] The steps taken by Mr WC and/or his secretary are recorded in detail in paragraph [45] of this decision.

[12] Mrs AB died on 1 September 2009 before Mr WC was able to have the will executed. Mr WC met with Ms XD (the executrix named in the 1989 will) on 8 September 2009 and proceeded to have the application for probate of the 1989 will filed. Probate was granted on 18 September 2009.

[13] On 20 May 2010 Ms UA wrote to Mr WC on behalf of herself and Mr and Mrs VB, seeking compensation from Mr WC in respect of the loss they had suffered "as a result of [Mr WC] breaching [his] duty of care owed to each of [them]". In the letter Ms UA referred in some detail to the Court of Appeal judgment in *Gartside v Sheffield, Young and Ellis.*[2] On the basis of this judgment, Ms VB and Ms UA alleged that Mr WC owed them a duty of

[1] WC submissions to LCRO (24 August 2015) at [6].
[2] *Gartside v Sheffield, Young and Ellis* [1983] NZLR 37 (CA).

care, and had been negligent, and sought compensation from him for the amounts which they had been deprived of by reason of the fact that the new will had not been signed.

[14] After taking advice, Mr WC briefly responded to Ms UA's letter on 25 June 2010, rejecting the allegations of negligence.

[15] The complaints by Ms UA and Ms VB were dated 28 February 2011 and received by the Lawyers Complaints Service on 3 March 2011.

The complaints and the Standards Committee determination

[16] Ms UA and Ms VB complained that Mr WC had failed to engage with them in respect of the issues raised by them in their letter of 20 May 2010. They went on to outline the facts recorded above and alleged that Mr WC was negligent in not ensuring that the will was signed straight after he received instructions.

[17] They further allege that Mr WC declined to enter into mediation to settle the claim and that as a result the family had become divided. The outcome sought by Ms UA and Ms VB, was to be compensated by Mr WC for the amount that they otherwise would have received under Mrs AB's proposed will.

[18] After recounting the facts, the Standards Committee identified the issues as being whether Mr WC had breached his duty of care to each of the complainants by his failure to have the will executed, and the manner in which he progressed the administration of the estate subsequent to Mrs AB's death. The Committee recorded the first issue in the following way: "Did Mr WC breach his duty of care to the beneficiaries named in the unexecuted will in respect of which Mrs AB gave him instructions?"

[19] It noted that, notwithstanding Mr WC was aware of the concerns expressed by Ms UA and Ms VB as to what had happened, he nevertheless proceeded to obtain probate of the 1989 will.

[20] The Committee referred to the affidavit to lead grant of probate which included the usual provision that the deponent believed the will produced with the affidavit was the deceased's last will. It specifically noted:[3]

> …The fact that the later Will could potentially be judged the last Will of Mrs AB and that this possibility was acknowledged by Mr WC, surely made it inappropriate for the application for probate for the earlier Will to be taken or

[3] Standards Committee Determination at [15]. Mrs AB died on 1 September and Mr WC advises probate was granted on 18 September 2009. I do not know the date on which the application was filed, and it appears the Committee has the dates wrong. If the application was filed on 16 September as recorded by the Committee, this was not 9 days after Mrs AB's death.

> filed by him. However it was filed in the High Court on 16 September 2009 (nine days after Mrs AB's death) and sealed on 28 September 2009.

[21] The Committee noted Mr WC's advice to the disappointed beneficiaries that the Wills Act 2007 provided a process whereby the disappointed beneficiaries could apply to the Court for an order that the document prepared in 2009 was in fact a valid will.

[22] The Committee then noted with regard to this suggestion:[4]

> On any reading of the letter forwarded to Mr VB, it would be clear that the expense of the course of action suggested by Mr WC would be a relevant factor.

[23] The Committee made reference to the *Gartside* judgment and commented:[5]

> 23. The facts in that case and in the present case are not dissimilar. Although Mr WC attended upon Mrs AB immediately, she remained in hospital for a week and clearly he had not arranged to have the Will executed in that week. Even subsequently she was contactable, had a serious effort been made to contact her. She died 25 days later without the Will having been executed. Whatever the reasons may have been, whether difficulty in locating her, or a belief that the matter lacked urgency because there were no assets at issue, the fact remains that the instructions were accepted and were not completed, in circumstances when urgency was called for.
>
> 24. However of further concern is the way the matter progressed after Mrs AB's death, particularly the completion of the Notice of Motion for Probate of the earlier Will while promoting the validation of the subsequent Will as a solution to the difficulty created. This would involve an application for a recall of the Probate now granted. The Committee queries why Mr WC pushed forward with Probate of the earlier Will. Once Probate of the earlier Will was granted, the beneficiaries under the later Will and their advisors would have incurred further time and cost in following the course of action suggested by Mr WC. The estate was of limited value.

[24] The determination of the Committee was as follows:[6]

> 25. Having inquired into the complaints and conducted a hearing the Committee considers the following conduct of Mr WC subsequent to Mrs AB's death unsatisfactory, namely:
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> a. The early taking of an affidavit to lead grant of probate when he was aware that there was a later (unexecuted) Will which could indeed be found to be the last Will of Mrs AB; and
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> b. The filing of the application for probate for the earlier Will when the opportunity for the affected parties to explore a settlement in a cost effective manner was removed
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> 26. Accordingly, the Committee determines that there has been unsatisfactory conduct on the part of Mr WC pursuant to s 152(2)(b)(i) of the Act.

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[4] Above n 3 at [18].
[5] Above n 3 at [23] and [24].
[6] Above n 3 at [25]-[27].

> 27. The Committee declined to order compensation to the complainants on the basis that there was insufficient evidence that the new unsigned Will would have been signed or validated by the Court under the Wills Act 2007.

[25] Following that finding, the Committee made the orders referred to in [1] above.

Review

[26] Ms UA's application for review was received on 3 August 2012 and Ms VB's application was received on 9 August 2012. Both applications are identical and take issue with the fact that the Committee had declined to order Mr WC to pay compensation to them. They again refer to the *Gartside* judgment and assert that Mr WC was negligent and should compensate them for the fact that they had not received the inheritance they would otherwise have received if Mrs AB's new will had been signed.

[27] Mr WC's applications for review are dated 10 August 2012 and were filed by email, although I note only one application has been date-stamped, and with the date 9 August 2012. Nevertheless, Mr WC's applications for review were validly lodged.

[28] Initially it was intended to progress this review by way of a hearing with all parties but before this could be scheduled Ms UA passed away. Both Ms VB and Ms UA had indicated they consented to the reviews proceeding on the basis of the material before me, but Mr WC advised that he wished to speak to submissions provided by him. I therefore determined I would hear from Mr WC in person and directed that he provide any further submissions he wished to make in writing prior to the hearing. These were provided and forwarded to Ms VB. Ms VB advised she did not wish to attend the hearing.

[29] The hearing proceeded on 25 August 2015 and Mr WC spoke briefly to his submissions. Following the hearing, Mr WC's submissions were forwarded to Ms VB and she was given the opportunity to comment on these. She initially advised she did wish to comment on the submissions but subsequently advised she had nothing further to add.

[30] Although there are four applications for review filed, all applications are dealt with in this single decision. Hereafter I refer to all review applications as "this review".

Gartside v Sheffield, Young & Ellis

[31] In [7] of its determination the Standards Committee identified the issues as being:

> …whether Mr WC breached his duty of care to each of the complainants in not securing the execution of the will drafted by him and the manner in which he progressed the administration of her estate subsequent to her death.

[32] The Committee then proceeded to examine the first of those issues: "Did Mr WC breach his duty of care to the beneficiaries named in the unexecuted will in respect of which Mrs AB gave him instructions?"

[33] The Committee discussed the judgment of the Court of Appeal in *Gartside* and noted that: "The facts in that case and the present case are not dissimilar".[7] Given the discussion in the Standards Committee determination, it would seem that the Committee was influenced by the acceptance of the apparent similarities between the facts of *Gartside* and the present case.

[34] Section 12(a) of the Lawyers and Conveyancers Act includes in the definition of unsatisfactory conduct, "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". However, the Committee did not make a finding of unsatisfactory conduct against Mr WC in respect of his failure to have Mrs AB execute her will.

[35] The determinations made by the Standards Committee were that:[8]

> ...the Committee considers the following conduct of Mr WC subsequent to Mrs AB's death unsatisfactory, namely:
>
> (a) The early taking of an affidavit to lead grant of probate when he was aware that there was a later (unexecuted) Will which could indeed be found to be the last Will of Mrs AB; and
>
> (b) The filing of the application for probate for the earlier Will when the opportunity for the affected parties to explore a settlement in a cost effective manner was removed.

[36] I do not know whether the omission of any finding in respect of Mr WC's conduct when compared to the conduct in *Gartside* was intentional on the part of the Standards Committee or an oversight. However, given the extent of the submissions concerning *Gartside* and the discussion in the Standards Committee determination, the relevance of that judgment to this matter requires to be addressed. The principle of law which was established by the Court in *Gartside* was that:[9]

> A solicitor who had accepted instructions to prepare a will for a client owed a duty of reasonable care to a beneficiary under the proposed will to carry out those instructions with due diligence and present the will for execution by the client within a reasonable time. The statement of claim sufficiently disclosed a duty of care and the other ingredients of a cause of action in negligence and should not be struck out.

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[7] Above n 3 at [23].
[8] Above n 3 at [25].
[9] Above n 2 at 37.

[37] Mr WC disputes the correctness of the statement made by the Standards Committee at [23] of its determination, recorded at [23] above. He says:[10]

> This is where the Standards Committee has substantially erred. The cases were totally dissimilar. The *Gartside* decision was a question of law as to whether a solicitor preparing a will and having it executed owed a duty of care to the beneficiary.

[38] I do not think the Committee has erred in noting the similarity between the facts in *Gartside* and the facts in this matter. In *Gartside,* the lawyer had failed to prepare a will for an "aged and infirm lady"[11] before her death, seven days after receiving instructions.

[39] However I do accept Mr WC's submission that the case is relevant for establishing the principle referred to in [37]. Importantly, Mr WC does not contest that he owed a duty of care to Ms UA and Ms VB (and Mr VB).[12]

[40] What Mr WC does contest, is the subsequent statement by the Standards Committee that "although Mr WC attended upon Mrs AB immediately, she remained in hospital for a week and clearly he had not arranged to have the Will executed in that week".[13] Mr WC submits this is an error of fact and points out that within a week he did endeavour to have the will executed but was told that Mrs AB was not in a state to receive visitors. What is correct is that the will was not signed.

[41] This clearly brings into consideration the requirements of s 12(a) for a lawyer to exhibit "a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". In this case, what is at issue is whether or not Mr WC applied the appropriate degree of diligence towards having Mrs AB sign her will.

[42] Whether or not Mr WC owed a duty of care to the beneficiaries does not alter the requirements of s 12(a) to act with the proper degree of competence and diligence. Those standards apply regardless of who is affected by any shortcoming in this regard and the primary person of course to whom Mr WC owed such a duty was Mrs AB. The question as to whom any duty of care was owed only becomes relevant in an action in negligence which was the issue in *Gartside*. The complaints process, Standards Committees and this Office have no place in deciding whether a lawyer has been negligent and the consequences thereof. The law of negligence involves an assessment of many factors which extend beyond a consideration of whether a lawyer has met the standard of competence and diligence required by s 12(a).

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[10] Above n 1 at [36].
[11] Above n 2 at [53].
[12] Above n 1 at [36].
[13] Above n 3 at [23.]

[43] Even though *Gartside* involved a consideration of whether or not a lawyer owed a duty of care in negligence to the disappointed beneficiaries, the existence or otherwise of a duty of care is not a prerequisite to the application of s 12(a). Section 132(1) of the Lawyers and Conveyancers Act provides that "any person" may complain about the conduct of a lawyer. It is clear that the complainant need not be a person to whom a lawyer owes a duty of care.

[44] No question about Mr WC's competence is raised in this complaint. The only question to decide is whether or not Mr WC acted with the required degree of diligence in his attempts to have Mrs AB sign her will.

Mr WC's attempts to have Mrs AB sign her will

[45] In his submissions for the review hearing Mr WC sets out the attempts that were made to have Mrs AB sign her new will:

- Mrs UA telephoned Mr WC's office on 6 August 2009 to advise that Mrs AB wished to make a new will.
- Mrs AB's existing will was located and Mr WC attended on Mrs AB in hospital that afternoon.
- A new will and powers of attorney were prepared "within a day or so".[14]
- Mr WC instructed his secretary (Ms YE) to arrange a convenient time to visit Mrs AB again to have the documents signed.
- In an undated memorandum to Mr WC, Ms YE recorded the sequence of events that took place from the time Ms UA contacted their office, and I transcribe here her words in respect of the events which took place after Mr WC instructed her to make contact with the hospital to make arrangements for him to attend on Mrs AB to have her new will and the powers of attorney signed. Ms YE says:[15]

> 6. I remember at some stage I contacted the hospital to try and make arrangements for you to go and see Mrs AB to have the will signed. I cannot recall, as some time has since passed, exactly what they told me but I do recall that there was some reason why Mrs AB was unable to take a visitor.
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> 7. At some stage UA telephoned to see how we were getting on with the Will. I did not keep a note of what I said to her.

[14] Above n 1 at [9].
[15] Memo attached to WC submissions to LCRO, 22 May 2013.

> 8. When I then contacted the hospital they advised me that Mrs AB had left the hospital and (understandably) they were not prepared to tell me where she had gone. My impression was that although Mrs AB was not at the hospital, she might be re-admitted again.
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> 9. Some time passed and I was concerned that we didn't seem to be able to make contact with Mrs AB or anyone who knew where she was so I then contacted UA. She said her Aunty had just been readmitted to the hospital.
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> 10. I then contacted the ward again and was told that Mrs AB was there, but she was very weak and not in any state to see you or to sign documents. The nurse suggested I contact them again in a day or so.
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> 11. Before we were able to have the will signed Mrs AB passed away in hospital.
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> 12. I did not make notes of every action/conversation as each time I made contact with the hospital or UA I expected that we would be able to locate Mrs AB and have her sign the will.

[46] The period of time which was covered by these actions is from 8 or 9 August, through to 1 September, a period of nearly three weeks.

[47] There are several factors to take into account when considering whether or not the attempts by Mr WC and his staff represented an appropriate degree of diligence.

- It must be recognised that Mr WC is the person who has the responsibility to act appropriately and transferring the obligation to his secretary is not sufficient to meet that responsibility.

- Ms UA must bear some responsibility for not keeping Mr WC's office informed. She was the person who initially advised Mr WC's office that Mrs AB wished to make a new will. She contacted the firm subsequently to ascertain progress. It is reasonable to assume she was told at that stage the documents were ready for signing but that the hospital had advised Ms YE that Mrs AB was unable to take a visitor.

- It is not unreasonable to expect that Ms UA should have some responsibility to advise Mr WC's office when Mrs AB was discharged. Instead, it seems, that Ms YE only became aware of this fact when she herself made contact with the hospital.

- I do not have any information about Mrs AB's state of health but if she had been discharged from hospital, again, it is not unreasonable to infer that she herself may have been able to make contact with Mr WC's office. There is no information available as to where Mrs AB spent the time between her

discharge and readmission to hospital but it is a reasonable assumption to make that she had the use of a telephone.

- It was not until Ms YE contacted Ms UA that she was then advised Mrs AB had been readmitted to hospital. This information had not been communicated directly to Mr WC's office. It does seem a little unreasonable, that Ms UA should not have accepted some responsibility for keeping Mr WC informed, and then to complain that he had not acted with an appropriate degree of diligence in ascertaining where Mrs AB was to have her sign the new will.

[48] I note again, that the Standards Committee did not make a finding on this point. However, I do not consider in all of the circumstances that there should be any finding of unsatisfactory conduct against Mr WC in this regard.

The application for probate

[49] The Committee's determination of unsatisfactory conduct results from the findings that Mr WC had acted precipitously in having the affidavit to lead grant of probate of the 1989 will sworn, and by obtaining the grant of probate removed the opportunity for the affected parties to explore a settlement in a cost effective manner.

[50] I do not consider the Committee was correct in making this finding. Ms UA and Mr and Mrs VB were aware of the situation shortly after Mrs AB's death. Mr WC was led to believe there was a willingness on the part of all parties to reach a compromise. Such a compromise does not require recall of probate as it is quite common for beneficiaries and potential claimants to enter into a Deed of Arrangement whereby beneficiaries who take under a will compromise their rights and reach a settlement with potential beneficiaries. Whether or not probate is granted does not affect the ability for this to occur. In any event, if the subsequent will was accepted by the Court as Mrs AB's last will, it would automatically follow that probate of the 1989 will would be recalled.

[51] Mr WC advises probate was granted on 18 September 2009, some two and a half weeks after Mrs AB's death. The affected parties were aware of the situation from the time of her death and had an opportunity to seek independent advice. Early action by a solicitor instructed by them could have been to lodge a caveat against the issue of probate, and again, therefore, it is unreasonable to suggest that Mr WC's conduct constituted unsatisfactory conduct when prompt action by the disappointed beneficiaries would have protected their position while negotiations to remedy the situation took place.

[52] Mr WC explains that it was convenient to have Ms XD swear the affidavit to lead grant of probate when she was in [AA Town] for the purposes of attending Mrs AB's funeral. Ms XD lived in [BB Town] and the executor's role is to administer the will as it stood. It was not Ms XD's duty or that of Mr WC, to take steps to have the draft will established as Mrs AB's last will. By that time, Mr WC was acting for Ms XD as executor of the estate, and he acted appropriately to assist her to swear the affidavit to lead grant of probate and file it in court.

[53] Mr WC has raised the procedural point in his review application, that the Notice of Hearing issued by the Standards Committee did not include any reference to an "early taking" of the affidavit to lead grant of probate. The Notice of Hearing refers to:

> The nature of the conduct itself, including alleged:
> …
>
> ii. Taking an affidavit to lead grant of probate (including a provision that the deponent believed that the document attached to the application was the deceased's last will) when Mr WC was aware there was a later will (unexecuted) in respect of which he personally had received instructions.

The allegation is that Mr WC compromised the position of the disappointed beneficiaries by proceeding to lodge the application for probate.

[54] Although the Committee in its decision has used the words "early taking of an affidavit to lead grant of probate" I do not think it affects the basis of the complaint, which is that probate of the 1989 will was applied for when the disappointed beneficiaries consider Mr WC thereby compromised their position by doing so and implicitly seem to suggest Mr WC should have taken steps to have the draft will admitted to probate. To do so would have affected the rights of the beneficiaries named in the 1989 will and Ms XD's duty to administer that will.

[55] I do not think the duty alleged by the complainants should have devolved onto Mr WC. He could not proceed with any certainty that Mrs AB would have signed a new will if he had presented it to her and this was an issue for the court to determine.

Compensation

[56] I have not found or confirmed unsatisfactory conduct on the part of Mr WC and so there is no need to discuss the issue of compensation. However, the outcome of the review sought by Ms UA and Ms VB is compensation for what they have been deprived of by reason of the fact that the new will was not signed.

[57] However, whether or not the finding of unsatisfactory conduct was confirmed, I would not have been minded to make an order for compensation in favour of the

complainants because it cannot be said with any degree of certainty that their loss flowed from the non-presentation of the will for signing. As noted above, Mrs AB may very well have declined to sign the new will even if it had been presented to her to sign.

[58] Although the facts of *Gartside* are similar to the facts of the matter complained of in this instance, the Court of Appeal judgment only established the existence of a duty of care. Whether or not damages are then awarded for breach of that duty is a separate issue.

[59] Standard Committees and this Office must be careful not to assume the role of a court and make determinations that can only be made by the court. The test as to whether or not compensation should be ordered to be paid by a lawyer is contained within s 156(1) of the Lawyers and Conveyancers Act which provides that:

> Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner … the Committee may order the practitioner to compensate the complainant.

[60] In the present instance, it does appear that Ms UA and Ms VB did suffer loss and Mr VB also. However, the Committee declined to make any orders of compensation "on the basis that there was insufficient evidence that the new unsigned Will would have been signed or validated by the Court under the Wills Act 2007".[16] I agree with the Committee's view in this regard.

Conclusion

[61] Having considered all of the material that has been provided in connection with this review, and considered Mr WC's submissions for the review hearing, I have reached the view that the determination of unsatisfactory conduct against Mr WC should be reversed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the findings of unsatisfactory conduct against Mr WC are reversed. Consequently the orders made by the Standards Committee fall away.

DATED this 10th day of September 2015

[16] Above n 3 at [27].

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 WC as an Applicant/ Respondent
Ms VB as an Applicant/ Respondent
The Executor of Ms UA's Estate
The Standards Committee
The New Zealand Law Society