

LCRO 189/2013

**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**

**RR**

Applicant

**AND**

**SU & TT**

Respondents

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

**DECISION**

**Introduction**

[1] Ms RR has applied for a review of a decision by the [City] Standards Committee [X] dated 24 May 2013 in which the Committee decided that further action in respect of Ms RR's complaints about conduct by Mr SU and Mr TT (the lawyers) after 1 August 2008 was not necessary or appropriate. The Committee declined jurisdiction over complaints made about conduct before that date.

**Background**

[2] The RR's home was owned by the trustees of the RR Family Trust (the trust), who were Mr TT, Mr and Mrs RR. Mr and Mrs RR were the settlors, and discretionary beneficiaries, along with others.<sup>1</sup>

[3] Mr TT is a sole practitioner. He acted for the trust between 2002 and 2011. From time to time he provided the trust with legal services. On behalf of the trust, he

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<sup>1</sup> RR Trust Deed (2002).

also instructed Mr SU, who is a barrister sole. Mr SU provided advice, and represented the trust's interests, as counsel in a High Court proceeding against the RR's neighbours seeking to rectify defects in the cross lease title to their home (the High Court proceeding) between February 2003 and December 2011.

[4] Mr and Mrs RR separated in 2007.

[5] The High Court proceeding impacted on the RR's ability to settle their relationship property issues. Ms RR's evidence suggests she found it difficult to persuade the other trustees to agree with her view of how the trust's best interests could be furthered in the High Court proceeding, and she was generally in dispute with Mr RR over their relationship property. Her position was not assisted by the trust deed, which provided for decisions by a majority of trustees to be binding on all trustees.<sup>2</sup>

[6] The High Court proceeding did not end well for the trust. When it was delivered in mid-2010, the High Court judgment required the trustees to pay a substantial amount of compensation. Arguments about money continued between Ms RR, her former husband and the lawyers. Substantial costs orders were later made against the trust.

[7] Ms RR says Mr TT was sole trustee of the trust for a short period after the RR's marriage was dissolved, which resulted in their trusteeships ending under clause 14A of the trust deed. At that stage it appears the family home was up for sale, and was later sold for more than its valuation. Ms RR says that when the sale proceeds were paid to [the law firm], the lawyers who acted for her personally, Mr TT made payment conditional on [the law firm's] undertaking to retain funds in its trust account until any complaint about the lawyers' fees was resolved.

[8] The RRs were both later reappointed as trustees. Ms RR was dissatisfied with the outcome of the High Court proceeding, the retention of funds and her involvement with the lawyers in general. She laid wide ranging complaints against Mr SU and Mr TT to the New Zealand Law Society (NZLS) in May 2012.

### **Complaint**

[9] Ms RR's complaint covers a broad range of concerns about the lawyers' conduct and the fees they charged, over nine years. Ms RR believes Mr SU and Mr TT could not act because of a conflict of interest between her and the trust. She is critical of Mr TT's exercises of professional judgement, alleges he promoted his own interests

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<sup>2</sup> At [30].

and those of Mr RR “over the interests of the trust and against [her] personally” and tried to coerce her into agreeing to pay his fees, and those of Mr SU, from the trust’s money.<sup>3</sup> She says he held her and Mr RR “to ransom” over the fees claim, and says there have been “many examples of negligence, incompetence and misleading information” by him and Mr SU.

[10] Ms RR’s complaint included allegations that both lawyers were incompetent, failed to communicate with her, and did not provide her with independent judgement or advice. She says the lawyers did not disclose conflicts of interest to her, nor did they obtain or follow her instructions. Ms RR says Mr TT did not convey her instructions accurately to Mr SU.

[11] The complaints against Mr SU include allegations that he made false promises about the likelihood of success in the High Court proceeding and failed to advise the RRs that he had been “found guilty of negligence” in another matter by Justice Hansen, the presiding Judge in the High Court proceeding. Ms RR believes Mr SU has “alcohol problems [which] impaired his performance” generally and in particular when he made his closing submissions in the High Court proceeding. Ms RR says his fee should be significantly discounted because of the “disastrous loss the parties suffered”.

[12] Ms RR says the fees the lawyers charged to the trust, \$45,820.36 (TT) and \$77,372.52 (SU), were excessive.

[13] Ms RR says Mr TT breached his duties as an independent professional trustee.

[14] Ms RR also referred to complaints made separately by Mr RR about Mr TT’s conduct. Those were determined by a Committee in a separate decision,<sup>4</sup> which is not the subject of this review.

### **Standards Committee**

[15] The Committee requested and received responses from the lawyers, and instructed a costs assessor to review the lawyers’ fees. The Committee then considered all of the information it had received in the context of the relevant legislation before and after 1 August 2008.

[16] The Committee concluded it had no jurisdiction to consider complaints alleging conduct before 1 August 2008 by either lawyer because it considered that the conduct

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<sup>3</sup> Letter RR to LCRO (30 July 2013).

<sup>4</sup> NZLS Auckland complaint file 6454.

alleged could not have given rise to the commencement of proceedings of a disciplinary nature under the Law Practitioners Act 1982 (LPA). The statutory jurisdictional bar to the Committee's consideration arises under s 351(1) of the Lawyers and Conveyancers Act 2006 (the Act) which says:

If a lawyer... is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

[17] With respect to the allegations after 1 August 2008 against both lawyers, the Committee did not consider that either lawyer had overcharged for the work he had done, or that the complaints raised conduct issues that called for further action to be taken by the Committee.

[18] In all the circumstances the Committee decided that further action was unnecessary or inappropriate pursuant to s 138(2).

[19] Ms RR was dissatisfied with the decision, and applied for a review.

### **Review Application**

[20] Ms RR's application for review repeats the allegations made in her complaint, and asserts that Mr SU is dishonest, unreliable, acted unprofessionally, and has misled NZLS.

[21] Ms RR is also critical of the Committee's process, says the Committee placed insufficient weight on her evidence, too much weight on the evidence of Mr TT and Mr SU, and did not carry out a proper inquiry, including failing to take proper notice of her comments on the costs assessor's report. She does not consider that the Standards Committee process was robust, effective or neutral, and says that the lawyers' conduct has impacted adversely on her personally and on the trust.

[22] Ms RR says she wants truth, transparency, and the lawyers to be held accountable for their conduct, which she describes as unprofessional and unacceptable. She also wants Mr SU and Mr TT to pay her share of [the law firm's] costs, who she later instructed to bring claims in negligence against Mr TT and Mr SU.

### **Review Hearing**

[23] Ms RR attended a review hearing in Auckland on 2 December 2014. Mr SU and Mr TT were not required to attend, and the hearing proceeded in their absence.

### **Role of LCRO on Review**

[24] 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.<sup>5</sup>

### **Scope of Review**

[25] 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 Issues**

[26] This Office has, and the Committee had, no jurisdiction to determine whether Mr TT breached his duties as a trustee. Those aspects of Ms RR's application cannot be advanced in the course of this process of review.

[27] Much of Ms RR's complaint relates to the seemingly complex claims in negligence she says she has initiated against Mr TT and Mr SU. In the circumstances, it would be inappropriate to determine those aspects of her review application within the framework of the Act.<sup>6</sup>

[28] The question on review is whether there is good reason to depart from the Committee's decision that further action was not necessary or appropriate with respect to the lawyers' conduct or their fees. For the reasons discussed in greater detail below, further action is not necessary or appropriate, the Committee was correct to reject jurisdiction over the conduct alleged to have occurred before 1 August 2008. On review, the decision is therefore confirmed overall.

### **Analysis**

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<sup>5</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

<sup>6</sup> *BR v CS LCRO 226/2013 AT [14]-[15]*.

[29] In 2002 the trust deed records that Ms and Mr RR agreed that Mr TT would be the independent trustee of their trust. He was also the trust's lawyer. His duties, therefore, were not to Mr RR personally, or to Ms RR personally. His duties were owed to the trust, and he was obliged to act in the best interests of the trust, separate from Mr and Ms RR while their interests were united, and from Mr or Ms RR when their interests diverged.

[30] The trust was committed to the High Court proceeding by the time the RRs separated. As trustee Mr TT was caught up in that process. There appears to have been a lack of unanimity between Ms and Mr RR and Mr TT as to the best way forward for the trust as the High Court proceeding progressed.

[31] At the heart of Ms RR's complaint about Mr TT is her perception that he lacked respect for her decision-making capability as a trustee, excluded her from the trust's decision-making, disempowered her, and was careless with the trust's assets. Those perceived slights and ultimate costs and losses to the trust also generally underlie the concerns Ms RR expresses about Mr SU's conduct. The point, however, in the context of professional discipline, is that any obligation Mr TT and Mr SU owed to Ms RR personally was subject to their obligation to act in the trust's best interests.

[32] It is clear from the information Ms RR has provided that she does not share the lawyers' views as to where the best interests of the trust lay. It is not obvious from the information available in the course of this review that the lawyers did not act in what they considered to be the trust's best interests, given the circumstances that gave rise to the High Court proceeding and the way in which it continued. Ms RR is aggrieved that the lawyers' views were more closely aligned to Mr RR's views, than to her own. That does not mean that either of the lawyers was wrong about where the trust's best interests lay.

[33] Much of the substance of Ms RR's concern arises from the provisions of the trust deed, the exercise of trustee's powers by Mr TT and from the lawyers' exercise of their judgement. It is not obvious from the information available in the course of this review that the lawyers' judgement was clearly wrong. There could never have been any guarantee that the High Court proceeding would succeed. It was, not surprisingly, acrimonious, risk-laden, and unpredictable. Those features are reflected in Ms RR's complaint and review application.

[34] At various times from 2002 onwards Mr TT and Mr SU provided advice to the trustees, decisions were made by the trustees partly on the basis of that advice, and

instructions given to Mr SU. As Ms RR says she has commenced court proceedings alleging negligence by both lawyers, it would be inappropriate to explore those allegations in any detail on review.

[35] There is no good reason to depart from the Committee's decision that it lacked jurisdiction to consider conduct alleged to have occurred before 1 August 2008. The criteria for commencing proceedings of a disciplinary nature under the LPA were generally higher than they are under the Act.

[36] Having carefully considered all of the information available on review, I have been unable to identify any good reason to depart from the Committee's decision with respect to either lawyer before or after 1 August 2008. The Committee's decisions to reject jurisdiction over conduct alleged to have occurred before 1 August 2008, and that further action is not necessary or appropriate in relation to the lawyers' conduct after that date, are therefore confirmed.

### **Fees**

[37] The Committee appointed a costs assessor who prepared a report<sup>7</sup> with the benefit of input from the lawyers, Mr and Ms RR. The costs assessor included all of the invoices the lawyers rendered to the trust, some of which had been paid. The costs assessor noted the RRs' predicament, which could not be resolved without the title defects being rectified, either with their neighbours consent, or by court order. He noted the High Court's decision, based on the trial Judge's preference of one valuer's evidence over the others, which was the basis of the compensation ordered against the trustees. He also mentioned the costs orders made in the proceeding against the trustees, and the differences of opinion between Ms RR, Mr RR and the lawyers. There is good reason to believe those differences of opinion would have contributed to increases in costs to the trust.

[38] The costs assessor considered all of the lawyers' fees, the history of the matter, the High Court proceeding, advice the RRs had sought on appeal, the costs orders, post judgment issues that called for the Court's intervention to resolve, enforcement proceedings, including an application for bankruptcy against Mr TT personally, a charging order and writ of sale and eventual sale of the property.

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<sup>7</sup> Costs Assessor's Report, 13 December 2012

[39] The costs assessor considered all of the lawyers' invoices rendered up to the date of Ms RR's complaint, reviewed all of Mr SU's files that spanned over eight years of work, and was satisfied that he had done the work narrated in the accounts, and contained in the files. He concluded Mr SU's fees were fair and reasonable, including the two invoices he had issued before the Act commenced on 1 August 2008. The costs assessor considered Mr TT's fees, his files, and was satisfied that he had done the work recorded in his invoices over the previous eight years. His view was that those fees were reasonable for all the work he had done, including in relation to the enforcement proceedings and application for bankruptcy.

[40] The costs assessor applied r 9 and the range of factors set out in r 9.1.<sup>8</sup> His report is comprehensive, takes into account relevant fee factors and authorities, and there is no obvious deficiency in his report.

[41] I have also considered Ms RR's critique of the costs assessor's report, her objections to the costs assessor's process and her view of the evidence and history of the matter. Ms RR also says she was "affronted by the arrogant and personal nature" of comments made by the costs assessor. I have looked at the comments referred to, and can see nothing objectionable in them. I can see no evidence of a lack of neutrality or imbalance as Ms RR asserts. The simple fact that Ms RR disagrees does not mean the costs assessment is wrong. On the contrary, although I have not reviewed the entire contents of both lawyers' files over the nine year period as the costs assessor did, I have gone through all of the materials available in the course of the review. Having undertaken that analysis and reviewed the costs assessor's report, I am left with the view that the report reads as a very thorough, balanced and thoughtful document.

[42] The Committee discussed whether it should exclude invoices rendered before 1 August 2008 from its consideration, but did not. That approach is consistent with the aggregating of invoices, which is the approach preferred by this Office where there is a sufficient connection between the fees charged, as there is here.<sup>9</sup> The costs assessor had included those invoices in his report, and considered costs overall to have been fair and reasonable. The Committee considered the costs assessors report and had no reason to differ, saying it could see no evidence of "gross overcharging", and confirmed its view that the fees were fair and reasonable.

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<sup>8</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>9</sup> *AA v BK, BL and BM* LCRO 264/2012.



[43] Although I note Ms RR's concerns, I have been unable to identify any good reason to depart from the Committee's view on fees. That aspect of the decision is, therefore, confirmed.

**Outcome**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision is confirmed.

**DATED** this 29<sup>th</sup> day of September 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 RR as the Applicant  
Mr TT and Mr SU as the Respondents  
[City] Standards Committee [X]  
The New Zealand Law Society