BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 80

LCDT 038/13

BETWEEN	**WELLINGTON STANDARDS COMMITTEE 2 OF THE NEW ZEALAND LAW SOCIETY** Applicant
AND	**CLS** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms S Gill

Mr M Gough

Ms J Gray

Ms M Scholtens QC

HEARING at Wellington

DATE 13, 14 and 15 October 2014

COUNSEL

Ms P Feltham for the Standards Committee

Mr R Laurenson for the Respondent

REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGE

[1] The practitioner faced a charge of misconduct brought by the applicant under s 7(1)(a)(1) of the Lawyers and Conveyancers Act 2006. There were alternative charges of unsatisfactory conduct or of negligence or incompetence in his professional capacity.

[2] The practitioner defended the charges. A hearing took place in Wellington on 13, 14 and 15 October 2014. At the end of the hearing the Tribunal announced its decision not to uphold the charges. This decision contains the reasons for the Tribunal's finding.

[3] Full details of the charge and the particulars are attached as Appendix A.

Background to the Charge

[4] The charge relates to the practitioner's administration of the estate of Mr H who died on 18 May 2009. The deceased left a will made on 3 August 2004 in which he appointed the practitioner the sole executor and trustee.

[5] The deceased was the sole director and shareholder of an Auckland based company, OTW. He was a sole trader. The company had few assets. The allegation was that it had limited value.

[6] The assets of the estate were 100 shares in OTW and a life assurance policy worth approximately $30,000. In his will, the deceased left the shares in his company to his two children, T and F. They were named also as residuary beneficiaries.

[7] The practitioner undertook the standard estate administration tasks and oversaw the continued operation of OTW. A temporary manager was appointed. The

practitioner maintained an active involvement in the operations of the company and endeavoured to sell it. It was listed for sale in October and November 2009. It was eventually sold in January 2010 for $1 the consideration being the transfer of the intellectual property of OTW. The two residuary beneficiaries were 10 per cent shareholders of the new business which acquired the intellectual property of OTW.

[8] The daughter of the deceased, T, had earlier in October 2009 requested that the shares in OTW be transferred to the beneficiaries as provided for in the will. The practitioner had at that time advised, that as OTW had been incorrectly named in the will, the gift of the shares failed and fell into the residuary estate.

[9] The practitioner rendered three accounts for the administration of the estate and for the sale of OTW. His fees totalled $37,739.01 which exceeded the value of the estate. The beneficiaries received nothing from their father's estate.

The case for the Committee

[10] The allegations of the Committee fall under four headings which are:

(a) The practitioner should have taken steps to rectify the error in the will about the correct name of the company, which was a fault which had originated in his firm. The shares should then have been transferred to the beneficiaries in terms of the deceased's will and following the request of the deceased's daughter.

(b) The practitioner's decision to continue running OTW while attempting to sell the company was imprudent given:

(i) The extent of his operational role in the company.

(ii) The very modest size of the estate.

(iii) The limited value of the company.

(c) The practitioner failed in his obligations as a trustee by not responding to requests for an estimate of costs, interim billing or for financial information relating to OTW.

(d) The practitioner's cost in the administration of the estate were neither fair nor reasonable.

[11] The Committee stated its position to be that the prosecution turned not so much on factual allegations, but on an assessment of the decisions made by the practitioner and the course taken by him in the administration of the estate.

As to the first issue – rectification of the will and transfer of shares

[12] Clause 4 of the will incorrectly described the shares in OTW as OWS. The practitioner, when responding to a request from the deceased's daughter, advised in a letter of 9 October 2009 that because of that error, the shares in OTW would form part of the residue of the estate. He went on to say that it would achieve the same end result because the residue of the estate was to be shared equally by the daughter and son.

[13] The practitioner was criticised for adopting that course. David Murphy is a barrister and solicitor of Wellington who specialises in trusts, wills, estate administration, property business and commercial law. He expressed the opinion that the practitioner could have made application to the High Court at his own expense to obtain an order correcting the will to carry out the will-maker's intentions. He also suggested that the practitioner could have negotiated a settlement whereby the two beneficiaries agreed that the will would be read as if the correct company had been named and clause 4 given effect.

[14] The practitioner's response to the criticism was that:

(a) He took the independent advice of a senior fellow practitioner in Wellington as a result of which he prepared and posted the letter of 9 October 2009.

(b) The daughter's request for transfer of the shares was inconsistent with her earlier agreement to market OTW for sale and concerns that she had about her role in the company.

(c) He remained with the advice he had given. The transfer of shares did not make any difference to the course adopted with the concurrence of T.

(d) The proceeds of sale after expenses would have been distributed equally to T and her brother F.

(e) F had agreed with the process which the practitioner followed.

[15] The practitioner's earlier evidence had been that the deceased had advised him of the following:

(a) That his business had a worldwide potential and he had put a value on a half share at between $300-$400k.

(b) His children were not interested nor capable of running OTW.

(c) That if anything happened to him the practitioner was to sort out the business and either continue to operate it until a suitable joiner was found, or to sell it at the best possible price.

[16] The deceased's advice was recorded in a file memo created by the practitioner and dated 1 April 2009.

[17] The Tribunal's finding is that the practitioner's conduct cannot be criticised in respect of this issue. It has taken into account that there were a number of courses which the practitioner could have adopted. It is the case that he had made a decision after careful deliberation, after checking with a professional colleague and against the background of his knowledge of the deceased and his wishes and the family dynamics.

[18] The Tribunal has taken into account the evidence from the practitioner and confirmed by T that she and her brother would not have been able to work together

because of family dysfunction. She was living overseas and F did not have the competence to deal with the business.

[19] The Tribunal has noted that T did develop with the practitioner a plan to manage the continued operation of the business and to market it for sale.

As to issue two – the continued running of OTW

[20] The practitioner was criticised for continuing to run OTW past the point where it should have been clear a sale was not likely to occur.

[21] T swore an affidavit in support of her complaints against the practitioner. There is implied criticism by her that the practitioner had persuaded her that the right course of action was to keep the business running as it was attractive to prospective purchasers to have it running. She became actively involved in arranging for a manager to run the business. She went on to say that during the short time that she was in New Zealand following the death of her father, she was actively looking for someone to take over the business. Her evidence makes it clear that she was becoming impatient with the length of time it was taking for a sale to occur. She did continue to enquire about a possible sale and did seek a copy of the agreement which the practitioner eventually negotiated early in 2010.

[22] David Murphy was critical of the practitioner. He challenged that the practitioner had embarked on an unrealistic programme of attempting to sell the company. He said that the company accounts for the years ended 31 March 2008 and 31 March 2009 disclosed that the company was hardly likely to sell for an amount sufficient to repay the deceased's current account of $71,000. He questioned the reality of the value that the deceased had placed on the worth of the company. While acknowledging that sale as a going concern was a realistic and acceptable way of attempting to realise best value, he questioned the prudence of continuing on for so long when it was questionable that there was any life in the business.

[23] Mark Chiu is a solicitor in general practice specialising in residential property and other matters particularly relating to small businesses. He has assisted many

Chinese clients with their business matters including the sales and purchases. He was critical of the practitioner's decision to continue the operation of OTW. He said that the practitioner's decision to take on the running of the business himself was the heart of his criticism. He criticised the practitioner for not obtaining independent advice as to the value of OTW. He assessed that the practitioner's judgment was flawed and therefore he was in breach of his duty as an executor.

[24] The practitioner answered the criticisms made of his decision to continue the operation of OTW and to persist with its planned sale. He said that his decisions were influenced by the following factors:

(a) That T did not want to have anything to do with her brother especially in relation to the business.

(b) That it was his obligation as executor and trustee to act prudently in the best interests of the estate and all the beneficiaries. It was that obligation that persuaded him to operate OTW until it was in a position to be marketed for sale.

(c) His decision was then made after taking into account various factors which he set out as being:

(i) The deceased's wishes recorded in his file record of 1 April 2009 and the unrealised potential of the system that had been developed and the marketing capabilities of selling through the web page.

(ii) That value could not be tested unless the business was properly marketed for sale.

(iii) That the two beneficiaries were not suited, able or capable of running the business because of their different circumstances.

(iv) That up to date financial information was necessary to market OTW properly and for that purpose he instructed OTW's

accountants to prepare interim financial accounts to 30 September 2009 and final accounts for the year ending 31 March 2009.

(v) That to properly market the business, it needed to be a going concern. It had existing orders to be met as well. That he had the full concurrence of T and F and arranged a short term contract of four months with a joiner/manager.

(vi) That he instituted measures to monitor the operation of the business.

(vii) That his enquiries with business brokers informed him that a minimum fee of $25,000 would be required for brokers to handle the marketing of the sale of the business.

(viii) That his own experience allowed him to consider that there was potential in the business of OTW and thus he made it his task to keep the business operating and so be able to sell it at its optimum price.

(ix) That he prepared an Information Package from within his firm to promote the sale of OTW. He did so because of his many years in practice and involvement in businesses which gave him expertise in preparing such a document.

(x) That he continued to advertise the business for sale through the website, TVNZ and by making contact with persons who had expressed an interest in buying the business.

[25] A sale did not eventuate as planned. He signed a contract on behalf of the estate early in 2012 which he said had the potential to produce a return to the beneficiaries of the estate.

[26] The practitioner deposed that he had gone through everything about the estate with F soon after his father's death. He, F, told the practitioner that he could not run the business. On 19 October 2009 F confirmed that he wanted the practitioner to continue to act in the estate and that the business was to be listed for sale.

[27] For her part, T had appointed an attorney to enquire into matters on her behalf because she was living away from New Zealand. The attorney was Belinda O'Brien who is an accountant and friend of T. She wrote to the practitioner on 23 September 2009 in which she recorded that it was not feasible for either of the siblings to take over the responsibility for their father's business because T was living overseas and F had mental health issues. She went on to say that the best and only option available was to try and sell the business as a going concern. She expressed pleasure that the practitioner was in a position to put it on the market.

[28] The Tribunal having considered all of the evidence has reached the conclusion that the practitioner's conduct in continuing to operate OTW while attempting to effect a sale of the business does not reach the threshold test for misconduct, unsatisfactory conduct or negligence or incompetence. There were four important factors that have emerged from the evidence which are:

(a) The wishes of the deceased as recorded in the practitioner's record of 1 April 2009.

(b) The inability of the residuary beneficiaries to operate the business and their agreement to market the business for sale.

(c) The thoroughness with which the practitioner approached the sale of the business albeit that the eventual sale did not produce a profitable result.

(d) The experience that the practitioner has in respect of small businesses and his expertise in computerisation as evidenced by the systems he has in place for the running of his own practice.

[29] There is the possibility of criticism that his enthusiasm for computerisation and interest in the website may have clouded his views, but the Tribunal has not found that to be a matter that elevates his decisions to be misconduct under any of the charges.

[30] Ultimately the practitioner faced the dilemma that a transfer of shares to the beneficiaries would result in the failure of OTW which he measured against an attempt to sell it as a going concern.

As to issue three – failure as trustee to respond to requests for information

[31] The allegation is that the practitioner failed to heed concerns expressed by T and Belinda O'Brien and to respond to them. T requested details of his costs by emails sent on 15 June 2009, 6 July 2009, 14 August 2009, 9 September 2009, and 23 September 2009. Belinda O'Brien also made a request on 24 September 2009.

[32] The practitioner's response was that the first record he held was for the request made by T in her email of 15 June 2009. He said that the email was discussed with her at a meeting he had with her on 17 June 2009. He said that his memo for that meeting records that he went through the email with her. He said that he informed T of his hourly rate which was then $250 plus GST along with the hourly rate of his staff and that his firm charged on a blended rate. He said that he had shown her his firm's web page which had the terms of engagement and client conduct rules on it. He said that it was not possible to give an estimate of costs because the extent of the work that would ultimately be required was not known.

[33] T did not agree that she had been shown the web page or that the hourly fee had been discussed. She did say that earlier she had enquired directly of the practitioner about his fees and was told that he charged $250 per hour.

[34] The practitioner did say that subsequent requests were not specifically answered until his report with the first bill of costs dated 22 September 2009. It had been his intention to provide a comprehensive report which he said he was able to prepare and do on 22 September 2009. He had been out of New Zealand between 16 July and 7 August 2009.

[35] As to the complaint that he refused to provide T access to the financial records of OTW, he said that she had full access to the records while working in Auckland alongside the manager Ms B. She appointed Belinda O'Brien as her attorney on 18 June 2009. That appointment remained after T returned overseas.

[36] He said that he answered all requests from Belinda O'Brien in a timely manner and did not know the true basis of her allegation.

[37] He said that matters did become somewhat complicated after complaints to New Zealand Law Society had been received on 21 October 2009 from T and Belinda O'Brien on her behalf. He noted that T had in her email of 15 June expressed satisfaction with his work and the personal effort he had made. She expressed faith in his concern for her situation.

[38] The Tribunal is not satisfied that the practitioner failed to respond to requests for information in a way that could lead to a finding that he was guilty of misconduct or of unsatisfactory conduct or of negligence or incompetence. It has taken into account the meeting the practitioner had with T on 17 June 2009 and the full report he provided on 22 September 2009. It has also taken into account the involvement that T had in the early stages of the administration of the estate where she actively participated in decisions about the future of OTW and the engaging of a manager/joiner for the company.

As to issue four – the reasonableness of the practitioners costs

[39] The allegation is that the practitioner rendered costs to the estate that were not fair and reasonable because the work he carried out was not necessary.

[40] The Committee has acknowledged that the practitioner's initial actions in administering the estate, looking at and assessing the company and appointing an interim manager were sensible. It asserts that by early July 2009 he was in a position to assess and take advice as to whether or not a sale of the company for any value

was achievable. That he continued with the attempted sale of the company was an action that was not in the best interests of the beneficiaries. In the end he was the only person to benefit by reason of the bills which he rendered.

[41] The practitioner's bills were examined by both David Murphy and Mark Chiu. Mr Murphy examined the bill rendered by the practitioner on 22 September 2009 which was in the amount of $22,150 plus GST and disbursements (a total of $25,171.93). He found that the existence of the company added considerable complexity to the administration of the estate. He was however critical of the practitioner's decision to persist with the sale of the company. He considered that futile attempts to sell it after early July 2009 were not reasonable. He considered that an appropriate fee for work done to 22 September 2009 would be $15,000 plus GST and disbursements.

[42] Mr Murphy said that the practitioner's hourly rate was reasonable and unexceptional, but considered that the fee charged in the light of time spent was too high having regard to the value of the estate. It was put to him by counsel for the practitioner that if the consensus was that the practitioner's decision to continue to operate the business was reasonable he could restore the fees charged. Mr Murphy's response was that there would be other factors that would colour his view including the low value of the estate and that the business had very little value.

[43] Mr Chiu assessed two bills rendered by the practitioner on 25 February 2010. The first bill (administration of the estate) was for the amount of $6,045 plus GST and disbursements which Mr Chiu reduced to $1,800 plus GST and disbursements. The second bill related to the sale of OTW. It was for the amount of $4,727.50 plus GST and disbursements. Mr Chiu reduced it to $2,000.00 plus GST and disbursements. He considered that the practitioner's hourly rate was modest for a lawyer of his experience. He went on to say that much of the work undertaken could have been done by members of his firm at a lesser rate. He was also critical of the practitioner's decision to continue to operate OTW and his endeavours to sell it.

[44] The Tribunal has already found that the practitioner's decision to continue the running of OTW and endeavour to sell it was not unreasonable in the circumstances of the estate and the position of the beneficiaries. It is not necessary therefore to set

out in detail the reasons advanced by Mr Chiu for his opinions about the fairness or reasonableness of the practitioner's costs.

[45] In his defence to the issue of costs the practitioner made the following comments:

(a) The costs he rendered were based on a blended hourly rate for attendances by himself and his staff and in terms of his firm's letter of engagement between him as executor and trustee and his firm.

(b) That the level of the rates was set so that it would remain reasonable irrespective of the outcome of the work undertaken. He considered that he worked diligently including operating OTW in order to facilitate a sale of the business.

(c) That he has not as yet taken any costs. Invoices have been issued but there has been no transfer of the fees from the trust account of the estate to the office account.

(d) That he has not charged any fees after the invoices of February 2010 were rendered even though there have been attendances since leading to the winding up of the affairs of the estate and of OTW.

(e) That the complaints were made without any prior discussion with him or attempt to reconcile with him any concern held before taking what he described as a drastic step.

[46] The practitioner in answer to questions said that his hourly rate took into account the factors under Rule 9. His fees took into account the cost of operating OTW, the prospect of a profit at the end and the value of the estate along with the difficulty created for it because of the business.

[47] The Tribunal concluded that the charge of misconduct, or unsatisfactory conduct or negligence or incompetence in respect of the fees rendered was not established.

[48] It took into account that it was reasonable for the practitioner to carry on the business of OTW and try to sell it. His hourly rate was modest and there was a willingness to discuss the fees had an approach been made to do so. Before us, the practitioner said that he had made an offer to mediate the matter but that had been rejected.

[49] For the reasons set out in this decision, the Tribunal has held that the charges as presented must fail.

Regulated services

[50] The Tribunal received submissions from both counsel on the question as to whether the practitioner's actions and decisions as the executor and trustee of the deceased's estate were regulated services for the purposes of charges under s 241 of the Lawyers and Conveyancers Act 2006.

[51] Counsel for the Committee submitted that the actions, decisions and services were regulated services. Reference was made to decisions by the Legal Complaints Review Officer which held that where the services provided by a lawyer are services that it is usual for a lawyer to provide and are provided in conjunction with legal work as defined, they are then properly considered to be of and incidental to legal work and therefore legal work which is covered by the term "regulated services".

[52] Counsel for the practitioner opposed the submissions of the Committee. He referred to the decision of the Court of Appeal in *Hansen v Young.*[1] In that decision the Court referred to the different capacities that a solicitor has in the dual role of solicitor/trustee. It held that the responsibility for the administration of an estate was with the executor/trustee and not with the solicitor. There was thus a distinction to be drawn between negligence of the solicitor arising out of work done in that capacity and negligence of the solicitor arising out of work undertaken in the capacity of executor/trustee.

[1] [2004] 1 NZLR 37.

[53] In this case, the Tribunal has found that the charges against the practitioner have not been proved. It has therefore decided that it is not necessary or useful to discuss and/or determine the issue in this decision.

[54] Having regard to its earlier decision to grant an interim order directing the non-publication of the practitioner's name and that the charges have not been proved the Tribunal made a final order prohibiting publication of the practitioner's name.

[55] The Tribunal s 257 costs payable by the New Zealand Law Society are certified at $11,987.

DATED at AUCKLAND this 8th day of December 2014

BJ Kendall
Chairperson

Appendix A

CHARGES

The Wellington Standards Committee 2 of the New Zealand Law Society (the **Standards Committee**) charges **CLS**, Barrister and Solicitor of Wellington, in relation to the administration of the Estate of Mr H with:

(a) misconduct; and

(b) in the alternative unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; and

(c) in the further alternative negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute.

The facts and matters relied upon, and the particulars of the charge, is set out below. Reliance is also placed on the affidavits of T, Belinda O'Brien, David Edward Murphy, Mark Chiu and Ms B.

FACTS AND MATTERS RELIED UPON

1. CLS was admitted as a barrister and solicitor of the High Court of New Zealand on 7 February 1974. He currently holds a practicing certificate as a Barrister and Solicitor under the Lawyers and Conveyancers Act 2006 (the **Act**).

2. CLS is a sole practitioner.

3. In 2004, a solicitor employed by CLS prepared a will for Mr H, an existing client of CLS. The will was signed by Mr H on 3 August 2004.

4. At that time, Mr H was the Director and sole shareholder of OTW, a company based in Auckland and involved in the manufacture of shelving systems.

5. In his will Mr H appointed CLS as his sole executor and trustee. He left the shares in OTW to his trustee to be held on trust for his two children, T and F. The residue of the estate was to be held by his trustee to pay all debts and the remainder then held for his two children in equal shares.

6. Mr H died on 18 May 2009.

7. At the time of his death, Mr H assets were 100 shares in OTW and a life assurance policy worth $30,936.

8. For the 2008/2009 year, OTW had a net income of $5,533 and Mr H had drawn a total gross salary from OTW of $8,005.

9. As at 31 March 2009, there were shareholder advances to the company of $71,897 and OTW had a negative equity of $4,665.

10. On 4 June 2009, CLS transferred the shares in OTW into his own name and appointed himself as the sole Director of OTW.

11. In the weeks after Mr H's death, CLS consulted with T and then employed a Manager, Ms B on a three month contract to continue to operate OTW in order to fulfil existing orders.

12. On 15 June 2009 T emailed CLS seeking details of his fees to date and a copy of the accounts for OTW.

13. In mid June CLS told T that he would speak to agents and brokers within weeks about the sale of OTW. T also provided CLS with the contact details of two prospective buyers for the company.

14. Probate was granted on 27 July 2009.

15. From 3 August 2009 Ms B emailed CLS regular reports setting out details of work she had completed for OTW.

16. On 14 August 2009 T emailed CLS to advise that she was still seeking details of his fees and a copy of the accounts for OTW.

17. On 4 September 2009, CLS advised T that he would shortly be in a position to provide some accounts for OTW.

18. On 9 September 2009 T emailed CLS expressing her concern that prospective buyers for the company had not been followed up, that the business was not yet on the market and she had not been provided with the details of his costs to date despite numerous requests.

19. On 23 September 2009 T emailed CLS seeking details of his fees and a copy of the accounts for OTW. She also enquired why CLS was exposing the company to further liability including hiring an additional part-time employee when the accounts for OTW had still not been obtained.

20. CLS responded that he would be providing a report to the Estate within 10 days.

21. On 24 September 2009 Ms O'Brien, T's attorney, advised CLS that she had grave concerns about his conduct in resolving the estate and then requested detailed information from him, including a full breakdown of costs to date, of the estate assets and liabilities and of the business assets and liabilities.

22. On 25 September 2009 CLS reported to the beneficiaries (by letter dated 22 September 2009), advising that OTW was continuing to trade to enable the best possible sale price to be achieved, which he stated was in accordance with Mr H's instructions to him prior to his death.

23. CLS rendered an account dated 22 September 2009 in relation to the administration of the estate for $22,150 plus GST and disbursements (a total of $25,171.93).

24. T made several requests to CLS for the shares in OTW to be transferred to the beneficiaries, including on 8 October 2009.

25. By letter dated 9 October 2009, CLS told T that he was unable to transfer the shares because in the will OTW was incorrectly referred to as OWS rather than OTW. He said that the gift of shares under the terms of the will therefore failed, that the shares fell into the residual estate and that this would effectively be what could be achieved from the sale of the business

26. On 13 October 2009 Ms O'Brien emailed CLS questioning his view that the share gifting failed simply because of the omission of the word "S" in the company's name in the will.

27. In October and November 2009, CLS advertised OTW for sale. Tenders closed on 11 December 2009.

28. On 2 December 2009 CLS emailed Ms B attaching a copy of the accounts prepared by OTW's accountants and noted that they showed that OTW had been operating at a loss for the six months to 30 September 2009.

29. On 24 December 2009 Ms B contract with OTW was terminated.

30. On 7 January 2010 T emailed CLS to ask whether OTW had been sold or closed down yet.

31. CLS responded by email on 9 January 2010 that no formal offer to purchase OTW had been received, but that he was in discussions with two prospective buyers for the IP of the company, one of whom had offered each of the beneficiaries 10% of any profits made by the new company as consideration for the sale.

32. On 10 January 2010 CLS emailed T to advise that shareholding in the new company would enable the beneficiaries to receive some payment in the future if the purchaser was able to make a go of the business and was the only way he had been able to realise some funds from the company for the estate and the beneficiaries.

33. T replied on 11 January 2010 requesting a copy of the agreement before CLS signed any document on her behalf.

34. On 15 January 2010 CLS emailed T to advise that as Executor and Trustee of the Estate he had entered into a contract to transfer those parts of OTW wanted by the purchaser. A copy of the agreement was attached.

35. On 25 February 2010, CLS reported to the beneficiaries. He confirmed that no offers had been received for the purchase of OTW and advised that he had accepted an offer for the transfer of the intellectual property of OTW on terms that no payment would be made by the purchaser, but that the two beneficiaries would be 10% shareholders in the new business.

36. CLS also rendered an invoice for $7,019.72 for the administration of the estate and an invoice for $5,547.36 for the sale of OTW. CLS noted that this left a shortfall in the estate of $17,076.96 which he would have to write off.

37. On 12 September 2011 CLS reported to the beneficiaries enclosing the final statement of account relating to the estate. CLS noted that he had unbilled attendances of $1600 relating to the estate administration and OTW, but that there was no point in rendering a bill for this because the estate had no funds.

PARTICULARS OF CHARGE

Failure to transfer the shares in OTW to the beneficiaries

38. The will expressly stated that the shares of OTW were to be transferred equally to the two beneficiaries.

39. T wrote to CLS specifically asking for the shares to be transferred, but CLS refused to do so.

40. There was a clear drafting error in the will as to the name of the company, which could have been corrected by an application to the High Court pursuant to section 31 of the Wills Act 2007. As the will had been drafted by a solicitor employed by CLS, the costs of such an application should have been borne by the firm.

Refusal to answer a request for an interim invoice and provide an estimate of costs

41. Pursuant to Rule 3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2009, a lawyer is required to 'respond to inquiries from the client in a timely manner".

42. Between early June 2009 and late September 2009, T made numerous requests to CLS seeking an estimate of costs and an interim bill relating to the administration of the estate.

43. CLS eventually responded by letter dated 22 September 2009, by which time the costs for the estate administration were already $25,171.93.

44. In responding as he did, CLS breached Rule 3.2 by failing to respond to his client in a timely manner.

Refusal to provide access to OTW financial records

45. Pursuant to Rule 3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2009, a lawyer is required to 'respond to inquiries from the client in a timely manner".

46. T made numerous requests for copies of bank statements and other records for the company.

47. In responding as he did, CLS breached Rule 3.2 by failing to respond to his client in a timely manner.

Continuing to operate the company and continuing to attempt to sell it

48. CLS should have been aware, given the size and nature of OTW that if any sale was to occur, it needed to happen as soon as possible.

49. Rather than engage a broker to try and sell OTW, CLS undertook this task himself. He did not list OTW for sale until October 2009, with tenders closing on 11 December 2009.

50. Once it became clear that a quick sale was not going to be achieved, CLS should have acted to wind the company up and settle the estate promptly.

Charging a fee that was not fair and reasonable

51. Pursuant to Rule 9 the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2009, a lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard to the factors set out in Rule 9.1.

52. CLS also oversaw the running of the business himself both before and then during the period of time he tried to sell it. By continuing to run OTW, CLS incurred significant costs and ultimately depleted the entire assets of the estate, contrary to the best interests of the beneficiaries.

53. The conduct of CLS in administering an Estate of this size and nature over an extended period of time, thereby invoking significant costs was not fair and reasonable.

54. CLS's conduct in relation to the administration of the Estate of Mr H was separately or cumulatively:

    (a) misconduct; and

    (b) in the alternative unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; and

    (c) in the further alternative negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute.