LCRO 203/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [XX] Standards Committee No. [X]
BETWEEN	**[AB]** Applicant
AND	**[IJ] OBO [EF]** Respondent

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

Introduction

[1] Ms [AB] has applied for a review of the determination by [XX] Standards Committee No. [X] pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 that there had been unsatisfactory conduct on her part.

[2] The determination of the Committee related to complaints by Mr [IJ] about two other practitioners:- [MN], a junior solicitor working for [Law Firm A], the firm in which Ms [AB] was a partner and Ms [CK], another partner in the firm.

[3] The Committee determined to take no further action in respect of the complaints about Ms [MN] and Ms [CK]. This application is in respect of the finding of unsatisfactory conduct, and penalties ordered, against Ms [AB].

[4] The Committee invited submissions from Ms [AB] as to whether or not publication of the decision and her identifying details should be made. In a subsequent determination dated 12 March 2015 the Committee determined that the facts of the

matter should be published but not any details that might lead to the identification of Ms [AB] or any of the other parties involved.

[5] Ms [AB] does not challenge the finding of unsatisfactory conduct against her and confines her application for review to the censure and the level of the fine and costs orders against her. I must nevertheless consider all of the matters relating to this complaint, including the finding of unsatisfactory conduct.[1]

Background

[6] Mr [IJ]'s stepdaughter ([EF]) was the residuary beneficiary of her father's Estate. Her father was living in Australia at the time of his death on [Day Month] 2012. [EF] lived in New Zealand.

[7] [EF]'s father [(Mr RF)] had appointed his sister ([EF]'s Aunt [TF])[2] who also lived in Australia to be executrix of his will. It would seem the relationship between [EF] and her aunt was strained and little, if any, progress was made by Ms [TF] in administering her brother's Estate.

[8] Mr [IJ] wanted to assist [EF] in "communications and negotiation"[3] with [TF] to progress the administration of the Estate, and consulted Ms [AB] on 17 January 2013 following referral by his employer.

[9] Ms [AB] provided a letter of engagement to Mr [IJ] on that day. The standard form letter of engagement provided for a summary of the legal services to be provided by the firm to be inserted, but that part of the form was not completed. However, the letter is headed "General advice re Estate [RF]".

[10] In his letter of complaint[4] Mr [IJ] says he attended an appointment at [Law Firm A] with his wife and [EF] in February 2013 where they spoke with Ms [AB] and Ms [MN]. It is acknowledged by all parties that Ms [MN] was the person primarily engaged on this file working under the supervision of Ms [AB]. Although there is a difference between Mr [IJ]'s recall of the date when he met with Ms [AB] and Ms [MN], and the file notes and statements made by Ms [AB], it is accepted and acknowledged by all parties that there was a meeting between the persons Mr [IJ] refers to in his complaint.

---

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209.
[2] In this decision I refer to [EF]'s Aunt as Ms [TF].
[3] Email [IJ] to Lawyers Complaints Service (20 January 2014).
[4] Above n 3.

[11] On 25 March Ms [AB] sent an email to Mr [IJ]'s employer thanking him for referring Mr [IJ] to her (the firm) and advising she had obtained instructions direct from [EF] and would be continuing with the file in [EF]'s name. An arrangement was made with Mr [IJ]'s employer for an invoice relating to the fees incurred to date to be rendered to Mr [IJ]'s employer.

[12] All attendances on the file up until then would seem to have been through Mr [IJ] and he continued to assist and advise [EF] thereafter, communicating with Ms [AB] and Ms [MN].

[13] After 25 March Ms [AB] regarded [EF] as her client. However Mr [IJ] remained an equal, if not the main contact with Ms [MN] and Ms [AB] for matters relating to the file.

[14] The first direct contact with [TF] was by way of a letter from Ms [AB][5] in which she sought the following information about administration of the Estate:

- a copy of the will.
- whether [TF] had instructed a solicitor in the administration of the Estate.
- whether a grant of probate was being sought.
- a list of the assets of the Estate; and
- what steps had been taken to realise the assets of the Estate.

[15] Prior to sending that letter Ms [MN] had been corresponding with insurance companies and other firms of solicitors in Australia to ascertain the requirements to enable insurance policies held by [RF] to be realised. It was accepted that the proceeds of the policies were payable to [EF] as the residuary beneficiary.

[16] Information received from the insurance companies and the lawyers consulted indicated it would be necessary for probate of [RF]'s will to be obtained. In the letter of 18 February to Ms [TF] Ms [AB] also stated:

> [EF] has provided us with correspondence in relation to two insurance policies; one from North and one from TWUSUPER. In order for these insurance policies to be redeemed a copy of sealed probate is required. This will involve you in the administration process which could well be lengthy and arduous.

---

[5] A draft of the letter was first sent to Mr [IJ] and [EF] on 31 January 2013 to review and approve. The letter on file is dated 18 February.

> You may wish to consider renouncing your appointment as executor to relieve yourself of these duties. If you were to do so, an application would then need to be made by [EF] for Letters of Administration.

[17] On 8 March, Ms [TF] sent the following email to [Law Firm A]:

> As of this moment I wish to resign from my duties as the Executor of [RF]'s Estate. [EF] expressed an interest in taking over so please proceed to prepare all necessary paperwork to facilitate this as quickly as possible.

[18] On 26 March Ms [MN] made contact with several law firms in Australia seeking advice as to what was required to have Ms [TF] renounce probate and for [EF] to be appointed as administrator. One of those firms was [GH Lawyers] who responded the following day with advice as to what was required and an estimate of costs.

[19] Shortly afterwards, on 29 March, Ms [AB] received a letter from [LW] of [OP Solicitors]. [LW] advised he had been instructed by Ms [TF] to prepare and file an application for probate. The letter contained the following statements:

> 1. Probate is generally required in Queensland, but that is not necessarily the case in every case. In simple Estates where there is unlikely to be a dispute, and in which the banks and other institutions with whom the deceased had money invested are prepared to release those investments without probate, the Estate can be dealt with without probate. In those circumstances the Executor has a discretion, whether to obtain probate or not. In this instance, where probate wasn't required in order to deal with the Estate's assets, and there was no or little likelihood of a dispute, my client elected to administer the Estate without probate.
>
>   This was one of those cases. When her brother died my client consulted a solicitor, who confirmed the information above. He also told her what it would cost to obtain probate, and she (quite rightly, in my opinion) elected to proceed to administer the Estate without probate, to avoid unnecessary expense.
>
> 2. I haven't mentioned it above, but one of the other instances in which probate is required is when any other party with an interest in the Estate, including the beneficiaries, request probate. That is obviously the case in this case, and even though probate is not required to deal with the Estate assets, my client has elected to obtain probate, in accordance with your client's wishes.
>
> 3. My client *is* aware of the duties of an Executor, as set out in the third paragraph in your letter, and has to the best of her ability, fulfilled her obligations in that regard. It must be noted, however, that: …

[20] [LW] went on to provide a detailed report as to how each of the Estate assets were being, or would be, dealt with.

[21] It would seem that this letter from [OP Solicitors] was not sent on to [EF] by [Law Firm A], as on 16 April Ms [MN] sent an email to [EF] apologising for a delay in communicating with her and forwarding a copy of Mr [RF]'s will, which had been sent to her by [LW] with his letter.

[22] Ms [MN] also advised that Ms [TF] was not going to renounce her appointment as executor and was applying for probate.

[23] In the meantime, Mr [IJ] had copied Ms [MN] into an email he had sent to Ms [TF's brother ([JF]) who was acting as an intermediary between [EF] and her aunt. In that email Mr [IJ] says:

> Hi [JF]
> As you are aware [TF] has resigned as executor of [RF's] Estate. That resignation has been accepted by [EF]'s solicitor. …

[24] [JF] sent that email to his sister [TF] who in turn sent it on to [LW] who then communicated with Ms [AB] to confirm that Ms [TF] was not renouncing probate.

[25] When he learned of that Mr [IJ] was angry at the delay in information being passed on to him and [EF], and made his views known.

[26] Some delays then occurred through inactivity by [LW], adding to [EF]'s frustrations. On 20 May Mr [IJ] sent a lengthy email to Ms [MN] raising many questions of a practical nature relating to Estate assets. Examples of the issues raised were:

- questions about receipts for repairs and accessories for a motor bike owned by Mr [RF].
- questions about receipts for repairs to a vehicle owned by Mr [RF].
- questions about a payment of $1,000 for car repair to [JF] some five weeks prior to the repairs being affected.
- querying why monetary bequests had been paid to all beneficiaries except [CF].
- complaints about a lack of activity with regard to a 'house' in a caravan park owned by Mr [RF]

[27] Mr [IJ] included the following statement in his email which is indicative of his concerns:

> For a relatively small Estate this is taking an unbelievable length of time to settle. I cannot believe the barriers that are constantly put in place with every issue. …

[28] In response to a follow up email on 21 May by Ms [MN] to [LW], [LW] referred to "developments" in the form of a telephone contact with [TF] by "someone known to [[EF]] and to her stepfather … accusing [[TF]] of stealing from [[EF]] …".[6] [LW] expressed concerns about the caller's manner in the telephone conversation referring to "… expletives … flying fast and furious and the caller … speaking/shouting in a very aggressive manner". He also referred to threats that had been made against Ms [TF].

[29] Mr [IJ] advised he/they had no knowledge of these communications and in a four and a half page summary dated 29 May Mr [IJ] recorded the numerous issues with regard to administration of the Estate, referring to it as a FIASCO and registering "… the huge amount of stress [these] delays and problems with administration of the Estate …" had caused to [EF] and her family. He continued:

> [EF]'s health has now been seriously affected by this and it continues to worsen as a result.

[30] That note from Mr [IJ] followed the expiry of a deadline of 10 May given by [Law Firm A] to [LW] for information or an adequate explanation for the delays "… so that [[EF]] can be assured that the Estate is being administered in a timely and expeditious manner".[7]

[31] The arrangement between Mr [IJ]/[EF] and [Law Firm A] was that if adequate progress in administering the Estate had not occurred by 10 May then [GH Lawyers] would be instructed to take steps to have Ms [TF] removed as executor.

[32] In the meantime, Ms [MN] continued to correspond with the insurance companies endeavouring to progress realisation of the policies. This included correspondence with the Australian Tax Office to get a Tax File Number for the Estate which was required by the insurance companies. This correspondence had been ongoing, with slow progress being made.

[33] In a letter dated 4 June, but sent by email on 6 June, Ms [AB] wrote to [GH Lawyers] to instruct them on behalf of [EF] "in relation to an Application for Removal of [TF] as executor". She provided a detailed summary of the lack of progress by Ms [TF]

---

[6] Email [LW] to [MN] (21 May 2013).
[7] Email [AB] to [OP Solicitors] (23 April 2013).

in administering the Estate and advised [GH Lawyers] to communicate directly with [EF] and Mr [IJ] but requested she be kept advised as to progress.

[34] However, on 31 May, [LW] had sent an email to Ms [MN], but addressed to Ms [AB], in which he:

- enclosed a copy of probate which had issued on 8 May.
- provided a summary of assets and liabilities.
- enclosed various forms for [EF] to sign to enable vehicles owned by her late father to be transferred to her.
- enclosed further documents for signature by [EF] to effect the transfer of an interest in a property owned by Mr [RF].
- gave a detailed report on administration of the Estate; and
- expressed the view that little remained to be done to finalise the Estate.

[35] A further letter from [LW], addressed and sent in the same manner, was sent on 5 June, in which [LW] sought instructions about [EF]'s views on certain matters relating to administration of the Estate. It appears that while Ms [MN] forwarded these letters to [GH Lawyers] she did not put copies of the correspondence on the file.

[36] Mr [IJ] corresponded with Ms [AB] on 5 June on the basis she remained instructed. On 13 June [GH Lawyers] communicated directly with [EF] by email enclosing the firm's costs agreement. The solicitor advised the firm was unable to commence any work until the costs agreement was signed and returned.

[37] On 9 July [GH Lawyers] wrote to [EF] expressing concerns at her instructions to take steps to have Ms [TF] removed as executor. The primary reason for concern was that the letter of 31 May had not been dealt with by [Law Firm A] and the documents sent with that email had not been signed by [EF]. They also advised that the Court would not approve an application for removal of an executor within 12 months of the date of death.

[38] I have not been able to locate a copy of the correspondence from [Law Firm A] dated 8 July, referred to in the letter from [GH Lawyers] of 9 July. However, on receipt of a copy of the letter of 9 July Ms [AB] expressed surprise at its tenor. She suggested [EF] herself request a copy of the email of 31 May from [GH Lawyers], which it was

alleged, had been sent to [Law Firm A]. She denied the firm had received any email from [LW] on 31 May. She also observed that [LW] had not followed up on that letter when the documents which were required to be signed by [EF] had not been received some six weeks later.

[39] There is a gap in the files received from Ms [AB], for the period between July and September 2013, but it would seem that administration of the Estate did not proceed rapidly (or at all), and [EF] expressed her frustrations in an email to Ms [AB] on 6 September following [LW]'s apparent failure to respond to correspondence from Ms [AB].

[40] Mr [IJ]'s frustrations were expressed in an email[8] to Ms [CK], a partner in the firm to whom he had directed his complaints about matters relating to the Estate. He says:

> Why the hell does [LW] not have to respond to [Law Firm A]'s and [EF]'s requests?????????? The request to sign the house over to [EF] has been ignored for over seven months. This is just a continuation of the constant frustration we have encountered to date and the reason I have documented my total displeasure to you personally.

[41] In another email[9] Mr [IJ] says:

> You are telling me NOW, after dealing with [Law Firm A] for eight months, that [LW] does not have to respond to [Law Firm A]'s and [EF]'s requests. Now I am furious. WHY were [EF] and I not told [LW] did not have to respond to your requests at the very beginning ?????

[42] It would seem that this state of affairs continued throughout September into October, and the relationship between Mr [IJ]/[EF] and Ms [AB]/Ms [MN] appeared to deteriorate as time went by with only slow (if any) progress being made in the administration of the Estate.

[43] Assurances from Ms [AB] and her assistant that letters to [LW] expressing dissatisfaction with progress were being drafted were not fulfilled adding to Mr [IJ]'s annoyance. It would seem that the promised draft was not finalised until towards the end of November.

[8] Email [IJ] to [CK] (6 September 2013).
[9] Email [IJ] to [CK] (9 September 2013).

[44] Mr [IJ] detailed his complaints in an email to Ms [CK] on 20 December and terminated the firm's instructions shortly thereafter. His complaint was received by the Lawyers Complaints Service on 24 January.

Mr [IJ]'s complaints and the Standards Committee determination

[45] Mr [IJ]'s complaints were that Ms [AB] had:[10]

(a) wrongly claimed she was familiar with Australian law;

(b) failed to honour her promise that she could get copies of Mr [RF]'s bank statements direct from the bank;

(c) failed to meet her promise to provide a letter on an agreed date;

(d) wrongly claimed she had emailed a letter to her office whilst she was away on leave;

(e) denied that [Law Firm A] had received an email dated 31 May 2013 from [LW].

[46] In its determination the Standards Committee was extremely critical of Ms [AB]. The words used by the Committee to describe her conduct included:

- naïve.
- inexperienced.
- incompetent.
- unacceptable.
- unprofessional.

[47] The tenor of the Committee's descriptions of Ms [AB]'s conduct is best reflected by including here a number of paragraphs from the Standards Committee determination.

> 17. The Committee considered the information provided and was of the view that a lawyer practicing in New Zealand dealing with trusts, estate administration and practice would expect to be familiar with the legal

[10] The complaints are as set out in paragraph 7 of the Standards Committee determination.

principles of trusts, estates and executors. Such a lawyer would not, however, claim to be familiar with the practical legal processes, procedures and steps applicable in Australia to get in estate assets and complete administration.

18. Ms [AB] subsequently claimed that she was not familiar with Australian law. The Committee, however, considered that is a misconception and what is clear is that neither she nor Ms [MN] were aware of the processes, procedures and steps applicable in Australia. In particular, they did not know that it was not necessary for the executor to obtain probate to be able to administer the estate in Queensland, that they would not be able to obtain the deceased's bank statements from the bank and that they could not take effective action from New Zealand to carry out the legal services required in an effective or competent manner.

19. The Committee noted that a competent and diligent lawyer practicing in New Zealand on the facts presented to Ms [AB] would have acknowledged that he or she would be unlikely to be able to provide the legal services sought in an effective, competent or timely manner and would have either agreed to instruct a recognised competent firm in Australia to carry out the services sought or obtain the details of such a firm and recommend that [EF] instruct that firm to carry out the legal services she required in Australia.

20. The fact that Ms [AB] accepted instructions to act makes it credible to the Committee that [EF] did receive the assurances she asserts she received from Ms [AB] of her competence and expertise. That the assurances were given is further supported by the letter of engagement which states only that legal services Ms [AB] expects to provide:

    - Estate [RF]

    This fails to provide information about the work to be done, who will do it and the way the services will be provided, the steps and the processes that are to be undertaken. There is no estimate or quote of costs for the work to be carried out.

21. Although the Committee considers that there may have been some minor advantage to Ms [EF] as a result of the letters written to the executor in February 2013 to make progress in the administration, the warning to the executor about *"being held personally liable for any loss incurred by the estate"* is unlikely to have assisted creating a good working relationship.

…

23. As such, the Committee was of the view that both Ms [AB] and Ms [MN]'s further actions were inept and did not address the obvious difficulty that letters, requests, demands from lawyers in New Zealand to the lay executor and to her solicitors to do as demanded would be unlikely to be actioned or responded to, much less in a timely manner. Furthermore, that the continuing allegations and insinuations of improper conduct only added to the costs being incurred by the estate with no benefit to the client. As Ms [AB] subsequently acknowledged, the firm members were in reality powerless to advance matters and could only pressure the estate solicitors.

24. The advice to [EF], and the instructions to the Australian solicitors in June 2013, to file proceedings to have the executor removed with little regard for the legal principles applicable was particularly naïve, inept and incompetent.

> 25. As the Australian solicitors advised, predictably, that on the facts outlined by [Law Firm A], the prospects of succeeding on the proposed application to remove the executor were extremely slim, that the most likely outcome would be that the application would be dismissed, that the executor's costs, some A$20,000, would come out of [EF]'s share in the estate and that their costs to take the case to Court would amount to A$18,320.
>
> 26. The Australian solicitors gave the further obvious advice that a residuary beneficiary is not entitled to disclosure of source documents such as the deceased's bank statements and certainly not without issuing proceedings against the executor for failing to account and that non-disclosure was not a grounds for removal.
>
> …
>
> 30. A lawyer competent in this area of the law (as acknowledged in the submissions for Ms [AB]) can guide and control the client with timely advice on the processes, timeframes, and procedures and with carrying out the legal services requested competently and promptly. The Committee was of the view that had [EF] been properly informed, advised and guided by a New Zealand lawyer [she] should have been able to deal directly with the solicitor handling the estate administration.

[48] The Committee then made the following comments about the potential fees to be charged by [Law Firm A]:

> 33. There is also no evidence from the files that would support a claim that [EF] received legal services from [Law Firm A] which would warrant charges of $12,000 or reduced charges of $6,000 or further reduced charges of $6,000 less A$1,500, which was for advice from Australian lawyers which a competent lawyer in New Zealand could have advised simply and easily with little cost.
>
> …
>
> 39. An account was rendered on 25 March 2013 for a fee of $750. No further fee account has been rendered. On a consideration of the files and of the effective time spent the Committee was of the view that [EF] would be justified in requesting the NZLS to test any fee rendered for more than a further $2,250.

[49] Its finding in respect of Ms [AB] was:

> 40. After considering the matter and holding a hearing the Committee is of the view that Ms [AB] provided legal services that fell well short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. In particular, Ms [AB] failed to properly supervise Ms [MN], was negligent and committed inept, unacceptable and unprofessional errors and omissions amounting to unsatisfactory conduct.

Review

[50] An applicant only hearing took place in Auckland on 12 August 2016. Ms [AB] attended in person and Mr [IJ] by telephone. Prior to the hearing Ms [AB]'s counsel (Mr [VL]) had provided written submissions. Mr [IJ] had provided comments in reply in writing.

Mr [IJ]'s allegations of misrepresentation

[51] In his complaint Mr [IJ] asserted that Ms [AB] had made the representations set out in paragraph [45] above. With his reply comments to Mr [VL]'s submissions, Mr [IJ] provided affidavits from himself, his wife and [EF], in which all three depose that Ms [AB] had made these representations at their initial meeting.

[52] In her reply to the complaint Ms [AB] said:[11]

> I certainly did not state to Mr [IJ] or Ms [EF] that I was familiar with Australian estate law. I am most emphatically not familiar with overseas estate law. On occasions in the past I have sought the assistance from lawyers in other directions.[12]

She wondered if her words had been misinterpreted.

[53] When Mr [IJ]/[EF] consulted Ms [AB] they explained the difficulties they were having with Ms [TF] and their concerns that "she intended to delay the settlement process as long as possible to deplete the estate funds so [EF]'s inheritance would be less".[13]

[54] At that stage no specialised knowledge of Australian probate law was required. What was required, and what Ms [AB] and Ms [MN] did, was to communicate with Ms [TF] and remind her of her obligations to administer the estate in terms of the will.

[55] The correspondence from [Law Firm A] initially resulted in Ms [TF] advising she intended to renounce probate. Shortly thereafter she instructed [LW], who advised that Ms [TF] intended to apply for probate and proceed with administration of the estate. At that stage it would have been expected that matters would progress properly and in an orderly manner. Unfortunately that did not occur.

[56] Unsatisfactory conduct is defined in s 12(a) of the Lawyers and Conveyancers Act 2006 as being conduct of a lawyer which falls short of the standard of competence

---

[11] The complaints are as set out in paragraph 7 of the Standards Committee determination.
[12] Letter [AB] to Lawyers Complaints Service (17 February 2014) at 4.
[13] Letter [IJ] to NZLS (20 January 2014).

and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Rule 3 of the Conduct and Client Care Rules[14] requires a lawyer to "always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".

[57] The language used by the Committee in its determination goes beyond the language used in the Act or the Conduct and Client Care Rules. Use of the words such as naïve, inept, and inexperienced, all carry a somewhat subjective tone to them which results in the determination having a personal and pejorative tenor to it. This is referred to by Mr [VL] in his submissions as an "overly-critical tone evident throughout the determination which has caused Ms [AB] considerable stress". Mr [VL]'s criticism of the tone of the determination is valid.

[58] The Committee considered that only a "minor advantage"[15] resulted from the correspondence with Ms [TF] and "the warning to the executor about being held personally liable for any loss incurred by the estate is unlikely to have assisted creating a good working relationship".[16] Whilst that may have been an objective which the Committee considered to be a desirable objective, this again amounts to a subjective assessment of the results achieved and the objective of getting "a good working relationship" with the executor is not necessarily what could be expected to be the objective of "a competent and diligent" lawyer.

[59] The Committee commented negatively[17] about the fact that it was not necessary for the executor to obtain probate to administer Mr [RF]'s estate. What the Committee seems to overlook is that the insurance companies with which [Law Firm A] were corresponding had indicated probate was required to enable the policies to be redeemed.

[60] The Committee also considered that a competent New Zealand lawyer would have instructed an Australian lawyer (or recommended [EF] instruct an Australian firm directly)[18] to assist her with the problems she was experiencing. I do not agree that was necessarily the only option open to Ms [AB] as the problems facing [EF] were not complex or even of a legal nature.

---

[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[15] Standards Committee determination (5 August 2014) at [21].
[16] Above n 14.
[17] At [18].
[18] At [19].

[61] There are several other comments made by the Committee, some of which are recorded in this decision, with which I disagree, but as the Standards Committee determination is to be reversed as a result of this review I will not record each matter where I disagree. However, I particularly note the suggestion by the Committee that [EF] would be justified in requesting NZLS "to test any fee rendered in excess of $2,250". [Law Firm A] had not rendered any invoice to [EF], and ultimately did not do so. Consequently no complaint had been made about a fee and there is no jurisdiction for a Committee to make any comment about a proposed fee. Because no fee invoice had been rendered, and no complaint made, the processes to be followed when a complaint about fees is made, such as considering whether a costs assessor should be appointed and receipt of submissions from both parties, did not occur.

Section 12(a) Lawyers and Conveyancers Act. Rule 11.3 Conduct and Client Care Rules

[62] Section 12(a) of the Lawyers and Conveyancers Act defines unsatisfactory conduct as referred to in paragraph [56]. The Standards Committee did not address the complaint against Ms [AB] against the requirement for a lawyer to act diligently in the conduct of a client's affairs or to ensure that the conduct of employees is at all times competently supervised, as required by rule 11.3 of the Conduct and Client Care Rules. However, it is in these areas that Ms [AB]'s conduct did fall short and I infer that she does not challenge the finding of unsatisfactory conduct against her because she accepts her conduct did not measure up to the standards required of her in this regard.

[63] Ms [MN] was a junior solicitor with some five months experience. The problems [EF] was facing with regard to her aunt's dilatory approach in administering Mr [RF]'s estate did not present particularly complex legal issues. It did require a certain amount of maturity in dealing with both Ms [EF] and Mr [IJ], which a newly qualified solicitor could not be expected to bring to the file. In this regard it would have been preferable for Ms [AB] to either assume direct control of the file or supervise Ms [MN] more closely than she apparently did. Certainly by the time it became apparent that [LW]'s email of 31 May had not been actioned, Ms [AB] should have taken a more active, if not direct, role in the matter, to ensure that [EF]'s interests were advanced as well as could be expected in the circumstances.

[64] At one point, [LW] objected to a perceived lack of courtesy from Ms [MN][19] and at another, Ms [AB] herself was suggesting that a complaint to the Australian Lawyers Complaints Service should be made about him.[20]

[65] Again, these circumstances demanded that Ms [AB] should have assumed direct control of the file.

[66] The events as described above and in the Standards Committee determination provide sufficient evidence to support a finding of unsatisfactory conduct against Ms [AB] pursuant to s 12(a) of the Lawyers and Conveyancers Act in relation to a lack of diligence, and pursuant to s 12(c) by reason of a breach of rule 11.3 of the Conduct and Client Care Rules.

Conclusions

[67] Having reviewed the firm's files in some detail and also having carefully considered all of the material provided by the parties, as well as having heard from Ms [AB] and Mr [IJ], I do not share the somewhat trenchant criticisms directed at Ms [AB] by the Committee. I consider the only way to redress this is to reverse the determination of the Standards Committee. However, I do consider Ms [AB] did not apply the appropriate degree of diligence required to properly advance [EF]'s interests and did not properly supervise Ms [MN]'s work on the matter. The finding of unsatisfactory conduct is therefore reinstated in this regard.

Penalty

[68] Having reached the view that a finding of unsatisfactory conduct is appropriate, it is necessary to consider the penalties to be applied.

Censure

[69] The Standards Committee censured Ms [AB]. Mr [VL][21] refers to the description of a censure in *B v Auckland Standards Committee 1* as a "harsh" criticism of a lawyer's conduct. That is the correct view of a censure (or reprimand) to be

[19] Email [LW] to [MN] (24 July 2013).
[20] Letter [AB] to [GH Lawyers] (5 July 2013).
[21] Submissions [VL] to LCRO (15 July 2016) at [53].

reserved for somewhat more egregious conduct than the conduct of Ms [AB] in respect of which I have reinstated the finding of unsatisfactory conduct. I do not therefore consider Ms [AB]'s conduct warrants the imposition of a censure.

Compensation

[70] The Committee ordered Ms [AB] to pay the sum of A$1,500 by way of compensation. That represented reimbursement of the fees incurred by [EF] from [GH Lawyers].

[71] Following the review hearing Ms [AB] provided me with a copy of a letter dated 2 December 2014 from Ms [CK] to Mr [IJ] enclosing a cheque for $6,992.34 which included reimbursement of A$1,500. Although this payment was made following the issue of the Standards Committee determination it did not need to be paid as Ms [AB] had lodged an application for review. In addition, Mr [VL] advises[22] that Ms [AB] had already agreed to make payment of [GH Lawyers] fees prior to the "disciplinary proceedings". In these circumstances, I do not consider that an order to compensate [EF] for this amount is necessary.

Fine

[72] The Committee imposed a fine of $9,000. The maximum fine that may be imposed by a Standards Committee is $15,000 and a fine of $9,000 represents the Committee's perceptions of Ms [AB]'s conduct. The imposition of a fine has been reversed as a result of my reversal of the determination of the Standards Committee. Because of the comments and orders which follow, I do not consider the imposition of a fine is either necessary or appropriate.

Compensation for stress and anguish

[73] Much has been said throughout the investigation of Mr [IJ]'s complaint and this review about the stress and frustration suffered by [EF] through the maladministration of her father's estate, exacerbated by the events giving rise to Mr [IJ]'s complaint. Because of the Committee's extremely critical view of Ms [AB]'s conduct, it imposed a significant fine as a reflection of the "profession's condemnation or opprobrium"[23] of her conduct.

---

[22] At [10].
[23] The terminology used in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

[74] In its determination, the Committee did not discuss ordering Ms [AB] to make a payment to [EF] to compensate her for her stress and frustration and resulting ill health which Mr [IJ] says has been caused (in part) by the conduct of [Law Firm A]. There is no direct evidence to support Mr [IJ]'s assertions, but it is clear that the circumstances in which [EF] found herself would not have been improved by the delays and errors emanating from [Law Firm A]. She clearly felt let down by her lawyers.[24]

[75] In the circumstances I consider that, rather than imposing a fine, a modest compensation order in favour of [EF], would more properly reflect the focus of the Lawyers and Conveyancers Act on the consumer of legal services and the impact on the consumer of unsatisfactory conduct. I take note of the fact that [Law Firm A] have not, and do not intend to, render any invoice for their services. The comments of the Standards Committee in paragraphs 33 ff are somewhat gratuitous given that the firm had not, and did not intend to, render any invoice.

[76] I do not accept that [Law Firm A] did not benefit [EF] in any way at all. In this regard I differ from the views of the Committee as to the benefit obtained by [EF] when Ms [TF] was persuaded to instruct a lawyer to assist in the administration of the estate. That should have resulted in matters proceeding more smoothly than they did and the reasons they cannot be laid solely at the door of [Law Firm A].

[77] Compensation for stress, anxiety and distress was recognised as being appropriate by the LCRO in *Wandsworth v Ddinbych and Keith* as an appropriate order to be made pursuant to s 156(1)(d) of the Act. In *Wandsworth* the LCRO commented that "there is … no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory" and "such orders should also be modest in nature".[25] That case involved a situation where a client was required to make alternative arrangements to be represented by a lawyer in leaky home litigation when the lawyer instructed moved firms and disagreement arose between the client and the new firm concerning fee payment arrangements. The LCRO ordered the lawyer to pay the sum of $1,200 by way of compensation to the client for the stress and anxiety suffered.

[78] The *Wandsworth* decision was made in 2010. I consider that some increase from the amount awarded in that case is appropriate due to the passing of time and in addition, recognition of the fact that [EF] was dealing with the death of her father as

---

[24] Email [EF] to [AB] (10 July 2013).
[25] *Wandsworth v Ddinbych and Keith* LCRO 149 & 150/2009 at [21].

well as having to counter what seemed to be an obstructive approach being taken by her aunt in the administration of the estate. The effect on [EF] personally was no doubt significant.

[79] In the circumstances I consider an award of compensation in the sum of $2,000 to be paid to [EF] is an appropriate level of compensation.

Apology

[80] I record here the many expressions of regret and apology tendered by Ms [AB] both in writing and personally. There is no need to make any further orders that apologies be tendered. Ms [AB]'s readiness to tender her apologies to [EF] and Mr [IJ] is noted.

Decision

[81] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

(a) the determination of the Standards Committee is reversed.

(b) pursuant to ss 12(a) and (c) (by virtue of breaches of rules 3 and 11.3 of the Conduct and Client Care Rules) of the Lawyers and Conveyancers Act, Ms [AB]'s conduct constitutes unsatisfactory conduct.

(c) Pursuant to s 156(1)(d) Ms [AB] is to pay the sum of $2,000 to [EF] within two weeks of the date on which [EF] provides Ms [AB] with sufficient details to enable Ms [AB] to make such payment to [EF] in such manner as such directs.

Costs

[82] The Standards Committee imposed an order for costs in the sum of $5,000. As the Standards Committee's determination has been reversed on review, the order for costs is necessarily reversed. However, the finding of unsatisfactory conduct has been reinstated for the reasons set out in this decision and it is appropriate that some costs should be paid by Ms [AB]. However, I use this decision as an opportunity to make some comments of a general nature about costs orders made by Standards Committees.

[83] My impression from the order imposed by the Committee in this regard is that the quantum of costs was somehow connected to, and formed part of the penalties imposed. That is not the case. Costs ordered to be paid by a lawyer should reflect the "costs and expenses of and incidental to the enquiry or investigation made, and any hearing conducted, by the Standards Committee".[26] This complaint, and the investigation, was not particularly involved, lengthy or complex. Mr [IJ]'s complaint was received on 24 January 2014, the Notice of Hearing was issued on 14 May 2014 and the hearing took place on 27 June. The Standards Committee issued its determination on 5 August 2014.

[84] I note that the Complaints Procedure Manual issued to Standards Committees by the New Zealand Law Society includes as Model Document 27, a schedule which includes the various stages and documents through which an investigation will proceed. There is no indication on the Standards Committee file that the Committee received or made use of such a schedule.

[85] I also perceive that the Committee did not make any allowance for the fact that this determination related to a complaint about three lawyers whereas the finding in respect of which the costs order was made should only have been made in respect of the complaints about Ms [AB].

[86] In the circumstances, I direct the Committee pursuant to s 209(1) of the Lawyers and Conveyances Act 2006, to reconsider the order for costs. Prior to making an order, the Committee is to provide Ms [AB] with details of the proposed order and with the opportunity to make submissions as to the quantum of the order to be imposed. Following receipt of any submissions from Ms [AB] the Committee is directed to then proceed to make such order pursuant to s 156(1)(n) as it considers appropriate.

LCRO Costs

[87] Section 210 of the Lawyers and Conveyancers Act provides this Office with a discretion to make order for payment of such costs and expenses as the LCRO thinks fit. Costs Orders Guidelines have been issued by this Office. Paragraph 3 of the Guidelines provides that where a finding of unsatisfactory conduct is made or upheld against a practitioner, costs orders will usually be made against the practitioner in

[26]Lawyers and Conveyancers Act, s 156(1)(n).

favour of the Society. Ms [AB]'s application for review has been partially successful in that the Standards Committee determination has been reversed. However, the finding of unsatisfactory conduct has been reinstated. In the circumstances Ms [AB] is ordered to pay the sum of $600 by way of costs to the New Zealand Law Society, being one half of the costs of a hearing in person for a straightforward review as set out in the Guidelines. Such payment is to be paid to the New Zealand Law Society by no later than 29 September 2016.

DATED this 29th day of August 2016

____

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:

Ms [AB] as the Applicant
Mr [IJ] obo Ms [EF] as the Respondent
Ms [CK] as a Related Party
[XX] Standards Committee No. [X]
The New Zealand Law Society