

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

SD

Applicant

AND

AE AND

BE

Respondents

DECISION

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

Background

- [1] GD, the husband of SD, died on 20 March 2010.
- [2] Mr GD's first wife passed away in 2005 following a marriage of around fifty years.
- [3] Following Mr GD's death, Mrs SD and Mr GD's adult children became embroiled in disputes over Mr GD's will, estate and related matters.
- [4] Mr AE and Mr BE (the Es) were instructed by Mrs SD.
- [5] Mr GD's estate was primarily comprised of farmland, properties and shares. The most significant asset was a half share in a farm Mr GD had inherited. The other half of the farm was owned by a Family Trust.
- [6] Mr and Mrs D owned three properties jointly. Ownership of those properties passed to Mrs SD on her husband's death.

[7] In March 2009, Mr GD entered into an agreement to sell his share of the farm property to Mr AG. The agreement for sale provided that Mr AG would make regular payments towards the purchase price up until the time the property was transferred. Mr AG was also a trustee of a number of the family trusts and of Mr GD's estate.

[8] Shortly prior to his death, Mr GD executed a codicil to his will. This provided that his share of the farm was to be left to Mrs SD, and a debt owed by one of his adult children was forgiven.

[9] The adult children lodged testamentary promises and family protection claims in the High Court. They sought to have Mr GD's will declared invalid based on argument that Mr GD had lacked testamentary capacity and allegation that he had suffered undue influence.

[10] On 4 October 2011, the claims were settled following a settlement conference in the High Court.

[11] Mr AG was subsequently removed as a trustee of a number of the trusts and as an executor of Mr GD's estate.

[12] The Es terminated their retainer with Mrs SD in April 2012.

[13] Mrs SD has fees outstanding to The Es in the sum of approximately \$122,000.

The Complaint and the Standards Committee Decision

[14] On 15 October 2012 Mrs SD lodged a complaint with the New Zealand Law Society complaints service.

[15] Her complaints were extensive, but can be summarised as follows. The Es:

- (i) Failed to provide competent representation.
- (ii) Failed to follow her instructions.
- (iii) Negotiated a settlement which was adverse to her.
- (iv) Were negligent in failing to understand the full scope and extent of the assets of the disputed estate.

[16] The Standards Committee tasked with making inquiry into Mrs SD's complaint distilled the complaint down to three issues:

- (i) Did the Es fail to properly represent Mrs SD?

- (ii) Were the Es fees excessive?
- (iii) Did the Es act appropriately when terminating the retainer?

[17] In a decision delivered on 4 June 2013, the Standards Committee concluded that:

- (i) The Es had not breached any of their professional obligations to Mrs SD.
- (ii) The fees rendered were fair and reasonable.
- (iii) No professional obligations were breached when the Es terminated their retainer.

Application for Review

[18] Mrs SD seeks to review the decision of the Standards Committee.

[19] Her application in large part reiterates the concerns raised in the initial complaint. She expresses a general disaffection with the Committee's decision. She is critical of the Committee's decision to take no action and considers that the Committee failed to accurately address her complaints. She maintains that the Committee's decision contains a number of factual errors. She describes the Committee's decision as "iniquitous and unjust".

[20] Subsequent to filing her application, Mrs SD filed further extensive submissions. Her concerns remain that:

- (i) She did not receive competent representation.
- (ii) She had been forced to accept a settlement that she was unhappy with.

Role of the LCRO on Review

[21] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee without good reason.

[22] The jurisdiction of the office of the LCRO to review complaints is confined to addressing complaints that have been considered by a Standards Committee.

[23] In a previous decision of this office (LCRO 56/2011) it was noted that:¹

It is the task of this office to review decisions of Standards Committees. The review includes consideration of how the Standards Committee dealt with the complaint and whether its decision is soundly based on the evidence before the Committee. Because this process is confined to a review, there is no jurisdiction to consider any matters that have not previously been considered and decided by a Standards Committee.

[24] Whilst the role of the LCRO is confined to addressing complaints that have been considered by a Standards Committee, the LCRO has a broad discretion to examine the approach adopted by the Committee in proceeding its enquiry, and can consider new evidence or material relating to the complaint that was not addressed by the Committee.

[25] In LCRO 258/2011 it was noted that:²

... the review process offered the opportunity for all aspects of the complaint to be revisited, and that any perceived procedural defects by the Standards Committee could be cured on review. It was particularly explained that the review process is not confined only to matters raised by the review applicant, but that the LCRO has the power, and indeed the responsibility, to review the manner in which the Standards Committee dealt with the complaint.

[26] The LCRO has a broad discretion to address how a Committee has conducted an enquiry into a particular complaint, but cannot review new complaints raised by an applicant at the review hearing.

[27] Mrs SD has filed voluminous submissions with both the Complaints Service and the LCRO. I acknowledge immediately that it is compellingly apparent that Mrs SD feels distressed with the outcome of the Court proceedings, and in particular the manner in which agreement was reached at the High Court settlement conference. She believes the settlement was entered into without her genuine consent, and without, in her view, the support and assistance of competent legal representation.

[28] It is clear however from Mrs SD's submissions that she has expectation of outcomes that neither the Standards Committee nor the office of the LCRO can provide. She initially sought for example financial compensation in the sum of \$1,407,000, amended at the hearing to approximately \$800,000, for loss suffered she alleges as a direct consequence of the E's failure to provide adequate representation.

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¹ *IQ v SG* LCRO 56/2011 at [26].

² *AJ v BJ* LCRO 258/2011 at [18].

[29] Whilst the office of the LCRO does have power to make an order for compensation in certain circumstances, the sum of compensation able to be awarded is limited to \$25,000.

[30] At the heart of Mrs SD's submissions is complaint that she received an unfavourable outcome from the High Court, because she was poorly represented. Implicit in that argument is inference that she could, and would, have received a more favourable outcome if she had not agreed to settle on terms she felt were unfavourable to her.

[31] It is not the role of the LCRO to usurp the role of the Court, or speculate as to possible litigation outcomes. Mrs SD was a defendant in two sets of proceedings filed in the High Court. If those proceedings had progressed to a hearing Mrs SD may have achieved a better result than achieved at the settlement conference, or she may not have.

[32] The pivotal issue for this office to address is the question as to whether the representation provided to Mrs SD fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, or whether the conduct of her legal representatives would be considered by lawyers of good standing to constitute conduct unbecoming or unprofessional conduct.

[33] Further, I am required to consider whether the conduct of which she makes complaint constituted a breach of the Lawyers and Conveyancers Act 2006, or any Regulations or Rules under that Act, or any other Act relating to the provision of regulated services.

[34] I expand on these matters at some length, in order to clarify, particularly for Mrs SD, the scope and extent of the Review process.

Analysis

Fees

[35] Mrs SD maintains that the fees charged were excessive.

[36] Despite the considerable sum involved, the Standards Committee elected not to appoint a costs assessor but rather took the view that the Committee was well placed to make a judgement as to whether the fees charged were reasonable.

[37] Mrs SD did not pursue complaint concerning the fees charged with any vigour at the hearing. Whilst she did contend that she had been poorly represented towards the

end of the proceedings, she did not identify any particular problems with accounts. She did not identify areas where she believed she had been excessively charged. She did not suggest that she had been charged for work that had not been carried out. She was however vigorously critical of the standard of representation provided, particularly at the settlement conference.

[38] If particular concerns had been raised about the fees charged which merited further enquiry, I would have referred the fees issue back to the Standards Committee with recommendation that a costs assessor be appointed.

[39] I do not intend to take that course for two reasons. Firstly I am not satisfied that significant problems have been identified with the accounts which would have justified the appointment of a costs assessor. Secondly, and importantly, Mr AE indicated at the first hearing that his firm had decided not to pursue Mrs SD for the outstanding fees. That position was confirmed by Mr BE at the second hearing.

[40] The sum outstanding is significant. The Es provided comprehensive explanation as to why they had made the decision to write-off the outstanding fees. Their reasons were:

- (i) Lack of confidence in the prospect of being able to recover.
- (ii) A desire to avoid being embroiled in further disputes with Mrs SD.
- (iii) A practical decision to 'cut their losses'; rather than expend further time and resources pursuing the outstanding fees.

[41] The E's decision not to pursue the fees is of course a matter for them. I do record however that I had formed the view that the reasons advanced by the Es for adopting what, on its face, presents as a very commercially disadvantageous decision, were genuine.

[42] I do not consider that the decision was motivated by a desire to avoid having the fees subjected to further scrutiny.

[43] Whilst in practical terms the E's decision may present as rendering any decision from this office (in response to the fees complaint) somewhat academic, the question as to whether professional disciplinary issues arise stands independent from any practical matters which arise from the approach taken to the recovery of the fees.

[44] I see no basis to depart from the Committee's findings that the fees rendered were reasonable for work completed.

Termination of retainer

[45] Mrs SD made complaint that the Es had inappropriately terminated their retainer, and that this had put her in a difficult position.

[46] The Es contended that they were left with no option but to bring their relationship with Mrs SD to an end. They maintain that:

- (i) Mrs SD had lost confidence in them.
- (ii) She had sought advice from another lawyer and had instructed that lawyer to act on matters relating to the proceedings.
- (iii) She had failed to pay any of her accounts and had given indication she was not intending to do so.
- (iv) They had increasing difficulty following Mrs SD's instructions.

[47] I am satisfied that the relationship between the parties had broken down at the time the Es terminated the retainer.

[48] Mrs SD's criticism of the representation she received at the settlement conference and her disaffection with a number of the aspects of her representation gives clear indication that it would have been untenable for the Es to continue to represent her.

[49] I see no basis to depart from the Committee's findings that the Es did not breach any of their professional obligations when terminating their retainer with Mrs SD.

Did the Es fail to properly represent Mrs SD?

[50] In large part, Mrs SD's criticism of the representation provided focuses on complaint that Mr BE failed to adequately represent her at the High Court settlement conference. That issue is so pivotal, that it merits separate discussion.

[51] Underpinning much of Mrs SD's criticism is her belief that she received an unfavourable settlement.

[52] She is highly critical of her late husband's children, and believes that the settlement reached advantaged the children to her detriment. She believes that the settlement has left her impoverished.

[53] She blames the Es for what she sees to be her reduced financial circumstances. She identifies a number of areas in which she maintains the Es failed her.

[54] In response, the Es submit that they provided Mrs SD with an excellent standard of representation. They contend that Mrs SD received a favourable settlement and believe if Court proceedings had progressed further, Mrs SD may have achieved a considerably less favourable outcome.

[55] The Es contend that the issues were highly contestable and that it was inevitable that Mrs SD's late husband's will would face significant challenge. They also note that the estate was represented by a solicitor who played a significant part in the settlement conference, and drafted various agreements.

[56] It does not fall within the jurisdiction of this office to minutely examine the respective merits of the competing claims, or to speculate as to whether Mrs SD should have received a more favourable settlement.

[57] It is clear from the extensive documentation that Mrs SD has filed, both in support of her complaint, and her application for review, that she believes that the professional complaints process is capable of achieving two things. Firstly, she has expectation that the complaints process will affirm her view that she was poorly represented. Secondly, if conclusion is reached that she was poorly represented, that will result in findings that her views as to the unfair outcome of the litigation are established.

[58] Best evidence of this is her request for compensation to be paid to her (through the complaints process) in a sum exceeding \$800,000. She arrives at this figure by identifying a number of aspects of the settlement which she considers were unfair to her, and various problems arising from the settlement, which again she suggests resulted in adverse financial consequences.

[59] The fundamental problem with the approach advanced by Mrs SD is that her argument demands acceptance of her view that she was entitled to, and would have received, a greater share of her late husband's estate, if she had not been 'pressured' into accepting a settlement she was inherently unhappy with.

[60] I accept that her views are materially shaped by her belief that her late husband's will should have been inviolate and not open to challenge.

[61] But that argument is at odds both with the law and with the reality of the fact that challenge had been mounted to the will.

[62] Whilst Mrs SD remains convinced that her late husband's will should have remained unchallenged, legal avenues are available to challenge testamentary

documents, and in this case it would not have been considered surprising that Mr GD's adult children elected to exercise their option to challenge their father's will.

[63] Mr GD's assets had been accumulated over a lengthy working life. His first marriage was a marriage of considerable duration. He re-married late in life. His second marriage was of relatively short duration. There could be little surprise that the will was challenged, and once proceedings had been filed, Mrs SD had no option but to defend those proceedings.

[64] Importantly, Mrs SD's argument that inadequate representation was directly responsible for her receiving a reduced financial settlement is not supported by any evidence to suggest that the quality of her legal representation materially affected the financial outcome.

[65] Little criticism is made by Mrs SD of the E's management of her file prior to the settlement conference. She conceded that Mr BE had made a good job of preparing submissions for the conference.

[66] Mrs SD's argument that she would have received better outcome if the proceedings had progressed to a full hearing is purely speculative, and fails to acknowledge that she may have received a less favourable outcome and incurred further significant costs if she had continued with the proceedings.

[67] Mrs SD believes that the grounds advanced to challenge her late husband's will lacked merit, but whilst it cannot be predicted the extent to which the adult children may have succeeded with their claims, the arguments advanced do not present as spurious or contrived and are typically reflective of the type of arguments that are regularly presented to the Court in these cases.

[68] In litigation of this nature, lawyers are inevitably called on to make assessment as to the likely outcome, and to evaluate the risks and costs of the litigation. It is the E's view that Mrs SD achieved a settlement which was "as good as it was going to get". I accept that assessment will never sit comfortably with Mrs SD but I cannot identify from the many issues raised by her, any evidence that would support conclusion that the Es had failed to properly represent her.

[69] Her criticism that Mr BE failed to provide proper representation in respect to the application to remove a trustee cannot be sustained. That criticism appears to relate more to her dissatisfaction with the replacement executor appointed by the Court than it does with Mr BE's management of the application.

[70] Mr BE correctly notes that, once the application to remove the trustee was successful, it was for the Court to determine who the replacement trustee would be.

[71] Nor is criticism of Mr BE's failure to secure additional costs on the application reasonable. It falls for the Court to determine cost issues.

The settlement conference

[72] As previously noted, the main basis of Mrs SD's allegation that the Es failed to provide adequate representation, is allegation that Mr BE failed to properly protect her interests at the High Court settlement conference, and as a consequence she was engineered into accepting a settlement that was significantly less than she expected.

[73] Mrs SD criticises many aspects of Mr BE's representation. The main thrust of her complaint is that Mr BE:

- (i) Was intimidated by opposing counsel.
- (ii) Failed to provide response to unpleasant criticisms made of her by opposing counsel.
- (iii) Failed to adequately advise her as to the implications of the settlement.
- (iv) Failed to appreciate the impact on the wider settlement of assets (land) being brought into account at last minute.
- (v) Coerced her into accepting a settlement that she was unhappy with.

[74] Mrs SD describes the conference as an unpleasant and emotionally draining experience. She is critical of the pace of the conference. She felt pressured and harried. She maintains that she was not given opportunity, despite her request, for quiet reflection. Whilst she signed the settlement document, she recorded her dissatisfaction by noting on that document, under her signature, that she had signed, "in disgust".

[75] In large part Mrs SD's arguments, understandably, rely on her recollection of what transpired at the conference.

[76] She does produce correspondence from Mr AH, a trustee, who attended the conference. Mr AH, whilst not specifically critical of Mr E, is critical of the process and says that he found the experience to be unsettling.

[77] Mr BE's recollection of the conference is quite different to that of Mrs SD. He maintains that:

- (i) He met with Mrs SD the day before the conference and talked her through the process.
- (ii) He provided proper and appropriate response to the submissions advanced by opposing counsel but did not consider it appropriate or promoting of Mrs SD's cause to engage in personal denigration or advancement of aggressive submission to the Court.
- (iii) Mrs SD was given frequent opportunity to discuss the settlement with him.
- (iv) The consequences of the settlement were carefully explained to Mrs SD.
- (v) The solicitor for the estate considered that Mrs SD should accept the settlement.
- (vi) All estate assets were taken into account when agreeing the terms for final division.
- (vii) Whilst Mrs SD conveyed to him in forceful terms her sense of disgust at the positions advanced by the adult children, she accepted the agreement on the basis that she understood the identified risk of proceeding with further litigation.
- (viii) Mrs SD was not coerced into accepting a settlement.
- (ix) Post conference Mrs SD, in discussions, confirmed her acceptance of the settlement.

[78] Settlement conferences frequently make demands on both parties to accept a degree of compromise in order to reach settlement.

[79] Mrs SD's conference presents as typical in this respect. Mr BE notes that both parties were required to give some ground.

[80] Whilst I accept that Mrs SD is adamant that she was cajoled by her counsel to accept an outcome she was not entirely satisfied with, I do not think it probable that she failed to appreciate what the purpose of the settlement conference was, or that she failed to understand that the process involved a degree of negotiation.

[81] Parties attending conferences of this nature do place considerable reliance on their legal counsel, and can justifiably have expectation that their counsel will guide them carefully through the process.

[82] There is a responsibility on counsel to give their best advice as to any outcomes proposed. That may involve counsel recommending to their client that a settlement is agreed, which their client is not totally happy with. But it would be remiss for a lawyer to fail to proffer their best advice because they are apprehensive that their client does not wish to hear that advice.

[83] A lawyer's assessment of factors such as litigation risk, costs, prospect of adverse outcome, may on occasions encourage a lawyer to advise a client in forthright terms to accept a settlement offer that is on the table.

[84] The degree of trust and confidence that a client frequently places in their lawyer can, on occasions, compromise the client's ability to make their own decisions.

[85] It is ultimately the client's decision whether to accept a proposed settlement or not. Whilst there is an imperative on lawyers to carefully guide their clients through the negotiations, and a need for them to ensure that their client fully understands the terms of any agreement reached, that does not absolve the client of an obligation to be certain that they understand the terms of any settlement reached and importantly, to ensure that they do not acquiesce to a settlement that they are uncomfortable with. Mrs SD had the choice of either accepting or rejecting the proposed terms of the settlement.

[86] Mrs SD argues that her indication on the settlement document that she had signed 'in disgust' is compelling evidence that she was unhappy with the outcome.

[87] It is not contested that she was unhappy with the outcome, but disgruntlement with outcome does not, and should not, translate to automatic conclusion that she did not confirm her agreement to the settlement.

[88] Nor is it reasonable to conclude that dissatisfaction with the outcome must lead to conclusion that she was poorly represented.

[89] If a client is to succeed in argument that their lawyer has coerced them into accepting an outcome they are unhappy with, that argument must be sustained by evidence which supports conclusion that the client's capacity to exercise independent judgement has been compromised by their lawyer promoting settlement not just in

terms which are forthright, but in terms which are insistent, coercive and indifferent to their client's instructions.

[90] It is difficult, and indeed fraught with risk, to endeavour to reconstruct the events of a settlement conference that occurred some years ago, when the only evidence of what transpired is the conflicting accounts of the parties.

[91] The onus rests with Mrs SD to establish that Mr BE coerced her into accepting the settlement, and in doing so, breached his professional obligations. In my view she has fallen considerably short of establishing that.

[92] Whilst I accept that Mr AH also felt pressured by the process, there is a degree of vigour to these negotiations which people who are unaccustomed to the process can find challenging. Mr AH would not have been a party to the private discussions Mr BE had with Mrs SD.

[93] The estate lawyer participated in the conference, and he clearly played a significant role. His advice to Mrs SD was to accept the settlement. It appears that this advice was proffered to Mrs SD in vigorous and forthright terms. Mrs SD had contemplated bringing complaint against the estate's lawyer that he had asserted undue pressure on her, but elected not to do so.

[94] I also consider it relevant that the conference, which proceeded for almost a full day, was under the direction of a High Court Judge. It is unlikely that the Judge would have countenanced submission which was denigrating or inappropriate. It is unlikely that a Judge would approve a settlement being agreed to, if there was manifest evidence that one of the parties was vehemently opposed to the settlement.

[95] I have not after carefully considering the substantial volume of evidence on the file, and after having opportunity to hear extensive submissions from the parties, been persuaded that the Committee erred in reaching conclusion that the Es had provided competent representation, and had not breached any of their professional obligations to her.

[96] In reaching that conclusion I have given careful consideration to all of the submissions filed by Mrs SD.

[97] I have not in this decision addressed all of the issues raised by Mrs SD, but my failure to refer to all matters raised should not be construed as indicating that those matters were not considered. The submissions filed were expansive. All matters have

been taken into account in arriving at a view as to the standard of the representation provided.

[98] Whilst Mrs SD makes criticism of many elements of the E's representation, many of those criticisms lead back to dissatisfaction with the outcome of the settlement conference, and her allegation that she was poorly represented at the conference.

[99] Mrs SD's remedy, if dissatisfied with the settlement outcome, was to challenge the decision through the Courts. She initially endeavoured to do so, but did not proceed with that challenge.

Decision

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

DATED this 21st day of August 2014

R Maidment
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:

Mrs SD as the Applicant
Mr AE as the Respondent
Mr BE as the Respondent
The City Standards Committee
The New Zealand Law Society