LCRO 235/2014

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	**SV** Applicant
AND	**BG AND HD** Respondent

DECISION

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

Introduction

[1] Mr SV has applied for a review of two decisions by the [City] Standards Committee [X]. In the first decision, dated 11 June 2014, the Committee concluded there had been conduct unbecoming on the part of Mr SV, made a determination of unsatisfactory conduct pursuant to s 12(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act), imposed a censure and invited submissions on compensation and publication.

[2] In the second decision, the Committee directed publication of the first decision including Mr SV's name, ordered him to pay $5,000 of compensation to Mrs BG and Mrs HD, and gave written notice of its decision to the Registrar-General of Land pursuant to s 159 of the Act.

Scope of Review

[3] Although Mr SV wrote to New Zealand Law Society (NZLS) objecting to the first decision, no application for review was received by this Office within 30 working days of the date of the first decision. Section 198 of the Act requires every application for review to be lodged within 30 working days after a copy of the notice of the determination is served on, given to, or otherwise brought to the attention of, the applicant for review.

[4] The application for review was received by this Office on 6 November 2014, so the time limit for Mr SV to seek a review of the first decision had passed well before his application for review was received.

[5] As a consequence, the only decision that this Office has jurisdiction to review is the second decision, which imposes the three orders referred to above.

Background

[6] The background is set out in some detail in the first decision. Briefly, Mr SV acted in various matters for Mrs JB over a number of years including assisting her in making what turned out to be her final will. Mrs JB's final will left nothing to her children and the bulk of her estate to her former son-in-law, Mr BG.

[7] Mrs BG and Mrs HD are Mrs JB's only children. They say they had concerns over their mother's competence for a number of years before she passed away in April 2011.

[8] On discovering they had received no benefit from their mother's estate and everything left of value had gone to Mrs BG's former husband, Mrs BG and Mrs HD contested the will in the Family Court. They received what was left of their mother's estate to divide between them.

[9] As Mr SV had acted for their mother over the years before she died, including assisting her in revising her living arrangements by agreement with Mr BG and making her final will, Mrs BG and Mrs HD consider that Mr SV should compensate them for the part he had played in allowing their mother's assets to be eroded. The nub of their complaint was that Mr SV had failed to take appropriate steps to safeguard Mrs JB's property and had caused significant losses to her and to her estate. Their complaint relies on Mrs JB having lacked legal capacity to make decisions and properly instruct Mr SV. They believe Mr SV knew their mother was incompetent, and allowed her to

take imprudent steps and make a will in which she did not leave everything she owned to them.

[10] Mrs BG and Mrs HD contend that Mr SV's conduct was inconsistent with his obligations both as a lawyer and in the exercise of a power of attorney over property Mrs JB had made in favour of Mr SV and Mrs BG.

Standards Committee decision

[11] In summary, the Committee considered:

(a) There was sufficient evidence to confirm a general deterioration in Mrs JB's overall health and capacity from 2002, and that should have been apparent to Mr SV.

(b) Mr SV should have taken into account the general lack of consistency and prudence in Mrs JB's instructions and decision-making from then on, and, given the proposed changes of her living arrangements, he should have been alert to the need to take additional steps to verify her capacity and secure her interests.

(c) Mr SV should have obtained medical evidence as to Mrs JB's capacity, before allowing her to commit herself to arrangements that did not adequately safeguard her property interests.

(d) That the enduring power of attorney over property under which Mrs JB appointed Mr SV and Mrs BG was operative, but Mr SV had failed to properly consult with Mrs BG over his exercise of powers under it.

(e) By making a payment of $40,000 to Mr BG without first obtaining security [whether on Mrs JB's instructions or in the exercise of the power of attorney] Mr SV was in breach of his fiduciary obligations to Mrs JB both as her lawyer and as her attorney.

(f) Relinquishing the protection a registered caveat afforded to Mrs JB's investment was not in Mrs JB's best interests.

[12] The Committee considered Mr SV's conduct was "derelict to such a degree as to satisfy" the test of what is expected of "competent, ethical and responsible

practitioners".[1] The Committee determined the complaint on the basis that "Mr SV had engaged in unsatisfactory conduct which could have amounted to conduct that was unbecoming of a solicitor or a barrister" [2] under the Law Practitioners Act 1982 (LPA). It imposed a censure and sought submissions on two matters: compensation and publication.

[13] The Committee noted:[3]

> That the conduct complained about occurred prior to 1 August 2008. Therefore the range of penalties are restricted to those available under s 106 of the LPA unless Mr SV consents to the imposition of any penalty that could have been imposed under the s 156 of the Act had the conduct occurred after 1 August 2008 (either in substitution for, or in addition to, any available LPA penalty).

[14] As noted above, Mr SV wrote to NZLS protesting the first decision, but did not file an application for review. His letter to NZLS included the following:[4]

> I do not believe I was aware of the fall and brain injury in about 2002. The implied incompetence is in any case not consistent with the medical advice.
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> …
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> The changes of [Mrs JB's] will were consistent with circumstances, that the last will was nonetheless against my advice. There was nothing to alert me to actual circumstances.
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> …
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> $40,000 was not a loan to Mr BG. It was to buy the cottage which was removable. I was acting as Mrs JB's solicitor – not under the Power of Attorney. She did not want me to deal with Mrs BG.
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> … I was not acting under the Power of Attorney …
>
> I was acting on Mrs JB's instructions, and in urgent circumstances. The Power of Attorney was not relevant.
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> … the caveat was removed under actual threat of proceedings but in my view did not affect the situation.
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> … I deny the serious finding of misconduct, and am surprised that it can be made without full knowledge of the facts, or personal hearing or submission.

[15] After receiving that information, the Committee made the orders for compensation and publication that are under review.

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[1] Standards Committee determination 11 June 2014 at [39].
[2] Pursuant to ss 152(2)(b)(i) and 12(b)(i) of the Act.
[3] At [44].
[4] Letter SV to Complaints Service (20 June 2014).

Compensation

[16] The Committee was satisfied that stress and anxiety and additional costs had been incurred by Mrs BG and Mrs HD as a result of Mr SV's part in the conduct of their mother's affairs. The Committee therefore ordered Mr SV to pay them compensation of $5,000 because he ought to have done more to protect the funds that were transferred to Mr BG. Mr SV is said to have failed to fulfil his professional obligations towards Mrs JB. The Committee considered that "had an undoubted impact on Mrs HD and Mrs BG", making it necessary for them to pursue a claim under the Family Protection Act 1955.[5]

[17] Noting the alternative of civil remedies, the Committee ordered the $5,000 payable by Mr SV to be divided equally between Mrs BG and Mrs HD to compensate them for loss and anxiety.

Publication

[18] In deciding to publish Mr SV's name, the Committee considered his conduct amounted to "a significant breach of his professional obligations" referring to the need for lawyers to take appropriate steps to protect the property and welfare of clients, the Committee considered there is a public interest in publishing the facts, and Mr SV's name, to inform and educate the public and the profession of the detrimental consequences that may follow if a lawyer breaches his or her professional obligations in this regard.[6]

[19] The Committee considered that Mr SV's response to the complaint confirmed he failed to fully appreciate the seriousness of his actions, lack of insight, and relevant previous findings of unsatisfactory conduct had been made against him. The Committee considered lawyers should be made "aware of the facts of this matter and his name in order to inform and protect them in relation to any future dealings with him".[7] The Committee considered that public confidence in the provision of legal services would be enhanced by publication, and that the impact on Mr SV's privacy and his practice were proportionate given the seriousness of the conduct, which was considered to be at the high end of the scale of seriousness in relation to findings of unsatisfactory conduct. Mrs HD, Mrs BG and Mr SV's fellow practitioners at his

[5] Standards Committee decision, 23 September 2014 at [6].
[6] At [12](a).
[7] At [12](b).

practice were not to be named in any publication. Although no direct reference was made to Mrs JB or Mr BG, their anonymity is assumed.

[20] The Committee made orders on the basis set out above.

Review hearing

[21] This review was determined on the papers with the consent of both parties pursuant to s 206(2) of the Act, after an applicant only review hearing had been set down but cancelled at Mr SV's request following issue of a Direction referring to the jurisdictional bar on this Office considering the first decision. The only issues available for review relate to the consequences that should follow the determination of unsatisfactory conduct and censure made in the first decision.

Nature and scope of review

[22] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[8]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
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> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[23] More recently, the High Court has described a review by this Office in the following way:[9]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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[8] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[9] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[24] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Review issue

[25] The issue on review is whether there is good reason to modify or reverse the Committee's orders for compensation, publication and notification.

Discussion

[26] Mr SV's application for review proceeds from the position that it is open to this Office to reconsider the substance and process of the first decision, and the censure imposed. That is not correct. That is not to say the information he has provided has not been taken into account. It has.

[27] The compensation, publication and notification orders made by the Committee represent the collective exercise of discretion on the part of the Committee. I would therefore have to exercise some particular caution before substituting my own judgment for that of the Committee without good reason.

Compensation – Section 106(4)(e) LPA

[28] Section 106(4)(e) of the LPA said, and 156(1)(d) the Act says, an order for compensation can be made where it appears that "any person has suffered loss by reason of any act or omission of" a practitioner.

[29] Although Mr SV was not acting for Mrs BG or Mrs HD, neither section excludes them from recovering losses suffered by reason of an act or omission by Mr SV. However, Mrs BG and Mrs HD are both strangers to Mr SV's professional relationship with Mrs JB. That fact alone gives pause when considering whether statutory compensation should be made available because Mr SV's duties were primarily owed to his client, Mrs JB. Mr SV owed Mrs BG and Mrs HD very limited professional duties.

[30] By ordering compensation, the Committee accepted that, but for one or more acts and omissions by Mr SV, Mrs BG and Mrs HD would have been the sole beneficiaries of Mrs JB's will, would not have had to make a claim under the Family Protection Act, and Mrs JB's estate would have been significantly larger.

[31] Causation and contribution can be difficult areas to resolve. For example, it would have to be accepted that no one in their right mind would have decided to do what Mrs JB did. Without a medical assessment saying otherwise, the presumption of competence would generally apply. It must also be accepted that although Mrs BG or Mrs HD say they had had concerns about their mother's capacity for years, neither of them appears to have taken any formal steps to challenge her capacity during her lifetime.

[32] As to capacity, the authors of *Lawyers' Professional Responsibility* say:[10]

> Capacity to contract lies at the heart of the lawyer-client relationship, as it does for other contracts. Aside from persons whose lack of capacity stems from minority, and are therefore represented by a tutor (or the like), the main concern for lawyers relates to clients who lack the mental capacity to give instructions for the purposes of a retainer and/or understand and act on advice received. A lawyer who is not reasonably satisfied that a prospective client possesses the mental capacity to give instructions must not act for or represent the client. A failure to be alert to issues of incapacity has the potential to generate liability in negligence, or even disciplinary consequences.
>
> Assessments of client capacity should not be confined to the commencement of the retainer; the validity of a lawyer's representation of a client rests on continuing client capacity. Lawyers must be sensitive to indicia of dwindling capacity, and must not proceed unabated in the face of client supervening incapacity. In circumstances where an existing client loses capacity, the lawyer should approach a friend or relative of the client to make an application to declare the client incapable of managing her or his affairs or, in an exceptional case, even make the application personally on the client's behalf.
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> (citation omitted)

[33] The Committee's determination means that, while the presumption of competence had not been formally rebutted by a declaration that Mrs JB was not legally competent, potentially the presumption was rebuttable, Mr SV knew enough to be on notice, and was professionally obliged to take steps. However, Mrs JB's daughters say they also had a view. They could have taken steps if they considered their mother's capacity had dwindled to the point she lacked capacity.

[34] Mr SV has had a lengthy career in general practice, including giving advice on wills and the administration of trusts and estates. He says there were a number of

[10] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.10].

things he did not know about Mrs JB and the medical advice he had seen had given him no reason to suspect she lacked capacity. It is fundamental to his case that he safely could presume Mrs JB had capacity when she instructed him and it is apparent from his comments that he does not accept there is a causative link between his conduct and the losses Mrs BG and Mrs HD claim against him.

[35] The fact that the merits of the Standards Committee decision have not been challenged does not make the assessment of whether compensation should be awarded any simpler. It is also the case that the disciplinary processes under the Act are not well suited to the making of orders where, as here, there are potentially legitimate arguments around causation. The statutory power to order compensation is better suited to circumstances that clearly establish a causative link between the breach of a duty and the losses claimed. Where there may be some doubt, as there is in the present case, the civil jurisdiction is better suited to testing conflicts of evidence.

[36] In the circumstances the order requiring Mr SV to pay compensation to Mrs BG and Mrs HD is reversed.

Publication

[37] The Committee considered that public confidence in the provision of legal services would be enhanced by publication of Mr SV's name, and that any impacts on his privacy and practice would be proportionate. The Committee's view was that the decision including Mr SV's name should be published for a number of reasons which can be summarised as:

(a) The seriousness of the conduct.

(b) Mr SV's lack of insight into the professional inadequacies of his conduct.

(c) To inform the public and other lawyers, so they can guard against Mr SV's perceived inadequacies in any future dealings with him.

(d) Mr SV's previous disciplinary history includes determinations of unsatisfactory conduct on his part.

(e) For the general education of the public and other lawyers.

[38] As the first decision is beyond challenge, it is assumed that the Committee is correct in its assessment of the seriousness of Mr SV's conduct.

[39] The educative functions of publication, for the public and the profession, could be met by the Committee's decision or this decision on review being published without Mr SV having been identified.

[40] Mr SV has been in practise for many years. It seems unlikely that he lacked insight over a number of years into his professional capabilities in his dealings with Mrs JB. Lawyers should generally be on guard for their clients, particularly if competence might be an issue. The extent to which Mrs JB's daughters may have kept Mr SV informed, or aired their concerns to him, if at all, is unclear.

[41] The concerns that emerge on review relate to the steps Mrs BG or Mrs HD could have taken to have their mother's capacity determined while she was alive, but did not. The line between competency and non-competency at any given time can be extremely difficult to discern. Given the discussion above relating to clients who may or may not actually lack competence, it is not clear to me that public safety concerns arise from Mr SV's professional failings, even if he has a relevant adverse disciplinary history.

[42] On balance, to use the terminology of the Act, publication of Mr SV's name is not so necessary or desirable in the public interest as to overturn the presumption of privacy.

[43] The decision to publish is reversed.

[44] Publication of this decision is directed pursuant to s 206(4) of the Act, with all identifying details removed, including Mr SV's.

Section 159

[45] The Committee ordered written notification of its determination be provided to the Registrar-General of Land pursuant to s 159 of the Act. Section 352 of the Act says that any penalty in respect of conduct that occurred before 1 August 2008 must be a penalty that could have been imposed in respect of the conduct when that conduct occurred. I read the word penalty in that section in its broadest sense, so that it encompasses any of the consequential orders that can be made pursuant to the Act.

[46] The LPA did not contain a provision that enabled notification of the Registrar-General of Land.

[47] As no such order was available to the Committee, the order made pursuant to s 159 is reversed.

Orders

[48] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the orders made by the Committee are reversed.

[49] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 publication of this decision is directed with all details that might identify the parties removed.

DATED this 18th day of July 2017

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D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr SV as the Applicant
Ms TR as the Representative for the Applicant
Mrs BG and Mrs HD as the Respondents
[City] Standards Committee [X]
New Zealand Law Society