

LCRO 245/2014  
156/2015

**CONCERNING**

applications for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

determinations of [Area] Standards Committee 1 and [Area] Standards Committee 2

**BETWEEN**

**TM**

Applicant

**AND**

**BS and Law Firm A**

Respondents

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

**DECISION**

**Introduction**

[1] Mr TM has applied for reviews of two Standards Committees determinations to take no further action in respect of his complaints about BS and Law Firm A. The applications for review concern the same parties and arise out of the same facts. This decision relates to both applications.

**Background**

[2] Mr TM's mother died in March 2003. Mrs TM appointed her two daughters executors of her will.

[3] Mr TM lodged a caveat against the issue of probate. He also applied to the High Court to revoke the appointment of his sister V as executor and for the

appointment of a temporary administrator.<sup>1</sup> BS advises that Mr TM also sought revocation of a power of attorney granted by his mother to his sister, V.<sup>2</sup>

[4] Ms TM applied to have the proceedings struck out, the caveat discharged and an order nisi for a grant of administration. She and her sister also applied for probate.

[5] The Court struck out Mr TM's proceedings but ordered Ms TM and her sister to apply for probate in solemn form, provided Mr TM gave security for costs by way of a charge against his interest in the estate within 14 days of judgment.<sup>3</sup> If Mr TM did not provide security the caveat against probate was to be discharged.

[6] Mr TM was also ordered to pay costs to Ms TM in the sum of \$5,843.50.

[7] Mr TM did not provide the security. Instead he applied for leave to appeal to the Court of Appeal. The application for leave to appeal was declined and Mr TM was ordered to pay a further \$2,000 by way of costs.<sup>4</sup>

[8] At the Court of Appeal hearing Mr TM provided the required security for costs and as the date for providing security had been extended, Ms TM and her sister were required to apply for probate in solemn form.

[9] Ms TM instructed BS to recover the Court ordered costs from her brother. As a result, Mr TM was declared bankrupt on 8 March 2004 on the grounds the he had not complied with a notice of bankruptcy issued by BS on behalf of Ms TM.

[10] Probate to Ms TM and her sister was granted on 15 June 2004.

### **The costs awards**

[11] The judgment of [Judge] on 2 September 2003 related to two proceedings – the application by V to strike out Mr TM's proceedings (Case X) and an application by both sisters (Case Y) for the caveat against probate to be discharged. The proceedings were dealt with together in a single judgment by [Judge] and used the intitlement on Mr TM's proceedings against V.

[12] The award of costs by the Court for \$5,843.50 on the strike out proceedings was therefore to V alone. Costs on the probate application were reserved.

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<sup>1</sup> Mr TM was self-represented.

<sup>2</sup> Letter BS to [Area] District Court Law Society [LCS] (18 December 2008). The power of attorney would have lapsed with the death of Mrs TM.

<sup>3</sup> [High Court decision].

<sup>4</sup> [Court of Appeal decision].

[13] The award of costs by the Court of Appeal of \$2,000 was recorded in a certificate issued by the Registrar on 8 October 2003. The intitlment on the certificate, and the proceedings, recorded the respondents as being V and her sister “as executors nominated in the will of [late Mrs] TM.

[14] The judgment prepared by BS/Law Firm A for sealing, used the intitlment in the strike out proceedings, recording V TM as the respondent.

[15] It is this variation between the Court record and the judgment prepared by BS and sealed by the Court which forms the basis of Mr TM’s allegations.

### **Mr TM’s complaints and the Standards Committee determinations**

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[16] In September 2014 Mr TM complained:<sup>5</sup>

... the bankruptcy notice is fraudulent and/or misleading – given that the party named as the “judgment creditor” is not the party to whom the costs were awarded by the Court.

[17] The Committee noted that s 351(2) of the Lawyers and Conveyancers Act 2006 provides that no complaint may be made if a complaint about the same matter had been disposed of under the Law Practitioners Act 1982. The issue to be decided was whether the Committee could “consider a further complaint about V TM’s instructions to BS to recover costs”.<sup>6</sup>

[18] The Committee noted the background to this complaint:<sup>7</sup>

In 2004, Mr TM complained about the bankruptcy notice filed by BS on instructions of V TM. His complaint alleged that, as the Court had awarded costs to the estate’s co-executors V TM and N TM, BS was wrong to act on the instructions of V TM alone.

That complaint was disposed of, by the [Area] District Law Society Complaints Committee, in a decision dated 16 August 2005, in the following terms–

“... the Committee could find no substance in this complaint and was of the view that Ms TM was entitled to enforce the Order of Costs in her capacity as a successful defendant regardless of her status as executor.”

[19] The Committee determined that the complaint had been disposed of in 2005 by the [Area] Complaints Committee and that it did not have jurisdiction to consider the complaint again.

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<sup>5</sup> Email TM to Lawyers Complaints Service (4 September 2014) at [5].

<sup>6</sup> Standards Committee determination (29 September 2014) at [6].

<sup>7</sup> At [3]–[4].

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[20] In May 2015 Mr TM made another complaint that BS and Law Firm A had a conflict of interest. He referred to an email from Mr H on behalf of the respondents to this Office in response to LCRO 245/2014, where Mr H stated that the respondents were acting for V TM personally.<sup>8</sup>

[21] Mr TM then said:<sup>9</sup>

After I was bankrupted by Law Firm A over a debt they claimed personal to their client, BS subsequently represented V TM in her capacity as executor of my mothers [sic] estate to obtain probate. In effect their client began proceedings to sue herself as the representative of the estate to recover the debt, thus obtaining a grant of probate without proper challenge ...

[22] The Standards Committee determined to take no further action in respect of this complaint. It said:<sup>10</sup>

It is not possible to respond to Mr TM's concern that V TM engaged BS "in effect ... to sue herself as the representative of the estate to recover the debt, thus obtaining a grant of probate without proper challenge." That is because there is no evidence that V TM has ever sued the estate to recover a debt. V TM did, as she was entitled to (see paragraph [6]), instruct BS to enforce an Order for Costs against Mr TM, but that is a different matter.

## Review

[23] The review progressed by way of an applicant only hearing in [Area] attended by Mr TM. The respondents were not required to attend and did not exercise the right to do so.

[24] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 of the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

[25] Both review applications were considered at the hearing.

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<sup>8</sup> Email H to Legal Complaints Review Officer (25 May 2015).

<sup>9</sup> Email TM to the Complaints Service (28 May 2015).

<sup>10</sup> [Area] SC 2 determination (18 June 2015) at [11].

## Nature and scope of review

[26] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>11</sup>

... 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.

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.

[27] More recently, the High Court has described a review by this Office in the following way:<sup>12</sup>

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.

[28] 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.

<sup>11</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>12</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

## Analysis

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[29] The complaint made by Mr TM in 2004 was that BS was wrong to act on instructions from Ms TM alone to issue the bankruptcy notice and proceedings against him. His 2014 complaint is that:<sup>13</sup>

... the bankruptcy notice is fraudulent and or misleading given that the party named as the “judgment creditor” is not the party to whom the costs were awarded by the Court.

[30] The party to whom the Court awarded costs in September 2003 was V TM. The costs ordered against Mr TM by the Court of Appeal were awarded in favour of “V TM and anor as executors nominated in the will of [late Mrs] TM”. In 2005 the Complaints Committee decided “... that Ms TM was entitled to enforce the order of costs in her capacity as a successful defendant regardless of her status as executor”.<sup>14</sup>

[31] That is the end of the matter. It is the same complaint and the Standards Committee correctly determined it had no jurisdiction to consider the complaint.

[32] In the 2014 complaint, Mr TM included the allegation that the bankruptcy notice was fraudulent and/or misleading. I do not accept that the complaint has been altered by these additional elements. In any event, those are matters for the Court, and Mr H is correct when he says “... [Judge], the Court of Appeal, and [Judge 2] have all now found that Mr TM’s arguments have no merit. There is, and can be, no criticism of BS”.<sup>15</sup>

[33] I concur with the determination of the Standards Committee to take no further action on these grounds alone, but a submission made by Mr TM at the review hearing must be addressed to ensure this matter does not come before the Complaints Service again in any form.

[34] Mr TM submitted that [Judge] referred to the fact that V TM had applied for various orders in her capacity as executor of her mother’s estate and that therefore the bankruptcy notice could not be issued on her instructions alone.

[35] His Honour said “V TM, in her capacity as an Executor named in the will, has applied for orders ...”.<sup>16</sup>

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<sup>13</sup> Above n 5, at [5].

<sup>14</sup> Above n 6, at [4].

<sup>15</sup> Letter H to LCRO (5 March 2015) at [7].

<sup>16</sup> Above n 3, at [5].

[36] V TM was **named** in the will as an executor. At the time the judgment was issued Ms TM had not been **appointed** an executor of the estate. She did not at that stage have any authority to act as executor of the estate.

[37] Mr TM argues that BS was required to mirror the judgment of the Court in the bankruptcy notice and proceedings and he had therefore changed what the Court had ordered and committed a fraud against, and misled, the Court.

[38] In this regard, I note the words of [Judge 2]:<sup>17</sup>

... If the correct position is that Ms V TM's standing as a creditor was limited to the amount of the costs judgment made in the High Court, and she had no entitlement to the costs ordered in the Court of Appeal (on the basis that those costs were awarded to her and her sister in their capacities as the named executors in their mother's estate) then it seems to me that the result would simply have been that the bankruptcy notice was overstated to the extent of the amount of the costs awarded by the Court of Appeal. Under s 20(b) that would not have been enough to invalidate the notice.

[39] The Associate Judge clearly did not express any view that the Court had been misled and Mr TM's argument is without merit.

[40] This Office has limited resources which should not be expended upon reviews that lack merit. Mr TM is on notice that if this issue comes before this Office in any form in the future it is likely that costs will be awarded against him.<sup>18</sup>

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[41] The complaint as to a conflict of interest is equally without merit. At the review hearing Mr TM argued that the respondents were acting for the estate in pursuing the bankruptcy against him and applying for probate.

[42] It is impossible to discern what Mr TM's complaint is when he says "In effect their client began proceedings to sue herself as the representative of the estate to recover the debt, thus obtaining a grant of probate without proper challenge".<sup>19</sup>

[43] Mr TM says the estate had to pay the costs of the applications by Ms TM. There is no evidence provided to support this submission. In any event, whether or not costs were properly paid by the estate (if Mr TM's assertions are correct) was a decision taken by the executors of the estate. It is not a matter of professional standards for which BS and/or Law Firm A are responsible.

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<sup>17</sup> [High Court decision].

<sup>18</sup> Lawyers and Conveyancers Act 2006, s 210.

<sup>19</sup> Above n 9.

[44] The only decision that can be reached with regard to this complaint is a decision to take no further action.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decisions of the Standards Committees are confirmed.

**DATED** this 15<sup>TH</sup> day of August 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 TM as the Applicant  
BS and Law Firm A as the Respondents  
[Area] Standards Committees 1 and 2  
New Zealand Law Society