

CONCERNING

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

AND

CONCERNING

a determination of [North Island] Standards Committee

BETWEEN

MS KB

Applicant

AND

MS JR

Respondent

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

Introduction

[1] Ms KB has applied for a review of the decision by [North Island] Standards Committee to take no further action in respect of the complaints raised by her against Ms JR. Ms JR acted for Ms KB's father and Ms KB was appointed her father's attorney.

[2] An earlier decision by the Committee to take no further action in respect of the initial complaints lodged by Ms KB is the subject of a separate review decision.¹ I do not intend to repeat the introductory material contained in that decision.

Ms KB's complaints and the Standards Committee decision

[3] The further complaints lodged by Ms KB with the Complaints Service were recorded by the Standards Committee as follows:²

- a) Non-release of the residue of the late [Mrs CG]'s estate to [Mr CG];

¹ *KB v JR* LCRO 191/2012.

² Standards Committee decision dated 17 September 2012.

- b) Unnecessary legal costs incurred after 2 December 2011 when Ms KB dismissed Ms JR but Ms JR allegedly refused to step aside; and
- c) Refusal to provide information requested by Ms KB regarding the estate of [Mrs CG].

[4] In each case the Standards Committee determined to take no further action and I record here the relevant comments in respect of each complaint:³

- a) ... the Committee considered that Ms JR's request for a deed of release and indemnity was sensible given the history of conflict between the parties. In any event, the Committee noted that the deed signed by [Mr CG] provided a relatively limited indemnity. The Committee observed that the decision as to whether or not to request a deed of final release and indemnity is a judgement call for a practitioner to make with reference to the circumstances of a particular retainer and is indeed common practice amongst some solicitors.
- b) The Committee noted that it had been Ms KB's choice to obtain advice from [Doctor]. The Committee found that there was no evidence that the legal costs that Ms JR⁴ (on behalf of [Mr CG]) incurred by instructing [Doctor] from November 2011 onwards could in any way be attributed to any breach of professional standards by Ms JR.
- c) Ms JR did not specifically respond to the complaint that she failed to comply with Ms KB's request under the Privacy Act 1993. However, in an email of 20 April 2012 to [Doctor]Ms JR advised that she was holding no documentation other than an authority and instruction form signed when the [unit] was transferred to a tenancy in common in 2009 and a prior and post registration title search. Finally, the Committee noted that Ms JR had provided a copy of the ledger activity report for [Mrs CG] in support of her letter of 17 January 2012 responding to complaint 5261 and that a copy was provided to Ms KB on 23 January 2012.

The application for review

[5] Ms KB's review application included a substantial amount of material, some of which referred to issues that were not addressed in the Standards Committee decision. In particular, these include a complaint about Ms JR's bills and an alleged conflict of interest.

³ Above n 2 at [18], [22] and [26].

⁴ The reference by the Standards Committee to Ms JR is an error – the costs were incurred by Ms KB.

[6] Both parties have consented to this review being completed on the basis of the material provided to the Standards Committee and to this Office. During the course of the review Mr CG has passed away and in addition, Ms JR has ceased to practice in New Zealand.

[7] A draft decision was sent to the parties for comment on 17 April 2014. Ms JR has not made any comments in respect of this decision. Ms KB provided comments which have been considered prior to issuing this decision.

Was Ms JR providing regulated services?

[8] Before addressing the complaints, it is necessary to first determine whether or not Ms JR was providing regulated services. If it is considered that she was not providing regulated services then her conduct is not subject to regulation under the Lawyers and Conveyancers Act 2006 (the Act) or the Conduct and Client Care Rules 2008 (the Rules).⁵

[9] Ms JR referred to *AH v ZS*.⁶ In that case, the lawyer was both executor and trustee of a will, and one of two trustees of a trust established by the deceased during the testator's lifetime. In that decision I noted:⁷

From the outset, it must be observed that the difficulty which the Applicant faces with regard to this complaint, is that her complaints about the lack of information being provided to her by the Trustees of her parents' Trusts, and/or breaches of fiduciary duties owed to her by the Trustees, relate to the conduct of the Respondent as a trustee.

The Applicant is seeking to use the complaints and disciplinary process to have the Complaints Service carry out an audit and investigation of the Trusts' affairs, and to produce the information required by the Applicant.

The major difficulty is that she is not the Practitioner's client. The Respondent's clients are the trustees. Notwithstanding that the Respondent is one of those trustees, once decisions are made by him and the other trustee, he must, in his role as solicitor for the trustees, act in accordance with his instructions.

[10] Later, I commented:⁸

⁵ Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008.

⁶ *AH v ZS* LCRO 90/2010.

⁷ Above n 6 at [33-35].

⁸ Above n 6 at [54-56].

The difficulty with this aspect of the complaint, however, is whether the initial refusal by the Respondent to supply the documents, and subsequently to provide answers relating to administration of the Trust, constitutes conduct to be considered in the context of a professional conduct complaint.

The Respondent has answered the queries of the Applicant in the manner he sees fit and as instructed. These responses are subject to scrutiny by the Court if he has failed in his duty as a trustee. It is not however the function of this office or the Standards Committee, to undertake the Court's role where a beneficiary remains dissatisfied with the answers provided.

When discharging the functions of an Executor or Trustee, the Respondent was acting in that capacity, and not as a solicitor. In general terms, therefore, the Applicant needs to pursue her claims through the Court. In this regard, the provisions of s 138(1)(f) of the Act apply. That section provides that the Committee may exercise a discretion to take no further action if, in all the circumstances, there is an adequate remedy that it would be reasonable for the person aggrieved to exercise. Consequently, the Committee's decision could equally have been made in reliance on this section.

[11] Ms JR argued that the conduct complained of was conduct in her capacity as executor/trustee, and therefore not conduct to be considered in the context of a professional conduct complaint.

[12] In its decision, the Standards Committee referred to another decision, LCRO 214/2011.⁹

[13] In that case, the lawyer was appointed executor/trustee of his client's will and a trustee of his client's trust. The initial question to be considered was noted as follows:¹⁰

Before considering the conduct complained of by [A] it is necessary to first determine what jurisdiction the Standards Committee and myself have in respect of [B]'s conduct. This arises for consideration because [B] was the sole Executor of Mrs [X]'s will and also a trustee of the [Trust 1]. As such, it could be argued that some of his conduct was conduct in his capacity as Executor and/or trustee and not in his capacity as a solicitor and therefore did not fall to be considered by the Standards Committee or the LCRO.

[14] It was intended that the deceased's grandson and his brother should be appointed additional trustees of the trust and they sought advice from the lawyer as to

⁹ Unpublished decision.

¹⁰ LCRO 214/2011 at [32].

their duties as trustees should they accept the appointment. I concluded from this that the lawyer was providing regulated services. In addition, the lawyer was formally appointed by resolution as solicitor to the trust and was also appointed as solicitor for the estate. It was clear therefore that the lawyer in that case was providing regulated services.

[15] When considering that issue I also took note of the comments made by the LCRO in *Shrewsbury v Rothestay* where the LCRO concluded:¹¹

... where the services provided by a lawyer are services of a type that it is usual for a lawyer to provide, and they are provided in conjunction with legal work (as defined by paragraphs a) to c) of the definition of that term) they are properly considered to be incidental to that work and also “legal work”.

[16] The issue subsequently arose to be considered in *TE v Wellington Standards Committee 2 (TE)*.¹² In that case, the lawyer was again an executor/trustee of his client’s will and argued that as he was not providing regulated services, his conduct could not be the subject of professional standards proceedings. This was particularly relevant, as the Standards Committee had determined to lay charges against the lawyer and it was to be assumed that the charge or charges would be that of misconduct. Section 7 of the Act defines misconduct as meaning “conduct of the lawyer... that occurs at a time when he or she is providing regulated services...”. Consequently, unless the conduct took place in the context of providing regulated services, or unless the conduct was such as would fall within the definition of s 7(1)(b)(ii) there was no basis on which a charge of misconduct could be laid.

[17] It is helpful to insert the discussion in that decision in full here:¹³

In *Shrewsbury v Rothestay*, the LCRO discussed the provisions in Australian jurisdictions parallel to the Lawyers and Conveyancers Act and also considered the purposes of the Act, being to protect consumers of legal services and to provide a more responsive regulatory regime in relation to lawyers and conveyancers. At paragraph [30] of that decision he noted: -

It would defeat that purpose [of consumer protection] if the legislation were interpreted to exclude from its scope functions which a lawyer routinely undertakes alongside the provision of legal services but these were not considered to be regulated services.

In the following paragraph he concluded: -

¹¹ *Shrewsbury v Rothestay* LCRO 99/2009 at [31].

¹² *TE v Wellington Standards Committee 2* LCRO 100/2010 & 92/2011.

[W]here the services provided by a lawyer are services of a type that is usual for a lawyer to provide, and they are provided in conjunction with legal work (as defined by paragraphs (a) to (c) [in section 6] of the definition of that term) they are properly considered to be incidental to that work and also “legal work”. In light of this the work of an executor/trustee who also acts as a solicitor for an estate will be regulated services.

[Mr] TF disagrees with that decision for the following reasons:

- (a) Estate administration stands as a separate and discrete and substantial discipline of its own.
- (b) The foregoing is reflected in the Court of Appeal decision of *Hansen v Young* [2004] 1 NZLR 37 at paragraphs [33] to [36]. At paragraph [34], the Court of Appeal referred to the House of Lords decision in *Dubai Aluminium Company Limited v Salaam* [2003] 1 All ER 97 where Lord Millett at paragraph [134] when discussing what might be expected by a client from a solicitor/trustee “...observed that it was part of the solicitor’s business to advise whether (for example) trust money may lawfully be invested in an overseas hedge fund or used to pay a discretionary beneficiary’s school fees but that it was not part of the solicitor’s business to make the decision whether to do so or not.”
- (c) Further on a ejusdem generis analysis, the first four definitions of “legal services” do not fit the notion of decision making in respect of the administration of estate.
- (d) Putting the matter in proper context, legal services may be an incident of estate and trust administration, but not the reverse.
- (e) Ultimately, the supervision of the administration of an estate or a trust lies with the High Court. There would have to be a very clear statement that Parliament intended the disciplinary processes governing legal practitioners should cut across that supervision of the High Court.
- (f) Although excluded from legal services and therefore section 7(1)(a), misconduct in the administration of an estate by a legal practitioner, might be misconduct covered by section 7(1)(b).

I agree that Mr TF’s arguments may have some merit where the conduct complained of can quite clearly be identified as conduct undertaken in the lawyer’s capacity as executor/trustee. Conduct that would fall into this category would be conduct undertaken with regard to disposal of the deceased’s body,

¹³ Above n 12 at [46-53].

and (as occurred in the case considered in *LV v VJ*¹⁴) distribution of a deceased's personal effects.

However, much of what a lawyer does in the administration of an estate when acting in the dual capacity of solicitor and executor/trustee can be considered to be conduct in either capacity, or can readily be identified as conduct in the capacity of lawyer for the Estate.

A helpful approach when categorising the conduct would be to consider the conduct as being undertaken by two separate persons, and to then determine whether the conduct in question could be considered to be conduct of a lawyer acting for the Estate. If the conduct in question is conduct that a lawyer acting for the Estate would be responsible for, then it can be considered that the lawyer in that instance is providing regulated services and therefore subject to the disciplinary regime.

It is therefore necessary to consider each of the matters complained of by Ms NT and to determine whether the conduct in question was taken by Mr TE in his capacity as a lawyer, or whether he was exercising discretion as executor/trustee only.

In summary therefore, I do not necessarily disagree with the LCRO in *Shrewsbury v Rothsay* but in the present instance, I address the issue more directly to determine whether or not the matters complained of constitute conduct in the course of providing regulated services.

[18] It is that test that I propose to follow in this matter.

Failure to distribute [Mrs CG]'s estate

[19] There are two parts to this complaint:

- a) Ms JR refused/failed to transfer Mrs CG's interest in the property to Mr CG;
and
- b) Ms JR delayed distributing the proceeds of sale of the property by transferring the funds to Mr CG.

[20] Applying the test in [51] – [53] of *TE* the conduct in respect of both issues was being undertaken by Ms JR in her capacity as the Estate solicitor. In both instances, advice would be required as to the steps to take, and in both instances it required Ms

¹⁴ LCRO 81/2011.

JR to carry out the necessary steps. I have no difficulty in concluding that her conduct with regard to these complaints is conduct which is subject to the Act and the Rules.

[21] The couple's unit was to be sold back to the Village operator. Whilst Mrs CG's interest in the property had to be transferred to Ms JR as executor, there was no purpose or need to transfer the interest on to Mr CG. The transfer back to the Village operator could be signed by Ms JR as executor and that is what she did. It would usually only be where the interest in the property is to be retained by the beneficiary that there would be an expectation that the interest would be transferred to the beneficiary.

[22] The sale proceeds were paid to Ms JR on 4 May 2012. [Doctor] acted on the sale of the property and paid out Mr CG's share the following day. A request from Ms KB to Ms JR to distribute Mrs CG's share of the funds to Mr CG was met with this response from Ms JR:¹⁵

I will complete the winding up of your late mother's estate when I am ready to and it will involve preparation of a final Deed of Release and indemnity which you will need to sign on your father's behalf if you believe that he lacks the mental capacity to do so.

[23] [Doctor], in an email dated 14 June 2013, also requested Ms JR to distribute the funds and advised Ms KB that Ms JR was not entitled to demand execution of a release and indemnity as a precondition to distribution. He cited case law in support of his position.

[24] Ms KB's concerns arose from the fact that Ms JR had been in communication with Ms KB's brother, [Brother CG] in which they had discussed withholding funds and in which Ms JR said to [Brother CG]:¹⁶

As I am the executor of [Mrs CG]'s estate, I can hang on to the funds in the meantime and there is no pressing reason why the estate has to be distributed.

(This communication was made in relation to funds paid into Ms JR's trust account by Mrs CG's bank).

[25] I am unaware of whether Ms KB was aware of this communication at the time or not, but the content of this email certainly adds to the strength of her complaint.

¹⁵ Email JR to KB (13 June 2012).

¹⁶ Email JR to CG (31 October 2011).

[26] It was not until Ms JR obtained execution of the deed of release and indemnity by Mr CG personally, on 10 August 2012, that distribution was finally effected. The Standards Committee determined:¹⁷

that the decision as to whether or not to request a deed of final release and indemnity is a judgement call for a practitioner to make with reference to the circumstances of a particular retainer and is indeed common practice among some solicitors.

Whilst I agree that this statement is correct, particularly where the solicitor is the executor/trustee, I do not agree that execution of the deed can be insisted upon as a precondition to distribution.

[27] Commonly, beneficiaries are cooperative and agree that administration of an estate has been properly carried out and in those circumstances have no objection to executing such a deed. If they do have objections, then the matter is raised and addressed as part of the administration of the estate. However, in this instance, it would seem that Ms KB was not prepared to execute the deed on behalf of her father, presumably as she had some dissatisfaction with Ms JR's conduct in administering the estate. The issues were either not raised, or Ms JR was not able to, or not prepared to address them. Whatever the reason, Ms KB did not wish to sign the deed.¹⁸

[28] In those circumstances, Ms JR was not in a position to insist the deed be executed before distribution was effected, and even if it were, the validity of a document executed under duress would have to be considered. [Doctor] cited case law to Ms JR which he advised supported his contention that she could not insist on the document being executed. Ms JR's response to Ms KB was somewhat less than professional, effectively telling Ms KB that she would complete administration of the estate in her own good time. This constitutes unsatisfactory conduct by reason of s 12(b) of the Act.

[29] In addition, Ms JR then delayed completing distribution of the estate until August 2012 when she obtained a signature from Mr CG to the deed of release and indemnity. This offends Rule 3 of the Rules which requires a lawyer to act in a timely manner.

Penalty

¹⁷ Above n 2 at [18].

¹⁸ In her comments on the draft decision Ms KB noted: "The LCRO has made no comment with regard to the information that I requested from Ms JR so that I could inform WINZ of my father's financial situation as I had a meeting with WINZ to discuss the Residential Care Subsidy and other matters." These matters are included in the discussion in [31] to [33] inclusive.

[30] The appropriate penalty to impose following this finding is a fine to reinforce the disapproval inherent in the finding of unsatisfactory conduct. I consider that a fine of \$500 is the appropriate level of fine to be imposed in the circumstances.

Refusal to provide information

[31] Ms KB's complaint to the Complaints Service was that Ms JR would not provide a copy of her trust account ledger for Mr CG for the period from 26 June 2011 to 28 October 2011. In addition, Ms KB's complaint was that Ms JR did not comply with a request under the Privacy Act 1993 to supply copies of correspondence, emails, documents and papers which Ms JR was holding in respect of Mr CG.

[32] Ms KB was Mr CG's attorney. As such, any request for documents relating to Mr CG's affairs was the same as if it had been made by Mr CG himself. Although Ms KB's request was made pursuant to the Privacy Act, Ms JR's obligation to provide all information relating to Mr CG's affairs arose by reason of Rule 7 of the Rules. Ms JR was obliged to provide Ms KB with all the information that she requested on behalf of her father including information relating to matters which Ms JR had dealt with for Mr and Mrs CG jointly. Each joint client is entitled to the same information.

[33] The claim by Mr CG's daughter was a claim against Mrs CG's estate, and Ms JR was the executor of Mrs CG's will. However, the person affected by the claim was Mr CG who was the sole residuary beneficiary, and he had the right to object to any claim and to defend and oppose any proceedings if they were issued. It seems to me that there was absolutely no reason why Ms KB as Mr CG's attorney should not have been provided with information relating to the claim. It was not for Ms JR to decide whether provision of the information was appropriate – Ms KB was Mr CG's attorney and she was entitled to it. Consequently, I consider that Ms JR's conduct in withholding this information constituted a breach of Rule 7 and therefore constitutes unsatisfactory conduct.

Penalty

[34] Had Mr CG still been alive, the appropriate remedy would have been to order that the relevant information be released to him. However, now that he has died, the Power of Attorney has ceased to be effective and Ms KB is not entitled to call for that information. In the circumstances, the appropriate penalty again is a fine and I fix the sum at \$500.

Fees

[35] In a follow up email to the Complaints Service dated 2 July 2012, Ms KB enclosed a further invoice from Ms JR for \$1,092.50 and advises that the total of the bills rendered by Ms JR for the administration of Mrs CG's estate, was \$5,117.50. She complains that she considered these bills to be excessive, given that Ms JR's original quote was for \$2,500 plus GST.

[36] In her response to the complaint Ms JR advises that she had never given any quotation for her fees with regard to the Estate. She says:¹⁹

It is not possible to estimate what a fee will be in a given estate due to the number of unforeseen matters which may arise during the course of administering an estate.

[37] The Committee did not conduct any investigation into the fees charged by Ms JR by requesting her time sheets or files and the only reference to fees in the Committee's decision related to the fees incurred by Ms KB in instructing [Doctor].

[38] Ms KB referred to items in Ms JR's account dated 27 June 2012 which related to settlement of the unit, suggesting that these were unnecessary attendances which forced her father to incur unnecessary fees. Ms KB's view, is that if Mrs CG's interest in the property had been transferred to Mr CG, then it would not have been necessary for Ms JR to be involved with the sale.

[39] Ms KB's complaints therefore seem to be both in relation to the quantum of Ms JR's bills, and the fact that by declining to transfer the interest in the property to Mr CG, unnecessary fees were incurred.

[40] These issues have not been addressed by the Committee and consequently an option available to me is to refer the matter back to the Committee. However, I make the following comments:

- (a) Even if one half of the bill dated 27 June 2012 were considered to be unwarranted, this would amount to a reduction of the account by approximately \$500.
- (b) It is likely, that even if Ms JR did give an indication of fees (which she disputes) this would have been an estimate, as distinct from a quote. This would leave the door open for Ms JR to show that she carried out work for

¹⁹ Letter JR to NZLS (16 July 2012).

which she was entitled to charge, even allowing for application of the law concerning estimates.

- (c) Applying a general rule of thumb, the Committee would have to reach the view that Ms JR's bill of costs exceeded what was a fair and reasonable fee by at least \$1,000 before it would consider making a finding of unsatisfactory conduct, which is a prerequisite before any reduction in the bills of costs may be directed.
- (d) It was the decision of Ms KB to instruct [Doctor] to act on the sale of the property. If Ms JR had been instructed, then the additional costs as perceived by Ms KB would not have been incurred. On that basis therefore, any additional costs were incurred as a result of Ms KB's own decisions.

[41] Overall, I do not consider that I should prolong this complaint by directing the Committee to address the issue of fees any further.

Conflict of interests

[42] In the application for review Ms KB alleges collusion between Ms JR and [Brother CG] resulting in a conflict of interests for Ms JR. These were not specifically matters complained of by Ms KB, but in any event, were addressed in LCRO 191/2012. I do not intend therefore to address matters further in this decision.

Summary

[43] Ms JR's conduct constitutes unsatisfactory conduct by reason of s 12(b) of the Lawyers and Conveyancers Act 2006, and by reason of breaches of Rules 3 and 7 of the Conduct and Client Care Rules.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is modified by finding that Ms JR's conduct constitutes unsatisfactory conduct for the reasons noted above.
2. Ms JR is ordered pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006, to pay the sum of \$1,000 by way of fines to the New Zealand Law Society, such sum to be paid by no later than 20 June 2014.
3. In all other respects, the determination of the Standards Committee is confirmed.

Costs

Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 and the Costs Orders Guidelines issued by this Office, Ms JR is ordered to pay the sum of \$900 by way of costs to the New Zealand Law Society, such payment to be made by no later than 20 June 2014.

DATED this 20th day of May 2014

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 KB as the Applicant
Ms JR as the Respondent
The [North Island] Standards Committee
The New Zealand Law Society