

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

GG

Applicants

AND

HH and II

Respondents

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

DECISION

Introduction

[1] Mrs GG has applied for a review of a decision by the [Area] Standards Committee [X], which decided it was not necessary or appropriate to take further action in respect of her complaint about conduct on the part of Mr HH and Mr II.

Background

[2] Mr HH acted for Mrs GG's mother, Mrs JJ, in 1996 when she established a family trust. The trustees of the trust were Mr HH and Mrs JJ. The beneficiaries were Mrs JJ's six children. Mrs JJ settled her primary asset, her home, into the trust. Mrs JJ also completed a power of attorney appointing Mrs GG as her attorney.

[3] Mr HH acted as lawyer for the trust.

[4] In 1997 Mr HH prepared what turned out to be Mrs JJ's last will.

[5] Mrs JJ's physical and mental capacity gradually declined with age. By the end of April 2005 she had moved into a care home, and been medically assessed as incapable of making decisions with respect to her property or personal care.

[6] With her mother's decline, Mrs GG's exercise of powers as Mrs JJ's attorney became more relevant.

[7] In June 2005 Mrs GG replaced her mother as trustee of the trust the day before the trustees sold Mrs JJ's former home, and invested the net sale proceeds.

[8] Over the years that followed, Mr HH attended to the trust's paperwork, including ensuring that annual tax returns were prepared and filed, and at times Mrs GG had limited involvement in her mother's affairs while she was away overseas.

[9] Mr HH retired from partnership in his firm on 31 March 2012, became a consultant to the firm, and remained a trustee of the trust. Mr HH handed over conduct of Mrs JJ's matters to Mr II, a senior associate of the firm.

[10] Mrs JJ died in early August 2012.

[11] With Mrs JJ's passing, arguments between siblings took shape. Mr HH refers to JK, Mrs JJ's son, having borrowed money from Mrs JJ, and disagreement between him and Mrs GG as trustees over the impact of JK's borrowing on the distribution of trust funds. Neither trustee had satisfactory evidence of the amount JK had borrowed from Mrs JJ while she was alive. Mrs GG wanted JK to account for everything Mrs JJ had lent or given to him, whereas he was only willing to acknowledge a debt to his mother of \$10,000.

[12] Mr HH's inquiries did not disclose evidence of any debt in excess of \$10,000, so he formed the view the distribution should be made to all the beneficiaries, with an adjustment to reflect the \$10,000 the trustees could prove JK had borrowed.

[13] Mrs GG did not agree, leaving the trustees in deadlock. Lack of unanimity between the trustees meant the trust could not be wound up, and none of the six beneficiaries could receive a distribution.

[14] Mr HH and Mr II spent some time attempting to break the deadlock without success. Mr HH sought independent legal advice on the validity of Mrs GG's appointment as a trustee. He preferred that alternative to the more costly option of applying to the High Court for orders. The advice Mr HH received was that Mrs GG's appointment could be invalid, and if it were, that would leave him as sole trustee.

[15] Mr HH says he passed the legal advice on to Mrs GG, and her lawyer. Based on that advice Mr HH said he intended to instruct the firm to distribute the trust fund equally between the six beneficiaries, with an adjustment of \$10,000 being made for JK's indebtedness.

[16] Mr HH says Mrs GG's lawyer told him she did not wish to contest Mr HH's position or prevent the distribution by applying to the High Court. As Mrs GG had formally conceded her position, Mr HH assumed the powers of the sole trustee to the trust. He authorised the firm to distribute the trust fund to the beneficiaries. At the end of May 2013 the firm charged fees of \$22,700 for the services provided by Mr HH and Mr II, deducted its fees from the funds held for the trust, and distributed the balance to the six beneficiaries with an adjustment being made to JK's share.

Complaint

[17] On 30 July 2014 Mrs GG and her husband laid a complaint to the New Zealand Law Society Lawyers Complaints Service about the lawyers' conduct and fees. The substance of the complaint was that Mr HH had acted unlawfully by making himself sole trustee, and the lawyers:

- (a) Were unprofessional, incompetent and negligent.
- (b) Had sided with the other beneficiaries against Mrs GG and undermined her position as trustee.
- (c) Kept substandard records and their administration was poor.
- (d) Overcharged and billed a fee twice for some attendances.

[18] Mr HH and Mr II denied any wrongdoing and gave their own account of events.

[19] The Committee considered the lawyers' conduct in relation to Mrs JJ having executed the trust deed and the will, Mrs GG's appointment as a trustee, the administration of the trust and distribution of its assets according to the professional standards that applied at relevant times. It also considered the fees charged for the services provided by Mr HH and Mr II, concluding those were fair and reasonable. The Committee did not find the evidence supported determinations that the lawyers had contravened professional standards, concluding that further action was not necessary or appropriate.

Application for review

[20] Mrs GG filed an application for review dated 12 November 2014. The application broadly disagrees with the Committee's conclusion. It includes reference to a date and amount Mrs GG says are misrecorded in the decision.

[21] Mrs GG is critical of Mr HH for not having quantified JK's debt while Mrs JJ had capacity, and for prematurely encouraging her to exercise her power as attorney and be appointed as trustee to replace her mother. She contends he did not exhaust all avenues of inquiry before making the distribution, and he could and should have done more to ascertain the level of JK's indebtedness to Mrs JJ.

[22] Mrs GG objects to the opinion Mr HH obtained, saying it was inconclusive and he did not give the lawyer all the relevant information.

[23] Mrs GG says that as she was a beneficiary of the trust, Mr HH was her lawyer and he made some major errors. She objects to repeated requests for updated information about beneficiary addresses, and delays in providing information to the beneficiaries about investments.

[24] Mr HH relied on the materials he had made available to the Committee.

Review on the papers

[25] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[26] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[27] The nature and scope of a review have been discussed by the High Court,

which said of the process of review under the Act:¹

... 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.

[28] More recently, the High Court has described a review by this Office in the following way:²

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.

[29] 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.

Discussion

Failure to quantify JK’s debt

[30] Mrs GG is critical of Mr HH for not having quantified JK’s debt when Mrs JJ instructed him in 1996. As conduct prior to 2002 is beyond the scope of consideration by this Office, that concern cannot be advanced.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[31] Mrs GG contends Mr HH did not exhaust all avenues of inquiry before making the distribution in 2013, and he could and should have done more to ascertain how much JK had borrowed from their mother.

[32] There was nothing preventing Mrs GG from making the enquiries to which she refers. She could have contacted Mr MN about a debenture from years before, for example.

[33] There is nothing objectionable in Mr HH satisfying himself that the evidence he had was sufficient to support the deduction, especially given what he knew from Mrs JJ because of his long standing professional relationship with her, as her lawyer, the lawyer for her trust, and as a trustee of her trust.

Premature exercise of power of attorney and appointment as trustee

[34] Mrs GG is critical of Mr HH for encouraging her to exercise her power as attorney and be appointed as trustee to replace her mother in 2005, which she considers to have been premature.

[35] Around the time of her admission to the rest home, Mrs JJ was medically assessed as capable of making some decisions and not others. She could no longer live in her home. She and Mr HH, as trustees, placed her home on the market after she went into care. The sale was finalised the day after Mrs GG replaced her mother as trustee, with the support of Mr HH as the other trustee. It is assumed that at the time, that decision was in the best interests of all concerned: Mrs JJ, as settlor and trustee, with her capacity on the decline, and the six children who stood to benefit from the trust's investments.

[36] It is worth noting that Mr HH's view at the time was that Mrs GG could lawfully do what she did. He gave her a legal opinion to that effect. There is no evidence of Mr HH having suggested Mrs GG obtain independent legal advice at that stage. If he did not suggest that course, he probably should have. However, that was not part of Mrs GG's complaint, and I exercise my discretion not to address it further here, largely because when the trustees reached deadlock after Mrs JJ passed away, Mrs GG did have her own lawyer.

[37] It is assumed that Mrs GG's independent lawyer explained to her all of the implications of what had gone before. On the basis of what she knew and the independent advice she had received, Mrs GG conceded to Mr HH's position that he was the sole trustee. She did not have to. She could have applied to the High Court for orders, formally objecting to the opinion on which Mr HH relied. She could have

presented all the information that was relevant to her case, and would have received a conclusive result from the High Court. She did not. Her concerns cannot be advanced through this review process, and it is not necessary to consider this concern further.

Was Mr HH the beneficiaries' lawyer?

[38] Mrs GG says that as she was a beneficiary of the trust, Mr HH was her lawyer, and he made some major errors. From this it is inferred that Mrs GG believes Mr HH breached professional obligations to her as her lawyer.

[39] Mr HH had two distinct roles. He was the trust's lawyer, which is an advisory role. Mr HH was also a trustee. In that role, he was obliged to make decisions in accordance with the trusts imposed on him by the trust deed. The two roles are not the same. Mrs GG's contentions about Mr HH's conduct as the trust's lawyer are misplaced.

Administration

[40] Mrs GG objects to a number of administrative matters, including repeated requests for updated information about beneficiary addresses, and delays in providing information to the beneficiaries about investments.

[41] The requests for updated addresses were periodic. There is nothing objectionable in a firm checking from time to time that it has correct addresses on file.

[42] Provision of information to beneficiaries is a matter for trustees. Concern about delays in providing investment information to beneficiaries does not relate to the time that Mr HH was acting as sole trustee. There is no evidence of undue delay on the part of either lawyer in providing information lawyers are expected to provide. In the circumstances, any delays there were in providing information were not such as to raise professional standards issues.

Date and amount

[43] Mrs GG says a date and amount are misrecorded in the decision. Neither of those makes any difference to the broad question of whether there has been conduct on the part of either practitioner that warrants a disciplinary response.

Fees

[44] There is no evidence to support the allegation that Mr II and Mr HH double dipped, and the timesheets strongly suggest that they did not bill for quite a lot of the time they spent on the file. There is no basis on which to conclude that the lawyers' fees were not fair and reasonable, taking into account the interests of lawyers and client, and the reasonable fee factors set out in rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008.

Summary

[45] I have carefully considered the materials available on review and am unable to identify evidence of conduct that warrants a disciplinary response from this Office, including as to fees. The Committee's decision is therefore confirmed.

Decision

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

DATED this 15th day of August 2017

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:

Mrs GG as the Applicant
Mr HH and Mr II as the Respondents
Mr Comeford as a Related Person
Wellington Standards Committee
The New Zealand Law Society