

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

BETWEEN

VN

Applicant

AND

VN

Respondent

DECISION

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

Introduction

[1] Mr VN has applied for a review of the [Area] Standards Committee decision to take no further action on his complaint about Ms VN's conduct in respect of their deceased parents' affairs pursuant to s 128 of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] At the time Mr VN made his complaint, Ms VN was a lawyer and principal of Law Firm A.

[3] Mr VN is Ms VN's brother. They have four siblings. Mr VN says he lost trust in Ms VN a long time ago, after their mother passed away in the late 1980s, and long before their father died in 2012.

[4] Their parents had entrusted them with the administration of the family's assets. Ms DH, a chartered accountant, was also appointed trustee and executor of the estate. The estate and trusts own real estate and other property.

[5] Ms and Mr VN were at odds from time to time over estate administration and the operation of the trusts.

[6] Mr VN received independent legal advice from Mr NT.

[7] On instructions from the trustees and executors, Ms VN's firm had obtained probate and handled funds on behalf of the trust. Ms VN's firm received funds into its trust account, held those funds and paid money out with authority from the trustees. Ms DH signed a deed of retirement as a trustee, but the titles to land owned by the trustees have yet to be amended because the trustees have not agreed on who would be instructed to complete that, and other related, transactional work.

[8] Mr VN says Ms VN refused or was slow to provide information relating to the trust and its affairs, and that the distribution of assets to beneficiaries was delayed by the trustees' wrangling. Mr VN proposed the appointment of an independent lawyer for the trust, then followed that up with a complaint to the New Zealand Law Society Lawyers Complaints Service in April 2015.

Committee's decision

[9] Mr VN alleged that Ms VN had acted in a conflict of interest, and had contravened the Trust Account Regulations (the regulations)¹ in 2009, when their father was still alive, by receiving money into her personal account rather than paying it into her firm's trust account.

[10] The Committee concluded that Ms VN had not acted in a conflict of interest and had not contravened the regulations. Its view was that there was nothing objectionable in Ms VN having done legal work for the estates or trusts because there was no conflict between her interests and those of her clients.

Review application

[11] Mr VN applied for a review on the grounds that there was evidence of a serious conflict of interest, breaches of the regulations, and a lack of honesty and transparency on Ms VN's part. Mr VN would like justice and accountability.

¹ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[12] Mr VN says that Ms VN:

- (a) Has withheld bank statements and financial reports from him.
- (b) Delayed advising the bank that their father had died.
- (c) Gave him wrong or incomplete information.
- (d) Did not reply to phone calls and letters promptly or at all.
- (e) Was defensive and abusive towards him when he challenged her.
- (f) Did not keep him informed about the work she was doing for the trusts and estates.

[13] Mr VN is suspicious and believes Ms VN has acted as a lawyer for the estates and the trusts where her interests conflict with those of her clients.

Review hearing

[14] Both parties attended a review hearing in [Town] on 25 July 2017. Ms VN was accompanied by Ms R, a lawyer who had provided regulated services to the executors and trustees on behalf of the firm, and Mr J VN, a brother.

Nature and scope of review

[15] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[16] More recently, the High Court has described a review by this Office in the following way:³

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.

[17] 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 relevant materials afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

Conflict of Interest

[18] The nub of Mr VN's complaint is that Ms VN acted where her interests were in conflict with the interests of those she served: the trustees and the executors of the estate.

[19] Rule 5.4 of the Lawyers' Conduct and Client Care Rules (the rules) says:⁴

A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and interests of a client for whom the lawyer is acting or proposing to act.

5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.

5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.

...

5.4.5 In this rule, a lawyer is deemed to be a party to a transaction if the transaction is between entities that are related to the lawyer by control (including a trusteeship, directorship, or the holding of a power of attorney) or

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

ownership (including a shareholding), or between parties with whom the lawyer or client has a close personal relationship.

[20] The key to Mr VN's complaint is the contention that Ms VN's independence as lawyer to the trustees and executors was compromised by her other interests. Hence, Mr VN's suggestion that the trustees and executors appoint an independent lawyer and follow that lawyer's advice.

[21] Ms VN was a trustee, a beneficiary and her firm acted for the trustees and executors of the wills. There were a number of services Ms VN and her firm did not provide, including not attending to the execution of Mr VN senior's will, and not being appointed pursuant to a power of attorney over Mr VN senior's property while he was alive. Ms VN's firm provided the following services that are regulated pursuant to the Act and rules made under it:

- (a) Obtaining probate of Mr VN senior's will on instructions from the executors;
- (b) Making payments from funds held in the firm's trust account with specific authority from the trustees, including Mr VN.

[22] Once probate was obtained, any further steps stalled because Ms and Mr VN, as executors, could not agree. Unanimity is a problem for the executors. Recourse is to the High Court. Lack of unanimity is not a difficulty that relates to the provision of legal services regulated by the Act or rules made under it.

[23] Similarly, Mr VN's concerns about refusing and delaying providing information and related concerns listed above do not relate to the provision of regulated services. Recourse to challenge trustees is to the High Court, not to this Office.

[24] To the extent that Ms VN's interests touched on the administration of the estate and the interests of the trusts, Mr VN as co-executor and co-trustee was well aware of Ms VN's interests.

[25] To the extent that the firm acted in transactions involving the estate and trust, those matters were not contentious. Ms VN's evidence is that she was conscious of the distinction between what she could do as a lawyer, and what she was obliged to do as executrix and trustee. Although her firm did legal work for the estates or trusts, the executors and trustees authorised and instructed the firm to do that work. There is no evidence that Ms VN's interests were in conflict with the interests of the executors or trustees for whom the firm acted in doing that work. There is no evidence that the

interests of Ms VN did not correspond in all respects with the interests of the executors or the trustees, or for that matter, the beneficiaries of the trust.

[26] To the extent that Ms VN's firm offered to act for the company of which she and Mr VN were directors, again, the matter was not contentious. Mr VN was well aware of Ms VN's interests, and there is no evidence of a divergence in their interests at a time when Ms VN or her firm was proposing to provide regulated services.

[27] The payments made from the firm's trust account were made with the express authority of both trustees. There is no evidence that Ms VN, or her firm, contravened the Act or regulations.

[28] Ms VN undertook a range of tasks in her capacities as executrix of the estates and trustee of the trust, including, for example, managing the trust's properties. The thrust of much of the correspondence Mr NT sent to Ms VN on instructions from Mr VN is driven by Mr VN's lack of trust in Ms VN and his concern to ensure there is transparency and accountability on the part of them both as executors and trustees.

[29] Mr VN suggested the trustees appoint an independent lawyer and that the trustees agree to follow that lawyer's advice. Not only is that suggestion premised on the apprehension that Ms VN was not an independent lawyer, it is inconsistent with the trustees' obligation to freely exercise their discretion. The latter may account for Ms VN as a trustee not agreeing to that course.

[30] If Mr VN had wanted the trustees to change, and it does not appear that he did, he could have resigned, or applied to the High Court for orders. He had legal advice at various times. That advice must be taken to have covered those, and perhaps other, options.

[31] On the available evidence, the work Ms VN did was that of executrix and trustee, not legal work. Overall, it appears that Mr VN's concerns relate to Ms VN's conduct as executrix and trustee, not to her conduct as a lawyer. The evidence does not lead to the conclusion that Ms VN or the firm contravened the rules around conflict of interest. The other concerns Mr VN raises are not professional standards issues.

[32] I have carefully considered Mr VN's complaint and other materials, and the evidence and submissions made at the review hearing. There is no information that suggests further action with respect to Mr VN's complaint is necessary or appropriate. Although for different reasons, the Committee's decision is confirmed.

Decision

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

DATED this 27TH day of July 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:

Mr VN as the Applicant
Ms VN as the Respondent
Ms R as the Representative for the Respondent
[Area] Standards Committee
New Zealand Law Society