LCRO 61/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 2
BETWEEN	**MR GO**
	Applicant
AND	**MS TQ**
	Respondent

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

DECISION

Background

[1] Mr GO's son GP died in July 2007. At the time of his death GP was living in Australia.

[2] His estate comprised substantial assets in New Zealand and Australia and included death benefits, insurance policies and bank accounts.

[3] GP died apparently without a Will, although Mr GO formed the view that there may have been a Will or a reference to a Will in a bundle of correspondence that was held for GP by a person in Australia.

[4] One of the assets of his estate was a ACR insurance policy. It seems that a ACR employee made contact with Ms TQ about the requirement for Letters of Administration to enable the policy to be redeemed. Mr GO says that Ms TQ telephoned him to offer her assistance, and while Ms GO cannot recall this phone call, she accepts that she

may have been asked by the ACR employee to make contact with Mr GO to discuss the requirement for Letters of Administration.

[5] On 30 October 2007, Mr GO and his wife met Ms TQ at her office to discuss what was required to progress administration of the estate. Ms TQ advises that she made a preliminary record of GP's assets and liabilities and also noted the possibility that GP was the father of a child.

[6] The discussion between Ms TQ and the GOs included advice as to as to what Letters of Administration were and the requirement for Letters of Administration to be obtained to enable assets to be realised.

[7] Whether or not GP had a child affected the distribution of his estate if no Will existed. Under the Administration Act 1969, any child would inherit all of GP's estate, whereas if there were no child, his parents would inherit his estate.

[8] It was therefore important to ascertain whether or not there was a child and to be certain that GP had died intestate. Mr GO's instructions to Ms TQ were to ascertain whether there was a paternity order in existence, to communicate with ACR to ascertain their requirements, and to establish what was required to comply with section 6A of the Status of Children Act 1969 to enable Mr GO to obtain Letters of Administration.

[9] Ms TQ reported to Mr GO by letter dated 11 February 2008 and advised Mr GO of the information she had obtained from the Department of Internal Affairs and confirmed that Letters of Administration could be applied for in New Zealand. She also advised Mr GO of the need to make full enquiries concerning the existence of the child and to ensure that the matter was clarified prior to any distributions of the Estate.

[10] On Instructions Ms TQ proceeded to draft the Letters of Administration but Mr GO wanted to make sure that there was no Will in existence, and to verify whether or not there was in fact a child.

[11] In November 2008 Mr TQ rang Ms GO to advise that he had been visited by the child's mother, and referred again to the missing bundle of correspondence in Australia, which Mr GO considered may have referred to a Will.

[12] Mr and Mrs GO met with Ms TQ on 24 November 2008 at which time Mr GO provided a copy of a paternity order that had been made in relation to the child. Mr GO subsequently advised Ms TQ that he had ascertained that the order had been made on the basis of DNA testing which confirmed that GP was the father.

[13] Ms TQ then proceeded to amend the draft Letters of Administration to take this information into account and in addition to comply with the new High Court rules insofar as they affected the Application.

[14] The drafts were sent to Mr and Mrs GO on 23 January 2009 but Mr GO provided no further instructions. On 25 February 2009 Ms TQ sent a further account for $1,139.31 and this account remains unpaid. Previous accounts rendered in February and May 2008 had been paid.

[15] In December 2009, a meeting took place between Mr and Mrs GO, Ms TQ, and her partner Mr TP. Following that meeting Mr TP wrote to Mr and Mrs GO with a summary of the options available to them. Whichever option they adopted, payment of Ms TQ last account was required.

[16] In June 2010, Ms TQ received a letter from a solicitor who Mr GO had consulted expressing Mr GO's concerns that despite having received accounts totalling $3,713.06, administration of the Estate was no closer to being finalised. Ms TQ responded to that letter but no further correspondence was received from the solicitor.

[17] Mr GO lodged his complaint with the Complaints Service of the New Zealand Law Society on 10 August 2010.

The Complaint and the Standards Committee Determination

[18] In his complaint, Mr GO expresses concerns with regard to the three invoices received from Ms TQ. He advises that he was in a vulnerable state of mind when he was contacted by Ms TQ not long after GP's death and accepted her offer of assistance.

[19] He states that he believes now that it was not in his best interests to have instructed Ms TQ and considers that it would have been more advantageous to employ Australian solicitors to obtain Letters of Administration in Australia. He refers to the fact that it will be necessary to reseal Letters of Administration in Australia to enable the Australian assets to be dealt with.

[20] Mr GO also complains about the length of time being taken to finalise matters but at the same time questions why Ms TQ prepared the draft Letters of Administration knowing that matters would take some time to finalise.

[21] He also notes that there has been some doubling up in the accounts in that the second account is expressed to be for the period from 29 February 2008 to 26 May 2008 whilst the final account is from 29 January 2008 to 23 January 2009.

[22] He notes the reference in the first account to "Letters of Administration" and states that he expected to have received these at the time of the first account. He also notes that he had been advised from an alternative source that he would not be a beneficiary of the Estate if GP had a child, and it was clearly not in his interests to expend money obtaining Letters of Administration if he was not to be a beneficiary.

[23] He expresses his dissatisfaction with "the whole matter" and records his view that he considered the bills to be excessive.

[24] The Standards Committee considered the matters raised by Mr GO and pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 determined to take no further action with regard to the complaints. That section provides the Committee with a discretion to take no further action if, having regard to all the circumstances of the case, the Committee considers that any further action is unnecessary or inappropriate.

[25] The Committee's determination with regard to the bills of costs needs some further explanation and comment which is provided later in this decision.

[26] With regard to the other matters raised by Mr GO, the Committee accepted Ms TQ responses and determined to take no further action.

Review

[27] A hearing took place in Hamilton on 7 December 2011 which was attended by Mr GO and a support person, and Ms TQ.

The Initial Contact

[28] Mr GO says that Ms TQ contacted him with her offer of assistance at a time when he was vulnerable following the death of his son.

[29] Rule 11.2 of the Lawyers and Conveyancers Act 2006 (Lawyers: Conduct and Client Care) Rules 2008 provides as follows:

> A lawyer must not directly contact a prospective client -
>
> a) A In a way that is intrusive, offensive, or inappropriate; or

> b) If the lawyer knows or should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgement in engaging a lawyer, or the lawyer is aware that the prospective client does not wish to be contacted by the lawyer

[30] Ms TQ says that she does not remember ringing Mr GO but accepts that she may have done so following a request by the ACR employee to advise on the process required to satisfy ACR's requirements. It is also likely that Letters of Administration would have been required to enable assets other than the ACR policy to be realised.

[31] There has been no evidence provided as to what Ms TQ knew of the circumstances relating to GP's death and whether she had knowledge such as is referred to in rule 11.2(b). However, it is a reasonable assumption that Mr GO and his wife would have been upset at the time.

[32] However, Ms TQ was not engaged by Mr GO at the time of her call. Instead, she presumably provided her contact details and left these with the GOs together with her offer to assist. Mr GO then made contact with Ms TQ some three months later and attended at Ms TQ office to discuss what was required to administer the Estate.

[33] On the information available to me it does seem that it is possible that Ms TQ may have breached rule 11.2(b) of the Conduct and Client Care Rules. However, given the manner in which Ms TQ was subsequently instructed by the GOs, I do not consider that there have been any adverse consequences flowing from the potential breach of that rule and in the circumstances consider that the Committee's determination is appropriate.

The bills of costs

[34] Ms TQ has rendered three accounts:

1) 28 February 2008 for $1,855.00 expressed to be an interim account re Letters of Administration and covering the period from 13 November 2007 to 28 February 2008

2) 30 May 2008 for $718.75 re Letters of Administration covering the period from 29 February 2008 to 26 May 2008. This account is not expressed to be an interim account but it is clear that it is in respect of the ongoing matters. Although this account is expressed to be "re Letters of Administration" the narration in the account identifies matters relating to

the general administration of the estate as well as discussions with the IRD which I understand were in relation to GP's payments for parent support which had fallen into arrears at the time of his death.

3) 25 February 2009 for $1,139.31 expressed to be an interim account re Estate administration for the period from 29 January 2008 to 23 January 2009.

The first two bills have been paid but the third bill remains outstanding.

[35] The Committee recorded its decision in the following way:-

> The first two invoices were not only rendered and duly paid but were issued prior to 1 August 2008. Without a Court order to the contrary, the Committee has no jurisdiction to investigate those costs. The third account was issued after the commencement of the new Act but was below the statutory threshold. The Committee did not consider there were any special circumstances to justify an investigation and dismissed the complaint.

This statement requires some explanation and comment.

[36] On 1 August 2008 the Lawyers and Conveyancers Act 2006 came into force. Under that Act, any complaint about bills of costs is treated as a conduct complaint, and the cost revision procedures that had previously existed under the Law Practitioners Act 1982 were repealed.

[37] Consequently, Mr GO's complaints about the first 2 bills of costs fell to be considered under the transitional provisions of the Lawyers and Conveyancers Act 2006. In this regard, section 351 provides that if a lawyer is alleged to have been guilty before 1 August 2008, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982 a complaint about that conduct may be made after 1 August 2008, to the Complaints Service of the New Zealand Law Society.

[38] Under the Law Practitioners Act, a practitioner's conduct could be considered to be conduct unbecoming if the practitioner's bills were grossly excessive. If the Committee considered this to be the case, it could then have investigated the complaint relating to the first 2 bills of costs, save for the time restriction imposed by regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[39] That provides as follows:

> If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs:
>
> a) was rendered more than two years prior to the date of the complaint; or
>
> b) relates to a fee that does not exceed $2,000.00 exclusive of Goods and Services Tax.

[40] The Standards Committee considered each bill separately and in respect of the first two bills of costs determined that "without a Court Order' it had no jurisdiction to investigate those bills of costs. It is not clear whether the Committee determined that it lacked jurisdiction because of the time limit imposed by regulation 29 or because it did not consider the accounts were grossly excessive. The Committee declined to consider the third bill because it was for an amount which is less than the limit imposed by regulation 29.

[41] In adopting this approach, the Committee therefore treated each bill as a separate bill, rather than interim bills in respect of the same matter. This was the submission made by Ms TQ.

[42] However, where there are a series of accounts all relating to the same matter, the bills are to be treated as a single account and therefore able to be reviewed (refer *Maidenhead v Margate* LCRO 108/2010). In this regard, I do not accept Ms TQ contention that each bill is to be treated as being separate and independent of the others. Consequently, the total of the three bills exceeds the restriction of $2,000 imposed by regulation 29, and because of this, I consider that this constitutes special circumstances in terms of that regulation such as would allow the Committee to investigate all three bills of costs. There is no need for a Court Order to enable the Committee to adopt this course of action.

[43] Pursuant to the Lawyers and Conveyancers Act, a practitioner's conduct constitutes unsatisfactory conduct if his or her bill is not fair and reasonable as required by rule 9 of the Conduct and Client Care Rules. Following a finding of unsatisfactory conduct, a Standards Committee may order the lawyer to reduce his or her bill of costs.

[44] However, having considered the bill of costs, there is no reason to consider that the bills of costs are anything other than fair and reasonable. I have checked the amount invoiced against the time records provided by Ms TQ, and it is clear that the period referred to as being covered by the third bill is incorrect. The amount invoiced coincides with the time records for the period from 30 May 2008 to 23 January 2009, not 29 January 2008 to 23 January 2009 as referred to on the invoice.

[45] In addition, I have checked the two previous accounts, and the time recorded coincides with the fee referred to in the invoice. I also note that Ms TQ invoiced less than the amount chargeable in accordance with the time recorded. In addition, an examination of the time records shows that various authors carried out the work, so that work was carried out at an appropriate level. Work carried out by Ms TQ would indicate that her hourly rate was charged at $250.00 plus GST which is a relatively modest hourly rate.

[46] Finally, from the explanations provided on the file and recorded in the timesheets as to the work, it appears to me that all work recorded has been properly undertaken and necessary to fulfil Mr GO's instructions.

Letters of Administration

[47] At the review hearing, Mr GO mentioned on a number of occasions, that because the first bill refers to Letters of Administration, he considers that these should have been obtained by that stage. Instead he says, they have still not been provided.

[48] He also says that Ms TQ proceeded to redraft the application to comply with the new High Court rules without instructions. These two comments made by Mr GO are somewhat contradictory.

[49] In addition, he refers to Ms TQ letter to the Complaints Service dated 26 August 2010 where she states that the draft Letters of Administration had been sent to Mr and Mrs TQ by 28 March 2008 whereas he states that he did not receive these.

[50] With regard to the first point it is clear from the file that Mr GO did not want to proceed to apply for Letters of Administration until the existence of a child had been determined, and in addition, whether there was a Will in existence or not. It was quite in order for Ms TQ to draft the Application in the first instance, but she then received instructions to hold off filing the Application until the issues were resolved.

[51] It is apparent that Ms TQ was concerned to ensure that the Court was properly advised of the fact that there was a child whose consent would have been necessary before Letters of Administration would issue to Mr GO. It seems that Ms TQ also had concerns that Mr GO had managed to have a significant death benefit from GP's employer paid to himself when such payment properly belonged to the child. I discern that the tension between Mr GO's position and Ms TQ advice that the Court had to be properly advised, may have caused some of the delays and possibly dissatisfaction on Mr GO's behalf.

[52] Mr GO rang Ms TQ office on 18 December 2008 and advised that DNA testing had confirmed that the child was GP's. He also gave instructions at that time to proceed with the Application. He was therefore aware that Letters of Administration had not been obtained at that stage and that further amendments were required and his statements to the Complaints Service and to myself that he expected that Letters of Administration to have been available by the time of the first bill in February 2008 is therefore somewhat puzzling. There were also clear instructions to proceed so the allegation that Ms TQ proceeded to carry out work without instructions is not sustainable.

[53] Ms TQ time records show that she prepared initial drafts of the Letters of Administration in late 2007. She concedes that the statement in her letter of 26 August 2010 to the Complaints Service that she had sent these drafts to Mr and Mrs GO is incorrect. That does not however disentitled her to include those attendances in her Bills of Account, or in any way affect her right to be paid for the work carried out.

[54] Overall, I am satisfied that none of the matters raised by Mr GO support a finding of unsatisfactory conduct and the determination of the Standards Committee was appropriate in the circumstances.

This means that Ms TQ third bill is confirmed as being fair and reasonable and she is entitled to have that paid.

Decision

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

DATED this 12th day of January 2012

Owen 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:

GO as the Applicant
TQ as the Respondent
The Waikato Bay of Plenty Standards Committee 2
The New Zealand Law Society