

**CONCERNING**

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

**AND**

**CONCERNING**

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

**BETWEEN**

**EAB**

Applicant

**AND**

**FBC**

Respondent

**DECISION**

**The names and identifying details of some parties in this decision have been changed. The Applicants name is published.**

**Introduction**

[1] Mr EAB has applied for a review of a decision by the [City] Standards Committee [X] which determined there had been unsatisfactory conduct pursuant to s 12 of the Lawyers and Conveyancers Act 2006 (the Act) on Mr FBC's part arising from failures in acting for Mr EAB's father [GCD]. The Committee ordered Mr FBC to pay a fine of \$500 and costs of \$500 to New Zealand Law Society (NZLS).

**Background**

[2] Mr FBC acted for GCD after his wife [HDE] died, and while her estate was being administered. GCD was in a position where he could claim an interest in HDE's estate, but there was some uncertainty about the value of his entitlements. Reference was made to a debt GCD was alleged to have owed to HDE. GCD instructed Mr FBC not to commence proceedings, but to attempt to maximise his entitlement by negotiation. While matters were resolved, rest home fees continued to accumulate for GCD.

[3] Mr FBC acted on GCD's instructions over a period of several months, during which time various settlement proposals were exchanged. Mr EAB intervened on behalf of his father from time to time, and at various times Mr FBC told Mr EAB to obtain independent legal advice. That advice was not acted on. Mr EAB continued to issue instructions to Mr FBC on behalf of GCD and to express dissatisfaction over Mr FBC's handling of matters on GCD's behalf.

[4] Mr FBC did not negotiate a resolution in terms that accorded with Mr EAB's view of the optimal outcome for GCD. Proceedings were not commenced in court. By 11 July 2012 administration of HDE's estate was complete.

[5] GCD had signed documents authorising Mr EAB to act on his behalf, and Mr EAB had been involved in matters to some extent. On 8 April 2014 Mr EAB sent an email to Mr FBC saying he had not heard from him in response to emails he had sent in April and May 2012. Mr EAB said he had only recently been advised by the estate's solicitor that a distribution had been made to GCD on 31 May 2012, via Mr FBC's trust account.

[6] It appears Mr EAB was not aware for quite some time that the estate had been distributed, that GCD's debts had been paid from his inheritance under [HDE]'s will, that the rest home fees had been paid, or that the balance had been distributed to GCD via Mr FBC's trust account. Mr EAB believed Mr FBC should have kept him informed.

[7] GCD passed away in August 2014, by which time Mr EAB had made a complaint to NZLS in GCD's name.

### **Complaint**

[8] Mr EAB was critical of Mr FBC in a number of ways including:

- (a) failing to act in GCD's best interests;
- (b) providing poor advice;
- (c) negligence;
- (d) mishandling and withholding of monies, of which over \$55,000 is still unaccounted for;
- (e) poor communication;

- (f) refusal to explain actions and failure to provide a detailed itemised account of fees charged.

[9] Mr EAB referred to Mr FBC not having communicated with him for long periods, questioned Mr FBC's competence, and said GCD had sustained losses arising from Mr FBC's representation of him. Mr EAB wanted Mr FBC to give him materials from GCD's file.

[10] Mr FBC said he had acted in accordance with his instructions from GCD, and had suggested more than once that independent legal advice should be sought. Mr FBC provided a copy of a letter from the estate's lawyers dated 8 June 2012, recording receipt into his trust account of \$55,815.89, which represented the \$100,000 that HDE had left to GCD in her will, less \$45,600 debt, plus interest. He says he charged GCD fees of \$11,599.11 and paid those by deduction, before he paid the balance into GCD's account. He says there was a delay in paying the money into GCD's account while he awaited receipt of GCD's account number.

[11] Mr FBC also said, with respect to allegations of delay, failing to render a final account and mishandling/failing to account for \$55,000:<sup>1</sup>

Delays occurred in respect of these because I was considering further how legally I could help the complainant. It became a "mental block" file, and I should have consulted another practitioner and at least discussed matters with him/her.

[12] Mr EAB disagreed with much of Mr FBC's explanation, noting that communications between them came to an end while the basis for negotiations was still being discussed. He believes it was wrong of Mr FBC to have retained money in his trust account for two years without telling Mr EAB. Mr EAB also contended Mr FBC's fees were excessive given the conduct and service issues he had raised in his complaint and believes Mr FBC was professionally obliged to pass on all communications relating to GCD's affairs to him

[13] Mr EAB believes Mr FBC caused financial loss of around \$95,000 to GCD and his estate calculated on the basis of the difference between what GCD received from HDE's estate, and what Mr EAB believes he should have received.

---

<sup>1</sup> Letter Hall to Complaints Service (9 September 2014) at (b)–(d).

### **Standards Committee Decision**

[14] The Committee considered Mr FBC had given advice competently and acted in GCD's best interests. It did not consider Mr FBC had communicated adequately with GCD and Mr EAB, and had conceded he had a mental block as to how he might assist GCD further once HDE's estate had been distributed.

[15] The Committee considered Mr FBC had been evasive when he was asked about his final account by Mr EAB, his brother, and the Committee in its inquiry pursuant to s 147. The Committee said he was slow to disclose whether he had rendered a final account, and the detail of it. The Committee concluded Mr FBC had contravened rule 9.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) twice, and made two further determinations of unsatisfactory conduct pursuant to s 12(c) of the Act.

[16] Pursuant to s 156 of the Act the Committee imposed a fine of \$500 and costs of \$500, requiring payment within 30 days. The Committee did not consider publication of Mr FBC's name was necessary or desirable in the public interest.

### **Application for review**

[17] Mr EAB's review application proceeds on the basis that Mr FBC owed him obligations and the Committee's orders did not go far enough. Mr EAB wants answers from Mr FBC, as well as the maximum available in penalties and compensation, and a refund of at least half of Mr FBC's fees. He considers Mr FBC's name should be published for the protection of the public.

### **Review Hearing**

[18] Both parties attended a review hearing by telephone on 6 December 2016. Mr EAB was asked to provide evidence that he was GCD's personal representative. After the review hearing Mr EAB provided another copy of a letter signed by GCD dated 8 February 2011, and letters of administration made by the High Court appointing Mr EAB and his two brothers to administer GCD's estate.

[19] This review, which is private, proceeds on the basis that the letters of administration are evidence that GCD's right to confidentiality pursuant to the rules<sup>2</sup> has now passed to his personal representatives, in this case Mr EAB.

---

<sup>2</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.1.1.

## Nature and Scope of Review

[20] 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>3</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.

[21] More recently, the High Court has described a review by this Office in the following way:<sup>4</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.

[22] 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.

## Analysis

[23] As a lawyer, Mr FBC was obliged to be independent and free from compromising influences or loyalties when providing services to his client, GCD.<sup>5</sup> As GCD was not assessed as lacking in competence, the presumption of competence

<sup>3</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>4</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

<sup>5</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 5.

applies. GCD is presumed to have been legally competent, able to manage his own affairs, including instructing Mr FBC, and of understanding the implications of decisions he made, and actions he took or decided not to take. He is taken to have understood his own interests and preferences.

[24] In his negotiations, Mr FBC was obliged to exercise his professional judgement on GCD's behalf, and solely for GCD's benefit. He had been instructed not to commence Court proceedings, so he was limited in what could be accomplished.

[25] It is not clear on the evidence that Mr EAB's directions to Mr FBC were entirely consistent with GCD's instructions, nor was his view of where GCD's best interest lay at the time necessarily the only view.

[26] Once the estate was distributed, it is not clear what more, if anything, Mr FBC could have done to further GCD's interests. Anything he did is likely to have attracted further cost, for example challenging the deduction of the alleged debt. Mr FBC could have discussed the situation with colleagues. However, there is no reason to believe that, in the widest sense, the potential benefits of anything more he could have done, would have outweighed the likely costs.

[27] The evidence does not show that Mr FBC was derelict in meeting any of his obligations to GCD, and there is no reason to take that issue further.

[28] There is no evidence directly from GCD. The only evidence of dissatisfaction with Mr FBC's conduct, service or fees comes from Mr EAB in GCD's name.

[29] The Committee appears to have formulated its decision on the incorrect premise that the rules obliged Mr FBC to act on Mr EAB's instructions and to communicate with him. As GCD was identified as Mr FBC's client, the rules did not require that of him. If there was any conflict between Mr EAB's instructions and what Mr FBC knew of GCD's view of where his own best interests lay, Mr FBC's first duty was to GCD.

[30] Given the presumption that GCD was competent, Mr FBC was not obliged to communicate with Mr EAB. He was not obliged to provide a final bill to Mr EAB. Nor was he obliged to furnish Mr EAB with information about GCD's affairs, the period to which it related, or the work he had undertaken for GCD.

[31] The evidence does not demonstrate, on the balance of probabilities, that Mr FBC failed to act in GCD's best interests, provided poor advice or was negligent. The allegation that Mr FBC mishandled funds arises from Mr EAB's view that Mr FBC was

obliged to report to him, when he was not. If communication with Mr EAB was poor, that may well be explained by Mr FBC having communicated directly with GCD. Similarly, there is no proper basis for the assumption that Mr FBC was obliged to explain himself to Mr EAB. He was not.

[32] I infer that Mr FBC's apparent reluctance to respond to the Committee's inquiries springs from the fact that he primarily owed obligations to GCD, rather than Mr EAB. As Mr EAB has produced letters of administration in the course of this review, Mr FBC may consider it appropriate to provide Mr EAB with information that would otherwise have been confidential to GCD. However, no such direction is made on review.

[33] In the circumstances, it is appropriate to reverse the three determinations of unsatisfactory conduct. Further action with respect to Mr EAB's complaint is not necessary or appropriate. The orders made pursuant to s 156 of the Act fall away.

### **Decision**

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

**DATED** this 7<sup>th</sup> 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 EAB as the Applicant  
Mr FBC as the Respondent  
[City] Standards Committee [X]  
The New Zealand Law Society