

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Waikato Bay of Plenty Standards Committee 1

BETWEEN

LV
of North Island

Applicant

AND

VJ
Of North Island

Respondent

DECISION

[1] This is an application for review of a decision of the Waikato Bay of Plenty Standards Committee 1 which considered a complaint by LV (the Applicant) against VJ (the Practitioner). The Standards Committee declined to uphold the complaint and the Applicant seeks a review of that decision.

Background

[2] The Applicant was a major beneficiary under the Will of DR who died in April 2010. The Practitioner was an executor of the estate; a niece of the deceased was co-executor.

[3] DR had bequeathed to the Applicant a sizable amount of money, her motor vehicle and the balance of her household chattels. The complaint against the Practitioner concerned those chattels. Many were found to be missing at some stage after the funeral. The Applicant blamed the Practitioner for failing in his duty as executor to protect the estate property.

[4] With his response to the complaint the Practitioner included a copy of an email sent to him by the Applicant advising that a member of the family, another niece of the deceased, wished to uplift some of her aunt's clothes and that she would call at the Practitioner's office for a key as the Applicant was not in possession of one. On that email the Practitioner had made a note recording his call to the co-executor obtaining her approval and noting that she had told the niece "*to only take clothes nothing else*".

[5] It appears that the deceased's former home remained unoccupied until sold sometime after her death. Family members had gathered there around the time of her funeral, and the co-executor had taken steps to make the property presentable for sale. The Practitioner had members of his staff take photographs of the chattels and furniture in the house a few days after the funeral.

[6] The Applicant said that about three weeks later that he went to the property when the co-executor was present and found some of the contents of the house "laid out" for the families of three of the deceased's relatives including the co-executor. He said he removed some of the items that had been set aside, and later gave the Practitioner a list of the chattels he alleged were left to him and which were missing. It seems there was also an issue regarding the definition of "household chattels".

[7] Enquiries failed to locate the missing items and a complaint was laid with the local Police on 10 December 2010 relating to the alleged unlawful removal of property from the deceased's home, in particular [3 items]. The Applicant's formal letter of complaint against the executors can be summed up as follows: "*They did not secure my valuable chattels*" and the Practitioner's firm was "*lax or indeed careless*".

[8] The Practitioner informed the Standards Committee that within a week of the deceased's death he arranged for his staff to secure the house and prepare an inventory (including photographs) of the contents. He wrote that about a month later (9 June 2010) the Applicant had arranged for a niece to collect a key to the deceased's property; that with the consent of the co-executor the key was given to her and returned the next day. The Practitioner denied any knowledge of who had removed the chattels, that "several attempts" had been made to negotiate a solution with the family without success and that a formal complaint had then been made to police.

[9] In reply to the Standards Committee the Applicant said that he was the main beneficiary, and that the co-executor had been able "*to hand to the family items of value given to me without the expected supervision from...*" the Practitioner's law firm. He noted that the niece had "*two days unsupervised entry into the house against my*

warning”, and that “*the family had a key for continued access into the house*”. He alleged that “*clear warning was given to [the Practitioner] on 2 May that the transfer of chattels [would] not go smoothly*”. He later expressed the view that this warning ought to have caused the Practitioner to change the locks on the house.

[10] The Practitioner’s next letter expanded on his initial response. He stated that there had been some confusion about the definition of “household chattels”, and had no recollection of a warning from the Applicant that the transfer of chattels would not occur without incident. He elaborated on the circumstances under which the niece had been permitted access to the deceased’s property in June 2010, including the Applicant’s giving permission for the Practitioner’s office to release the house key to her.

[11] The Practitioner referred to his file note of 24 May recording his telephone conversation with the co-executor who advised him that the Applicant had taken all he wanted from the house and that the family had taken a keepsake. He further wrote that the Applicant had collected a few items from the garage on 28 May and that from 31 May until 2 June the Applicant and co-executor had been in regular email contact about the chattels.

[12] The Practitioner stated that the Applicant had arranged for the niece to be given a key and had expressed no concerns about her entry into the house unsupervised. The Practitioner had provided to the Applicant’s solicitor a copy of the chattels inventory in early August on request, and up to that time he was unaware of problems. The Applicant informed the Practitioner in October about the three missing chattels and subsequent unsuccessful enquires were made by the co-executor along with the Applicant writing to the niece which also did not result in any clarification.

[13] The Practitioner denied that the Applicant was “*continuously refused further access to his chattels until 4 October 2010*”. He confirmed that he discussed with the Applicant the benefit of leaving furniture in place while the house was on the market, and had met with him at the house on no less than two occasions. In addition he delivered household items to the Applicant at his home. He concluded by asserting that he had always promptly responded to the Applicant’s enquiries “*until it became apparent we were getting nowhere and suggested he obtained independent legal advice*”.

Standards Committee Determination

[14] The Committee declined to uphold the complaint, and resolved pursuant to Section 138 (2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on the complaint. Its reasons reflect both the detail and its understanding of the nature of the complaints.

Application for Review

[15] The Applicant disagreed with the Committee's decision and filed an Application for Review. The outcome he sought was "*...to see that no one else suffers the same humiliation that I had to suffer on entering [the deceased's] home and seeing what the family did; reducing a home to four walls with contents the co-executor did not want!*". He considered that the Practitioner had given free and uninterrupted access to his co-executor and her family to the deceased's house and his chattels. He believed property to the value of about \$20,000 had been taken without authority.

[16] The parties have consented pursuant to Section 206 of the Act to this review being conducted in the absence of the parties, their representatives and witnesses, and on the basis of the information, records, reports and documents available to the LCRO. The review has proceeded in this manner.

Discussion

[17] It is the task of the LCRO to review decisions of Standards Committees. This task involves consideration of whether the Standards Committee decision appears to be correct on the basis of the evidence, its understanding of the complaints, and the application of the professional standards and procedures. If there are errors in any of these matters the LCRO may either return the matter to the Standards Committee for further consideration or may assume all the powers of a Standards Committee and make a determination.

[18] The Standards Committee concluded that there was no wrong doing in the Practitioner's performance as an executor, adding "*... but that the actions were in his capacity as an executor and did not relate to professional conduct*".

[19] I will first address the suggestion that a lawyer who is acting as the executor and trustee of the estate is not thereby providing "legal services". The question of whether the Practitioner is providing "regulated services" when acting as executor for an estate was considered by the LCRO in decision LCRO 99/2009 *Shrewsbury v Rothesay*. There the LCRO embarked on an analysis of the definition of "regulated services" and concluded, with reference to section 6 of the Lawyers and Conveyancers Act, that acting as an executor was work that is 'incidental' to the areas of 'legal work' as

specifically defined, when considered in the context of the purposes of the Act to protect the consumers of legal services.

[20] It was therefore appropriate to conclude that a lawyer acting as an executor was providing regulated services. (The full analysis may be found on the LCRO website as LCRO 99/2009 *Shrewsbury v Rothestay*). In that light the Standards Committee may be considered to have erred in suggesting that the Practitioner was not providing regulated services when acting as an executor.

[21] The Standards Committee had nevertheless considered the substantive issues arising in the complaint and concluded that the Practitioner had "*taken all prudent steps that an executor and a solicitor acting for an executor could have taken in the circumstances*".

[22] I have considered all of the evidence on the file in respect of the Practitioner's actions. The evidence shows that the Practitioner took proper steps to create an inventory, had worked closely with the family member who was a co executor, and that the access to the property by the niece was arranged with the knowledge and agreement of the Applicant. It could not have been foreseen that chattels would be removed. Extensive enquiry was made from family members, the Practitioner also having specifically written to the niece about the missing items. Eventually a complaint was laid with the Police.

[23] The question for the Committee was whether the Practitioner had been irresponsible in his role or failed in his obligations as executor, the Committee concluding that the Practitioner's conduct did not fall short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent lawyer.

[24] I have independently considered the matter. In his review application the Applicant wrote "*An executor must carry into effect the provisions of the will!*" It may be that he intends to suggest that the Practitioner has failed in his professional obligation because he has not in fact been able to transfer to the Applicant all of the estate chattels. However, it is implicit that a duty that is imposed is indeed capable of being performed. In this case the chattels were removed by a person or persons unknown. This made it impossible for the Practitioner to have completed the task.

[25] There is nothing in the evidence to support the allegation that the Practitioner was negligent. Although the Applicant considers that the locks should have been changed when he '*warned*' the Practitioner in early May 2010, there is nothing to

suggest that the Applicant would not, thereafter have authorised the release of the key to a third party, as he did in June 2010 when the key was given to the niece. Such access as was authorised was with the Applicant's knowledge, and on clear limited terms. The items were noted to be missing only in October. It is not known who removed the missing items, but it is clear that the house was accessed and items removed without the knowledge or authority of the Practitioner.

[26] Having considered all the material on the file I have found no reason to take a different view to that of the Standards Committee in its conclusion that the Practitioner took all prudent steps that an executor and solicitor acting for an executor could have taken in the circumstances. I can see no basis for concluding that there was any professional failing by the Practitioner. The application for review is declined.

[27] For the sake of completion I noted that the Applicant also raised a concern about the niece having made a claim against the deceased's estate, a claim that the Applicant contended was known by the Practitioner to have no proper foundation. No lawyer can prevent an individual making a claim against an estate, and no professional conduct issues arise if that occurs.

[28] The Applicant also raised concerns about bonus bonds that he believed were missing. I noted that the Practitioner had provided to the Standards Committee a copy of a letter from the Bonus Bonds Centre, dated 4 May 2010, confirming the value of the bonus bonds registered in the name of the deceased (which were later paid into the estate).

Decision

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

DATED this 6th day of September 2011

Hanneke Bouchier
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:

LV as the Applicant
VJ as the Respondent
Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society