LCRO 81/2012

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [an] Auckland Standards Committee
BETWEEN	**MS UX** Applicant
AND	**MR OC** Respondent

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

DECISION

Background

[1] The Standards Committee declined to uphold a number of complaints made by Ms UX against Mr OC (the Practitioner). Ms UX (the Applicant) sought a review of that decision.

[2] The Practitioner had acted in the administration of the estate of the Applicant's [family member]. The Applicant and her two sisters (one of whom I refer to as 'D') were all executors and also the beneficiaries of the estate. Difficulties in the relationship between the three executors delayed the progress of administering the estate. Although the Practitioner was able to obtain probate of the [family member]s will, and call in the estate assets (proceedings held in the firms trust account) as well as transferring two estate assets into the names of the executors, no further steps were taken by the Practitioner to distribute the estate to the beneficiaries.

[3] The Practitioner had rendered an invoice to the executors on [in March] 2011, and the Applicant lodged her application with the New Zealand Law Society in the following June.

[4] The complaints alleged that the Practitioner had:

- Failed to provide all of the executors with a letter of engagement individually.
- Had charged excessive fees.
- Had caused a loss to the estate due to delays in not selling shares at an earlier time. She sought compensation from the Practitioner for the loss in value of the shares.
- Failed to keep executors informed/communication.

[5] The Standards Committee set out the steps it had taken in its investigation (including obtaining a costs assessment which upheld the Practitioner's fees), and also its reasoning for not upholding the complaints.

[6] The Applicant sought a review, alleging bias on the part of the Committee for having 'overlooked the facts' and accepting the Practitioner's view. She reiterated the basis of the complaint about loss on the sale of the shares allegedly caused by the Practitioner's delays, which seemed to be an overriding concern.

[7] A review hearing was attended by the Applicant. Also in attendance was the Practitioner and another partner from the law firm

Considerations

[8] It is my task to review the decision of the Standards Committee. This involves considering not only the Standards Committee decision, but also considering the way that the Standards Committee dealt with the complaint. The process includes a fresh consideration of the original complaint, and I have considered all of the information on the Standards Committee file and that arising in the course of the review. It was helpful to have heard from the parties at the review hearing. I will deal with the three main complaints under the headings previously mentioned.

Letter of Engagement

[9] The Applicant's complaint was that the Practitioner had not sent a letter of engagement to all of the executors separately. Her concern was that the Practitioner was aware that the three executors did not get along, and submitted that it was incumbent on him to have sent each one of them a letter of engagement. The Applicant further alleged that the Practitioner had not sent a letter of engagement at all.

[10] The Practitioner's evidence was that a letter of engagement had been sent to an address provided by the Applicant. At the review the Applicant confirmed that the address was the estate address, being the home of the deceased which was quite near to where the Applicant lives. She denies having ever received the letter of engagement at any time.

[11] The Applicant was the only one of the three executors who attended an appointment with the Practitioner, and at no time did she put it to the Practitioner that she was not a representative of the three executors. The Applicant also argued that the Practitioner could have given her a letter of engagement personally at the time of their first meeting, I can find no wrong doing on his part for not doing so. Usually a letter of engagement is forwarded to a client after the Practitioner is provided with the information necessary to ascertain the scope of retainer, and there is no failure on the Practitioner's part for not having provided a letter of engagement to the Applicant at the time of their meeting, but sent it shortly thereafter. Nor is it necessary that the client signs a letter of engagement, it is sufficient that the information is given to the client.

[12] In this case I find that a contact address was given to the Practitioner by the Applicant, because it is by no means clear how he would have known of it otherwise. There is nothing to suggest that he did not send it as he says. Although the Applicant denies having received it, that alone does not sufficiently evidence that the Practitioner failed to send it. I have no evidence to suggest that the Practitioner did not send a letter of engagement, but in the absence of any evidence, I can find no basis for an adverse finding against the Practitioner.

[13] I also note that, even if the Applicant herself did not receive the letter of engagement sent to the address of the deceased estate, then one of the other executives did in fact get this same information from the Practitioner via email.

Alleged Overcharging

[14] The Standards Committee appointed a costs assessor who concluded

that overall, the charges of the Practitioner were fair and reasonable for the work done.

[15] One of the Applicant's complaints was that the Practitioner had charged at his own rate ($300.00 per hour plus GST) for all of the administrative work, much of which could have been done, she submitted, by a legal executive or at least a person who was not charged out at that rate.

[16] I noted that this was also a point raised by the assessor, who took into account the Practitioner's advice that the firm did not employ para-legal staff. It is clear from his report that the costs assessor was fully aware that his task required him to determine whether the work carried out justified the Practitioner charging at his own rate the work that might be regarded as routine correspondence to banks and others. The assessor noted that much of the routine correspondence that might have been charged by a lesser qualified person as two units, was in fact charged by the Practitioner as a single unit. He wrote,[1]

> In my view, if one was to consider that a para-legal might charge half the rate of the Practitioner at two time units per letter, the fact that such correspondence has been charged at one unit compensates for the hourly rate of the Practitioner.

He concluded that he was satisfied that the work claimed had been carried out, that the work needed to be done, that there was no delay in the work, and it accorded with the estimate, and that he was satisfied that the charge was fair.

[17] At the review hearing the Applicant considered that the Practitioner's fee was exorbitant. She contended that had she been aware of his hourly rate of $300.00, she would have gone to another law firm which charged a lesser fee. She claimed that there was a "set rate" for charges for small estates. No further information was provided about this assertion and I have no other information to assist. (There is the difficulty that the Practitioner's letter of engagement was not received by the Applicant, so that she remained unaware of his hourly rate.)

[18] The Practitioner's hourly rate cannot be considered excessive, and having noted that the terms of engagements was sent to one of the other executors, there is no reason to suppose that the Practitioner intended to conceal this information. An adjustment has been noted by the costs assessor, and this was

[1] Costs assessor report darted [December] 2011 at [4.5].

accepted by the Standards Committee. I see no basis for criticising the costs assessor's approach in this case which appears to have been reasonable. There is no basis for disturbing the Standards Committee conclusion.

Transfer of the Shares

[19] The assets of the estate included certain shares. When the Practitioner sought details about these a summary of the deceased's shareholding was sent to the Practitioner by [Business 1] on [December 2010]. These shares were not transferred into the names of the three executors until March 2011.

[20] The Applicant stated that she and her sisters had agreed that the shares were to be sold, with the proceeds applied to renovating or repairing the [family member]'s property in preparation for sale. The shares had dropped in value between December and when they were eventually sold. The complaint alleged that the loss to the estate was caused by the Practitioner's delays in transferring the shares into the names of all three executors jointly, for which the estate should be compensated. The Applicant also questioned the reason for the change of address being recorded to that of the Practitioner.

[21] The Practitioner explained that it is usual for [Business 1] to record the solicitor's address as the interim address in the case of an estate. The Practitioner disagreed with the Applicant's view about an agreement between the executors, and advised that they were not ad idem as to the matter of dealing with shares. In this the Practitioner referred to his (email) communications with D, who had expressed concerns about the Applicant seeking to have the shares transferred to herself. The Practitioner did not accept that there had been agreement among the three sisters as to the disposal of the shares.

[22] Ultimately the issue is whether or not there is a proper basis for compensation here. Section 156(1)(d) of the Lawyers and Conveyancers Act 2006 allows for an order of compensation to be made if loss is suffered by a party which is the direct consequence of a wrongdoing by the lawyer. Such an order can only be made after a disciplinary finding of unsatisfactory conduct is made. The issue is therefore whether disciplinary consequences arise for the Practitioner in this case.

[23] The Applicant places weight on the agreement having been reached by the executors. She relied significantly on an email sent by the Practitioner to her sister on [in January] 2011 where in, the Practitioner informed D, "I understand

from [the Applicant] that some/all of the shares are to be sold, but this cannot be done until we have Probate." However, this was one sentence in a small email in which the Practitioner was informing D that the full value of the estate was not yet known. I have found no evidence of an agreement by the three executors concerning the earlier transfer of the shares. There is indeed evidence to the contrary. The Practitioner explained that in December D had informed him that she was unhappy about the way that the Applicant wanted to deal with the shares. The Practitioner provided evidence of some correspondence sent to him by D, in March 2011, in which she had continued to express her concerns about the Applicant as co-executor. The exchanges between the Practitioner and D involved questions about how to complete the estate distribution, where monies might be obtained to repair the [family member's] house, etc, (including an enquiry about whether a loan could be obtained to do up the house). The Practitioner had in his possession earlier emails sent by D (who was unwilling to consent to their disclosure) concerning her opposition to the Applicant's handling of the shares, and this, coupled with the later emails, somewhat negated, in the Practitioner's mind, the claim by the Applicant that the sisters had agreed that the shares should be sold.

[24] At the hearing the Applicant acknowledged that she had hoped, and indeed expected, that the shares would be left to her solely because she and her [family member] (with whom she had a close relationship) had "worked on the shares together", and there had been a number of occasions, she said, where the [family member] had proposed that the shares should be transferred into the Applicant's name. They were not in fact transferred to the Applicant and thus became part of the estate.

[25] Considering the evidence before me, and being aware that not all of D's communications were available, the information I have viewed is nevertheless consistent with the Practitioner's explanation. I find no evidence that in December he disregarded instructions from the executors as to the disposal of the shares, and I accept that the Practitioner was unable to get joint instructions from the executors as to what to do with them.

[26] This means that any resulting reduction in the sale price of the shares due to the delay in selling them is not due to any wrongdoing of the Practitioner. Accordingly there is no basis for compensation.

Communication

[27] In relation to all of the above matters was the allegation that the Practitioner had failed to communicate adequately or effectively with the executors, and failed to keep them informed.

[28] The Applicant particularly focused on the Practitioner's failure (which she described as a refusal) to supply her with certain information she had asked for, which was necessary for shares to be transferred. The Applicant recounted a telephone call to the Practitioner asking for the information, his agreement to provide it, but not having done so.

[29] At the review the Practitioner did not deny that he was reluctant to give the Applicant the numbers or codes that would have allowed the shares to be dealt with, as he was concerned that she would deal with the shares on her own, and against the will or agreement of the other executors.

[30] The evidence showed that the Practitioner had kept in email contact with D (it appears she never personally attended his office as had the Applicant), who had made clear that she and her sister were at odds with one another over dealing with the estate assets. The Practitioner also admitted, at the review, that he found the Applicant difficult to deal with.

[31] It was not clear (and seems unlikely) that the emails exchanges between the Practitioner and D were copied to the other executors. My impression is that there was very little communication with the Applicant, at least in writing, and it appears that such communication as they had took place by telephone, and the Practitioner did not generally make file notes.

[32] At the hearing the Applicant acknowledged that there were tensions between her and the other executors, but reiterated several times that the Practitioner, being a senior solicitor with twenty two years experience, ought to have been able to navigate through their tensions successfully. It appears she holds quite firmly the belief that the Practitioner should have found a way forward to resolve the impasse between them.

[33] This raises a question about how lawyers can discharge their professional duties in administration of an estate, when confronted with disagreements between executors. A lawyer must act on the joint instructions, and cannot act on instructions of one executor that are opposed by another. It is by no means

unusual that the lawyer may receive communications from one or other of the executors at various times, and will usually take the precaution of establishing a means for obtaining instructions, whether that be by one or more of the executors.

[34] Difficulties inevitably arise when the executors cannot agree, and where the estate lawyer has difficulty in progressing the administration. Lawyers need to recognise the difficulty that they confront, and be particularly vigilant in maintaining transparency in their activities. In such circumstances it seems to me that the most risk-averse approach is to ensure that file notes are kept, and to explain to executors when conflicts arise that may prevent his or her continuing progress with the work. At some point it may be necessary for the lawyer to question whether he or she can continue with the retainer, but it is to be expected that co-executors are kept informed in writing of reasons as to difficulties in progressing the estate.

[35] What the evidence shows in this case is that the Practitioner experienced difficulties dealing with the Applicant, that he was also dealing with concerns about the Applicant that were raised by a co-executor, and reluctant to disclose these to the Applicant. While understandable, in a situation of doubt a preferable approach would have been to seek the consent of each executor to confirm the instruction of one of them.

[36] In this case the Applicant was unaware that the Practitioner was waiting for joint instructions from all three of them. Whether or not that is so (the evidence does not support this), the Practitioner was fully aware of the conflicting circumstances and this required some positive act on his part, rather than doing nothing and waiting for the executors to give him joint instructions. Overall I conclude that the Practitioner's communications with the executors could have been better, and that he ought to have been more objective in assessing his professional position.

[37] I do not agree however that it was the Practitioner's role to have navigated a resolution between executors who do not get along. Some lawyers do have particular skills that can facilitate disputes but it is not generally part of a lawyer's responsibility to mediate resolutions between parties who have personal or family disagreements. These too, however, need to be recognised by the Practitioner, with advice given as to how the parties may proceed to achieve their objectives.

[38] I have since received communication from one of the Practitioner's colleagues (said to have been sent against the Practitioner's wishes) to explain health difficulties that the Practitioner suffered during the relevant time. These are of a personal nature and therefore have not been disclosed to the Applicant. However, I have considered the impact that health may have had on the Practitioner during the above events and accept that he was likely experiencing health problems which made coping with the above stresses difficult. This may well explain the reasons for the Practitioner's management of the file, and the way he dealt with the Applicant. I accept that there was a somewhat strained relationship between them. Lawyers need to be alert to any issue that may adversely affect their professionalism in the performance of their professional duties, whether health or otherwise.

Conclusions

[39] I have given my close consideration to the full circumstances arising in the complaint. I can find no wrong doing on the part of the Practitioner in relation to the letter of engagement. Nor have I found any wrongdoing with regard to delay in the sale of the shares, and therefore there is no basis for compensation.

[40] I consider that the Practitioner's communication was less than satisfactory, and could be seen as a failure to have kept the Applicant adequately informed. I have also taken into account that the Practitioner was communicating with one of the other executors, so that it was not a case of inactivity. The Practitioner did not satisfactorily manage the difficulties between the co-executors and this may well be explained by a want of energy due to his health issues which were not in fact diagnosed until a few months later.

[41] Having considered all of these matters, I have decided to give the Practitioner the benefit of the doubt and make no adverse finding against him in this matter, aware that this outcome has no impact on the Applicant in any event, given my conclusion that there is no basis for any compensation that was primarily sought by her.

[42] It is nevertheless important to send a strong reminder to lawyers to remain mindful of their professional position in circumstances where disputes arise among individuals for whom they act. This situation is by no means uncommon where the lawyer is required to obtain instructions from multiple executors who

are in conflict with one another. Such circumstances behoves a lawyer to be particularly vigilant as to his dealings and communications.

[43] Despite this outcome there was a sound basis for the review application and I therefore intend to impose a cost order. I have arrived at what I consider a fair contribution with reference to the Guidelines of this office on costs.

Decision

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

Pursuant to section 210(3) of the Act the Practitioner is ordered to pay $500 to the New Zealand Law Society as a contribution for the costs of this review. This should be paid within 30 days of the date of this decision.

DATED this 29th day of April

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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:

Ms UX as the Applicant
Mr OC as the Respondent
[An] Auckland Standards Committee
The New Zealand Law Society