

LCRO 97/2015

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

SD

Applicant

AND

ET AND CH

Respondents

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

DECISION

Introduction

[1] Ms SD has applied for a review of the determination by [City] Standards Committee X to take no further action in respect of her complaints against Mr CH and Ms ET. The Committee determined that Mr CH and Ms ET had handled the administration of the estate of Ms SD's mother competently and had charged a reasonable fee.

[2] Ms ET is a legal executive and Mr CH is a partner in the firm of [Law Firm A].

Background

[3] Ms SD's mother died on 24 June 2013. By the late Mrs MD's will dated 5 December 1995 she appointed Ms SD and her brother to be executors of the will. The will was held by the [City] law firm of [Law Firm B] and paragraph [6] of the will directed that the firm should be engaged to act to obtain probate and administer the estate.

[4] Ms ET, a legal executive at that time employed by the firm, was assigned to act in the administration of the estate.

[5] Mrs MD had lived with Ms SD for some 20 years and Ms SD had acted as her mother's caregiver.

[6] Mrs MD's will provided that, after payment of expenses and debts, the residue of her estate was to be divided equally between Ms SD and her brother, Mr BD.

[7] After making the will, Mrs MD sold her home and the funds were used to buy a replacement property in which she and Ms SD lived until Mrs MD's death. The title to this property records Ms SD as the registered proprietor.

[8] Ms SD advised at the review hearing that upgrading of the lighting on the property was carried out at her mother's request and paid for from her mother's funds. A letter from Ms ET to Mr BD dated 2 July 2013 recorded that other renovations and work had been carried out to the property and paid for from Mrs MD's funds.

[9] Ms SD also confirmed at the review hearing that Mrs MD's vehicle was traded in on a replacement vehicle suitable for transporting Mrs MD, and that Ms SD had contributed some \$10,000 towards the replacement vehicle which had been retained by her.

[10] Ms SD asserted to Ms ET that all funds utilised in this way were gifts by Mrs MD to Ms SD and were not to be treated as loans. The net effect of these transactions was that Mrs MD's estate for division in terms of the will was reduced to some \$12,000. Ms SD advised Ms ET that Mrs MD had recognised the effect of these transactions on the value of her estate for division and that it was her intention that whatever was left of her estate at the date of her death was to pass to Mr BD. Ms SD advised Ms ET she was in agreement with that.

[11] Before the balance of the estate was finalised, there were some costs for a memorial plaque to be agreed upon and this was the subject of some discussion between Ms SD and Mr BD directed through Ms ET. Various communications by Ms ET to Mr BD requested his agreement to proposals put forward. Ms ET was not able to get any instructions from Mr BD and it would seem that instructions have still not been received to enable administration to be finalised.

[12] As a result of the difficulties encountered in the administration of Mrs MD's estate, Ms SD sought advice from another law firm ([Law Firm C]) which corresponded with Ms ET.

[13] [Law Firm B] merged with [Law Firm A] on 1 November 2014 and Ms ET became an employee of the merged firm. Ms SD complained about Ms ET on 29 December 2014 and Mr CH responded to her complaints. He directed his responses initially to Ms HP at [Law Firm C] and subsequently corresponded directly with Ms SD.

Ms SD's complaints

[14] Ms SDs complaints are:

- (a) Ms ET was rude to Ms SD when referring to the share of the estate to be received by Mr BD.
- (b) It has taken too long to complete administration of the estate.
- (c) The fees charged to administer the estate are exorbitant for unnecessary work or for work that has not been done.
- (d) A letter from the firm putting forward a proposal to enable agreement to be reached was biased in favour of Mr BD.

The Standards Committee decision

[15] The Standards Committee addressed each of the issues. It determined:

- (a) ... where neither the view of Ms SD [that Ms ET had been rude to her], nor the view of Ms ET can be corroborated, it is not possible for the complaint to be resolved or taken any further.¹
- (b) As trustees, Ms SD and her brother must act jointly and unanimously. However, they have been unable to agree on certain matters.

Without the agreement of both trustees, Mr CH and Ms ET cannot complete administration of the estate.

Ms SD has consulted her own lawyer for advice on the administration of the estate. The Standards Committee notes, however, that the letters from Ms SD's lawyers to Mr CH do not contain any reference to ineptitude on either his part or that of Ms ET. What the letters do reflect are attempts to negotiate the impasse between Ms SD and her brother.

In such circumstances, the Standards Committee cannot uphold this complaint.²

- (c) Having examined the invoices, the Standards Committee is of the view that the fees charged are fair and reasonable for the work undertaken. Although the estate is small, the difficulties between the trustees have

¹ Standards Committee decision at [7].

² At [9]–[12].

added to the time and labour expended and meant that the services of both senior lawyer and a legal executive have been required to administer the estate.³

- (d) ... Mr CH ... says that the letter [dated 10 November 2014] was sent as solicitors for the estate in an attempt to resolve matters between the trustees.

The Standards Committee has reviewed the letter and can find no evidence of partiality in Mr CH's letter; rather it reflects a sensible and pragmatic approach to resolution of a small estate.⁴

[16] Having reached these views, the Standards Committee determined to take no further action on Ms SD's complaints against either Ms ET or Mr CH.

Nature and scope of review

[17] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁵

... 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.

[18] More recently, the High Court has described a review by this Office in the following way:⁶

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.

³ At [18].

⁴ At [14]–[15].

⁵ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁶ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Review

[19] This review was progressed by way of an applicant-only hearing in [City] on 19 April 2017. The hearing was conducted by Mr Vaughan acting as a delegate duly appointed pursuant to clause 6 of Schedule 3 of the Lawyers and Conveyancers Act 2006 (the Act). The final determination of the outcome of this review as set out in this decision is made following full consideration of all matters by myself following discussion with Mr Vaughan.

[20] During the course of this review the practitioner's file was requested and received. The file has been fully reviewed in the course of considering the issues raised by Ms SD.

Delay in administering estate

[21] During the course of the review hearing it became clear that Ms SD held the view that administration of her mother's estate could be completed by the respondents in accordance with the terms of Mrs MD's will without instructions from Mr BD. Ms SD was under the impression that Mr BD's instructions were only required if the terms of Mrs MD's will were to be varied to provide that Mr BD received the residue of the estate, rather than the estate being distributed equally between her and her brother.

[22] That is not the case and although not stated precisely in those terms by the Standards Committee that was the basis of its determination. It is apparent from the lawyer's file that it was difficult to communicate with Mr BD from the outset. The difficulties in communication were occasioned by the fact that Mr BD's occupation required him to be in remote places from time to time. However, at other times, it is clear from a review of the firm's file that Mr BD has not provided the firm with any instructions in relation to the various proposals put to him.

[23] Section 110 of Act requires a practitioner to hold any money received on behalf of a client "exclusively for that person, to be paid to that person or as that person directs".

[24] The funds in the trust account of [Law Firm A] are held for the estate of Mrs MD. The executors of that estate are Ms SD and Mr BD.

[25] The requirement to have instructions from both executors extends to any action taken by a practitioner on behalf of the estate. Ms ET and Mr CH cannot take any steps to further administration of the estate without instructions from both Ms SD

and Mr BD. Ms SD will need to take separate advice as to what options exist to enable the administration of the estate to be completed.

[26] Any delay in completing administration of the estate arises from an inability to obtain instructions from both executors. Neither Ms ET or Mr CH have breached any professional standards in this regard.

[27] The determination of the Standards Committee to take no further action in respect of this complaint is confirmed.

Bias

[28] On 10 November 2014 Mr CH wrote to Ms SD's lawyer and canvassed the issues discussed by Ms ET with both Ms SD and her brother. He put forward a proposal to be considered by Ms SD to enable administration to be finalised.

[29] It must be noted at the outset, that the proposal put forward had been communicated to Ms ET by Mr BD. [Law Firm A] did not act in any way for Mr BD and were not representing his interest. Mr CH was passing on to Ms SD through her lawyer the basis on which Mr BD had advised he would agree to administration of the estate proceeding.

[30] On that basis it cannot be said in general sense, that Mr CH was biased in favour of Mr BD.

[31] At the review hearing Ms SD referred to various statements in the letter which she says indicated bias in favour of her brother:

- The funds from the sale of Mrs MD's property "were, in due course, utilised by your client in the acquisition of her home at [Road]".⁷
- Without disclosing the total amount [spent on repairs and maintenance on the property] the impression gained by Ms ET was of a reasonably considerable sum.⁸
- She also confirmed her mother wanted anything that was left in her account(s) to go to Mr BD. Your client indicated she was happy for this, even though she was aware the amount was considerably less than what her mother anticipated going to Mr BD.⁹

⁷ At [5].

⁸ At [6].

⁹ At [8].

- In addition to the shares that were sold we understand the deceased's motor vehicle was sold and the proceeds went towards the purchase of a new vehicle by your client.¹⁰
- In his email he states he has had discussions with others regarding the possibility of bringing proceedings against his sister, as well as looking at other options. It is only fair to say he has real concerns regarding the money received by his sister from their mother and the true nature of the payments.¹¹

[32] The relationship between Ms SD and her brother was not harmonious. It does however explain why Ms SD took offence to these statements and formed the view they indicated the respondents were favouring Mr BD. Viewed objectively however, I do not agree that they display bias.

[33] Ms SD was separately advised by her own lawyer. The letter to which Ms SD objects was sent to her lawyer. The letter was not endeavouring to persuade Ms SD to respond in any particular way and in any event, her own lawyer would have been able to advise her on any matter raised in the letter.

[34] Mr CH has not offended against any professional standards in the terminology used in this letter. The Standards Committee's determination to take no further action in respect of this complaint is confirmed.

Rudeness

[35] Ms SD complains that Ms ET was rude to her at their initial meeting. She alleges Ms ET commented that Mr BD's inheritance amounted to little more than a "piddle/piss in the bucket".

[36] Mr CH, on behalf of Ms ET, denies the comment, and Mr CH has commented "this is not the type of language Ms ET would use".¹²

[37] Before any adverse finding can be made against a practitioner any complaint must be supported by evidence. As noted by the Standards Committee, the alleged comment cannot be corroborated. On that basis alone there can be no finding against Ms ET.

[38] It is also noted Ms SD did not complain about the alleged comment until some 18 months after it was alleged to have been made. Ms SD says she was overcome by

¹⁰ At [9].

¹¹ At [17].

¹² Letter Briscoe to Watson (16 January 2015).

grief at the time and did not pursue the matter until her complaint addressed to [Law Firm B] on 29 December 2014. However, I observe that if a comment made was so offensive to a client that a practitioner should be disciplined, it would be expected that the degree of offensiveness would prompt an almost immediate reaction.

[39] The Standards Committee determination to take no further action in respect of this complaint is confirmed.

Fees

[40] Ms SD describes the fees charged in connection with administration of Mrs MD's estate as "exorbitant" in relation to the size of the estate. If fees were assessed solely on the basis of the value of assets administered, that would be a fair comment.

[41] There have been four bills of costs rendered for the administration of this estate. I anticipate there may be further bills of costs rendered if the estate is able to be progressed.

- (a) \$3,000 plus GST and disbursements (7 October 2013).
- (b) \$300 plus GST and disbursements (25 March 2014).
- (c) \$1,250 plus GST and disbursements (19 February 2015).
- (d) \$200 plus GST and disbursements (11 May 2015).

[42] As noted by the Standards Committee, a lawyer may take into account the various factors set out in rule 9.1 of the Conduct and Client Care Rules.¹³

[43] I have received and thoroughly reviewed the time records of the law firms in connection with this matter. These record the value of time spent on this file to be \$4,428. The bills rendered total \$4,750. It appears therefore that the bills rendered may slightly exceed the value of time recorded. I have not requested an explanation for this (and I accept my calculations may be incorrect) but given there will be no adverse finding against the respondents, a response has not been necessary. [Law Firm A] may establish the reasons for the difference following this decision and may take this into account when establishing any further fees to be rendered.¹⁴ There is no reason why the firms should depart from rendering accounts on the basis of time recorded. The hourly rate charged by Mr CH is \$330 and for Ms ET \$225. I have not

¹³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁴ This comment is not to be taken by either party as a directive by this Office or as an indication of the likely outcome of any further complaint about fees rendered in the future.

enquired into the experience of either respondent but these are reasonable rates charged by a partner and legal executive. The hourly rates are somewhat below what could be expected.

[44] I also note that the letter of engagement provided by Ms ET included an estimate of \$3,000 for the preparation of probate documents. The letter of engagement was signed by Ms SD on 19 July 2013. When the bill rendered on 7 October 2013 for \$3,000 plus GST and disbursements is examined, it is clear that it included all work carried out in administering the estate to that date, and was rendered in accordance with time spent.

[45] At the review hearing Ms SD asserted that some work carried out by Ms ET was unnecessary and that she herself had done whatever was needed. She cited as an example any work carried out by Ms ET to realise the proceedings of the [Firm D] Insurance policy.

[46] Ms SD's assertions are not correct. On the file received by this Office, it is clear that Ms ET was engaged in telephone conversations and email correspondence with [Firm D] staff, particularly to ascertain that the policy could be redeemed on the documentation provided by Ms SD. This indicates that Ms ET was being careful and paying close attention to the matter. In addition, an examination of the time records provided indicates that only a minimal amount of time was spent on this matter and charged for.

[47] Overall, notwithstanding the minimal size of the estate, the fees charged are fair and reasonable. The time spent on the file has expanded out of proportion to the size of the estate and this has largely been due to the inordinate amount of time expended through differences arising between the two executors. A lawyer should not be required to compensate for such disharmony by a reduction in the fees for the time expended on the file.

[48] I confirm the determination of the Standards Committee to take no further action on the complaint about the fees.

[49] Having considered all of the issues we have reached the same conclusions as the Standards Committee.

Decision

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

DATED this 10TH day of May 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:

Ms SD as the Applicant
Ms ET and Mr CH as the Respondents
Mr RL as a related person
[City] Standards Committee X
New Zealand Law Society
Secretary for Justice