LCRO 99 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2 of the New Zealand Law Society
BETWEEN	**I SHREWSBURY** of Wellington Applicant
AND	**B ROTHESAY** of Napier Respondent
AND	**FIRM A** of Napier Related Party

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

DECISION

[1] Mr Shrewsbury complained to the New Zealand Law Society about the conduct of Mr Rothesay on 31 March 2009. The complaint related to the manner in which the estate of the complainant's father (Mr Rex Shrewsbury) was administered. Mr Rothesay was the executor and trustee of that estate under the will of the deceased dated 12 November 2007. There are five adult children of the deceased (Allan, Susan, Jocelyn, Bronwyn, and Alison). I will refer to them by their first names to avoid confusion.

[2] The essence of the complaint at the review hearing was that Mr Rothesay had acted negligently in his conduct of the administration of the estate. In particular the estate had significant holdings in securities (such as shares, debt securities and unit trusts). It was the view of Mr Shrewsbury that it was negligent of Mr Rothesay not to

accede to a request to distribute those shares to the beneficiaries as requested at the commencement of the administration. In the alternative it was argued that if it was not negligent to refuse to distribute the shares and it was proper for the securities to be retained it was negligent not to place the portfolio under professional management. Mr Shrewsbury has also raised questions of whether it is appropriate for costs in respect of responding to his complaint to be charged to the estate, and whether it is appropriate for Mr Rothesay to seek an indemnity from the beneficiaries of the estate as a condition of distributing it.

[3] The matter was considered by the Wellington Standards Committee 2 which determined to take no further action on the complaint. Mr Shrewsbury sought a review of that decision. It should be noted that the original complaint also raised this issue of costs. The Standards Committee determined that costs should be dealt with separately and sought a report of a costs assessor. The decision of the Committee dealt only with conduct matters and only its decision in respect of the conduct of Mr Rothesay is under review.

[4] I also observe that Mr Shrewsbury was seeking wide-ranging relief. I note that I am restricted in the orders that I can make by the provisions of the Lawyers and Conveyancers Act 2006.

[5] A final procedural matter should be commented on. The Standards Committee in its decision identified a firm as a respondent to the complaint. This was carried over into the application for review. A law firm is not a party who may be complained against in terms of s 132 of the Lawyers and Conveyancers Act. Complaints may only be made (and considered) in respect of lawyers, employees of lawyers and incorporated law firms. Accordingly the firm is not properly considered a respondent to this review. I acknowledge, however, that law firms are recognised as "related entities" in s 6 of the Act and are recognised as having an interest in the conduct of a review by (for example) s 194(2)(c) of the Act.

Background

[6] Mr Rex Shrewsbury died on 10 April 2008. By his will of 12 November 2007 he appointed Alison and Mr Rothesay as executors and trustees. Alison elected to refuse appointment and in the event Mr Rothesay appointed as sole executor by probate which was granted on 28 April 2008.

[7] On 21 April 2008 Allan wrote to Mr Rothesay and in that letter he raised issues as to whether the deceased had been competent to execute the will and suggested that undue influence had been brought to bear on the deceased as regards the content of

the will. It was inferred that the allegation of undue influence was directed at Alison. In his original complaint Mr Shrewsbury suggested that in this letter he had requested that the shares be transferred to him. This request does not appear in that letter.

[8] In a letter dated 15 July 2008 from Jocelyn to Mr Rothesay a request that the securities be distributed by transferring them to the beneficiaries was clearly made. That letter was stated to be on behalf of Allan, Jocelyn, Maree and Susan. At this time it does not appear that Alison consented to such a distribution.

[9] By a letter dated 4 August 2008 Mr Rothesay declined to accede to the request that the shares be transferred to the beneficiaries. He did so on the basis that the estate may have insufficient funds to meet the outgoings of the estate and to meet a specific bequest to Alison of $100 000 (which by law has priority over general bequests). It was also noted that the trustee considered that a notice of claim had been given by Allan and as such it would be inappropriate to distribute any assets of the estate until either the status of the claim had been determined or the 12 month period in which such a claim could be made had elapsed with no claim being made.

[10] Allan reiterated his request for distribution of the securities in a letter to Mr Rothesay of 8 September 2008. He also stated that he considered that the will was executed when the deceased was “in a severely impaired state”. Susan reiterated the request that the securities be distributed to the beneficiaries in a letter to Mr Rothesay dated 12 September 2008.

[11] It should also be noted that the specific bequest to Alison of $100 000 was objected to by the other four beneficiaries. There has been ongoing negotiation as regards the entitlement of Alison to that bequest which involve the possibility of Alison relinquishing part of that bequest. At the time of hearing it appeared that no final agreement in respect of that bequest had been reached between the beneficiaries.

[12] Around February 2009 Mr Rothesay had prepared a “Deed Releasing Legal Personal Representatives”. That deed stated that the beneficiaries have requested that the estate be distributed and that the trustee agreed to do so “upon receiving the indemnities hereinafter contained”. The deed then proceeded to provide a broad indemnity to the trustee. That deed also noted that the trustee would retain funds to meet various outgoings including “any costs chargeable by Firm A in responding to complaint by I R Shrewsbury to NZ Law Society”.

[13] I observe that there may also be issues regarding the sale of real estate which some of the beneficiaries had suggested ought not be sold under a certain sum. In fact it was sold for less than that sum.

[14] On 1 May 2009 Susan Shrewsbury wrote to Mr Rothesay stating that she was dissatisfied with the administration of the estate and had taken advice “with a view to possible action”.

Complaint and response

[15] The complaint by Mr Shrewsbury at the hearing was fundamentally that Mr Rothesay had failed to administer the estate with due care and that by his negligence the assets of the estate had been diminished. This complaint was particularly directed to the management of the investments of the estate. It was argued by Mr Shrewsbury that Mr Rothesay should have either distributed the investments to the beneficiaries in specie, or have placed the investments with professional managers. The inference was that had either of these courses of action been taken the value of the investments would be greater than they currently are.

[16] Mr Shrewsbury also raised issues as to whether it was proper for Mr Rothesay to seek an indemnity before further distributing the assets of the estate, and whether it was proper to seek to take from the estate costs for his time in dealing with this complaint.

[17] It was argued for Mr Rothesay that his conduct was not properly the subject of professional proceedings because he was acting as the executor and trustee of the estate and was not providing legal services.

[18] It was also argued that the complaint lacked substance because the investments were now worth approximately the same as they had been in May 2008 and that such fluctuations in the value of investments is inevitable.

[19] It was observed that final distribution of the estate had still not been made because the beneficiaries were still in discussion as regards whether Alison would relinquish part of her bequest and also because there remained outstanding questions with regard to certain expenditures by Alison prior to the death of the deceased.

[20] In respect of the charging of costs in relating to the dealing with this complaint, it was argued that this was permissible under the terms of the will which had a general charging clause.

[21] Costs were also sought from Mr Shrewsbury on behalf of Mr Rothesay.

Jurisdiction

[22] Mr Rothesay has argued that because he was acting as a trustee and executor and not a solicitor his conduct is not subject to the jurisdiction of the Law Society. I observe that conduct outside of the provision of regulated services is dealt with by

s7(1)(b)(i) of the Lawyers and Conveyancers Act which states that a finding of misconduct may be made where there has been conduct which is:

> Conduct of the lawyer or incorporated law firm *which is unconnected with the provision of regulated services* by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

That finding may only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. There can be no suggestion that conduct of that nature has occurred here.

[23] In light of this I must consider whether the conduct of Mr Rothesay falls foul of the standard of unsatisfactory conduct set out in s 12. In particular subsection (a) provides that unsatisfactory conduct includes:

> conduct of the lawyer or incorporated law firm *that occurs at a time when he or she or it is providing regulated services* and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer;

The initial question therefore is whether Mr Rothesay was providing "regulated services" at the time when the conduct occurred.

[24] In relation to a lawyer "regulated services" is defined in s 6 of the Act as "legal services", "conveyancing services", and "services that a lawyer provides by undertaking the work of a real estate agent". Legal services is in turn defined as "services that a person provides by carrying out legal work for any other person". Legal work is then defined to include:

> (a) the reserved areas of work [which relates to advocacy work and the provision of statutory legal advice]:
> (b) advice in relation to any legal or equitable rights or obligations:
> (c) the preparation or review of any document that—
>
> (i) creates, or provides evidence of, legal or equitable rights or obligations; or
>
> (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
>
> (d) mediation, conciliation, or arbitration services:
> (e) any work that is incidental to any of the work described in paragraphs (a) to (d).

[25] Clearly when acting as a trustee and executor Mr Rothesay was not undertaking any of the work in paragraphs (a) to (d). The question therefore is whether the work he undertook can properly be considered as "incidental" to any of the work described in paragraphs (a) to (d) and therefore falling under paragraph (e).

[26] Mr Rothesay sought to rely on *Hansen v Young* [2004] 1 NZLR 37 as establishing that there was a clear division between the role of a solicitor and an executor or trustee even though the roles may be fulfilled by the same person. That case concerned the administration of an estate which held speculative shares. The solicitor was a co-executor and co-trustee. The solicitor negligently managed the investments and a considerable sum of money was lost. The solicitor claimed that the failure to manage the investments was conduct as a trustee/executor and not a solicitor. As such he ought to be entitled to claim the benefit of an indemnity provided to trustees and executors in the will. The Court of Appeal accepted this argument.

[27] That case affirmed the principle that the roles of solicitor and executor/trustee are distinct, even if they are held by the same person. However, it sheds little light on the question in issue here. That question is whether the work of an executor/trustee of an estate who is also the solicitor of the estate is properly regarded as "work that is incidental" the other established classes of legal work set out in s 6 of the Act.

[28] In addressing this question I take note of the parallel legislation from Australian jurisdictions. For example, section 4.4.2 of the Legal Profession Act 2004 (Vic) defines unsatisfactory professional conduct to include:

> conduct of an Australian legal practitioner *occurring in connection with the practice of law* that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

A substantially identical provision is found in s 496 of the Legal Profession Act 2004 (NSW) and s 418 of the Legal Profession Act 2007(Qld). The use of the phrase indicates a general legislative intent that a finding of unsatisfactory conduct may be made in respect of any of the services that a lawyer offers in the course of his or her practice.

[29] Such a stance is consistent with the purposes of the Lawyers and Conveyancers Act 2006. A central purpose of that Act is to protect the consumers of legal services and conveyancing services (s 3). In seeking to attain that purpose s 3(2) proceeds to state that it intends to provide a more responsive regulatory regime in relation to

lawyers and conveyancers. I also observe that s120 of the Act sets out the purposes of Part 7 of the Act (Complaints and Discipline) which include the provision of system in which complaints can be processed and resolved expeditiously. It is therefore appropriate to interpret the respective provisions in a way which is consistent with the protection of consumers of legal services, and the provision of a responsive and expeditious complaints process.

[30] I also take into account the fact that the Lawyer's and Conveyancers Act 2006 is at least in part a consumer protection measure. It would defeat that purpose if the legislation were interpreted to exclude from its scope functions which a lawyer routinely undertakes alongside the provision of legal services but these were not considered to be regulated services.

[31] I conclude that where the services provided by a lawyer are services of a type that it is usual for a lawyer to provide, and they are provided in conjunction with legal work (as defined by paragraphs (a) to (c) of the definition of that term) they are properly considered to be incidental to that work and also "legal work". In light of this the work of an executor/trustee who also acts as a solicitor for an estate will be regulated services. The services provided by Mr Rothesay in this case fall into that category.

[32] Accordingly it is proper that I now consider whether the conduct of Mr Rothesay fell short of the standard set out in s 12 of the Act.

Administration of investments

[33] Mr Rothesay was faced with beneficiaries who were not in agreement as to whether the will was valid and/or whether aspects of it were challengeable. He was on notice that a claim could be made against the estate. In light of this his decision not to distribute the estate or part of it (whether in specie or not) was a proper one to make.

[34] There is also no evidence that Mr Rothesay acted negligently in not realising the investments. He stated at the hearing that he sought the advice of an expert in the area who informed him that the portfolio could be considered a conservative one. I also observe that by the clause 5(a) of the will as trustee he was empowered by to postpone the sale of any of the estate assets. While it is accepted that over the ensuing months the investments fell in value this is not, of itself, evidence of negligence.

[35] The question is whether in all the circumstances the decision of Mr Rothesay not to realise the investments at an early stage was one which a reasonable professional executor/trustee could make given the circumstances prevailing at that time. Caution must be exercised in determining that question with the benefit of hindsight. I also note that Mr Rothesay was not obliged to accede to the demands of a number beneficiaries

in this matter. The fact that some of the beneficiaries demanded that he take a particular course of action can have no bearing on the question of whether or not it was negligent for him to take a different course of action.

[36] I also take into account the view of the Standards Committee that it is not normal practice to transfer investments at the time of probate, especially when there is an indication that there may be a claim against the estate. The Committee is comprised of experienced legal practitioners and lay membership. On a question of usual and reasonable professional practice its view should be accorded considerable weight.

[37] Mr Shrewsbury also suggested at the review hearing that Mr Rothesay should have placed the portfolio under professional management. This would of course have incurred a fee. While it may have been open to Mr Rothesay to do so, I do not consider that Mr Shrewsbury has established that it was negligent of Mr Rothesay to fail to do so in this case.

[38] Mr Shrewsbury's argument proceeded essentially on his own assertion that the course of action of Mr Rothesay was ill founded. Other than this assertion (and the inference I was invited to make from the fact that the investments had fallen in value) there was no independent evidence that the decision of Mr Rothesay to retain the investments for the time being was negligent in any way.

[39] I conclude that Mr Rothesay adhered to the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer in the way he acted in the administration in the estate of this matter.

Costs for dealing with complaint

[40] In the course of the hearing I noted that there was a suggestion on the documents on the file that the costs of dealing with this complaint might be seen as a legitimate cost to be imposed on the estate. I observe that in *Watt v R* (17 October 2006, Court of Appeal Glazebrook J, Ellen France J, Ronald Young J, CA131/06) a conviction for criminal breach of trust was upheld on appeal in circumstances where a lawyer charged costs to an estate in respect of his own attendances in responding to a costs revision of the Law Society (knowing that this was inappropriate). Leave to appeal was refused in *Watt v R* [2007] NZSC 60. In declining to grant leave the Court stated:

> The guilty verdict followed from the Judge's finding that Mr Watt knew that he was not entitled to charge for the particular matter, namely for work which he did when beneficiaries of the estate sought a revision of costs which he had previously rendered. The applicant's case that the verdict was unreasonable or

> unsupported by the evidence was rejected by the Court of Appeal. … [I]t is clear enough that on the central issue of Mr Watt's dishonesty in relation to his charging of fees the Court considered that the Judge was obviously correct.

[41] It can also be noted that the estate derives no benefit from Mr Rothesay's attendances in responding to this complaint. Moreover (putting to one side that Mr Rothesay is the sole trustee and executor) if the estate were to instruct Mr Rothesay that it did not consider itself liable for the costs of responding to the complaint and Mr Rothesay should desist from any work in this regard on its behalf Mr Rothesay would still be obliged to respond to the complaint.

[42] My attention was drawn to clause 6 of the will which permits Mr Rothesay to charge for work done "in relation to my estate or affairs". I do not consider that this clause permits Mr Rothesay to charge the estate for the costs of responding to this complaint. Responding to a complaint is a matter between the professional body and the lawyer. It cannot be said to be "in relation to my estate or affairs" in the manner contemplated by the will.

[43] Although Mr Shrewsbury raised this in the course of the review and it was drawn to the attention of the Standards Committee I observe that there was no evidence before me that the estate had in fact been charged with any of the costs of responding to this complaint. I also observe that the costs that Mr Rothesay has charged are the subject of separate proceedings before the Standards Committee. I also understood from counsel from Mr Rothesay that any guidance offered in respect of the entitlement to charge for the costs involved in dealing with this complaint would be accepted. In light of these matters further consideration of this issue is unnecessary.

Indemnity

[44] Mr Shrewsbury also complained on review that an indemnity was being sought from the beneficiaries under the estate before any further distribution would be made. There appears to be some confusion between the indemnity (or release) that is being sought by Alison in respect of allegations made against her in respect of various matters touching on the will. She has stated that she will not agree to relinquish part of the bequest unless "a waiver in full and final settlement not just of any estate issues but of all disputes whatsoever involving the administration of the estate" is given by the other beneficiaries. There can be no suggestion that this conduct is attributable in any way to Mr Rothesay.

[45] However, some time around February 2009 a proposed "Deed Releasing Legal Personal Representatives" was put to the beneficiaries. The tenor of that deed was that

the estate would be distributed (with certain retentions to cover outstanding liabilities) on the basis that the beneficiaries provided an indemnity to Mr Rothesay as trustee. I observe that that indemnity related to Mr Rothesay's status as a trustee only and not as the solicitor of the estate. The document has not been executed and it is understood that the estate is yet to be finally distributed.

[46] Where the beneficiaries in an estate agree that the estate may be distributed in a mannerr which is at variance with the terms of the will or would undermine a possible claim against the estate (such as a claim under the Family Protection Act 1955) it is usual and permissible for the trustee to obtain the consent of the affected parties to the proposed distribution. Such consent has the effect of precluding a claim by the consenting parties against the trustee (see for example s 47 of the Administration Act 1969) arising from that distribution.

[47] However, in the present case there is no suggestion that the distribution contemplated was to be other than in accordance with the terms and powers set out in the will. The purpose of the document appears to have been to preclude any claims by the beneficiaries in respect of alleged negligence in the way in which the assets of the estate were realised or managed by the trustee.

[48] In so far as there has been a suggestion from Allan and Susan that claims may be made against the estate on the basis that the will was not valid it would be appropriate for the trustee to seek consent from them to the proposed distribution and thereby ensure that no claims would be made against him or the estate on that basis. However, it is not at all clear that it is appropriate for a trustee to seek to obtain an indemnity from beneficiaries simply for distributing the estate in accordance with the terms of the will. That is after all the fundamental duty of the trustee.

[49] In the event the deed in question was not signed. I also observe that this was not a matter which was considered by the Standards Committee and as such it would not be appropriate to consider it for the first time on review. I do not propose to consider this matter further.

Costs of review

[50] An application was made for costs in favour of Mr Rothesay against Mr Shrewsbury on the basis that the complaint was vexatious. It was suggested that the complaint lacked substance and that the application by Mr Shrewsbury for compensatory orders well outside of the jurisdiction of this office supported that.

[51] My jurisdiction to award costs flows from s 210 of the Lawyers and Conveyancers Act 2006 which provides in subsection 1 that:

> The Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

[52] Subsections 2 and 3 proceed to give specific instances of costs awards which may be made. In particular they state that costs may be "awarded to any person to whom the proceedings relate" and the LCRO may order that they be paid by practitioners to whom the proceedings relate (including where no unsatisfactory conduct is found) or against the Law Society. There is no mention of costs being paid by a lay complainant.

[53] The Costs Orders Guidelines of this office state that any power to award costs between the parties will be exercised sparingly. In particular paragraph 13 of those guidelines provides:

> A costs order may be made against a party to review (whether a practitioner or a lay person) in favour of the other party where there has been some improper conduct in the course of the review. Such conduct may exist where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review. Improper conduct may also exist where a party has ignored or disobeyed an order or direction of the LCRO or breached an undertaking given to the LCRO or another party.

[54] I do not consider that the threshold contemplated by that guidance has been reached in this case. While Mr Shrewsbury has been unsuccessful in his application for review I consider that the application was brought with the genuine intention of airing a perceived grievance. I do not consider it was brought simply to harass. Mr Shrewsbury's conduct in the course of the review has been reasonable and measured. I also observe that this review traversed matters upon which I considered it appropriate to make observations in respect of the administration of the estate by Mr Rothesay as trustee, although it should also be emphasised that no adverse professional findings were made against him.

[55] No order for costs of any kind will be made in this matter.

Decision

[56] The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Standards Committee is confirmed.

DATED this 13th day of November 2009

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Duncan Webb
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:

Applicant
Respondent
Firm A as a related party
Wellington Standards Committee 2
The New Zealand Law Society