LCRO 137/2017
LCRO 33/2018

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [x]
BETWEEN	**CH** Applicant
AND	**RB and GN** Respondents

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

DECISION

Introduction

[1] Mr CH has applied for a review of two decisions of the [Area] Standards Committee [x] (the Committee). Both relate to his legal services in the administration of the estate of the late AEN. Ms RB and Ms GN were the executors of her will and amongst the beneficiaries of her estate.

[2] The first decision (now the subject of review 137/2017) was made on 16 June 2017. The second (now the subject of review 33/2018) was made on 17 January 2018. I will come back to these decisions in more detail, but it is helpful briefly to outline them here.

[3] The first decision recorded a finding of unsatisfactory conduct in relation to deduction of fees from estate monies held in Mr CH's trust account. The second decision imposed penalties on account of that unsatisfactory conduct finding.

[4] The finding of unsatisfactory conduct was made on two counts:

(a) firstly, that Mr CH had breached reg 9 of the Lawyers & Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations) by debiting a fee of $1,638.75 from the estate's trust account on 27 April 2016 without issuing (delivering or posting) an invoice until 4 May 2016; and

(b) secondly, and in any event, correspondence dated 28 March 2016 from the executors had revoked Mr CH's authority to deduct any fees from the estate monies held; so that

(c) the deduction was not only in breach of reg 9, but also of s 110 of the Lawyers and Conveyancers Act 2006 (the Act).

[5] Should I conclude that the finding of unsatisfactory conduct decision was wrong on both counts, then the penalty decision would obviously fall away as redundant and need to be set aside.

[6] Mr CH does not contest the penalties imposed as such, but if I should hold that the finding of unsatisfactory conduct was correct but involved conduct not as serious in the overall as the Committee found to be the case, it will be necessary to review the penalties imposed.

[7] Mr CH requested that the two reviews be heard together. That is the appropriate course and I so proceed.

Background

[8] Mr CH acted on the instructions of the executors in the administration of the estate of the late Ms AEN.

[9] By April 2016 his task was nearing completion.

Fee deduction

[10] Mr CH says that on 26–27 April 2016, then under pressure from the executors to complete his instructions, he prepared a draft fees invoice and statement of account. However, other obligations intruding, he did not finalise the invoice and the statement at that point.

[11] He refers to his trust account ledger and entries on 4 May 2016. These record:

(a) a fee deduction of $1,638.64;

(b) final distributions of $7,389.50 each to Ms RB, Ms GN and four others; with the end result being a nil balance.

A statement of account dated and issued on 10 May 2016 — six days later — incorporates references to (a) and (b). In that statement (a) is identified as "TO: M CH fees of 27 April (sic) 2016 $1,638.64".

[12] Two invoices dated 4 May 2016 have been produced but none dated 27 April is apparent.[1] As to the May invoices:

(a) one is for $1,638.75 (the amount noted by the Committee) comprising a fee of $1,425 and GST $213.75;

(b) the other is for $1,638.64 (the amount appearing in the ledger) comprising a fee of $1,424.90 and GST $213.74; and

(c) each carries the terms of payment notation that payment has been made "by approved deduction from estate funds held".

[13] A time recording and costing printout, covering 9 March to 26 April 2016, totals $1,785 and bears at the foot the handwritten notation:

Say $1425

213.75

$1638.75

[14] That notation seems to mark the origin of (a) in [12] above but as noted earlier the actual and only relevant deduction — made on 4 May 2016 — was of the $1,638.64 identified in (b) of that paragraph.

Authority to deduct fees

[15] The executors say that by 28 March 2016 letter they revoked Mr CH's authority to deduct fee from the estate monies by writing that:

[1] The anomaly of two invoices for very slightly different amounts is not explained in the papers but is of no moment given that the ledger deduction position is unequivocal — one of $1638.64 on 4 May 2016.

> … we do not authorise you to deduct your fees to date as we are concerned that your charges are neither fair nor reasonable. Please review your charges and provide us with an itemised account.

[16] Mr CH says that he received no such letter and was unaware that, contrary to the case with earlier fee notes, by April 2016 he was supposedly bereft of authority to deduct any more.

The complaint

[17] The executors' 15 June 2016 complaint to the Complaints Service had focused on the executors' concern that Mr CH's fees had been unfair and unreasonable overall, but an accompanying copy of the supposed 28 March 2016 letter obviously highlighted to the Committee that an issue relating to fees deduction also required attention in terms of the trust account rules.

The Standards Committee's 16 June 2017 decision

[18] The Committee initially identified from the complaint as a whole that the issues raised were:

(a) justification for the level of fees;

(b) failure to provide a detailed costs breakdown when requested;

(c) whether the administration of the estate had been carried out in timely fashion; and

(d) whether there had been an unauthorised fee deduction.

[19] The Committee then distilled those issues down to whether:

(a) Mr CH's fees were fair and reasonable;

(b) disciplinary action was appropriate in relation to the fees; and

(c) Mr CH had breached any of his professional obligations in relation to the remaining aspects of the complaint.

[20] Before proceeding to make a decision on (a) and (b) the Committee appointed a costs assessor whose opinion was that the total fees should be reduced by $3,592.03. Mr CH unhesitatingly accepted this view and agreed to reduce his fees accordingly.[2]

[2] A refund was made on 13 July 2017.

[21] The Committee noted that response and concluded that a significant portion of the amount overcharged had resulted from error rather than bad faith. Thus, it found that the disciplinary threshold was not reached as regards quantum of fees and determined to take no further action on issues (a) and (b). That outcome has not been challenged.

[22] As to (c), the Committee recorded factual findings that:

(a) Mr CH had deducted $1,638.75 for fees from the estate on 27 April 2016;

(b) the corresponding invoice was only issued on 4 May 2016; thus

(c) Mr CH had breached reg 9 of the Trust Account Regulations; moreover

(d) the executors had written to Mr CH on 28 March 2016 revoking his authority to deduct fees from monies held.

[23] That last finding meant, so the Committee went on to hold, that Mr CH had then had no choice but simply to issue a fees invoice and pursue recovery of its amount in the usual way.

[24] The Committee ordered Mr CH to refund the fees taken, as if they had been cancelled.

[25] It was on those accounts that, by reference to s 12(c) of the Act the Committee made an unsatisfactory conduct finding against Mr CH and on 17 January 2018:

(a) fined him $2,000 — s 156(1)(l) of the Act; and

(b) ordered him to pay costs of $1,000 — s 156(1)(n) of the Act.

Application for review

[26] Mr CH applied for a review of the Committee's first decision on 17 July 2017. He sought its reversal or that the whole matter be referred back to the Committee.

[27] Mr CH's case was that:

(a) as regards the fee deduction, the Committee had been wrong to conclude that the fees in question had been deducted on 27 April 2016;

(b) rather that had been done on the 4 May 2016 invoice date, as appeared in the trust account ledger; and

(c) he had never received the executors' letter of 28 March 2016.

[28] The executors responded by saying that:

(a) they were surprised that Mr CH said he had never received their revocation letter; but

(b) had no proof of sending by post or electronic means.

[29] Mr CH also sought the review of penalties.

Review on the papers

[30] The parties have agreed to the reviews being dealt with on the papers. The reviews have been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[31] I record that having carefully read the complaint, the response to the complaint, the Committee's decisions and the submissions filed in support of and in opposition to the applications for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the reviews can be adequately determined in the absence of the parties.

Nature and scope of review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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" …

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

> … 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.

[33] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[34] 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

Fees deduction

[35] In light of the materials now available, which include further clarifying information provided following a request from this Office, the following is clear:

(a) A fee of $1,638.64 was deducted from the estate monies held in trust on 4 May 2016.[5]

(b) The invoice for those, the fees of $1,638.64, bears the date of that deduction rather than 27 April 2016.[6]

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[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[5] Source: trust account ledger printout.
[6] As identified in [12] above, the materials also include an identical invoice except for a small difference (11 cents) in amount but given the actual deduction this corresponds with the invoice promoted by Mr CH as the one actually issued, nothing of present significance turns on that.

(c) The statement of account which incorporates that invoice (albeit with a reference to 27 April 2016 which Mr CH identifies as but a draft date) is dated 10 May 2016.

(d) On that date Mr CH emailed a letter to the executors that included:

> I am attaching a final statement of account showing all transactions through our trust account during the course of administration, and also our final account

(e) That matches Mr CH's advice (in the form of a timeline) to this Office that on 10 May 2016 he sent them both his final statement of account (which bears that date) and his invoice dated 4 May 2016.

[36] It thus becomes clear that the Committee (which had less information than has this Office) was mistaken in its conclusion that fees were taken on 27 April 2016.

[37] Instead (see [11] and [35] above) the fees were taken on the date the invoice was finalised (4 May 2016).

[38] However, the deduction was not accounted for to the executors until the final statement was sent out by email on 10 May 2016 — 4 May 2016 was a Wednesday and 10 May 2016 was the following Tuesday, thus a delay of six days.

[39] Regulation 9 of the Trust Account Regulations relevantly says:

> (1) No trust account may be debited with any fees of a practice … unless—
>
> (a) a dated invoice has been issued in respect of those fees …
>
> (2) If fees are debited under subclause (1)(a), *an invoice must be delivered or posted* to the person who has a legal or beneficial interest in the trust account to be debited *before or immediately after the fees are debited*.
>
> (emphasis added)

[40] What "immediately" means in a legal sense is to be judged by the context in which it is used. The words I have underscored convey a real sense of urgency. If a deduction has not been preceded by the issue of an invoice, then there is no room for delay in reporting. The deduction must be reported straight away after deduction is made.

[41] Letting six days go by before reporting plainly constitutes a failure to do so "immediately".

[42] Regulation 9 is a fundamental rule that every lawyer must know and obey. So if Mr CH had any mitigating explanation for the delay (the perennial of work pressure not amounting to that) one could expect him to have brought that forward. He has not done so.

Revocation of authority to deduct fees

[43] The executors say that by their 28 March 2016 letter they revoked Mr CH's authority to deduct fee from the estate monies.

[44] However, they also say that they have no proof of the letter being posted nor either any electronic record of the letter being sent to Mr CH.

[45] Their habitual form of written communication with Mr CH was by email, so if the letter had been sent the likelihood would have been of that being the mode of sending.

[46] It is usually possible to track back through electronic mail system to find emails sent very much earlier than the time of search. I take it from the response of the executors that they would have checked before advising they had no record of the letter being sent by electronic means.

[47] Mr CH says:

(a) that he has reviewed his file very carefully and had one of his staff do the same; and

(b) those searches have revealed no sign of the letter; he then notes

(c) that (as is the case) the letter does not include a postal address;[7] and

(d) that the letter produced contemplates signature by both executors, but is only signed by Ms GN; and

(e) it is her (postal) address that appears at the top of the letter; and

(f) that none of the emails from the executors between 4 March and 21 June 2016 nor any records of phone conversations (which he produces) makes any reference to such an instruction or letter.[8]

[7] Nor does it include an email address.
[8] The executors would have been aware of the deduction by 10 May 2016 when the invoice and statement were emailed to them.

[48] He also said in his 13 July 2017 letter to the Complaints Service:

> I can absolutely assure the Society that I have only ever received an instruction or request from a client not to deduct fees from a client trust account in about six instances in my 35 years of legal practice, and I have complied with that request or instruction absolutely on every occasion, as I would have done in relation to this matter had I actually received the instruction.

[49] There is no presumption here of due despatch and receipt, so it is not for Mr CH to prove non-receipt.

[50] The short point is that, taken together and considered objectively, the submissions each way speak for themselves in driving the conclusion that, most probably, the letter was never actually sent.

[51] In other words, the evidence carries matters beyond it being less than probable that the letter was sent and delivered to the point of it being affirmatively apparent on the probabilities that it was never actually despatched.

[52] I only add that the odds against it having been sent and in fact received are enhanced by the sheer improbability of a lawyer blithely ignoring such an instruction.

[53] For all of the above reasons, I find that when Mr CH deducted the $1,638.64 on 4 May 2016, he did not do so in contravention of any instruction he had received.

[54] Attention then necessarily turns to whether my conclusion that Mr CH had not deducted fees in the face of specific instructions from his client not to do so, materially compromised the Committee's unsatisfactory conduct finding to the extent that the finding should be set aside.

[55] The Committee's finding of unsatisfactory conduct was reached, following its conclusion that Mr CH had committed two breaches of the Trust Account Regulations.

[56] The first, was his decision to issue an invoice, some days after deducting funds.

[57] For the reasons set out at paragraphs [40]–[42] above, I consider that breach to be a serious one, and one which would, in itself, merit a finding of unsatisfactory conduct.

[58] That said, whilst in no way diminishing the importance of the obligation well understood by lawyers to ensure that an invoice is properly issued if funds are to be deducted from funds held on the basis of the invoice issued, that oversight on Mr CH's part presents as evidence of him having been less attentive to his obligation to issue the invoice promptly then he should have been, but the failing in my view, is not as

egregious as a finding that a lawyer has deliberately flouted a client's instructions not to release funds.

[59] It is appropriate that the finding of unsatisfactory conduct remain, however I consider it necessary to reduce the fine imposed by the Committee from $2000 to $1000.

[60] Whilst this Office is customarily reluctant to interfere with penalty orders imposed by the Committee, unless there are good grounds to do so, the Committee's assessment that a fine of $2000 was appropriate, would clearly have been calculated with regard to its finding that there had been two conduct breaches by Mr CH.

[61] Having concluded that there was only one breach, a reduction in the fine of 50 per cent seems appropriate.

[62] Finally, I note that the Committee directed that Mr CH was to cancel his invoice of 4 May 2016 and refund the sum of $1,638.75 to the estate.

Costs

[63] Where an adverse finding is made or upheld, costs will be awarded in accordance with the Costs Orders Guidelines of this Office.

[64] Mr CH has succeeded in part with his application. I consider costs in the sum of $450 to be appropriate.

Anonymised publication

[65] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision and Orders

[66] To the extent identified, my conclusions on review differ from those of the Committee and do so to an extent that requires modification of both the first ,the liability decision, and the second, the penalty decision.

[67] The Committee had earlier ordered that Mr CH, refund the $1,638.64 to the complainants, on the basis that he could then pursue payment of that amount in the usual way.

[68] Mr CH has advised this Office that, on advice from NZLS, he has not yet refunded the $1,638.64 to the complainants, pending the outcome of this review.

[69] I note from a review of the file, and the original complaint, the complainants squarely raised concerns about Mr CH's fee. Those complaints were addressed by the Committee and Mr CH accordingly refunded a portion of his fees.

[70] When Mr CH applied to this Office for a review of the Committee's decision, the complainants noted that the "errors" in Mr CH's charging had been revealed in the costs assessor's report and that "those funds were refunded on 13 July 2017". On 15 February 2018, the complainants advised this Office by email they had no further comment to make on Mr CH's application for review.

[71] The practical effect of the order made requiring Mr CH to refund the fee he had inappropriately deducted from funds held, was effectively to put Mr CH in the position where he would, following the refunding of the fee, then be required to pursue the fee.

[72] I am persuaded that following that approach would necessarily involve Mr CH, and importantly the complainants, in further inconvenience.

[73] I am conscious of the unsatisfactory conduct finding made against Mr CH, and the overarching consumer protection focus of the Act, and indeed of this Office, but in view of the way this matter has evolved since that finding, such a refund would serve no practical purpose, as it seems that no issue is now taken with the quantum of the balance of the fee (given the separate refund made).

[74] The implementation of such an order would involve the artifice of a refund and then a repayment in respect to a fee that is no longer in dispute between the parties.

[75] In this particular situation and in light of these facts, Mr CH is no longer ordered to refund $1,638.64 to the complainants. That direction is made with no criticism of the approach adopted by the Committee, which was in my view the correct one, but with a pragmatic recognition of the desirability of bringing all matters outstanding between the parties to conclusion.

[76] The tidiest way to give effect to my conclusions is to apply s 211 of the Act by setting aside (as I now do) both of the Committee's decisions and substituting for them the following:

(a) Given the importance of strict adherence to the Trust Account Regulations, and Mr CH having delayed six days before informing the

executors of the fees deduction of $1,638.64 and providing the requisite invoice, I hold that to be unsatisfactory conduct on his part;

(b) On that single account he is fined $1,000.

(c) Costs of $1,000 ordered by the Committee to be paid to the New Zealand Law Society pursuant to s 156(1)(n) of the Lawyers and Conveyancers Act 2006 are confirmed.

(d) The fine and the costs must be paid to the New Zealand Law Society no later than 15 working days after the date of this decision;

(e) Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, costs in the sum of $450.00 awarded in respect to this review, are to be paid to the New Zealand Law Society no later than 15 working days after the date of this decision;

(f) Failing payment of the fine and/or the costs as above, such may be enforced in the civil jurisdiction of the District Court.

DATED this 28TH day of June 2019

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R Maidment
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 CH as the Applicant
Ms RB and Ms GN as the Respondents
[Area] Standards Committee [x]
New Zealand Law Society