

LCRO 196/2013

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

XM

Applicant

AND

WG

Respondent

DECISION

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

Introduction

[1] Mrs XM has applied for a review of a decision by [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of Ms WG.

Background

[2] Ms WG acted for Mr HY who was the executor of the estate of Mr RS. Mrs XM is Mr RS's daughter.

[3] Mr RS died between 14 and 16 October 2012.

[4] Mr RS had appointed Mr HY and his nephew, Mr MN, as the executors of his will.

[5] The will provided for legacies of \$10,000 each for Mrs XM, Mr RS's son Mr HL, and Mr RS's sister Mrs KA. The residue of the estate had been left to Mr MN, however Mr MN predeceased his uncle.

[6] As a consequence, the residue of the estate fell to be distributed equally between Mrs XM and her brother Mr HL.

[7] In the early stages of managing the estates affairs, Ms WG and Mrs XM enjoyed a close working relationship.

[8] Mrs XM was communicating with Ms WG on a regular basis, and actively assisting in attending to sorting out a number of estate issues.

[9] Mrs XM attended her father's property for several weeks to clear out her father's personal effects which were to be sold at private auction. During this time, there was frequent correspondence between Mrs XM and Ms WG.

[10] Towards the end of November 2012, the seemingly close working relationship between Ms WG and Mrs XM began to fracture.

[11] Whilst there were a number of matters that became contentious, Mrs XM had particular concerns regarding:

- (a) Mr HY continuing in the role as executor; and
- (b) the manner in which Ms WG was managing the tender process for sale of the estate property.

[12] In December 2012, Mrs XM's concerns prompted her to instruct her own counsel.

[13] Her disaffection with Ms WG's performance as the lawyer for the estate prompted her to make complaint that Ms WG had, in various ways, breached her professional obligations. On 22 December 2012, she lodged the first of what was to become several complaints with the New Zealand Law Society Complaints Service.

[14] By mid-January 2013, Mrs XM's confidence in Ms WG had deteriorated to the point where she had instructed her counsel to write to Ms WG expressing Mrs XM's total lack of confidence in Ms WG's ability to competently manage the estates affairs.

[15] Ms WG instructed Mr QP, a practitioner with considerable estate experience, to review her file. Mr QP could identify nothing untoward in Ms WG's management.

[16] On 25 January 2013, Mrs XM lodged her second complaint with the Complaints Service. She lodged further complaints on 28 January 2013, 4 February 2013, 11 February 2013 and 3 March 2013.

[17] Probate was granted on 13 February 2013.

The complaints and the Standards Committee decision

[18] Mrs XM lodged six complaints in total. I will detail those complaints in the order received:

Complaint 1 — Three principal areas of concern, 22 December 2012

- (a) Ms WG had advised her on 30 November 2012, that the executor Mr HY had renounced his position, and that she was making application for letters of administration to have Mrs XM appointed as the sole executrix.
- (b) Ms WG had advised her that any tenders received for the sale of the land would be discussed with her, and that no offer would be accepted without her approval. Tenders closed on Friday 14 December 2012. Ms WG failed to contact her to discuss the tenders, as she had indicated that she would.
- (c) Ms WG had failed to respond to requests for information.

Complaint 2 — 25 January 2013

- (d) Ms WG continued to avoid providing information when requested.
- (e) Ms WG did not advise whether the tender offer or the valuation figures included GST.
- (f) Ms WG had failed to manage the tendering process in an open and professional manner.
- (g) Ms WG had failed to ensure that the terms of her father's will had been complied with.
- (h) Ms WG had failed to ensure that the estate property was adequately secured.
- (i) Ms WG was failing to disclose information to her.

Complaint 3 — 28 January 2013

- (j) Emails had not been responded to.

Complaint 4 — 4 February 2013

- (k) Ms WG had mismanaged the sale of hay from the property.

Complaint 5 — 11 February 2013

- (l) Further complaint that Ms WG was refusing to communicate.

Complaint 6 — 3 March 2013

- (m) Ms WG had failed to promptly inform Mrs XM that she was a beneficiary of her father's will.
- (n) Ms WG had failed to advise her of the arrangements that had been made for sale of hay from the property.
- (o) An estate vehicle was sold for a value considerably less than its true value.
- (p) Items which formed part of the estate's assets had been stolen.
- (q) Ms WG had forwarded inappropriate communications to third parties.
- (r) Ms WG had delayed in applying for probate.
- (s) Ms WG had made inappropriate personal comments about her.
- (t) Further concerns raised regarding the tendering process.

[19] Subsequent to filing these complaints, Mrs XM filed a further nine complaints in May 2014, and a further four complaints which were the subject of a Committee decision delivered on 10 July 2015.

[20] The Committees that have conducted inquiry into Mrs XM's complaints have, in all instances, elected to take no action in respect to the complaints filed.

[21] The Standards Committee delivered its decision in respect to the complaints that form the subject of this review, on 28 May 2013.

[22] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaints was necessary or appropriate.

[23] In reaching that decision the Committee concluded that:

- (a) Ms WG's duties in acting in the administration of the estate were to protect and promote the interests of the executor, Mr HY;¹
- (b) Ms WG's obligations to Mrs XM as a third party were modest;²
- (c) Ms WG was not required to act on directions from Mrs XM as a beneficiary;³ and
- (d) Mr HY as executor was not prepared to renounce his executorship. Mr HY was satisfied with the competence and ability of Ms WG in acting for him.⁴

Application for review

[24] Mrs XM filed an application for review on 5 July 2013. The submissions filed in support of the application are comprehensive, extending to some twelve pages.

[25] The outcome sought is for the decision of the Standards Committee to be reversed and for the original complaint to be investigated. Mrs XM requests that Ms WG:

- (a) be censured or reprimanded;
- (b) be ordered to apologise to Mrs XM;
- (c) compensate Mrs XM for expenses she has paid in relation to her father's estate;
- (d) reduce or cancel her fees;
- (e) rectify at her own expense the errors or omissions made in administering the estate; and
- (f) pay Mrs XM's costs and expenses incurred in respect of her complaint.

¹ Standards Committee determination, 28 May 2013 at [17].

² At [18].

³ At [24].

⁴ At [23].

[26] Mrs XM asks that the Legal Complaints Review Officer (LCRO) take possession of any money or property belonging to her father's estate that is currently held by Ms WG or Mr QP, including any records or documents.

[27] Mrs XM submits that the Committee:

- (a) failed to consider her actual complaint. Mrs XM contends that her complaint effectively raised only one issue and not those articulated by the Standards Committee. She describes her complaint as being complaint that Ms WG had assured her at commencement, 30 November 2012, that the executor wished to play no part in the administration of the estate, and had decided to renounce his role as an executor. Mrs XM says that a correct characterisation of her complaint, is complaint that Ms WG had engaged in misleading and deceptive conduct;
- (b) erred in concluding that the duties owed by Ms WG to her and her brother were modest;
- (c) accepted Ms WG's submission that the executor was satisfied with her conduct without inquiring further into Ms WG's behaviour, an approach Mrs XM refers to as a "Nuremberg defence";
- (d) rejected suggestion that Ms WG could rely on argument that she was acting on instructions from the executor to shield her from consequence of the many errors she had made in administering the estate;
- (e) erred in concluding that once she (Mrs XM) had instructed counsel, it was appropriate for Ms WG to refuse to respond to her inquiries;
- (f) placed undue reliance on Ms WG's version of events; and
- (g) placed a disproportionate emphasis on the views of Mr QP, and failed to provide her with opportunity to respond to Mr QP's correspondence.

[28] Mrs XM's then counsel, Mr CV, filed further submissions in support of Mrs XM's application on 5 July 2013. He submits that:

- (a) the Committee regarded Mrs XM and Mr HL as having little or no status as complainants, being only the beneficiaries of the estate; however, s 132 of the Act provides that any person can make a complaint about the conduct of a practitioner;

- (b) the Committee implies that provided the executor/trustee of an estate does not complain about the conduct of the practitioner “then that determines the matter, and the beneficiaries in question have no recourse”. Mr CV states if that proposition is to be accepted it should only be arrived at after a detailed and careful analysis and a reasoned decision to that effect;
- (c) it is questionable whether the beneficiaries in such circumstances cannot be said to be, in effect, “clients” of the practitioner;
- (d) the rights of beneficiaries with regard to a practitioner have been specifically recognised in s 160 of the Act;
- (e) the Standards Committee was incorrect to characterise the obligations of a practitioner to beneficiaries as “modest”. The original complaints should have been investigated and determined on their merits without regard to that finding;
- (f) the Committee placed undue reliance on the opinion of Mr QP, and in doing so, abrogated its responsibility to make proper enquiry;
- (g) the Committee were wrong to exonerate Ms WG on the basis that Mrs XM had instructed a solicitor. None of the communications by Mr CV were answered satisfactorily by Ms WG. Grounds for the complaint existed long before Mrs XM instructed Mr CV;
- (h) the complaints by Mrs XM regarding the estate administration, in particular in relation to the proposed sale of the estate land, go well beyond a failure to report and communicate; and
- (i) comments of the Standards Committee decision were unfair to Mrs XM and gave a misleading impression.⁵ Mrs XM was relying on an indication given to her that Ms WG intended to hand over the administration of the estate to another lawyer.

[29] Ms WG was invited to comment on Mrs XM’s review application and did so in correspondence of 19 July 2013. Ms WG submits that:

- (a) she agreed with the decision of the Standards Committee to take no further action;

⁵ At [13].

- (b) it was not open to the LCRO to consider new complaints raised on review;
- (c) Mrs XM's requests for compensation constitute harassment and fall within ss 138(1)(b) and (c) of the Act;
- (d) Mrs XM was not her client and her duties as a practitioner are first to the court and then to her own client;⁶
- (e) as a residuary beneficiary, Mrs XM had no legal or proprietary interest in an un-administered estate and there was no basis to require the executor to disclose any estate documents;⁷
- (f) she had always dealt with Mrs XM with utmost courtesy;
- (g) whilst it was not her responsibility, she had suggested to Mrs XM that it would be beneficial for her to seek the help of a grief counsellor to work through various issues; and
- (h) Mrs XM was refusing to take necessary steps to enable her to finalise the distribution of the estate.

[30] Consistent with what had now become both a very extensive range of complaints, and a comprehensive advancement of argument in support of those complaints, Mrs XM, through Mr CV, filed further submissions.

[31] I do not propose to provide account of those further submissions, except to note that central to the arguments advanced by Mr CV, was argument that a lawyer who has been instructed by an executor to manage the winding up of an estate has wide ranging responsibilities to the beneficiaries of the estate.

Review Hearing

[32] This review was initially commenced as an applicant only hearing in [City] on 27 June 2017. Ms WG was not required to attend. Mr CV represented Mrs XM at the hearing.

[33] At the commencement of the hearing, Mr CV focused his submissions on addressing argument as to the extent that a lawyer acting in the administration of an

⁶ *GH v UF* LCRO 22/2011 (9 November 2011) at [32].

⁷ *Rauch v Maguire* [2010] 2 NZLR 845 (HC).

estate, owed duties to a beneficiary, this to support his contention that the duties owed by a lawyer to a beneficiary were wide-ranging.

[34] When the argument shifted to the factual matters arising from Ms WG's administration of the estate, it was submitted that Ms WG had acted in a dishonest and deceptive manner when attending to the administration of the estate.

[35] These were criticisms that demanded that Ms WG be given an opportunity for a right of reply. I directed that the review application should be adjourned, and reconvened with Ms WG in attendance. Mr CV supported that approach.

[36] The matter was set down to be heard in [City].

[37] When the matter was reconvened, Mrs XM had instructed fresh counsel, Mr LP. Ms WG was represented by Mr ZO and Mr YT.

[38] At the commencement of the reconvened hearing, which was conducted with the assistance of Mr Hesketh, a LCRO delegate, I advised counsel that I proposed that the review hearing commence afresh. Both counsel confirmed their agreement to that approach.

[39] I indicated to counsel that it would be of assistance if Counsel would ensure that their submissions were focused, and confined to addressing matters that were properly the subject for review.

[40] This indication was not intended to restrict the matters which counsel wished to traverse, but rather to ensure that the review hearing was confined to considering matters which properly fell within the scope of the review.

[41] The submissions filed in support of the review application were comprehensive, and at times raised issues which went beyond the scope of what could properly be addressed by the review. On occasions, those submissions diverted to providing detailed and comprehensive account of broader matters relating to the administration of the estate, rather than focusing on the matters which had been the subject of the initial complaints.

[42] The role of a Review Officer is confined to reviewing any determination, requirement, or order made, or direction given, by a Standards Committee.

[43] A Review Officer cannot consider fresh complaints that have been raised on Review. Its role is strictly confined to reviewing matters that have been considered by a Standards Committee.

Nature and scope of review

[44] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁸

... 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.

[45] More recently, the High Court has described a review by this Office in the following way:⁹

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.

[46] 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

[47] At the commencement of the hearing, I invited Mrs XM’s counsel to identify the issues he proposed to traverse. He confirmed those as being argument that Ms WG had:

⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (a) misled and deceived Mrs XM by advising her that she would organise a renunciation of Mr HY's appointment as an executor;
- (b) mismanaged the tender process; and
- (c) advised a real estate agent that she had a contract with a party whose land was adjacent to the estate land, which would entitle her to claim a commission on the sale of the estate land, if the neighbour proceeded to purchase all or some of the blocks from the beneficiaries.

[48] Mr LP also submitted that the Committee, in conducting its inquiry had made a number of procedural errors, including:

- (a) failing to accurately articulate Mrs XM's complaints;
- (b) neglecting to consider one of the complaints filed;
- (c) misunderstanding the role of an executor; and
- (d) placing undue reliance on the evidence of Mr QP.

[49] That helpful clarification from Mr LP greatly assisted in extrapolating from the comprehensive review grounds advanced by Mrs XM, the issues which were of significance for her, and the matters which could be focused on at the review hearing.

[50] In response, Mr ZO submitted that:

- (a) the Committee was correct to determine that no further action be taken on the complaints;
- (b) Mrs XM had advanced numerous complaints against Ms WG, her goal being to have Ms WG removed as the solicitor for the estate;
- (c) there was no evidence to support allegation that Ms WG had misled Mrs XM;
- (d) Ms WG was under no obligation to report to the beneficiaries;
- (e) Ms WG had consulted Mrs XM throughout the sale process;
- (f) Ms WG had not entered into any agreement to take a commission on sale of estate property; and
- (g) the Committee had not placed undue reliance on the opinion of Mr QP.

[51] The arguments that Mr LP advanced of procedural irregularities invariably overlapped to a degree with the issues he had identified as being central to Mrs XM's review. Concern that the Committee failed to accurately articulate Mrs XM's complaints provides foundation for argument that the Committee failed to address Mrs XM's complaint that Ms WG had engaged in deceptive and misleading behaviour. Argument that the Committee had failed to consider one of the complaints brought to the forefront the issue as to whether Ms WG had, in organising the sale of the estate property, entered into an agreement whereby she would potentially benefit from securing a commission on the sale of the property.

[52] The issues to be considered on this review are:

- (a) Were there procedural irregularities in the manner in which the Committee conducted its inquiry of such significance as could be said to have compromised its decision?
- (b) The extent of the obligation Ms WG owed to Mrs XM.
- (c) Had Ms WG misled and deceived Mrs XM?
- (d) Had Ms WG, in managing the sale process, breached obligations owed to Mrs XM?
- (e) Had Ms WG entered into an agreement which would enable her to claim a commission on the sale of estate property?

[53] There was a degree of overlap with the issues.

Were there procedural irregularities in the manner in which the Committee conducted its inquiry of such significance as could be said to have compromised its decision

[54] Mr LP submitted that the Committee had, particularly in respect to one of the complaints, failed to articulate the complaint in the terms it had been expressed by Mrs XM.

[55] An examination of the Committee decision indicates that the Committee's approach to dealing with the several complaints filed was to address those complaints by reference to broad principles, rather than focusing on the specific complaints.

[56] The Committee took the view that the criticisms made of Ms WG's conduct in managing the estate's affairs had to be considered from the context that:

- (a) Ms WG's duties were to protect and promote the interests of the executor;
- (b) the obligations owed by a lawyer to third parties are modest; and
- (c) Ms WG was not obliged to act on the directions of a beneficiary.

[57] Mr LP suggested that the Committee had overlooked, and had therefore not inquired into, Mrs XM's complaint that Ms WG had misled and deceived her, by continuing to encourage her in the belief that Mr HY would be stepping down as executor.

[58] He suggests that the Committee framed this element of her complaints as complaint that Ms WG had failed to obtain the renunciation of the executor of the will of the deceased.

[59] He says that this complaint should more properly have been characterised as complaint that Ms WG had misled and deceived Mrs XM by representing to Mrs XM that an application would be filed, when it was not.

[60] It is not complaint that Ms WG failed to do something, but rather that she represented that she would do something, and did not do it.

[61] Mrs XM argues this was misleading conduct, and was exacerbated by the fact that Ms WG had led her to believe, and continued to encourage her in the belief, that Mr HY wished to renounce his role as executor.

[62] I have considered the raft of complaints filed by Mrs XM. Having done so, I do not conclude that the Committee misdirected itself when it characterised Mrs XM's complaint as complaint that Ms WG had failed to obtain the renunciation of the executor.

[63] Complaint that a lawyer has failed to get on and do something is one thing, but complaint of that nature is quite different from a complaint that a lawyer has engaged in deceptive and misleading conduct.

[64] Argument of a failure to do something goes to issues of competency. Argument that a practitioner had engaged in misleading and deceptive conduct raises issues of probity and honesty, matters fundamental to a lawyer's reputation.

[65] Argument that the Committee failed to accurately articulate a specific complaint must be considered in the context of the approach that Mrs XM adopted in advancing her complaints.

[66] Mrs XM filed her first set of complaints in December 2012, and her sixth in March 2013. That was not the end of the matter. After her final complaint had been filed, Mrs XM made request of the Committee to consider further information. Mrs XM contends that the additional information she had filed, identified a new complaint, separate and distinct from what had been previously raised.

[67] Mrs XM emphasised at hearing that she was not a lawyer, and was uncertain as to the process to be followed when filing her complaints. I accept that, but when looking at the complaints in their totality it is difficult to escape conclusion that the approach she adopted, exhaustive as it was, presented difficulties.

[68] The complaints are replete with hearsay accounts of what parties had said or done, and detailed account of various events. Not infrequently, the complaints traverse matters pertaining to the day to day administration of the estate, matters which present as peripheral to the complaints being advanced.

[69] It is difficult to escape conclusion that Mrs XM had formed a view that the complaints process provided her with a vehicle to challenge the decisions Ms WG was making, and opportunity to assert a degree of control over the administration of the estate.

[70] It is not the case that it is unduly difficult to distil from the voluminous information filed, specific issues of complaint. Mrs XM's level of dissatisfaction with a multitude of the decisions made by Ms WG is made crystal clear. However, the advancement of complaints in this fashion did, in my view, likely make it more difficult for the Committee to particularise the complaints.

[71] However, I do not agree with Mr LP that the Committee erred in failing to identify one of Mrs XM's complaints as being an allegation that Ms WG had engaged in deceptive and misleading conduct.

[72] In two of the complaints filed, Mrs XM expresses dissatisfaction with Ms WG's apparent failure to respond to her requests to clarify why she had not proceeded with an application for renunciation, and complains that she had taken no steps to effect the renunciation. But these are complaints of failure to act rather than complaint of deceptive conduct.

[73] In further complaints, Mrs XM continues to be critical of what she perceived to be Ms WG's failure to provide her with information. She takes issue with how Ms WG is managing some of the practical matters that needed to be attended to.

[74] Having carefully considered the complaints filed, I do not consider that the Committee failed to identify that Mrs XM had made complaint that Ms WG had engaged in deceptive and misleading behaviour.

Had Ms WG misled and deceived Mrs XM?

[75] If I am wrong on that, I nevertheless am not persuaded that if the Committee's inquiry had been articulated as argument that Ms WG had misled Mrs XM, that the evidence would have established that Ms WG had misled or deceived Mrs XM.

[76] It is unclear as to how suggestion that Mr HY was expressing a desire to renounce his position initially gained traction.

[77] It appears to be the case that suggestion that Mrs XM take on the role of executor was first raised by Mrs XM herself. She records in her complaint of 22 December 2012 that:

When I first met Ms WG at our offices, I asked if I could become the executor because I was aware that one of the executor's name (sic) in the will, my cousin [MN], was deceased. Ms WG said that the law was very clear on this matter namely, that only one executor was required and that [HY] would (sic) the sole executor because he was not dead and was of sound mind. It was only on contacting my solicitor, Mr [CV] of [Law firm], [City] that I learned that renunciation was a possibility. It was therefore a surprise to learn from Mr HY that he had not wanted to be the executor (sic) along and that Ms WG had not advised him that it was possible to renounce.

[78] It is clear that there were discussions about Mr HY renouncing his role, and it appears to be the case that Ms WG was giving consideration to making an application to the court to effect the renunciation.

[79] In an email to Mrs XM of 7 December 2012, Ms WG advises Mrs XM that she "requires funds to complete the application to the Court re the renunciation and letters of administration".

[80] Mrs XM says that Ms WG had spoken with her on a number of occasions about taking steps to have Mr HY removed.

[81] Bringing clarity for Mrs XM as to the roles that an executor, lawyer instructed by an executor, and a beneficiary have in the administration of an estate was not assisted by the imprecise manner in which Ms WG described her role in

correspondence to a third party of 30 October 2012. In that correspondence, which subsequently came into Mrs XM's hands, Ms WG wrote that she was the "administrator for the estate of Mr RS. I am appointed by the executor and instructed by Mrs XM, Mr RS's daughter". Ms WG had not described the roles with precision and this, not surprisingly, lent more grist to Mrs XM's mill and further encouraged her in the belief that she was instructing Mrs XM.

[82] I accept Mrs XM's evidence that her discussions with Ms WG encouraged her to have a reasonable expectation that she would take on the role of executor. But any proposal to have Mr HY removed as the executor was entirely dependant on Mr HY agreeing to step down.

[83] Whilst it is contended that Mr HY was anxious to renounce his position, there is no evidence from Mr HY himself to suggest that he did not wish to continue as executor.

[84] If the situation was that Mr HY was wishing to relinquish his position and Ms WG had frustrated his desire to do so, it could have reasonably been expected that evidence of Mr HY's position would have been put before the Committee.

[85] If it was the case that Mr HY initially had reservations about continuing in the role of executor, he clearly reassessed his position.

[86] In 2015, Mrs XM brought proceedings against Mr HY in the [City] High Court. In that application, Mrs XM argued that Mr HY had failed, despite several requests, to provide her with information.

[87] The application did not proceed to trial. Mr HY agreed to provide Mrs XM with the information she had requested. Costs then became an issue, and the Court delivered a costs decision on 2 October 2015.¹⁰ The decision has some relevance for this review.

[88] What is clear from the decision, is that almost three years after Mrs XM suggests that Mr HY was wanting to relinquish his position, he remained as executor and was seemingly prepared to do so in circumstances where the task had clearly become difficult and contentious. It is not within the contemplation of most persons who take on the at times thankless task of executor of an estate, that they will, in doing so, become embroiled in disputes that bring to them to the door of the High Court.

¹⁰ *XM v HY* [2XXX] NZHC XXXX.

[89] The judge considered that he had acquired a good understanding of the history of the matter which had enabled him to form a view as to how Mr HY had met his obligations to the estate. He concluded that in his assessment, Mr HY had carried out his duties in a “proper manner”.¹¹

[90] Whilst I accept that Mrs XM became frustrated at what she considered were inadequate responses from Ms WG to requests to update her on progress in finalising the renunciation, I do not consider that Ms WG’s conduct can reasonably be described as deceptive or misleading.

[91] Allegation that Ms WG had deceived and misled Mrs XM is not established because the proposal to have Mr HY replaced did not eventuate.

[92] Argument that Ms WG’s conduct went beyond that of simply informing Mrs XM of Mr HY’s apparent intentions, and ventured into the misleading and deceptive, is entirely premised on Mrs XM’s account of events. There is no other evidence to suggest that Ms WG was dishonestly representing Mr HY’s position.

[93] Whilst Mr HY may have been prepared to step back from the role early in the piece, it is quite unclear in the absence of any indication from Mr HY himself as to exactly what his position was.

[94] It presents as possible that Mr HY was initially reluctant to take on the role of executor, but then reassessed his position. The instructions Ms WG received from her client remain confidential to her client.

[95] It would have been helpful if Ms WG had more clearly conveyed to Mrs XM that Mr HY was not stepping down, but her failure to do so does not remotely establish argument that she was misleading or deceiving Mrs XM.

[96] Communication between Ms WG and Mrs XM broke down around mid-December 2012. From 22 December 2012 onwards, Mrs XM was making regular complaints about Ms WG.

[97] Ms WG was being put under considerable pressure. It is clear from both the content of the complaints, and the number of complaints filed, that virtually every step taken by Ms WG was being subjected to critical oversight from Mrs XM and the lawyer she had engaged to promote her interests.

¹¹ At [12].

[98] It would have been understandable if Ms WG decided, in the face of the manifest breakdown in her relationship with Ms XM and the sustained criticism she was receiving, to refrain from discussing matters with Mrs XM, unless it was essential to do so, and to focus on taking instructions from Mr HY.

[99] Ms WG says that she had sought advice from two practitioners as to how to best manage the escalating dispute with Mrs XM, and had been advised by both that she should refrain from engaging in any dialogue with Mrs XM.

[100] Nor was it the case that Ms WG failed to provide any response to request for clarification on the renunciation issue. On 12 December 2012, Ms WG informed Mrs XM's lawyer that she continued to be instructed by Mr HY.

[101] On 25 January 2013, Ms WG sought to clarify with Mrs XM, her understanding of their discussions concerning Mr HY. In an email to Mrs XM she advised:

With regards to the executor we only discussed a possible renunciation by the executor, not that he would. [Name] is experienced in estates so I would ask him to explain to you about into meddling and the effect. The executor has not been unwilling to participate in the winding up of your father's estate at all. The executor merely did not want to be responsible for sorting out your father's personal effects for sale. He was personally unable to do the mental task of going through your father's things. He found this distasteful and couldn't do it. You are aware that I personally started the process on the authority of the executor.

[102] I cannot discount the possibility that there had been a genuine misunderstanding between Mrs XM and Ms WG as to Mr HY's position. But I am not persuaded that Ms WG set out to deliberately mislead and deceive Mrs XM.

[103] In my view, Mrs XM had formed a view early on that she would be appointed as executor. It was a view that she reasonably arrived at on the back of the information that had been provided to her. Her understanding of the significance of her role was amplified by the extent of the involvement she had initially had in the estate's affairs, and the extent to which she had formed a view that Ms WG was placing reliance on her, and consulting her on various issues. However, in my view, and I do not intend this to be construed as criticism of Mrs XM, her view that she would be appointed an executor solidified into an intractable and obdurately held conviction that she should be appointed, and that it was her right to be so appointed. Many of Ms WG's perceived failings are viewed through the prism of Mrs XM's belief that Ms WG was obstructing her in assuming a position that was rightly hers.

Further criticism of Committee process

[104] Mr LP submits that the Committee's approach was further flawed, as it failed to appreciate the limited role the executor had played in the administration of the estate, and the extent to which the executor had abdicated his responsibilities to Ms WG.

[105] This criticism traverses matters that will be to the forefront when considering complaint that Ms WG failed to sufficiently appreciate the extent of the obligations she owed to Mrs XM.

[106] Mr LP concludes his criticism of the Committee's process by arguing that the Committee had placed undue emphasis on the opinion of Mr QP, to the detriment of a careful consideration of Mrs XM's views.

[107] When Mrs XM expressed her dissatisfaction with the way in which Ms WG was managing the administration of the estate, Ms WG consulted Mr QP.

[108] Mr QP, a practitioner with experience in the management of estates, was asked to review Ms WG's file. Mr QP viewed his role as being that of counsel engaged by the trustee/executor of the estate and the estate's lawyer, with purpose to address the allegations involving both the executor and Ms WG.

[109] Mr QP's involvement was not welcomed by Mrs XM who took the view that Mr QP's involvement was that of a surrogate solicitor for the estate and a "minder" for Ms WG. Mrs XM was concerned that Mr QP's involvement would escalate costs. There followed, a robust exchange of correspondence between Mr QP and counsel for Mrs XM.

[110] I am not persuaded that the Committee was unduly influenced by Mr QP's views, and with every respect to Mr LP's submission, there is no evidence advanced to support the accusation made.

[111] A practitioner facing a conduct complaint is entitled, when responding to the complaint, to provide evidence from a colleague who has carried out a peer review of the practitioner's files. It could be reasonably argued that in some circumstances it is not simply prudent, but essential, for a lawyer facing complaints which present serious risk to reputation, to have the conduct complained of scrutinised by a colleague who has garnered knowledge and experience in the area of practice relevant to that engaged by the complaints.

[112] It would be expected of the Committee that they would bring to an examination of Mr QP's views, the same degree of even handed and fair minded scrutiny that it would be required to bring to all of the evidence before it.

[113] The Committee's decision makes sparse reference to Mr QP simply noting that he was an experienced lawyer who had reviewed Ms WG's files and reached conclusion that she had acted appropriately in providing legal services to the executor.¹² That observation is noted in the part of the decision which records the responses Ms WG provided to the complaint.

[114] I accept that Mrs XM may have considered that Mr QP was not providing an independent view as he had been instructed by Ms WG, but the Committee would have been aware of that.

[115] But it is entirely speculative to draw conclusion that the Committee had been unduly influenced by Mr QP, solely on the basis of the Committee recording that Ms WG had, in responding to the complaint, provided a copy of correspondence from Mr QP which was supportive of her.

The extent of the obligations owed to Mrs XM.

[116] A critical issue which underpins a number of the issues raised on review, is the extent to which Ms WG owed duties or obligations to Mrs XM.

[117] Mr LP accepts that Ms WG was instructed by Mr HY and that Mr HY, as the executor of the estate, was Ms WG's client. He argues however that Ms WG's obligations were not owed solely to Mr HY, and that Ms WG had significant obligations to the beneficiaries. A number of the conduct complaints proceed from an assumption that conduct breaches arise as a consequence of Ms WG's purported failure to meet obligations properly owed to Mrs XM.

[118] It is contended for Mrs XM, that the ambit of the obligations Ms WG is said to have owed to Mrs XM was greatly expanded because Ms WG, from the time she took instructions, approached the administration of the estate from the perspective that Mrs XM, rather than Mr HY, would take the lead, give her instructions, and run the cutter. It was argued that in the face of an apparent indifference or reluctance on the part of Mr HY to be involved in the administration, Mrs XM, with the full support of Ms WG, took over.

[119] Complaint that Ms WG:

¹² Standards Committee determination, at [21].

- (a) failed to communicate;
- (b) failed to consult;
- (c) ignored Mrs XM's complaints; and
- (d) refused to respond to enquiries from Mrs XM's lawyer;

are advanced from the assumption that Ms WG had an obligation to treat Mrs XM in a manner analogous to that of a client.

[120] Mrs XM contends that Ms WG had advised her that she was her client.

[121] In advancing argument that Ms WG owed extensive obligations to Mrs XM, Mr LP did not clarify to what extent he considered that those obligations were circumscribed. Nor was explanation provided as to how Ms WG was to reconcile the extensive obligations said to be owed to Mrs XM, with those owed to Mr HY.

[122] Mrs XM considered that Ms WG's primary obligations were owed to her.

[123] It was apparent that Mrs XM had initially provided considerable assistance to Ms WG, and that Ms WG had been consulting regularly with Mrs XM. As I have noted, I think it probable that the extent to which Mrs XM was significantly engaged encouraged her in the belief that it was both her obligation and her right to be involved in all of the significant decision-making.

[124] The estate's assets were primarily composed of the farm parcels. There were only two beneficiaries. It is understandable that Mrs XM would wish to ensure that her and her brother's views as to what was to happen to the property were taken into account. It is also understandable, that Mrs XM would be anxious that if the land was to be sold, that the best possible sale price was achieved.

[125] Whilst Mrs XM says that her brother supported her in the bringing of complaints against Ms WG, there is no indication of him having advised either the Committee or this Office, that he wished to pursue complaint against Ms WG.

[126] Mrs XM's brother appears to have been distanced from matters. At one stage in the proceedings, Mrs XM was making request of Ms WG not to provide a copy of her father's will to her brother. Mrs XM was likely keeping her brother informed on all relevant matters, but it certainly was not the case that there is any indication of him having played any active role.

[127] If argument is advanced that Ms WG owed significant duties to Mrs XM, then argument could also be advanced that she owed identical obligations to Mrs XM's brother.

[128] Ms WG rejects suggestion that she owed any significant duties to Mrs XM. She argues that her responsibility was to Mr HY and any duties or obligations owed to Mrs XM were limited. Mrs XM submits that it was her responsibility to protect and promote the interests of the executor, to act on his instructions, and to guide him as to his duties and obligations.

[129] To what extent does a lawyer acting on instructions from an executor owe duties to the estate's beneficiaries?

[130] A helpful starting point is to consider the duties of an executor. The High Court has stated that an executor of a person's will is required:¹³

... to administer his or her property and carry out the provisions of the will. To this end the executor has certain specific statutory and common law duties and powers; namely to: ... make an inventory of assets; ... pay legacies; ... distribute residue to the persons entitled; ...

[131] The Court explained that this requirement derives from:¹⁴

... the special fiduciary relationship which exists between a trustee and a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property. ... the requirement imposed in equity that the trustee will deal with those assets with the utmost probity ... not have or acquire any personal interest in those assets without the express and informed consent of the beneficiary ... a duty to act even-handedly between the beneficiaries ...

[132] Concerning the duty to be "even-handed" towards the beneficiaries, the New Zealand Court of Appeal has held that this also applies to persons whom the executor knew were going to make a claim against the estate.¹⁵ Moreover, in circumstances where an executor is aware of a claim, then there is "a duty on the executor to act neutrally and provide information to the claimants when requested. It would be a breach of the executor's fiduciary obligations to thwart those claimants or mislead them".¹⁶

[133] It is to Mr HY then, that Mrs XM could look for information and clarification of any issues relating to the administration of the estate.

¹³ *Re: Stewart* [2003] 1 NZLR 809 (HC) at [24].

¹⁴ At [25].

¹⁵ *Irvine v Public Trustee* [1989] 1 NZLR 67 at 70.

¹⁶ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington 2009) at 1221.

[134] It is accepted by Mr LP that Mr HY was Ms WG's client. Ms WG was instructed by Mr HY, the estate's executor. She provided regulated services to Mr HY.

[135] Ms WG was required to follow his instructions.

[136] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions. A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.¹⁷

[137] If a prospective client's instructions to the lawyer "could require the lawyer to breach any professional obligation", then the lawyer may decline the instructions.¹⁸ If, during the carrying out of the work on a retainer, the client's "instructions ... require the lawyer to breach any professional obligations," then the lawyer may terminate the retainer.¹⁹

[138] It follows from this that a lawyer is required to follow a client's instructions on a client's matter. It has been observed that a lawyer:²⁰

...must not act in contravention of a client's instructions. It may be appropriate for the lawyer to counsel against a particular course of action when it is considered not to be in the client's best interests. But when clients are firm in their instructions, the lawyer may not substitute the lawyer's own judgment for that of the client.

[139] Mr LP cited two authorities in support of argument that the duties owed to Mrs XM were extensive, a decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, *Auckland Standards Committee v Johnston*,²¹ and a decision of this Office, *TS v LD*.²²

[140] Those decisions do not, in my view, assist Mr LP. Neither decision stands as authority for the proposition, as argued for by Mr LP, that a lawyer acting on instructions from an executor owes significant duties to the beneficiaries of the estate.

¹⁷ Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008, rr 7, 7.1.

¹⁸ Rule 4.1.

¹⁹ Rule 4.2(a).

²⁰ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 291.

²¹ *Auckland Standards Committee v Johnston* [2011] NZLCDT 14.

²² *TS v LD* LCRO 298/2012 (10 December 2014).

[141] The facts in *Johnston* are so at variance with the facts of this case, that little reliance can be placed on the decision. One of a number of charges faced by Mr Johnston was that he had, when acting as a solicitor/executor in an estate, failed to promptly account for monies due to the estate, and failed to render statements to the beneficiaries in a timely manner.

[142] It is to be immediately noted that Mr Johnston was acting as both solicitor and executor in the estate.

[143] To the extent that the decision addresses, albeit in limited manner, a lawyer's duty to beneficiaries, the decision affirms what could be regarded as a relatively uncontentious view, that it would be accepted practice for a lawyer acting in the role of an executor and lawyer for an estate to deal with beneficiaries in a courteous fashion, and to keep those beneficiaries advised on progress of collecting and realising assets in which they had an interest.

[144] The factual background to *TS v LD* concerned a lawyer who had failed to disclose to his client that his client had not been appointed a trustee of a particular trust, despite continuing to represent to his client that she had been so appointed. I see nothing in that decision of relevance to the issues at the forefront of this review.

[145] In a helpful article published by the Law Society intended to assist lawyers who practice in the area of estate administration, the author explained that "[o]ften beneficiaries do not realise that the estate solicitor can only accept instructions from the executor or administrator, and can only report on instructions".²³

[146] In recommending that lawyers "should ensure that executors are keeping the beneficiaries informed", the author acknowledges that this "... can, of course, be difficult in situations where the beneficiaries do not get along with the executor or administrator, and working around this is an especially challenging part of handling estates."²⁴

[147] Central to the Committee's decision to take no further action in respect to Mrs XM's complaints, was its finding that Ms WG owed limited duties to Mrs XM. It concluded that the extent to which Ms WG had obligations to Mrs XM was "modest".

[148] I agree with the Committee.

²³ Lisette Solis "Complaints against lawyers over estate administration" (2017) 905 Lawtalk 38 at 40.

²⁴ At 40.

[149] The obligations Ms WG owed to Mrs XM were limited.

[150] Viewed through the prism of the disciplinary regime, Ms WG's obligation was to conduct her dealings with Mrs XM with integrity, respect and courtesy.²⁵

[151] Mrs XM had expectation that she would be consulted on all matters relating to the administration of the estate. It was expectation that was encouraged by the initially fruitful working relationship the parties had enjoyed, the high level of consultation that had occurred, and the view Mrs XM had formed that she was to become the executor for the estate.

[152] The criticisms that Mrs XM makes of Ms WG are numerous, but what is very apparent from an examination of those complaints in toto, is that Mrs XM had expectation that she was to be consulted on virtually every issue relating to the administration of the estate. From the significant to the mundane, Mrs XM proceeded from the assumption that her position as a beneficiary gave her the right to ask questions of Ms WG, and that Ms WG had obligation to answer them.

[153] Entirely absent from the stage is Mr HY. It was he to whom Ms WG was required to account. If Mrs XM was concerned that the estate was being mismanaged, she was not without remedy. Mr HY's primary responsibility was to ensure that the estate was administered in accordance with the testator's wishes. In what presented as a not particularly complex estate, this imposed responsibility on Mr HY to ensure that the assets of the estate were realised and managed in efficient manner, for the benefit of the beneficiaries.

Had Ms WG mismanaged the tender process?

[154] Mrs XM was highly critical of Ms WG's management of the tender process. She was concerned that the process may not achieve the best financial outcome for the beneficiaries.

[155] Underpinning this complaint is Mrs XM's concern that Ms WG was failing to keep her informed.

[156] Mrs XM's concerns are reflective of her overriding apprehension that she was being distanced from being as directly involved in the decision-making process as she had become accustomed to.

²⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 12.

[157] I see nothing in the issues raised by Mrs XM that could properly persuade me that Ms WG's management of the tender process raises conduct issues.

[158] Ms WG was acting under instructions from Mr HY.

[159] It could not be suggested that Mrs XM suffered any disadvantage as a consequence of the tender process. The land was not sold, and eventually transferred to Mrs XM and her brother.

Had Ms WG entered into an agreement which would enable her to claim a commission on the sale of estate property?

[160] Mrs XM raised complaint that Ms WG had entered into an agreement which would allow her to claim a commission on the sale of estate property.

[161] Mrs XM's counsel framed the complaint in a memorandum dated 15 September 2007, as being an allegation that Ms WG had "agreed a secret commission to be paid to her, if the property was sold to a particular neighbour".

[162] It was contended that the Standards Committee had failed to address the complaint.

[163] Mr ZO submitted that the Committee's failure to consider the complaint was understandable, as the complaint had not, in his view, been put to the Committee.

[164] There is no indication in the Committee's decision of it having addressed complaint that Ms WG had endeavoured to financially advantage herself by securing a commission on the sale of estate land.

[165] As has been noted, Mrs XM filed a series of complaints over a number of months.

[166] Ms WG was invited to provide response to the series of complaints that had been filed by 6 March 2013. It could be reasonably assumed that at this point, the Complaints Service was taking a view that Mrs XM had filed all of her complaints.

[167] Ms WG provided a comprehensive response to the complaints on 22 March 2013. Mrs XM was provided with Ms WG's response.

[168] Mr JK, the Committee convenor, drafted a report for the Committee members. His report was finalised on 23 April 2013.

[169] On 1 May 2013, Mrs XM forwarded further email correspondence to the Complaints Service in which she advised that she was in receipt of further “disturbing” information concerning Ms WG. Attached to that email, was a two-page summary described by Mrs XM as “additions to my complaint”.

[170] Relevant for this review is that Mrs XM advised that:

- (a) The real estate agent who had been instructed to sell the estate land had informed her that Ms WG had prepared a sale agreement for a prospective purchaser who was the owner of land adjacent to the estate property.
- (b) She had been advised that if the contract was to proceed, Ms WG would receive a commission on the sale.

[171] Mrs XM asked the Complaints Service to confirm if the further matters she had raised would be addressed as part of her existing complaints, or whether she would be required to file a separate complaint.

[172] The Complaints Service confirmed that her email and additional information would be provided to the Committee for its consideration.

[173] Committee members were then provided with that additional information, and request was made of them to consider the information along with the report from Mr JK that had been previously provided.

[174] The Committee decision delivered on 28 May 2013 presents, with the exception of minor modification, as almost identical in its composition to the report prepared by Mr JK on 23 April 2013.

[175] The Committee notes, at paragraph 13 of its decision, that it had considered the further information received, but it is apparent from its decision that it did not appear to have considered it necessary to address complaint that Ms WG had sought to secure a “secret commission”, as a separate complaint.

[176] That is surprising. Complaint that a lawyer in managing the affairs of an estate under the instructions of an executor, had drafted an agreement for sale of estate property which provided opportunity for the lawyer to personally benefit from the sale, could potentially raise significant conduct issues.

[177] The Complaints Service did not provide Ms WG with a copy of the further information received. She had no opportunity to respond to it.

[178] There is no evidence on the Standards Committee file of the further information having been sent to Ms WG, and counsel for Ms WG confirmed that to be the case.

[179] Both counsel accepted that Ms WG had been disadvantaged by being denied an opportunity to respond to what was a serious allegation.

[180] Counsel's views were sought as to whether they considered it appropriate for the commission complaint to be addressed on review, as I am able to do, or whether the complaint should be returned to the Standards Committee.

[181] Mr ZO was happy for the complaint to be considered as part of the review process. Mr LP argued that the complaint should be returned to the Committee.

[182] I agree with Mr LP. Complaint that Ms WG may have entered into an agreement which provided opportunity for her to secure a commission on sale of estate property is not a matter which can be properly determined on the evidence that I have before me.

[183] There is for example, no evidence from the Real Estate Agent who is said to have knowledge of the agreement that Ms WG is purported to have entered into.

[184] Ms WG should have an opportunity to provide a comprehensive response to the allegation made.

[185] Complaint that Ms WG facilitated an agreement for sale of estate property, which would, if it had proceeded, allowed for her to secure a commission on the sale is to be returned to the Standards Committee for consideration.

[186] It is likely that the Committee will, in the course of concluding that inquiry, be required to obtain further information material to the complaint.

[187] The decision of the Standards Committee in respect to all other complaints, is confirmed.

Costs

[188] Mr ZO sought costs.

[189] He accepted that it was rare for the LCRO to award costs against an unsuccessful applicant, but argued that the manner in which Mrs XM had progressed what he described as “trivial” complaints, merited a costs award in favour of his client.

[190] Mere lack of success with an application does not provide basis for a costs order.

[191] Consistent with the consumer protection objectives of the Act, this Office is reluctant to have a complainant’s concerns as to the possibility of them facing a cost award, act as a disincentive for parties to pursue an application to review a Committee decision. That approach must be balanced by an appreciation of the fact that the advancing of frivolous or vexatious reviews, or advancing of reviews for collateral purpose, may be met with a costs response.

[192] It is submitted that Mrs XM used the complaints process with the cynical objective of wresting control of the estate from Mr HY and Ms WG.

[193] The exhaustive approach that Mrs XM has adopted to pursuing complaints, the “drip feeding” of complaints over a lengthy period of time, and the indication she gave at hearing of her intention to file further complaints fairly raises concerns about her approach.

[194] But I am not satisfied that Mrs XM’s complaints approach the threshold of the frivolous or vexatious.

[195] Mrs XM has had partial success with her review, although only to the limited extent that she has succeeded in argument that one of her complaints should be returned to the Committee for further consideration.

[196] I decline to make any order for costs.

Decision

[197] Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee is directed to reconsider and determine complaint that Ms WG had prepared an agreement for sale of estate property which provided, if the sale was to proceed, that she would receive a commission on the sale.

[198] In all other respects, the decision of the Standards Committee is, pursuant to s 211(a) of the Lawyers and Conveyancers Act 2006, confirmed.

DATED this 13th day of December 2017

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:

Mrs XM as the Applicant
Mr LP as the Applicant's representative
Ms WG as the Respondent
Mr ZO and Mr YT as the Respondent's representatives
Ms BC as a related person
[Area] Standards Committee [X]
New Zealand Law Society