

LCRO 159/2015

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

BETWEEN

Mrs OP

Applicant

AND

MS RS

Respondent

DECISION

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

Introduction

[1] Mrs OP has applied for a review of a decision in which the Committee decided that Ms RS's handling of matters arising from Mr OP's will on behalf of Mrs OP was deficient to the extent that her conduct was unsatisfactory. Orders were made as a consequence of the unsatisfactory conduct finding. Ms RS was placed under supervision for a year, at her own cost, censured, and ordered to deliver a written apology to Mrs OP. She was also ordered not to charge fees to the Estate, and to pay fees and costs to Mrs OP of up to \$2,000 plus GST and disbursements. The decision was not published.

Application for Review

[2] In her complaint Mrs OP asked for compensation of \$190,000. On review she maintains she is entitled to compensation in varying amounts for a range of reasons.

Aside from Mrs OP's quest for compensation, neither party takes particular issue with the Committee's decision.

[3] The grounds for review are essentially that the Committee did not order Ms RS to pay compensation to Mrs OP for errors made in giving effect to the provisions of Mr OP's will.

Nature and Scope of Review

[4] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Lawyers and Conveyancers Act 2006 (the Act):¹

[39] ... 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.

[40] 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" ...

[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.

[5] More recently, the High Court has described a review by this Office in the following way:²

[2] 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.

[6] 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:

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209.

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

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Review Hearing

[7] Mrs OP attended a review hearing on 2 June 2016. Ms RS was not required to attend and the review hearing proceeded in her absence. Further information was provided by Mrs OP after the review hearing and Ms RS was given an opportunity to comment on that.

Review Issues

[8] There is no real dispute over the events at the heart of Mrs OP's complaint. Ms RS was the principal of [XX Law] (the firm). She failed to properly supervise and manage an employed legal executive. The legal executive attended to matters on behalf of Mrs OP without understanding the relevant processes. Ms RS did not fulfil her obligations and duties to Mrs OP in a number of respects.

[9] Briefly, Mrs OP and her son [XP] were named as beneficiaries of Mr OP's will. They were also named as his trustees and executors. After Mr OP died, Mrs OP came to believe there was an error in Mr OP's will. As the will was drafted by the former principal of Ms RS's firm, the allegation of error gave rise to a potential claim against the firm. That issue was not identified or managed in accordance with the relevant rules.

[10] The will also gave rise to a conflict between Mrs OP's and [XP]'s interests as beneficiaries. Although Mrs OP says there was never any dispute between her and [XP], their interests did not coincide, they conflicted. The fact that Mrs OP and [XP] entered into a Deed of Family Arrangement (the Deed) indicates they resolved conflicts between their interests by agreement. The existence of the Deed supports the view that there were conflicts, because without conflict there was no need for the parties to enter into the Deed. Although she was involved with the file, Ms RS did not identify or manage conflicting interests in accordance with the relevant rules.

[11] There was also an issue regarding a proposed relationship property claim against Mr OP's estate, and the filing of a Notice of Choice of Option A (the Notice) signed by Mrs OP, on Ms RS's advice and with her certification. Once the choice was made, other than in limited circumstances, the Notice was irrevocable. That left Mrs

OP in the position of having applied for probate and filed the Notice. The High Court Registrar's advice, which I take to be correct, was that she could do one or the other, but not both.

[12] The Committee found that Ms RS's part in supervising and managing the file was unsatisfactory within the definition set out in s 12 of the Act. No reason has been provided that suggests that determination is not the proper one.

[13] The Committee made the range of orders against Ms RS set out above. Those included payment of up to \$2,000 towards Mrs OP's fees and costs, plus GST and disbursements. Mrs OP does not think that is nearly enough.

[14] Against that background, the issue on review is whether there is good reason to vary the compensation orders made against Ms RS.

Analysis

[15] In her complaint Mrs OP claims compensation totalling \$190,000 under a number of headings. She wants \$25,000 for mental trauma caused by the legal executive's lack of communication; \$20,000 for detrimental effects on her physical health; \$40,000 for financial hardship caused by her having to use her personal funds to pay expenses normally paid by an estate; \$50,000 for lack of closure following a prolonged grieving process caused by delays in gaining probate; \$20,000 for stress caused by having to sell her home because of personal hardship due to no income from Mr OP's investments; \$10,000 for stress caused by having to move into a retirement village prematurely; \$15,000 for the detrimental effects on her future income because she had to use her personal funds and Mr OP's cash which were frozen in low interest-bearing accounts. Mrs OP says she also had to employ a different solicitor to apply for probate. For that, she seeks \$10,000.

[16] The jurisdiction of this Office to order compensation is limited to \$25,000 by regulations made under the Act.³ Section 156 of the Act relevantly says:

- (1) If a Standards Committee makes a determination under section 152(2)(b), that Standards Committee may—

...

- (d) where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner ... or an employee or former employee of a practitioner..., order the practitioner...or

³ Lawyers and Conveyancers Act (Conveyancing Practitioners: Complaints Service and Standards Committee) Regulations 2008, reg 30.

employee or former employee of a practitioner..., to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding, as the case may require, [\$25,000] ...

[17] Section 152(2)(b) says that a Standards Committee may make a determination that there has been unsatisfactory conduct on the part of a practitioner, or an employee or former employee of a practitioner. Thus, there is no statutory power to make any of the orders provided for by s 156, including compensation unless a finding of unsatisfactory conduct is made first, as has occurred in the present matter.

[18] Where a determination of unsatisfactory conduct is made, compensation of up to \$25,000 can be ordered to address a range of costs pursuant s 156(1)(d), including for specific costs incurred by a person by reason of an act or omission by a lawyer, and for anxiety and distress caused by a lawyer's conduct, with the latter being paid at a level that is "modest ... [but] not grudging".⁴

[19] The Committee ordered Ms RS not to charge a fee to the Estate, and to meet:

Fees and costs from Mrs OP up to \$2,000, plus GST, plus disbursements.

[20] In response to a request for particulars of the costs she seeks, Mrs OP provided copies of power bills, telephone accounts and a range of expenses including the cost of Mr OP's funeral, a lunch, extra postal charges caused by delay in obtaining probate, and accountancy fee for the estate, the cost of transferring shares into her name, and professional fees for the administration of the estate by [AA] Law. All of those costs are a result of Mr OP's passing and the terms of his will. Any of those problems should have been addressed in the course of finalising the Deed. None of them can properly be laid at Ms RS's door.

[21] Ms RS did not charge a fee to the estate for the work done by her or the legal executive.

[22] Mrs OP says she is not certain what the \$2,000 ordered by the Committee was intended to cover. In my view it was intended to be a contribution towards the costs of fixing the main error made while the file was Ms RS's responsibility. Essentially, that appears to be the filing of the application for probate as well as the Notice. As Ms RS appears to have accepted that the Notice was filed by her firm in error, presumably that error can be addressed by an application made to the Court pursuant to the Property (Relationships) Act 1976.

⁴ *EB v NI* LCRO 269/2013, 19 June 2015 at [42]. See also *Sandy v Khan (Decision on Orders)* LCRO 181/2009, 25 February 2010 at [29].

[23] In all the circumstances, this review is determined on the basis that the orders made by the Committee are confirmed.

Decision

Pursuant to s 211(1)(a) of the decision of the Committee is confirmed.

DATED this 17TH day of February 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mrs OP as the Applicant
Ms RS as the Respondent
[Area] Standards Committee
The New Zealand Law Society