LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 184

Ref: LCRO 158/2018

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	**YCH** Applicant
AND	**TSR** Respondent

DECISION

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

Introduction

[1] Mr YCH, at the relevant time a partner with [Law Firm A] (the firm), has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) which made a finding of unsatisfactory conduct against him, and orders that he refund fees, pay a fine, and pay costs.

[2] The firm had acted for Ms TSR's father, Mr ASR, for many years. Mr YCH was a co-executor of Mr ASR's will, and acted in the administration of Mr ASR's estate. Mr ASR was survived by his relationship partner, Ms UIL, and his adult children, Ms TSR, Mr QSR who was the other executor of Mr ASR's will, and Ms BSR (the beneficiaries).

[3] Ms TSR complaint about Mr YCH arose from her and Ms BSR's disagreement with Mr QSR about how the estate assets should be distributed, and her concerns about the way Mr YCH acted on the estate administration, and performed his role as executor.

[4] Mr ASR owned two adjoining properties which took centre stage to Ms TSR and Ms BSR's disagreement with Mr QSR. First, [Property A] [no. A] comprising 1.3155ha being part of a disused quarry, surrounded by a cliff face, on which a number of sheds had been constructed by Mr QSR.

[5] Secondly, adjacent [Property B] [no. B], situated on top of that cliff, comprising 2,071m^2 with a house previously occupied by Mr ASR and Ms UIL. Informal physical access to [no. B] was provided over part of [no. A] (the access land).

[6] On 23 December 1996, Mr ASR made a will (the 1996 will), prepared by Mr YCH's father who was a partner in the firm at that time, whereby Mr ASR: (a) appointed Mr YCH's father, and Mr QSR, executors and trustees; (b) granted Mr QSR an option to purchase [no. A] at a valuation to be agreed between Mr QSR and the executors or failing agreement determined by arbitration; (c) granted Ms UIL a life interest in [no. B]; and (d) provided for the residue to be divided among such of Mr QSR, Ms TSR and Ms BSR as survived him in equal shares.[1] Mr ASR signed an informal codicil on 10 August 2012 in which he provided for specific legacies to Ms UIL.[2]

[7] Both properties suffered damage from the Christchurch earthquakes of September 2010 and February 2011. Mr QSR, with Mr ASR's approval, carried out mitigation work on [no. A] which Ms TSR says Mr ASR paid for.

[8] On 5 June 2013, Mr ASR instructed Mr YCH to prepare a new will (the 2013 will) whereby he proposed (a) appointing Mr QSR and Mr YCH executors and trustees, (b) leaving [no. B] to Ms UIL outright, and (c) granting a life interest in the estate residue to Ms UIL which, upon her death, would pass to Mr QSR, Ms TSR and Ms BSR in equal shares.[3]

[9] Importantly, for the purposes of this review, the 2013 will did not bring forward the option contained in the 1996 will for Mr QSR to purchase [no. A]. Mr ASR died on 25 June 2013 without signing the 2013 will.

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[1] Upon Ms UIL's death, [no. B] was to pass to the survivors of Mr QSR, Ms TSR and Ms BSR in equal shares. Provision was made for gifts over to grandchildren.
[2] These being cash, money in bank accounts, fixed deposits, money in cheque accounts including rent money, a motorhome, and a car.
[3] There was to be a gift over to Mr QSR, Ms TSR's and Ms BSR's children.

[10] As detailed in my later analysis, from 26 July 2013 to 22 January 2014, Mr YCH endeavoured to obtain agreement from the beneficiaries for him and Mr QSR to apply to the High Court for validation and probate of the 2013 will.

[11] Although the beneficiaries subsequently gave their consent to that application being dealt with on the papers, on 8 April 2014, without their consent, Mr YCH and Mr QSR filed that application which was granted on 24 July 2014.

[12] Meanwhile, from December 2013, Mr YCH and Mr QSR sought to dispose of [no. A] by effecting a boundary adjustment between [no. B], and [no. A] whereby part of [no. A] including the access land (the severance land), would be amalgamated with [no. B].

[13] Mr QSR purchased [no. B] from Ms UIL during 2014. By April 2016, Mr YCH and Mr QSR all but achieved their goal of implementing the boundary adjustment when the Christchurch Earthquake Recovery Authority (CERA) conditionally agreed to purchase the balance of [no. A]. The purchase price of $50,000 offered by CERA was considerably less than a purchase price calculated on the 2007 council valuation.[4]

[14] By September 2016, the beneficiaries, including Mr QSR, were all being independently advised. A year later, on 22 September 2017, they entered into a deed of arrangement which provided for the sale of [no. A] by the estate to Mr QSR thereby doing away with Mr QSR's need for the boundary adjustment to provide legal access to [no. B].

Complaint

[15] Ms TSR lodged a complaint with the Lawyers Complaints Service on 4 November 2016. She claimed "negligence or collusion" by Mr YCH "with [Mr QSR's] interests" which she said had "cost [the estate] $500,000 and more".

[16] She said it was "not possible to fully complain" about Mr YCH's conduct because he had neither "provided [them] with any information", nor "initiated any procedures for handling [their] complaints", and had "ignore[d]" them. She said she and Ms BSR had each "spent over $2,000" on "lawyers' letters requesting replies" from Mr YCH that "remain[ed] ignored and unanswered".

[17] Ms TSR said once the details of CERA's offer to purchase [no. A] were known to her then Mr YCH "must pay reparation" for losses suffered by the estate. She also

[4] The council valuation of [no. A] at 1 August 2007 was $570,000, being land value of $535,000, improvements of $35,000.

sought reimbursement of her legal expenses incurred as a result of Mr YCH's conduct. She said Mr YCH and Mr QSR should be supervised or replaced as executors.

(1) Conflicting duties

(a) Mr ASR snr's wills

[18] Ms TSR said she "believ[ed]" Mr YCH had (a) not given effect to Mr ASR's wishes, and (b) had "not met his fiduciary duties" owed to her, and Ms BSR thereby "significantly erod[ing]" Mr ASR's "legacy" to be divided among Ms TSR, Ms BSR and Mr QSR.[5]

[19] She alleged Mr YCH's "fail[ure] to answer any questions", and his "serv[ice]" of "papers" on her and Ms BSR had "forced [them] into the expense and distress of seeking independent legal advice to try and assert [their] rights".

[20] She claimed she and Ms BSR had been "forced … to sign [a]n agreement" that the 2013 will "prevail[ed]" over the 1996 will. She said Mr QSR's desire "to have clauses of both wills interpreted in his favour" led to them incurring further legal costs.

(b) CERA offer for [no. A]

[21] Ms TSR claimed [no. A] was valued at "over $500,000", offers from CERA were "time-limited", and the "opportunity" to sell to CERA "ha[d] now been lost".

(2) Keep informed

[22] She said "over an extended period", Mr YCH had "not answered repeated requests" from her and her lawyer for "information about the CERA offer" for [no. A] which in her view was "serious misconduct". She said this had caused her "significant hardship".

[23] She said she did not know whether an offer from CERA had been "sought, … received, … replied to", and "whether any offer lapsed through [Mr YCH's] negligence or … [his] collusion with [Mr QSR] … for [Mr QSR's] advantage".

[5] Ms TSR said her complaint applied equally to Mr QSR, as evidenced by Mr YCH's "fail[ure] to ensure" the estate advanced $7,000 to her for medical purposes which she said Mr QSR, as co-executor, had refused.

(4) Fees invoiced to the estate

[24] Ms TSR claimed Mr YCH's legal services were "far below the professional standard expected in a fiduciary role", but until he provided her with information about his fees invoiced to the estate, she could not make a complaint about them.

Response

[25] In his response, referred to in my later analysis, Mr YCH said Ms TSR's complaint concerned his "involvement with the estate", in particular, "the possible sale of [no. A] to the Crown".

[26] Mr YCH said "the central issue was the civil dispute between beneficiaries". He said he considered he had "conducted [him]self both as a co-trustee and solicitor for the trustees in an appropriate manner". He said Ms TSR's "position as a beneficiary ha[d] not been compromised by [his] actions as solicitor for the trustees" of the estate.[6]

Standards Committee decision

[27] The Committee delivered its decision on 12 July 2018, and determined, pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act), that Mr YCH had failed to adequately address the implications of the boundary adjustment for the CERA process.

[28] By not doing so, the Committee concluded Mr YCH's conduct had fallen short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer which constituted unsatisfactory conduct pursuant to s 12(a) of the Act.

[29] The Committee ordered Mr YCH to refund his fees of $7,100 plus GST in his 9 May 2016 invoice to the estate, pay a fine of $3,000, and pay costs of $1,500.

(1) Conflicting duties

(a) [no. B] – purchase by Mr QSR

[30] In the Committee's view, by acting for both Mr QSR and Ms UIL on Mr QSR's purchase of [no. B], Mr YCH's professional duties owed to each of them did not conflict.

[6] Mr YCH, letter to Lawyers Complaints Service (21 December 2016).

(b) [no. A] – boundary adjustment proposal

[31] The Committee said it was "unable to conclude that had [no. B]… been in the ownership of a third party", in presenting the boundary adjustment proposal to the beneficiaries, Mr YCH "would have advised the executors and the beneficiaries in the same manner or taken the course that he did".

[32] The Committee concluded that Mr YCH had been "[unable] to separate out the beneficiaries' interests" thereby "put[ting] himself, as executor and the estate's lawyer, in a difficult and conflicted position".

[33] In arriving at that decision, the Committee said Mr YCH's responses to Ms TSR's complaint did not "directly" address his "duty to administer the estate", and "the consequent potential and actual loss" to the estate of a boundary adjustment. Instead Mr YCH concentrated on "the necessity for the boundary adjustment".

[34] In the Committee's view, Mr YCH "appeared to regard" Mr QSR's boundary adjustment proposal "as a genuine (potential) testamentary promises' claim" by Mr QSR for his "improvements made", and "the mitigation works" described in Mr YCH's 5 May 2016 letter to the beneficiaries.

(2) Estate administration – disposal of [no. A]

(a) CERA offer

[35] The Committee stated that in August 2015, CERA "was offering 100%" of the 2007 rating valuation for vacant land in the Red Zone yet no evidence was produced of advice by Mr YCH to the beneficiaries that this was "the real value" CERA would pay for [no. A] "under the Red Zone process".

[36] In the Committee's view, the value of [no. A] "absent the boundary adjustment" was "arguably $535,000", and Mr YCH ought to have appreciated [no. A] "had a value to the Estate as a red zoned property".

[37] The Committee observed that had the whole of [no. A] been sold to the Crown "there could have conceivably been a life interest to Ms UIL to the value of $535,000, with the remainder to be divided up" among Mr QSR, Ms TSR, and Ms BSR compared with the boundary adjustment proposal whereby the estate would "obtain $100,000 in total".[7]

[7] $50,000 from Mr QSR for the severance land; $50,000 from CERA for the balance of [no. A].

(b) Boundary adjustment proposal

(i) Reasons for

[38] In discounting Mr YCH's submission that the main reason for the boundary adjustment was the "avoidance of risk of liability for rock fall", the Committee said that risk "would need to be weighed up against the benefit to be obtained by holding" [no. A] "while the red zone offers for uninsured properties were revalued and prepared".

[39] In the Committee's view (a) the boundary adjustment was "primarily" for Mr QSR's benefit without "demonstrable benefit" for the other beneficiaries, and (b) the risk the boundary adjustment may "complicat[e] and delay" the CERA process "outweighed" the risk of Mr QSR claiming against the estate, or the "removal or reduction of liability from any rock fall hazard".

[40] The Committee said it would have expected Mr YCH to have advised the beneficiaries about (a) the "possible effect" on the "realisable value" of [no. A] considering a "Crown Red Zone offer" had "not yet been formulated"; (b) because the timing of a CERA offer was unknown, the time needed to obtain and comply with a subdivision consent; (c) the value of improvements on, and mitigation works to [no. A] claimed by Mr QSR; and (d) on "the merits" of a possible testamentary promises claim.

[41] The Committee found that in the absence of evidence of his advice to the estate that the boundary adjustment "might affect the value of any future CERA offer - even if one was not then on the table", Mr YCH "err[ed]" by "fail[ing] to appreciate and forewarn the executors, and therefore the beneficiaries, of the implications of the boundary adjustment".

[42] The Committee noted that the value of improvements made by Mr QSR to [no. A] "were essentially lost" as a result of the earthquakes. Therefore, while the "assessed value" of $50,000 for [no. A] "would presumably be the extent of Mr QSR's claim", the "real value" of the boundary adjustment to Mr QSR was access to [no. B] purchased by him from Ms UIL.

[43] The Committee found that although Mr YCH "made a number of attempts at conciliation to try to resolve issues between the beneficiaries" he "did not adequately address the possibility" of the sale of [no. A] to the Crown "at its assessed pre-earthquake "2007" valuation".

[44] Even when "it became apparent" that the boundary adjustment would result in "a significant loss of value", the Committee said Mr YCH "did not move to obtain

approving instructions" from the beneficiaries "to re-engage with CERA or suggest [they] might need to seek independent advice".

(3) Fees

[45] The Committee observed from the "narration" on Mr YCH's 9 May 2016 invoice for his fee of $7,100 plus GST, that his attendances "almost exclusively relate[d] to the boundary adjustment thereby "highlight[ing] the conflict that operated through Mr YCH acting for both the [e]state and [QSR]".

Application for review

[46] In his application for review, submitted by his counsel on 27 August 2018,[8] Mr YCH seeks a direction that the Committee reconsider its findings including the penalties imposed. He says there are "some factual inaccuracies" in the Committee's decision "which may affect the conclusion" reached by the Committee.

(1) Conflicting duties

[47] Mr YCH submits that "as part of his … negotiations with CERA", he was "promoting the interests of all beneficiaries" who he says "together owned [no. B] and [no. A]", and were receiving "independent advice".

(2) CERA offer

(a) Boundary adjustment

[48] Mr YCH says that both [no. B], and [no. A] stood to benefit from the proposed boundary adjustment.

[49] He says Mr QSR's ownership of [no. B], purchased by him from Ms UIL, "did not mean that [Mr YCH] could no longer represent the estate in negotiations with CERA". He says the "cooperation" of the owner for the time being of [no. B] was required in those negotiations.

[50] He says because "the potential liability for rockfall" affected [no. B], and [no. A], his "advice to the [e]state about the boundary adjustment" would have been "the same if [no. B] … been owned by a third party".

[8] Ms OPL, senior associate, [Law Firm B].

(b) CERA agreement – advice

[51] Mr YCH says, since Mr ASR's death in 2013, he had "significant negotiations" with CERA.

[52] He says the "only" offer made, received on 15 April 2016 the day before CERA disbanded, was to purchase "part of [no. A]" for "$50,000".[9] For that reason, he says there was "no time to provide detailed written advice" to the beneficiaries.

[53] He says he was not aware of any CERA offer "to purchase [no. A] … for $535,000". He says if CERA's offer was "calculated as an apportionment of the rating valuation" for [no. A], then "the return to the [e]state would have been well in excess of market value", but that "was not the case" because the "CERA offer was for $50,000".

[54] Mr YCH explains because the Council's subdivision consent conditions "in relation to rockfall" were "unacceptable" to both to CERA, and the estate, CERA cancelled the CERA agreement. He says although he "attempted to negotiate a variation" whereby the sale price would represent "the whole amount of the rating valuation" for [no. A], once the CERA Act had been repealed CERA ceased to exist and "there was no statutory authority" to sign a variation.

Response

[55] Ms TSR's response was filed in this Office on 14 September 2018 by her advocate, Ms MNH. Ms TSR says whilst she supports the Committee's decision, she is disappointed the Committee did not order a refund of her and Ms BSR's legal costs incurred as requested in their complaint.[10]

Hearing

[56] The parties attended (by teleconference) a review hearing in Auckland on 15 September 2020.

Nature and scope of review

[57] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[11]

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[9] The Canterbury Earthquake Recovery Act 2011 (CERA Act) was repealed on 19 April 2016 by section 146(1) of the Greater Christchurch Regeneration Act 2016.
[10] Ms TSR says Mr ASR's three surviving children were herself, Mr QSR, and Ms BSR. ISR died in 1967.
[11] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> … 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.

[58] More recently, the High Court has described a review by this Office in the following way:[12]

> 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.

[59] 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 consider all of the available material afresh, including the Committee's decision; and provide an independent opinion based on those materials.

Issues

[60] The issues I have identified for consideration are:

2013 will – validation, and probate

(a) For whom did Mr YCH act when the beneficiaries were deliberating whether Mr ASR's estate should be administered pursuant to the 1996 will, or the 2013 will?

(b) For whom was Mr YCH permitted to act on that matter?

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

Estate administration – disposal of [no. A]

(c) Concerning the disposal of [no. A], having obtained probate of the 2013 will, did Mr YCH act for the estate, as well as for Mr QSR in Mr QSR's capacity as a beneficiary? If so, was Mr YCH permitted to do so?

(d) Did Mr YCH owe a duty to the beneficiaries – Ms TSR, Ms BSR, Mr QSR, and Ms UIL – to inform them of the boundary adjustment proposal whereby (i) the severance land on [no. A] would be amalgamated with [no. B], and (ii) the balance of [no. A] sold to CERA?

(e) If so, did Mr YCH keep the beneficiaries informed of progress with the boundary adjustment proposal before he and Mr QSR, as executors/trustees, accepted CERA's 15 April 2016 offer to purchase the balance of [no. A]?

Fees

(f) Were Mr YCH's fees charged to the estate fair and reasonable?

Analysis

2013 will – validation, and probate – issues (a) and (b)

(1) For whom did Mr YCH act?

(a) Context

[61] The events leading up to Mr YCH and Mr QSR making application for validation and probate of the 2013 will provide context for consideration of the questions (a) for whom Mr YCH acted, and (b) for whom he was permitted to act during the period from Mr ASR's death until the grant of probate of the 2013 will.

[62] On 26 July 2013, a month after Mr ASR's death, Mr YCH briefly explained (by letter) to the beneficiaries the differences between the two wills. He noted that in the 2013 will Mr ASR proposed leaving [no. B] to Ms UIL outright instead of the life interest in the 1996 will. He referred to the beneficiaries' "common consensus" of a "preferen[ce]" for the 2013 will. He said having taken counsel's advice he "recommended" validation of the 2013 will and requested their "instructions".

[63] On 11 August 2013, Mr YCH provided (by letter) the beneficiaries with a schedule of the differences between the two wills, and a possible compromise which included an option for Mr QSR to purchase [no. A] as provided in the 1996 will. He said until he had provided them with estimated values of the estate assets he did not expect them to decide under which will they preferred to have Mr ASR's estate administered.

[64] On 26 September 2013, he provided (by email) them with a valuation of [no. B], and [no. A].[13] He said he would use the rating values for the rental properties, and Mr QSR's estimated value of Mr ASR's "toys" to "illustrate the differences" between the two wills, and the "possible compromise". He said his intention was to provide them with "sufficient information" to make "an informed decision about validating" the 2013 will.[14]

[65] Mr YCH sent (by letter) the beneficiaries a further schedule of differences on 23 October 2013. He asked for their "confirm[ation]" for Mr QSR and him to apply for the validation and probate of the 2013 will.

[66] On 27 November 2013, he provided (by letter) them with copies of both wills. He noted they had not "reached a consensus" to apply for validation of the 2013 will.[15] He said if they could not agree they must obtain their "own advice" which was required "if a deed of family arrangement is entered into". In that case he said he would "act for the Trustees only". He asked whether they wanted to meet.

[67] In his 22 January 2014 letter, Mr YCH noted "no consensus" had been reached. He stated he was "concerned with the delays" in obtaining probate. He said he and Mr QSR would apply for validation and probate of the 2013 will, but because of the "differences between some beneficiaries" he could not advise them "individual[ly]" but would "continue to act for the trustees only".[16]

[68] On 8 April 2014, Mr YCH informed (by letter) the beneficiaries that although he "remained optimistic", until there was "certainty with" [no. B], and [no. A], he did not consider an "overall compromise can be achieved". He said the "ongoing delay" in "obtaining" probate "cannot continue".

[69] He said because Mr ASR "wish[ed]" to change his will, "the starting point" was the 2013 will. He said an application to validate the 2013 would be filed in the High Court

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[13] [Company A] valuation (8 August 2013). [no. B] valued at $240,000; [no. A] valued at $50,000.
[14] Mr ASR's "toys" included a collection of motorbikes, a quadbike, a dinghy (with oars and sails) and a lathe.
[15] Also, Mr ASR's informal testamentary instrument (10 August 2012).
[16] Mr YCH also asked for their response by 5 PM that day to his suggested "partial distribution of some of the toys" set out in his letter.

that day, and if any of them "opposed" they would need to obtain "their own independent legal advice".

[70] On 11 April 2014, Mr YCH asked the beneficiaries for their written consent to the application which Ms TSR provided (by email) on 14 April. Having subsequently been notified of the proceedings by the Court, the beneficiaries provided their formal consent to the application being dealt with on the papers. Validation and probate of the 2013 will was granted on 24 July 2014.

(b) Retainer

[71] The first question is whether Mr YCH provided legal services to the beneficiaries in the lead up to his and Mr QSR's application to validate the 2013 will filed by them in the High Court on 8 April 2014.

[72] The term "retainer" is defined in r 1.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) as:

> an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[73] As stated in the definition, a "retainer" may be "express or implied", and need not be in writing. In the context used, the word "client", although not defined in the Act or the Rules, means the recipient of legal services from a lawyer.

[74] The function of a retainer has been described as "central to various incidents of the lawyer-client relationship" by "identif[ying] the client and prescrib[ing] the services expected" of the lawyer. In that way, a retainer determines upon whose instructions the lawyer acts, the scope of the lawyer's authority in carrying out those instructions and the scope of the lawyers' duties.[17]

[75] Whether or not a retainer exists is to be "determined objectively" by asking "whether a reasonable person observing the conduct of both [the lawyer] and [the client] would conclude that the parties intended [a] lawyer-client relationship to subsist between them".[18]

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[17] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.20].

[18] *Hartlepool v Basildon* LCRO 79/2009 (3 September 2009) at [23]*;* see also Dal Pont at [3.20].

[76] An alleged client who claims a lawyer contravened a professional obligation or duty bears the burden of proof "of facts and circumstances sufficient to establish a tacit agreement to provide legal services".[19]

[77] In such an inquiry, "objective facts, not merely from the lawyer's belief as to which clients he or she was acting for" will be determinative. The "reasonable expectations of the alleged client carry significant weight here, as the lawyer may always take steps to dissuade a belief that the lawyer acts for a person", but "some responsibility" also "lies properly" with the lawyer in the inquiry. However, a lawyer's "personal reservations" as to whether he or she was going to act for a client "are relevant only in so far as they were objectively ascertainable".[20]

[78] Relevant considerations include (a) "how" the lawyer "referred to and dealt with" the alleged client, (b) the lawyer's file material, (c) "who instructed the lawyer", (d) who is liable for the lawyer's fees, and (e) whether the alleged client had previously retained the lawyer.[21]

(c) Discussion

Mr YCH

[79] Mr YCH explained at the hearing that he assisted Mr QSR, as a potential co-executor, to apply for validation and probate of the 2013 will. He says he was not acting for Mr QSR in Mr QSR's capacity as a beneficiary.

[80] He says probate was needed to administer Mr ASR's estate in respect of which there were two issues: (a) validation of the 2013 will in order to deal with the estate's most pressing issues, EQC,[22] and insurers, and (b) obtaining a compromise by the beneficiaries concerning distribution of Mr ASR's assets.

[81] Mr YCH says his intention was that the beneficiaries, having each "take[n] independent legal advice", would (a) record their agreement reached "in a deed of family arrangement", and (b) provide their written consent to the application for probate.[23]

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[19] Dal Pont at [3.60].
[20] *Hartlepool v Basildon*, above n 18 at [23], referring to *Day v Mead* [1987] 2 NZLR 443 (CA) at 458; *Blyth v Fladgate* [1891] 1 Ch 337; *Giffith v Evans* [1953] 1 WLR 1424 (EWCA) at 1428. See also *T v G* LCRO 29/2009 (21 April 2009) at [26].
[21] Dal Pont, above n 17 at [3.60].
[22] Earthquake Commission.
[23] Mr YCH refers to his 27 November 2013 letter to Mr QSR, Ms TSR and Ms BSR.

[82] He says he expected the beneficiaries to reach agreement among themselves, and during this time provided them with information to enable them to make a decision, but was not advising them.

[83] He says although he did not take file notes of his meetings with the beneficiaries, his "strong recollection" is they "acknowledged" that the 1996 will "did not make adequate provision" for, and left the estate open to a claim by Ms UIL.

[84] He says had he considered there was not a prospect of an agreement, he and Mr QSR would have applied earlier for validation and probate of the 2013 will, or probate of the 1996 will. He says prior to sending his 27 November 2013 email to the beneficiaries he was unaware of their competing views, but by 22 January 2014 there was "a breakdown" among them.

Ms TSR

[85] Also at the hearing, Ms TSR said there was no "common consensus" among the beneficiaries of a preference for the 2013 will.

[86] Ms TSR denies she met with Mr YCH. She says there was only one meeting, the week after Mr ASR's death, attended by her, Ms BSR, Mr QSR and Ms UIL. She says at that stage she andMs BSR had not decided which will "would be best to protect" their and Ms UIL's interests.

[87] She says Mr YCH, in his correspondence to the beneficiaries, explained his preference for the 2013 will because his father, an executor under the 1996 will, had died leaving Mr QSR as surviving executor. She says Mr YCH "specifically counselled" her "to accept" the 2013 will, which did not grant Mr QSR an option to purchase [no. A], so that the beneficiaries "would all have the same rights".

[88] Whilst acknowledging some changes were required to provide for Ms UIL's needs, Ms TSR explains she and Ms BSR preferred the 1996 will, which granted Mr QSR the option to purchase [no. A], so long as he paid a "fair price", not $50,000.[24] She says Mr QSR would have been happy with the 1996 will.

[89] Ms TSR says by 23 October 2013, when Mr YCH asked the beneficiaries to "confirm [they] agree[d]" to validation and probate of the 2013 will, she and Ms BSR did not agree, and that position remained unchanged on 8 April 2014 when Mr YCH informed the beneficiaries he and Mr QSR intended to apply that day. However, she says after

[24] Mr YCH, letter to the beneficiaries (11 August 2013) (assets schedule).

subsequently speaking to Ms BSR she told Mr YCH she would consent. She says Ms BSR was the last to agree.

Consideration

[90] On 26 July 2013, having obtained counsel's advice, Mr YCH explained to the beneficiaries the differences between the two wills. He "recommended" Mr ASR's estate be administered pursuant to the 2013 will, and requested their "instructions" to do so.

[91] In his 11 August 2013 letter, Mr YCH referred to having "requested" the beneficiaries' "instructions". He said he had not provided them with "sufficient information" to make an "informed decision" having "only made reference to some of the differences" between the two wills.

[92] For "the purpose of promoting discussion" he provided a schedule with the main features of each will, and a "possible compromise" which included an option for Mr QSR to purchase [no. A], and a modification of Ms UIL's life interest in the estate residue.

[93] On 26 September 2013, Mr YCH provided the beneficiaries with valuations of estate assets to assist them to make "an informed decision about validating" the 2013 will. On 23 October 2013, he sent them the same, or another, schedule of differences between the two wills, and requested their "confirm[ation]" to apply for validation of the 2013 will.

[94] He informed them on 27 November 2013 they would have to obtain their "own advice" if they couldn't agree in which case he said he would continue to act for Mr QSR and himself as trustees. He asked them if they wanted to meet.

[95] It was not until 22 January 2014 that Mr YCH, referring to his 23 October 2013 email, told the beneficiaries that in the absence of their agreement he and Mr QSR would apply for validation and probate of the 2013 will. He repeated he would "continue to act" for the trustees, but not for them.

[96] At the hearing Ms TSR explained she knew Mr YCH had acted for Mr ASR, and then for Mr QSR following Mr ASR's death. Mr YCH acknowledges he acted for Mr QSR in Mr QSR's capacity as an executor, but not in Mr QSR's capacity as a beneficiary.

[97] As noted above, whether Mr YCH, in addition to acting for Mr QSR as executor, and the estate, was also acting for the beneficiaries is to be "determined objectively".

[98] In addition to the considerations referred to above, assistance with that enquiry is also provided in the requirements of r 12 of the Rules that "[a] lawyer must, when

acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy"; and in r 12.1 that a lawyer who "knows that a person is self-represented, … should normally inform that person of the right to take legal advice".

[99] In communicating with that person, the lawyer should also avoid "seeking to confuse [the person] with unnecessary technical language or obfuscation", and guard against the person "looking … for guidance on the appropriate course to take or assistance in technical matters".[25]

[100] Importantly, apart from advising the person of the right to take legal advice, the lawyer "should avoid giving any substantive advice … as to do otherwise would be to create a conflict of interest".

[101] Further assistance is provided in the definitions of "legal services", in s 6 of the Act, which includes "(b) *advice* in relation to any legal or equitable rights or obligations"; and of "reserved areas of work" which includes "(a) in giving *legal advice* to any other person in relation to the direction or management of – (i) any proceedings that the other person is considering bringing, or has decided to bring, …; or (ii) any proceedings … to which the other person is a party or likely to become a party". *[emphasis added]*

[102] In that context, "advice" means an "opinion given or offered as to what action to take; counsel; recommendation"; and "information conveyed or imparted".[26]

Conclusion

[103] Mr YCH's position is he did not advise the beneficiaries at this time, but provided them with information only. However, adopting the objective approach referred to above, and for the reasons set out below, I do not consider that is consistent with his written communications to them.

[104] As I have noted, on 26 July 2013 Mr YCH "recommended" they agree to validation and probate of the 2013 will. He asked for their "instructions".

[105] In his 11 August, 26 September, and 23 October communications, he provided them with information about the estate including the differences between the two wills, and valuations of the estate assets. He put forward a compromise for discussion.

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[25] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.5]; also Dal Pont, above n 17 at [21.275].
[26] Oxford English Dictionary <www.oed.com>.

[106] Although Mr YCH describes his role as providing the beneficiaries with information to assist them to make a decision, in my view, that must be seen in the overall context of his communications to them in which, as I have noted, he "recommended", and sought their "confirmation" for him and Mr QSR to apply for validation and probate of the 2013 will.

[107] From the information produced, Ms BSR appears to have taken independent legal advice in mid-December 2013, Ms TSR from June 2015,[27] and Mr QSR from May 2016.[28] Ms UIL's lawyer first wrote to Mr YCH on 11 May 2016.[29]

[108] If, as Mr YCH contends, he was not advising the beneficiaries, it is reasonable to expect he would have informed them of their right to take legal advice on 26 July 2013, not on 27 November 2013 after attempting to persuade them to agree to the 2013 will being validated.

[109] From my analysis of Mr YCH's written communications to the beneficiaries, the conclusion I have reached is that Mr YCH advised all beneficiaries from 26 July 2013, the date of his first letter to the beneficiaries, until 27 November 2013 when he informed them for the first time to obtain their "own advice" if they could not agree how to administer Mr ASR's estate.

(2) For whom was Mr YCH permitted to act?

[110] This leads to the next question whether Mr YCH was permitted to advise the beneficiaries during that period?

(a) Parties' positions

[111] Ms TSR claims, by not giving effect to Mr ASR's wishes, Mr YCH failed in his "fiduciary duties" owed to her and Ms BSR thereby "significantly erod[ing]" Mr ASR's legacy to be divided among [Mr ASR's] children. She says Mr YCH "forced" her to agree to the validation and probate of the 2013 will.

[112] Mr YCH considers he did not have a conflict between his roles as the lawyer acting in the administration of the estate, and as an executor of the estate. He says probate was required to administer the assets, and deal with insurance claims. Yet, he

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[27] [Law Firm A], Time Transactions printout (31 March 2015 to 26 July 2015), "Emails from Mr FRG"; [Law Firm A] invoice (27 July 2015); letter Mr FRG to Mr YCH (12 June 2015).
[28] Mr YCH, email to LCRO (18 September 2020); Mr CFR [Law Firm C], letter to Mr YCH, (12 May 2016).
[29] Mr YCH, letter to Lawyers Complaints Service (17 October 2017); [Law Firm A] invoice (12 May 2014).

says, "despite [his] best efforts" the beneficiaries could not agree how to distribute the estate assets.

(b) Client interests

[113] Consistent with the consumer purposes of the Act, and lawyers' fundamental obligation to protect clients' interests,[30] r 6 of the Rules requires that "[i]n acting for a client, a lawyer must, within the bounds of the law and [the rules], protect and promote the interests of the client to the exclusion of the interests of third parties".

(c) Conflict of duties – acting for more than 1 client

[114] Underpinning that duty is the "obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients conflict".[31] To that end, r 6.1 contains a qualified prohibition that:

> [a] lawyer must not act for more than 1 client on a matter in any circumstances where there is **a more than negligible risk** that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients. [emphasis added]

[115] Therefore, a lawyer in Mr YCH's position who faces the prospect of, or finds himself or herself advising more than 1 client on a matter, must first carefully consider whether he or she is permitted to do so.

[116] The threshold "a more than negligible risk", below which the prohibition in r 6.1 does not apply, is very low and has been described as there being "no meaningful risk that the obligations owed to the parties would not be able to be discharged", but is reached when there is "a real risk of an actual conflict of interest".[32]

[117] This may occur where a lawyer looks to protect one client's interest at the expense of the interests of another client(s) for whom the lawyer is also acting on a matter.[33] In another example, a lawyer, having received information from one client, is

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[30] Sections 3(1) and 4 of the Act.
[31] Webb, Dalziel, Cook, above n 25 at [7.1], referring to *Moody v Cox & Hyatt* [1917] 2 Ch 71 (EWCA) at 781.
[32] *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [27] and [36]. In this context, the word "negligible", which is not defined in either the Act or the Rules means, "unworthy of notice or regard; so small or insignificant as to be ignorable": *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003).
[33] Rules 6 and 6.1. See *Sandy v Kahn* at [25] and [32].

duty bound to disclose that information to the other client(s) which may give rise to a breach of confidence owed to the client who provided the information.[34]

[118] A helpful approach for a lawyer to determine whether he or she has a conflict, or potential conflict of duties is to ask whether the matter is contentious. This is most obvious where there is a dispute between the parties which may lead to, or is already being contested. In that case the lawyer would almost certainly be prohibited by r 6.1 from acting for more than one party in the dispute.

[119] On the other hand, if the matter is non-contentious such as a transaction where the parties' respective interests may be "concurren[t], rather than conflict", the threshold "a more than negligible risk" may not be reached.[35]

[120] However, the observation has been made that even where a lawyer is proposing to act on a matter which appears non-contentious, where the parties are "negotiating and significant terms remain to be resolved, it would be more or less impossible for a lawyer to act for both parties". This is because "an advantage acquired by one client will often result in a detriment to the other client."[36]

[121] The same applies in a family setting where a lawyer has been asked to act for one family member on a matter or transaction that "is clearly not in the interests" of another, or other family members.[37]

(d) Discussion

[122] This is much the position Mr YCH would have found himself in on 26 July 2013 when he first wrote to the beneficiaries recommending validation and probate of the 2013 will, and seeking their instructions to do so.

Ms TSR

[123] Ms TSR says by 26 July 2013 the beneficiaries had not agreed to Mr YCH and Mr QSR applying for validation and probate of the 2013 will.

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[34] Rules 7 and 8. See *Black v Taylor* [1993] 3 NZLR 403 (CA) at 419, referred to in *Torchlight Fund No 1 LP (In Receivership) v NZ Credit Fund (GP) Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [15].
[35] Webb, Dalziel and Cook, above n 25 at [7.2]; *Sandy v Kahn* above n 32, and more recently *ZAA v YBC* LCRO 243/2013 (27 June 2017); generally, Dal Pont, above n 17 at [7.35], [7.95] and [7.115].
[36] At [7.2].
[37] At [7.2].

[124] She says because both wills "had problems", and Mr QSR "would do his best to override [their] rights", she and Ms BSR had "not decided" which will "would be best to protect" theirs, and Ms UIL's interests. However, she says "[u]nder pressure" from Mr YCH they "accepted" the 2013 will.

Mr YCH

[125] In my 4 March 2020 directions, I asked the parties to address the issue whether Mr YCH complied with his professional obligations and duties including those in rr 6 and 6.1 referred to above.[38]

[126] In his submissions, Mr YCH said he did not have a conflict between his roles as executor, and the estate lawyer. Presumably because he considered he did not advise the beneficiaries, he did not address whether he considered he had a conflict of his duties owed to his co-executor, Mr QSR, on the one hand, and to the beneficiaries individually or collectively on the other.[39]

[127] Mr YCH "accepts it would have been a cleaner process" if, having "taken independent legal advice", the beneficiaries had provided their consent before the application was filed, but says that "proved impossible in the circumstances". He says he had "referred" them for independent advice.[40]

[128] He says consistent with his advice to Mr QSR, because the 2013 will, which he says he had not discussed with Mr ASR before Mr ASR's death, "recorded" Mr ASR's "most recent and up-to-date wishes", he "was required to observe", and apply for probate of that will.

[129] Referring to his written communications to, and meetings with the beneficiaries about "estate issues", Mr YCH says he and Mr QSR wanted to apply for probate of the 2013 will for which they required the other beneficiaries' consent. He says the beneficiaries "acknowledged and accepted" the 2013 will "most accurately reflected" Mr ASR'a "most recent wishes".

[130] He says Mr QSR, Ms TSR and Ms BSR were "keen to avoid" a claim by Ms UIL, and "wanted to come to an arrangement" concerning distribution of the estate assets. In his view, given that "intention", it "would not matter greatly" which will was administered.

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[38] At fn 4.
[39] Mr YCH, submissions (5 June 2020).
[40] Mr YCH, letters to the beneficiaries (27 November 2013 and 22 January 2014).

[131] He "refutes" Ms TSR's claim she "was forced to agree" to validation of the 2013 will. He says Ms TSR knew what the estate assets were, including valuations, and the differences between the 1996 will, and the 2013 will. He says having agreed "to the various arrangements" between the beneficiaries, Ms TSR "accepted" an interim distribution from the estate.

Conclusion

[132] Mr YCH knew the 2013 will he drafted did not carry forward the option granted to Mr QSR in the 1996 will to purchase [no. A]. In my view, that ought to have signalled to him that the prospect of the beneficiaries reaching agreement on the distribution of Mr ASR's assets, and to that end which of the two wills they preferred, was less than assured. Particularly, as subsequently occurred, when they failed to agree until they settled their differences four years later.

[133] As I have noted, Ms TSR denies she met with Mr YCH to discuss this issue let alone reached an agreement, as Mr QSR later claimed.[41] Ms TSR's position that an agreement had not been reached at that time is, in my view, supported by Mr YCH's communications to the beneficiaries, commencing from his 26 July 2013 letter, in which he stated there "appears" to be a consensus, yet concluded by "recommend[ing]" validation and probate of the 2013 will and seeking their "instructions" to do so.

[134] Despite Mr YCH's subsequent 11 August 2013 letter "to promote discussion", and his 26 September, and 23 October follow-ups in which he repeated his recommendation of validation and probate of the 2013 will, it was not until 27 November 2013 when he told them to obtain their "own advice" that he realised the prospect of an agreement looked beyond reach.

[135] From my analysis of Mr YCH's communications to the beneficiaries, commencing with his 26 July 2013 letter to them, I consider it more probable than not[42] that Mr YCH would have known (a) the beneficiaries had not agreed which will they preferred, and (b) the prospect of an agreement was not assured.

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[41] Discussed below – see YCH, letters to the beneficiaries (5 May 2016); GHT (Mr QSR's lawyer) to Mr YCH (15 September 2017).

[42] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [112]: "There is … a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them"; and at [118]: "A flexibly applied civil standard of proof should be adopted in proceedings under … similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other rule requiring a different standard".

[136] Again, as noted, an agreement was not achieved despite Mr YCH's endeavours to assist the beneficiaries to find common ground.

[137] The conclusion I have reached is that on 26 July 2013, when Mr YCH "recommended" the beneficiaries apply to validate the 2013 will and requested their "instructions" to do so, there was "a more than negligible risk" he may not be able to discharge his professional obligations owed to Mr QSR, in [Mr QSR's] capacity as an executor in the estate administration on the one hand, and the beneficiaries on the other.

[138] It follows that having already found that Mr YCH advised Mr QSR, in [Mr QSR's] capacity as an executor, under either the 1996 will or the 2013 will, as well as the beneficiaries, including Mr QSR, about applying for administration of Mr ASR's estate, I consider he did so in contravention of r 6, and r 6.1.

Estate administration – disposal of [no. A]

(3) Conflict of duties – issue (c)

[139] The first question concerning this aspect of Ms TSR's complaint is whether Mr YCH, when dealing with CERA concerning the proposed boundary adjustment, was acting for Mr QSR, in Mr QSR's capacity as an executor of the estate, and also as a beneficiary? If so, whether he was permitted to do so?

(a) Context

[140] The events relating to the disposal of [no. A] spanned the period commencing on 12 December 2013, when Mr YCH and Mr QSR raised the boundary adjustment proposal at their meeting with CERA, until 15 April 2016, the date of the CERA agreement.

[141] In his 22 January 2014 letter, Mr YCH informed the beneficiaries [no. B] was under insured, and [no. A] had been "red stickered" which he said were "[f]urther issues frustrating progress", and an obstacle to "a proposed compromise" among the beneficiaries with the estate administration.

[142] On 8 April 2014, he informed (by letter) the beneficiaries about his and Mr QSR's meeting on 12 December 2013 with CERA. He said because he had not received the

information requested from CERA at that meeting he would make a request under the Official Information Act 1982.[43]

[143] During mid-March 2015, having reviewed the Supreme Court quake outcasts decision, Mr YCH spoke with CERA, and again in mid-April 2015 about the disposal of [no. A] to CERA.[44]

[144] On 24 June 2015, Mr YCH received (by email) an update from CERA about red zoned land. He met with Mr QSR and a CERA representative on 13 October 2015 concerning the 2007 rating valuation, and again on 16 November 2015 when CERA told him it would consider a boundary adjustment.[45]

[145] Having been told by Ms BSR about the boundary adjustment in October 2015, on 15 October 2015 Ms TSR (informed (by email) Mr YCH that "allowing Mr QSR to negotiate with CERA, and to do a boundary change [was] a conflict of interest" because the boundary adjustment "will benefit" Mr QSR "personally".

[146] On 9 December 2015, Mr YCH told (by letter) CERA a subdivision plan for the proposed boundary adjustment would be lodged with the Council the next day. He asked CERA for "an extension of the 10 December deadline" to "the end of April 2016" for acceptance of CERA's "red zone offer". On or about 15 December, CERA informed Mr YCH it would extend that date "until 10 February 2016".

[147] During February 2016 Mr YCH provided CERA with updates on progress with the subdivision plan approval process.

[148] On 15 April 2016, CERA presented its offer, accepted by Mr YCH and Mr QSR, to purchase the balance of [no. A] for $50,000. A condition required the parties' approval of the Council's subdivision consent conditions by 13 May 2016, extended by agreement to 7 June 2016 (the CERA agreement).[46]

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[43] Mr YCH, letter to Mr QSR, Ms TSR, and Ms BSR (5 May 2016). Mr YCH said at the 12 December 2013 meeting CERA representatives "refused to entertain as a possibility" a boundary adjustment between [no. B] and [no. A].

[44] CERA told Mr YCH on 9 February 2015 this decision, which issued on 13 March 2015, was expected. Proceedings issued by a group of owners of red zoned land, whose improvements were underinsured – Crown offers to purchase that land at 50 per cent of the 2007 rateable value were held unlawful. See the narration in Mr YCH's 16 March 2015 and 27 July 2015 invoices, and his corresponding trust account time printout.

[45] Mr YCH chronology produced to the Committee. His time printout records his attendance "CERA offer" on 9 November 2015.

[46] Mr YCH, letter to Mr QSR, Ms TSR, Ms BSR (7 June 2016).

[149] In his 5 May 2016 "update" (by letter) to the beneficiaries, Mr YCH explained that, although "[i]t was decided to apply" for validation of the 2013 will, "until" the beneficiaries "agreed to a compromise of their entitlements" the 2013 will "prevail[ed]".

[150] As discussed in more detail below, Mr YCH said the intention of the boundary adjustment was to provide legal access to [no. B], and enable the sale of the balance of [no. A] to CERA. He provided details of Mr QSR's claim against the estate if [Mr QSR] was required by the executors/trustees "to pay the difference between the 2007 rating valuation and the purchase price" paid by CERA for the balance of [no. A], and QSR's settlement proposal.

[151] On 11 May 2016, Ms UIL's lawyer informed (by email) Mr YCH that Ms UIL agreed to Mr QSR's settlement proposal, and requested "an accurate summary of the value of the estate" so Ms UIL could "assess her position".[47]

[152] Ms TSR's lawyer's 12 May 2016 letter to Mr YCH spoke of Ms TSR's concern that Mr QSR, as an executor, was not acting in the interest of all the beneficiaries, and of "some acrimony" with Mr QSR which was impeding a compromise. Ms TSR requested "clarification" of (a) "the legitimacy" of the CERA agreement, (b) Mr QSR's settlement proposal, and (c) Mr QSR's intended claim against the estate.

[153] Ms TSR said she did "not agree" to Mr QSR purchasing part of [no. A]. She asked Mr YCH to arrange a further extension of the condition date in the CERA agreement. She claimed Mr QSR was "endeavouring to pressure" her and Ms BSR, in order to obtain "more" than he was "lawfully entitled" from the estate.[48]

[154] On 7 June 2016, Mr YCH informed (by letter) the beneficiaries CERA had cancelled the CERA agreement.[49] He described Mr QSR's amended settlement proposal whereby Mr QSR would purchase all [no. A] for $100,000, and "waive his claim for reimbursement of the cost of mitigation work". He said if the beneficiaries did not agree he and Mr QSR, as executors, would apply to the Court for consent to Mr QSR's settlement proposal.[50]

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[47] On 16 May, Ms UIL's lawyer requested (by letter) from Mr YCH "a summary of the capital value of the estate at the present time, listing all of the property and, … current values", and "any information about the positions of the other beneficiaries".

[48] On 12 July 2016, Ms TSR's lawyer requested (by letter) further information from Mr YCH about [no. A].

[49] The Council wanted an indemnity from the owner of [no. B] for "remediation and preventative costs" which was not acceptable to him and Mr QSR as executors, or to Mr QSR who owned [no. B].

[50] Mr YCH, noted Ms TSR did not agree, and Ms BSR had not responded.

[155] Mr YCH says Mr QSR took independent legal advice from mid-May 2016. On 15 September 2016, Mr QSR's lawyer informed (by letter) Mr YCH of Mr QSR's claim against the estate, and requested the transfer of [no. A] to Mr QSR "at nil value". Mr QSR stated had he known Ms TSR and Ms BSR "would renege on what was agreed" he would not have agreed to the validation and probate of the 2013 will.

[156] On 28 March 2017, Mr QSR's lawyer proposed (by letter) "a pragmatic solution" to Mr QSR's claim, and on 4 April 2017, made demand (by letter) for payment of the amount claimed for Mr QSR's earthquake mitigation work on [no. A].[51]

[157] On 8 August 2017, Ms TSR's and Ms BSR's lawyer sent (by letter) a copy of the Court of Appeal quake outcasts decision to Mr YCH.[52] The beneficiaries reached a compromise on 22 September 2017 which included the sale of [no. A] by the estate to Mr QSR for $270,000 plus GST.[53]

(b) Discussion

Mr YCH

[158] Mr YCH says the boundary adjustment proposal, first put to CERA in December 2013, was primarily to remove potential liability from the owner of [no. B] for any rockfall onto [no. A] below, but also to provide legal access to [no. B].

[159] He says Mr QSR, who in 2014 had purchased [no. B] from Ms UIL, could see the benefit of the boundary adjustment, but [Mr YCH's] objective was to "maximise value" to the estate. He says for [no. A], this was "best" achieved by the boundary adjustment.

[160] Mr YCH says he did not advise Mr QSR about the boundary adjustment proposal, and was not acting for Mr QSR when, on 5 May 2016, he informed the other beneficiaries about Mr QSR's claim, and settlement proposal. He says Mr QSR, as owner of [no. B], was "aware he would have to pay" for the severance land.

[161] Mr YCH says his expectation was that CERA's offer for the purchase of the balance of [no. A] would be "pro rata the 2007 council valuation", and Mr QSR would pay "the difference" for the severance land.ZA

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[51] Mr YCH forwarded (by letter) that demand to Ms TSR on 13 April. Mr QSR's lawyer sent follow-up letters to the lawyers acting for each of Ms TSR, Ms BSR, and Ms UIL on 12 April 2017, and 2 June 2017.

[52] The Court of Appeal's quake outcasts decision required CERA to make "fresh offers" to purchase residential red zone land, including [no. A], for at least the 2007 rateable value of that land.

[53] Deed of Arrangement entered into by Mr QSR and Mr YCH (as Trustees), Ms TSR, Ms BSR, Mr QSR and Ms UIL.

[162] However, he says because CERA's only offer was received on 15 April 2016, the day before the CERA Act expired, he had no time to refer to the beneficiaries before acceptance. He rejects, as Ms TSR contends, that because CERA did not purchase [no. A] for the 2007 rateable value, he had "allowed a cash offer" of $535,000 for an estate asset "to devalue" to $50,000.

Ms TSR

[163] Ms TSR says it was not so much that she objected to Mr QSR purchasing [no. A], but she had her own history with the property. She says Mr ASR had told her that she, Ms BSR and Mr QSR "all ha[d] equal rights to buy estate assets".

[164] Ms TSR says by failing to sell [no. A] to CERA for the 2007 rateable value, $535,000, Mr YCH had "erod[ed]" [no. A]'s value, and in doing so "overwhelmingly improved" Mr QSR's position.

[165] She explains the rockfall damage to [no. A] caused by the earthquake only affected Mr QSR's sheds, located on [no. A] against the base of the cliff, and the cost of mitigation work included in Mr QSR's notice of claim had been met by Mr ASR.

[166] Ms TSR disagrees that the possibility of rockfall damage to [no. A] was the reason for the boundary adjustment. In her view the boundary adjustment "had nothing to do with the rockfall area" on [no. A]. She says it was a "fabrication" by Mr YCH to say otherwise. She says she did not know about the boundary adjustment proposal "until after the fact" when Mr QSR told Ms BSR in October 2015.

[167] She says Mr QSR and Mr YCH knew the outcome of the quake outcasts proceedings made it possible to sell [no. A] for the 2007 council valuation, but "were not interested" because Mr QSR would pay only $50,000 for the severance land.

[168] Ms TSR says she could not understand why Mr YCH did not know about the process for the acquisition of "red zoned" land by CERA. She explains she told Mr YCH and Mr QSR about the quake outcasts proceedings before Mr QSR purchased [no. B] from Ms UIL, but Mr QSR told her he could not afford to buy the severance land calculated on the 2007 council valuation.

Consideration

[169] Mr YCH stated in his submissions both to the Committee, and in support of his review application that his and Mr QSR's main reason for the boundary adjustment was

to remove any liability from the owner of [no. B] for damage caused to [no. A] below by any further rockfall.

[170] However, in my view, that is not consistent with Mr YCH's statement in his 5 May 2016 letter to the beneficiaries in which he spoke of the "uncertainty" concerning the earthquake insurance claim for [no. B], and the red zoning of [no. A].

[171] He said "[o]ne item of concern was the absence of a right-of-way easement over part [no. A] to provide access to [no. B] which CERA was "unwilling to allow", and the "topography [being] [un]favourable" for an alternative access.

[172] He explained CERA initially rejected "the possibility of a boundary adjustment" in December 2013, but two years later in November 2015 acknowledged that was possible. He said although CERA did not agree with the Council's subdivision consent conditions, he "expected th[at] issue can be resolved".

[173] He told the beneficiaries of that on 15 April 2016, "the last day for finalising an agreement with the Crown", he had received Quotable Value's valuation assessment for [no. A] of $50,000 which he said could be challenged because the purchase price "should be calculated as an apportionment of the 2007 rating valuation".[54]

[174] He said Mr QSR had given notice that [Mr QSR] would make a claim against the estate if the executors required [Mr QSR] "to pay the difference between the 2007 rating valuation and the purchase price" paid by CERA for part of [no. A].[55]

[175] He described the "dispute" among the beneficiaries as "contentious". He explained he could continue in his dual role as an executor/trustee, and estate lawyer, but could not provide the beneficiaries with legal advice. He said Mr QSR's settlement proposal was that the estate would receive $100,000 from the sale of [no. A] without having to reimburse Mr QSR for his earthquake mitigation work.[56] He said if agreement could not be reached then he and Mr QSR, as trustees, would seek legal advice about Mr QSR's claim.

[176] By mid-May 2016, Ms UIL, Mr QSR, Ms TSR and Ms BSR had all retained independent lawyers. On 7 June 2016, Mr YCH informed (by letter) the beneficiaries of Mr QSR's amended settlement proposal which, if not accepted, would lead to him and

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[54] As stated above this was $570,000 including a land value of $535,000.
[55] Mr QSR claim: (a) the cost of [Mr QSR] mitigation work, approximately $140,000, on [no. A], and (b) Mr ASR having failed to honour his promise made to Mr QSR to grant Mr QSR an option to purchase [no. A].
[56] (a) $50,000 from Mr QSR for the sale of the access land to him, and (b) $50,000 from CERA for the balance of [no. A].

Mr QSR, as executors, applying to the Court for consent to Mr QSR's settlement proposal.

[177] Although Mr YCH says the boundary adjustment proposal was his idea, no evidence has been produced that Mr QSR, an executor and a beneficiary, and from October 2014 also the owner of [no. B], did not support the proposal.

[178] At the very least Mr QSR would have been aware, more probable than not fully aware, of the boundary adjustment proposal.[57] He accompanied Mr YCH at the meetings with CERA. Mr YCH referred to him in correspondence to CERA as a representative of the owner, and then as a trustee. Mr YCH's 29 April 2014 letter to CERA referred to the 12 December 2013 meeting and "confirm[ed]" his and Mr QSR's "request … whether or not there could be a boundary adjustment … to reduce the red zone area".

[179] In his 9 December 2015 letter to CERA in which he reported progress with the boundary adjustment subdivision, Mr YCH referred to the 15 October 2015 on-site meeting when CERA told him and Mr QSR that "neither a boundary adjustment or any other options … suggested would be considered" at that time.

Conclusion

[180] With validation and probate of the 2013 will granted on 24 July 2014, Mr YCH, in his dual role as an executor, and the estate lawyer, was duty bound to administer the 2013 will under which Mr ASR gifted [no. B] to Ms UIL outright, and provided her with a life interest in the residue, which included [no. A], of [Mr ASR's] estate.

[181] Mr YCH acknowledges that duty required him to obtain the best return when realising the estate assets. However, from the information produced, without consulting Ms TSR and Ms BSR, commencing from December 2013 when he and Mr QSR first raised the boundary adjustment with CERA, Mr YCH concentrated on the boundary adjustment, and endeavoured to obtain CERA's agreement to purchase the balance of [no. A].

[182] Ms TSR says she first learned about the boundary adjustment proposal from Ms BSR almost 2 years later in October 2015. She refers to her 15 October 2015 email to Mr YCH in which she told him "allowing Mr QSR to negotiate with CERA, and to do a boundary change [was] a conflict of interest" because it "will benefit" Mr QSR "personally".

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[57] *Z v Dental Complaints Assessment Committee*, above n 42.

[183] Mr YCH informed the beneficiaries in his 5 May 2016 letter that the Quotable Value 15 April 2006 valuation of $50,000 for [no. A] "could be challenged on the basis of the 2007 rating valuation" which he noted was $570,000 (including land value of $535,000).

[184] Importantly concerning this issue, as I have noted, he informed the beneficiaries that the absence of legal access for [no. A] was an "item of concern" which, by implication, the boundary adjustment would resolve. Mr YCH made no mention in that letter of potential liability for the owner of [no. B] for any future rockfall onto [no. A].

[185] Apart from that letter, no evidence has been produced by the parties of advice provided by Mr YCH to Mr QSR, in Mr QSR's capacity as an executor, of the options open to dispose of [no. A], including the sale of the whole of [no. A] to CERA, and how that might be achieved.

[186] Although Mr YCH contends he was not advising Mr QSR in Mr QSR's capacity as a beneficiary, in my view that ignores the obvious benefit of the boundary adjustment to Mr QSR who, as I have noted, from October 2014 owned [no. B].

[187] In my view, by focusing on the boundary adjustment proposal as the only way to realise [no. A] as an estate asset, Mr YCH, in contravention of r 6, and r 6.1 became conflicted in his professional duties owed to Mr QSR as an executor, to administer Mr ASR's assets in accordance with the 2013 will, with his professional duties owed to Mr QSR, in Mr QSR's capacity as a beneficiary who, from October 2015, was in dispute with Ms TSR, and Ms BSR about that proposal.

[188] Finally, concerning this issue, I make the observation that r 6.1.2 of the Rules requires that "if a lawyer is acting for more than 1 client in respect of the matter and it becomes apparent the lawyer will no longer be able to discharge the obligations owed to all of the clients", then the lawyer "must immediately inform each of the clients of this fact and terminate the retainers with all of the clients".

[189] Mr QSR retained an independent lawyer from mid-May 2016. Although that ought to have prompted Mr YCH to cease acting for the estate, he does not appear to have informed the beneficiaries of that intention. On 7 June 2016, the date CERA cancelled the CERA agreement, Mr YCH informed the beneficiaries of his and Mr QSR's intention to apply to the Court for consent to sell [no. A] to Mr QSR if the beneficiaries could not agree.

[190] From the information produced, Mr YCH's attendances from that point seem to have been confined to receiving a demand from Mr QSR's lawyer which he forwarded to

Ms TSR. For that reason, although I consider by not ending his retainer with the estate from mid-May 2016 at the latest Mr YCH contravened r 6.1.2, in view of the adverse findings I have already made, I consider it unnecessary to make a further adverse finding against him.[58]

(4) Keep informed – issues (d), (e)

[191] The next question is whether Mr YCH owed the beneficiaries a duty to inform them about the administration of the estate, in particular, the proposed boundary adjustment? If so, whether he did inform them?

(a) Parties' positions

Ms TSR

[192] Ms TSR claims Mr YCH, as an executor, and the estate lawyer, although having "responsibility for advice and actions" concerning the disposal of [no. A], did not provide advice to her and Ms BSR about that matter.

Mr YCH

[193] Mr YCH acknowledges he had a duty to inform the beneficiaries about the boundary adjustment proposal which he considers he satisfied in his 5 May 2016 letter to them.

(b) Estate lawyer

[194] There is a "general reluctance" by the Courts in "extending solicitor's duties to third parties" largely because there is no "direct client relationship" between the beneficiaries and the estate lawyer.[59] For that reason, a beneficiary may ask the estate lawyer to do something, but cannot instruct a lawyer to do so.[60]

[195] Other than the professional duties of a broader nature contained in the Rules, and the professional duty of "integrity, respect and courtesy" owed to third parties, a lawyer acting in the administration of an estate would normally not owe beneficiaries the same professional duties he or she owed to the lawyer's executor client.[61]

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[58] s 138(2) of the Act; letters Mr YCH to the beneficiaries, 7 June 2016, to Ms TSR, 13 April 2017.
[59] *Davis v Mancer* [2015] NZHC 3005 at [26]. See discussion in *SY v LT* LCRO 1/2018 (17 December 2019) from [72].
[60] *SY v LT* at [80].
[61] Professional duties include the duty "to uphold the rule of law and to facilitate the administration of justice" (r 2) which reflects the fundamental obligation in s 4(a) of the Act; "[t]he overriding duty

[196] The Lawyers and Conveyancers Disciplinary Tribunal has similarly observed that although an estate lawyer does "not have an obligation to formally report to the beneficiaries", it is "accepted practice" for an estate lawyer "to have shown the beneficiaries courtesy and to have kept them advised of progress in collecting and realising the assets in which they clearly had an interest". The lawyer's failure to do so in that decision constituted unsatisfactory conduct.[62]

(c) Dual role – estate lawyer/executor

[197] By definition the interests of an executor differ from those of a beneficiary. Because an executor is sworn to "faithfully execute the will … in accordance with the law", for that reason the executor's interests in the estate may not necessarily align with a beneficiary's interests, actual or intended.[63]

[198] The fiduciary duties owed by an executor to beneficiaries include (a) acting in good faith and in the beneficiaries' best interests, and even-handedly treating them (b) reporting to the beneficiaries, (c) keeping proper records, and (d) acting in a timely way.[64]

[199] It does not necessarily follow that the conduct of an executor, who is also the estate lawyer, falls within the professional obligations and duties prescribed in the Act and the Rules. There is, however, "a heavy onus" on the lawyer "to show that the conduct complained of did not have a connection with [his or her] status as a lawyer and the client could not reasonably have thought he [or she] was acting as a lawyer."[65]

[200] To determine into which category the work of a lawyer acting in a dual role falls, an examination of the nature of the work carried out by the lawyer in each role is required.[66] One helpful point of differentiation is that a lawyer advises executors and trustees whether a proposal is lawful or not, but does not decide the matter.[67]

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of a lawyer…as an officer of the court" (r 2.1); not to "attempt to obstruct, prevent, pervert, or defeat the course of justice" (r 2.2); the duty to "promote and maintain proper standards of professionalism in the lawyer's dealings" (r 10).

[62] *Auckland Standards Committee v Johnston* [2011] NZLCDT 14 at [23]; this is reflected in r 12 referred to below.

[63] High Court Rules 2016, r 27.4 and form PR1.

[64] *Sadler v Public Trust* [2009] NZCA 364: an executor's duty of even-handedness can extend to potential claimants against an estate.

[65] *Morpeth v Ramsey* LCRO 110/2009 (12 November 2009) at [28].

[66] *LCRO 291/2014* at [31] to [33] (not published publicly), citing *TE v Wellington Standards Committee* LCRO 100/2010 (1 February 2013); *Shrewsbury v Rothesay* LCRO 99/2009 (November 2009) at [31].

[67] *Hansen v Young* [2004] 1 NZLR 37 (CA) at [33]–[36], referring to *Dubai Aluminium Company Limited v Salaam* [2003] 1 All ER 97 (HL) at [134]; the principle in *Hansen* is cited in *AW v ZK* LCRO 230/2012 (28 March 2014) at [39].

[201] In a matter considered by the Disciplinary Tribunal the lawyer concerned, who was also a trustee, argued he was not providing legal services and therefore was not subject to the disciplinary process. However, the Tribunal held the lawyer "[could] not hide behind his "trustee hat" while also performing legal services for the trusts and the relevant estates, and "not attending to the various breaches of trust involved by his serious negligence".[68]

(d) Discussion

Ms TSR

[202] Ms TSR says in October 2015, the boundary adjustment was already underway when Mr QSR told Ms BSR about it. She says on 7 June 2016 she forwarded information to Mr YCH about "red zoned" properties.

Mr YCH

[203] Mr YCH submits that when acting for the estate in his dual role on the disposal of [no. A] he complied with his professional obligations and duties.

[204] His position is that he "promot[ed]" all of the beneficiaries' interests in his negotiations with CERA and "treated" them all "equally". He says Mr QSR had discussed the boundary adjustment proposal with Ms TSR and Ms BSR. He says by May 2016, Mr QSR, Ms TSR and Ms BSR were all being independently advised.

Duty to third parties

[205] The professional rules in the Rules conveniently fall into three broad categories. First, those rules which directly concern the provision of legal services by lawyers to their clients;[69] secondly, those rules which concern lawyers' dealings or interactions with other lawyers, and third parties; and thirdly, those rules which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.[70]

[206] Rule 12, referred to earlier, requires that a lawyer must, when "acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy". As such, r 12 sits in the second category of the

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[68] *Waikato Bay of Plenty Standards Committee No 1 v Campion* [2019] NZLCDT 20 at [64].
[69] See also s 4 of the Act, lawyers' fundamental obligations, include (at s 4(b)): "be independent" when acting for their clients; (at s 4(c)) "… act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients".
[70] Section 4(a): "uphold the rule of law and facilitate the administration of justice in New Zealand"; … s 4(d) "protect [clients'] interests" subject to "overriding duties as officer[s] of the High Court".

Rules which includes lawyers' dealings or interactions with third parties. This includes beneficiaries who are not an estate lawyer's clients.[71]

[207] Illustrations of contraventions of r 12 include a lawyer's manner of communications, and not responding to letters received from another lawyer engaged by the complainants.[72]

Legal Services

[208] As noted above, if a lawyer who performs the dual role of estate lawyer and executor is to avoid the disciplinary reach of the Act, the lawyer's conduct must be unrelated to the provision of legal services by the lawyer.[73]

[209] On 22 January 2014, Mr YCH explained to the beneficiaries that the fact [no. A] was underinsured, and "red stickered" was an impediment to "a proposed compromise" of their differences concerning the division of assets.

[210] During the remainder of 2014, and 2015, he reviewed the Supreme Court's quake outcasts decision, met and communicated with Mr QSR and CERA representatives, and arranged for the preparation of, and lodged a subdivision plan for the boundary adjustment with the Council for consent.

[211] However, from the information produced, apart from reference in his 8 April 2014 letter to his and Mr QSR's meeting with a CERA representative on 15 December 2013, there was a two-year gap until 5 May 2016 before he next reported to the beneficiaries that, amongst other things, he and Mr QSR, as executors, had sold part of [no. A] to CERA.

[212] No evidence has been produced that Mr YCH responded to Ms TSR's 15 October 2015 email in which she told him she considered the boundary adjustment favoured Mr QSR.

[213] In my view, Mr YCH's attendances, which I have described concerning this aspect of Ms TSR complaint, including his negotiations with CERA, his arrangements made for the preparation and lodging of a subdivision plan, his communications with the

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[71] A lawyer's duties to keep a client informed are contained in rr 3.2, 7.2 (respond to inquiries); 3.3 (inform of any material or unexpected delays); 7 (promptly disclose information); 7.1 (keep informed, consult).

[72] *EO v VO* LCRO 240/2010 (3 August 2011) at [7] and [49]. Rule 10.1 which requires that "[a] lawyer must treat other lawyers with respect and courtesy" was perhaps the relevant rule where the lawyer had not responded to another lawyer's correspondence – in this regard see *IO v SJ* LCRO 84/2010 (February 2012).

[73] *Morpeth v Ramsey* LCRO 110/2009 (12 November 2009) at [20].

Council, with CERA and its lawyers, and the receipt and review of CERA's offer were largely, if not wholly, of a legal nature.

Conclusion

[214] Ms TSR says Mr YCH did not provide information to her and Ms BSR about the disposal of [no. A].

[215] She says Mr YCH, and by implication Mr QSR, as an executor, did not, to Mr QSR's advantage, and conversely to her and Ms BSR's disadvantage, obtain the best price for [no. A]. She said Mr YCH made "[no] effort" to either "get" the beneficiaries "together and negotiate", or "mediat[e]".

[216] Following the approach taken by the Disciplinary Tribunal in the decision referred to above, I consider that Mr YCH's professional obligations and duties required him to extend to Ms TSR, and Ms BSR, the courtesy of keeping them informed of progress with the realisation of [no. A].

[217] In arriving at that conclusion, I also take into account (a) the importance to the beneficiaries of the disposal of [no. A] in the overall administration of the estate, and (b) Ms TSR history with that property.

[218] Mr YCH has not suggested that his legal work on that matter, which I have described, was not subject to the Act, and the Rules. In my view, by not keeping Ms TSR informed about the boundary adjustment proposal, in contravention of r 12, Mr YCH failed in his duty owed to Ms TSR to extend her "integrity, respect, and courtesy".

(5) Fees – issue (e)

[219] Ms TSR stated in her complaint that she considered Mr YCH's legal services were "far below the professional standard expected in a fiduciary role". However, Ms TSR said until she received details about his fee invoices issued to the estate, other than that comment it was not possible for her to add anything further at that time.

(a) Invoices

[220] Mr YCH issued ten invoices to the estate for his attendances (a) obtaining the validation and probate of the 2013 will, and (b) thereafter estate administration which included his work concerning the proposed boundary adjustment, and the proposed sale of the balance of [no. A] to CERA. The total of his fees billed was $56,500 plus GST and disbursements.

Validation, probate

[221] Mr YCH's first invoice, (1) 12 May 2014, $11,000 (fee) plus GST largely appears to have concerned his advice to the beneficiaries, obtaining property valuations, meeting with CERA, instructing counsel to prepare, and filing the application to validate the 2013 will.[74]

[222] Having obtained probate of the 2013 will, Mr YCH invoiced the trustees on (2) 24 November 2014, $9,300 (fee) plus GST. This also included attendances concerning validation and probate of the 2013 will, transmission of estate properties, transfer of [no. B] to Ms UIL, and CERA attendances concerning the red zoning of [no. A].

Administration

[223] Mr YCH's subsequent invoices issued to the trustees entitled "Estate Administration" were (3) 16 March 2015, $5,100 (fee) plus GST – includes "CERA offer to purchase [no. A]"; (4) 27 July 2015, $2,700 (fee) plus GST – includes "reviewing judgment of Supreme Court in relation to CERA offer"; (5) 16 November 2015, $2,800 (fee) plus GST – includes "corresponding with CERA in relation to [no. A]"; (6) 9 May 2016, $3,900 (fee) plus GST; (7) 12 July 2016, $5,700 (fee) plus GST; (8) 24 January 2017, $5,500 (fee) plus GST – includes "arranging updated valuation of [no. A]".

Disposal of [no. A]

[224] He issued two separate invoices concerning "CERA - [Property A]", (9) 9 May 2016, $7,100 (fee) plus GST; (10) 12 May 2017, $3,400 (fee) plus GST. As noted above, attendances concerning [no. A] were referred to in the narrations of some of Mr YCH's other invoices.

(b) Standards Committee

[225] Although Mr YCH provided copies of his fee invoices and corresponding time records to the Lawyers Complaints Service, the Committee did not delegate to a cost assessor, or undertake itself, the task of assessing whether Mr YCH's fees were, as required by r 9 of the Rules, fair and reasonable both to the estate and to himself taking into account the fee factors in r 9.1.

[226] Having determined Mr YCH had failed to adequately address the implications of the boundary adjustment in the disposal of [no. A] to CERA, the Committee decided

[74] Mr YCH 24 November 2014 invoice was issued before the grant of probate of the 2013 will on [redacted].

to order a refund of Mr YCH's fee of $7,100 plus GST in his 9 May 2016 invoice, on the grounds that the fee "almost exclusively relate[d]" to the boundary adjustment. The Committee stated this "highlight[ed] the conflict that operated through Mr YCH acting for both the [e]state and [Mr QSR]".

(c) Discussion

[227] I have found that Mr YCH, in contravention of r r 6, and 6.1 of the Rules, was conflicted in his duties when (a) advising the beneficiaries in respect of his and Mr QSR's desire to apply for validation of the 2013 will, and (b) pursuing the boundary adjustment proposal with CERA. I also found that in contravention of r 12, Mr YCH failed to inform the beneficiaries of progress concerning the realisation of [no. A].

[228] Having made those findings, the further question arises to what extent Mr YCH's fees were properly chargeable to the estate.

[229] As a beneficiary of the estate, Ms TSR is entitled to make a complaint about Mr YCH's fees.[75] However, although the Committee ordered him to refund his fees charged in his 9 May 2016 invoice, the parties were not provided with the opportunity to address Ms TSR's overall complaint about all of Mr YCH's fees in his invoices issued to the estate at the Committee stage.

[230] For that reason, I have decided that the appropriate course is to return to the Committee the task of assessing all of Mr YCH's invoices for the purpose of determining whether, in view of my findings, his fees, as required by r 9, were fair and reasonable for the services provided having regard to the interests of the estate, and Mr YCH, and having regard also to the factors set out in rule 9.1.

Decision

[231] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed as to the finding of unsatisfactory conduct but modified by providing that Mr YCH:

(a) By acting for (i) Mr QSR, in Mr QSR's capacity as an executor, and (ii) the beneficiaries from 26 July 2013 to 27 November 2013, contravened r 6, and r 6.1 which constitutes unsatisfactory conduct under s 12(c) of the Act.

[75] Sections 132(2) and 160 of the Act.

(b) By acting in his dual role as executor and estate lawyer, as well as for Mr QSR, as a beneficiary, in respect of the boundary adjustment proposal from 24 July 2014 when probate was granted for the 2013 will until mid-May 2016 when Mr QSR retained an independent lawyer, contravened r 6, and r 6.1 which constitutes unsatisfactory conduct under s12(c) of the Act.

(c) By not keeping Ms TSR informed, particularly in respect of the boundary adjustment proposal from December 2013 until Mr YCH's 5 May 2016 letter to the beneficiaries, contravened r 12 which constitutes unsatisfactory conduct under s 12(c) of the Act.

[232] Pursuant to s 209(1)(a) of the Act, the Committee is directed to reconsider and determine whether, in view of my findings, Mr YCH's fees in his invoices issued to the estate were, as required by r 9, fair and reasonable for the services provided having regard to the interests of the estate, and Mr YCH, and having regard also to the factors set out in r 9.1.

Orders

[233] Having arrived at the same result as the Committee, albeit by a different route, and made findings of unsatisfactory conduct, section 156 of the Act includes among the orders that a Standards Committee can make, orders in the nature of penalty. In this regard, the functions of penalty in the disciplinary context have been considered by the Court of Appeal as:[76]

(a) punishing the practitioner;

(b) a deterrent to other practitioners; and

(c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[234] The starting points for penalty are the seriousness of the conduct and culpability of the lawyer concerned. Mitigating and aggravating features, as applicable, are also taken into account. Acknowledgement by the lawyer of error, and acceptance of responsibility are matters to be considered in mitigation.

[76] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].

(a) Fine

[235] A fine is one of the orders a Standards Committee, or this Office on review, can make. The maximum fine available is $15,000.[77] Concerning an appropriate fine, the observation has been made that where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, regulations or the Act) and a fine is appropriate, a fine of $1,000 would be a proper starting place in the absence of other factors.[78]

[236] The Committee ordered a fine of $3,000 for Mr YCH's failure "to adequately address the implications of the boundary adjustment for the CERA process" in respect of which the Committee said the estate had incurred "[a]dditional costs" which included the resource (subdivision) consent application to the Council, and Mr YCH's 9 May 2016 fee of $7,100 plus GST. In the Committee's view, those costs "highlighted the conflict" Mr YCH had "acting for both the Estate and MT [QSR]".

[237] As did the Committee, I have found, particularly from October 2014, with the prospect of the balance of [no. A] being in separate ownership (be it CERA, or another purchaser), the acquisition of the severance land, which included the access land, was important to Mr QSR.

[238] From as early as October 2015, when told about the proposed boundary adjustment, Ms TSR signalled to Mr YCH that in his dual capacity as an executor, and the estate lawyer she considered he had a conflict of interest by pursuing the boundary adjustment proposal which she regarded as benefiting Mr QSR personally.

[239] Mr YCH did not respond to Ms TSR as she requested. Instead, having been informed by CERA on 16 November 2015 that it would consider a boundary adjustment, Mr YCH had a subdivision plan prepared and lodged with the Council for approval, and on 15 April 2016, accepted CERA's conditional offer to purchase the balance of [no. A] for $50,000.

[240] For these reasons I have decided that a fine of $3,000 is appropriate.

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[77] Section 156(1)(i).
[78] *Workington v Sheffield* LCRO 55/2009 (26 August 2009) at [68].

(b) Compensation

[241] Ms TSR seeks compensation from Mr YCH by way of reimbursement of her legal expenses incurred with an independent lawyer which she claims was due to Mr YCH's conduct.

[242] Section 156(1)(d) provides:[79]

> Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner … [it may] order the practitioner … to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000].

[243] The section provides that the person who seeks compensation must have "suffered loss by reason of any act or omission of [the lawyer]". There must therefore be a clear "causative link" between Mr YCH's conduct and the loss claimed by Ms TSR.

[244] As observed by the Committee, it is not unusual for a beneficiary of an estate in dispute with the executors/trustees, or other beneficiaries, to obtain independent legal advice. Ms TSR and Ms BSR consulted another lawyer during July 2015. Having received Mr YCH's 5 May 2016 letter to the beneficiaries referred to earlier, Ms TSR instructed her own lawyer. It was another year before Ms TSR and Ms BSR's dispute with QSR was settled.

[245] From the information produced, the differences between Ms TSR and Ms BSR on the one hand, and Mr QSR on the other about how to distribute Mr ASR's assets predate Mr YCH's involvement as executor, and estate lawyer. I do not consider there is a sufficient causal link between his conduct and the legal expenses Ms TSR incurred.

(c) Orders

[246] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) Reversed as to the Committee's order that Mr YCH refund his fee invoice dated 9 May 2016 of $7,100 plus GST. (s 156(1)(g))

[79] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

(b) Confirmed as to the Committee's order that Mr YCH pay to the New Zealand Law Society the sum of $3,000 by way of a fine to be paid within 30 days of the date of this decision. (s 156(1)(i))

(c) Confirmed as to the Committee's order that Mr YCH pay to the New Zealand Law Society the sum of $1,500 by way of costs to be paid within 30 days of the date of this decision. (s 156(1)(n))

Review costs

[247] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. Pursuant to s 210(1) of the Act it follows that Mr YCH is ordered to pay costs in the sum of $1,600 to the New Zealand Law Society within 30 days of the date of this decision. Pursuant to s 215 of the Act, I confirm that the money orders made by me may be enforced in the civil jurisdiction of the District Court.

(d) Anonymised publication

[248] 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.

DATED this 30TH day of September 2020

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B A Galloway
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 YCH, as the Applicant
Mr XDE/Ms OPL as Representatives for the Applicant
Ms TSR as the Respondent
Ms MNH as the Representative for the Respondent
Mr RTG as a Related Party
[Area] Standards Committee [X]
New Zealand Law Society