

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

QW

Applicant

AND

RH

Respondent

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

DECISION

Introduction

[1] Mr QW has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning the conduct of Mr RH.

Background

[2] Mr RH acted for Mr QW's brother BN. BN made a will. When he died, Mr RH and BN's widow were appointed as trustees and executors under the will, and as trustees of trusts established pursuant to the terms of the will. The estate was substantial.

[3] Mr QW has been represented by lawyers, most recently, Mr KN.

[4] Mr QW is broadly critical of the way in which Mr RH has undertaken his duties as a trustee on BN's instructions. He says Mr RH has used his legal skills and knowledge of the affairs of BN and others to the detriment of Mr QW and other

beneficiaries, in particular his mother. Mr QW laid a complaint to the New Zealand Law Society (NZLS).

Complaint

[5] Mr QW says Mr RH was professionally responsible for:

- (a) Assisting with the preparation of BN's last will;
- (b) Assisting with the preparation and execution of the Trust A as the beneficial owners of 90 per cent of Company 1 at the time of BN's death;
- (c) Assisting with the preparation and execution of the Trust B as the beneficial owners of 10 per cent of Company 1 at the time of BN's death;
- (d) Assisting with the preparation for final sale of Company 1 and distribution of funds said to exceed NZ\$1.2 billion;
- (e) Negotiating with the QW family for sign off to not contest BNs will, and the terms of settlement and distribution where those have occurred of additional funding for several members of the QW family;
- (f) Ongoing management of trust issues, beneficiaries and investments.

[6] Mr QW objects to Mr RH restricting access to information about the trusts and their activities, and to the way in which he has carried out his duties as a trustee. Mr QW says Mr RH has abused the trust reposed in him by BN, and exploited his position to his own advantage. He refers to promises made and betrayed, that Mr QW believes would have saved him from bankruptcy.

[7] Mr RH is said to have failed to comply with undertakings and promises, breached the trusts reposed in him, failed to act in a manner consistent with what BN would have wanted, betrayed the trust and confidence reposed in him by BN, and misapplied trust money. Mr QW says he was the "only member of the QW family who did not receive any income stream" from BN's estate. Mr QW mentions delays and reductions in payments made to beneficiaries, his mother in particular.

[8] Mr QW alleges Mr RH breached his duty as trustee, by significantly reducing payments to his mother, and preferring the interests of other beneficiaries by continuing distributions to them at the previous levels.

[9] Mr QW objected to his mother having to seek approval for payments from the trustees before funds would be released to cover her expenses. Mr QW refers to health and financial difficulties his mother has faced which he considers could have been assisted by the trustees' generosity in distributing more of the trust's funds to her. Mr QW says Mr RH removing his mother's financial autonomy simply because she had elected to support Mr QW was "unbecoming, deeming [sic demeaning], and unacceptable" and an act of cowardice that requires immediate correction.

[10] Mr QW says that his mother had to endure more than two years of "pain, stress, and humiliation" at Mr RH's hands. He says she lost a substantial amount of income, self-esteem, financial freedom, lifestyle, and her stress levels have increased. Mr QW says Mr RH has abandoned his mother, as, apparently, have other family members. Mr QW describes Mr RH's treatment of his mother as "punishment", and says other family members are fearful of challenging Mr RH in case he also punishes them in the same way.

[11] Mr QW said his mother has had her own lawyer.

[12] Mr QW says that in 2009 Mr RH undermined a transaction with BANK to the detriment of the QW family, leaving his mother in a difficult financial position, then refused to assist with financial support to meet her consequent legal costs. The transaction was a proposed sale of a property owned by Mr QW, to his mother. It appears Mr QW may have intended to apply the sale proceeds to reduce his debts, and perhaps those of Company 2, before he was declared bankrupt.

[13] Mr QW is critical of Mr RH for a lack of objectivity, and alleges Mr RH has "misappropriated" funds from Trust A and Trust B, thereby frustrating BN's wishes.

[14] Mr QW provided various correspondence and documents in support of his complaint, including a copy of an acknowledgement apparently signed by him personally and as a director of Company 2 in November 2006. It appears from that document that Mr QW agreed to withdraw a claim of over US\$6 million against BN's estate. The withdrawal referred to a letter signed by Mr RH on behalf of the trustees and executors of BN's estate dated 20 November 2006. In that letter Mr RH confirmed the withdrawal arrangements would satisfy all of Mr QW's entitlements under the will.

[15] Mr QW also provided copies of his records of his discussions with BN's widow, and correspondence between and on behalf of Mr QW's mother and the trustees of Trust A and Trust B pleading her case for an increase in the amount of distributions to

her from trust funds. Litigation was threatened and mention was made of claims by creditors against Mr QW.

[16] Further to his complaint, Mr QW confirmed to NZLS that he was not a beneficiary and not entitled to trust documents. He maintained his view, however, that if BN had still been alive, he would have helped him out financially.¹

[17] In his letter of [Date] to NZLS Mr QW alleges Mr RH has acted without honesty and integrity in his capacity as executor and trustee. He alleges criminal wrongdoing, saying Mr RH has privileged his own economic and financial interests over his moral obligations and duty, and questions whether his actions as an executor were appropriate to a lawyer, holding a practising certificate. Mr QW says both trustees have “received financial rewards” from the trusts “that cannot be accounted for when Trustee fees are considered”. Mr QW describes receipt of over NZ\$100 million resulting from the sale of shares in Company 1, which passed into the ownership of the trustees of the trusts. He describes this as not legally or ethically appropriate, although this concern appears to misconceive the distinction between legal and beneficial ownership.

[18] Mr QW says Mr RH gave undertakings as a lawyer, not as an executor and trustee, and makes arguments about the integrity of the release he signed surrendering any rights he may have had under BN’s will. He says Mr RH was negotiating with him in his capacity as a lawyer, not as an executor or trustee, and his decision not to contest BN’s will was made without sufficient information. He lacks information, he says, because Mr RH would not disclose it. Mr QW describes Mr RH’s negotiating strategy as “strong arm tactics”. It is apparent Mr QW made the concessions he did at a time when he and his business interests were under some financial pressure. It later emerged that around the time he conceded his interests in BN’s estate he was assisted in his negotiations with Mr RH by Mr ZA. Mr ZA was initially a barrister who represented Company 2 in various matters, and later became a director of Company 2 at Mr QW’s request.²

[19] Mr QW says Mr RH has not given effect to the terms of an agreement reached between the trustees and some members of the family, and suggests Mr RH concluded agreements without the other trustee’s consent. Mr QW alleges Mr RH has acted as a lawyer in a situation of conflict of interest between his clients, and various family members. Mr QW says members of the family relied on Mr RH because he was lawyer, but he reneged on the promises he made. Mr QW says there is an “intimate

¹ Letter QW to NZLS ([Date]).

² Brief of evidence of ZA dated [Date] at [65].

relationship” between Mr RH and BN’s widow which “appears not to be consistent with two trustees taking individual decisions”. Mr QW says Mr RH needs to be brought to account, his conduct as a solicitor has a direct influence on payments due and the policies that the trustees have employed.³

[20] Mr QW provided copies of correspondence, including a letter from Mr DS to his mother, dated [Date], explaining that BN’s widow was not prepared to give assistance to Mr QW via his mother, and that it was not acceptable for him to pressure her in the hope of getting help from BN’s widow. It appears there was a reluctance on the trustees’ part to pay money to Mr QW only for it to be swallowed up by his creditors. Mr QW’s mother was urged to amend her will so that her assets, too, did not end up in the hands of Mr QW’s creditors. The only condition the trustees imposed on continuing to make substantial payments to Mr QW’s mother was that the money did not end up with Mr QW.

[21] A copy of a letter from Mr ZA and Mr DS dated [Date] to BN’s widow records that Mr QW formally withdrew all claims regarding the US\$6 million, and refers to an arrangement whereby the QW family recognised that various financial arrangements involving them did not include Mr QW, whose position was said to be separate.

[22] Further correspondence from Mr QW escalates the allegations to include allegations of fraud by Mr RH on the basis of transactions apparently carried out in his capacity as trustee. He repeats his concerns, including conflict of interest, Mr RH’s part in negotiating and documenting settlement of Mr QW’s claims on BN’s estate, and the trustees’ treatment of Mr QW’s mother.

Practitioner’s response

[23] Counsel for Mr RH responded, submitting that the complaint raises matters that were outside the Committee’s jurisdiction, or should first be determined in other fora. Mr RH does not accept there is a relevant factual basis for any of the complaints Mr QW has made. Emphasis is placed on the limits the Act provides, in that it regulates the conduct of lawyers acting in the capacity of lawyer. It is noted that Mr RH did not act for Mr QW, his mother, or his companies at any time. It is submitted that all issues arise from Mr RH’s involvement as executor and trustee in BN’s estate, and then of trusts established pursuant to the will.

³ Letter QW to NZLS ([Date]).

[24] Counsel submits Mr QW's complaint is an attempt to obtain advantages through the use of the complaints process. The distinction between a lawyer acting as a trustee or executor, and a lawyer acting as a lawyer is emphasised, with reference to *Young v Hansen* [2004] 1 NZLR 37, 27 – 36. It was noted that the disciplinary process may still apply if a lawyer's conduct as trustee and executor was "egregious".

[25] Counsel refers to concerns expressed by Mr QW over the administration of BN's will and the trusts; negotiation and settlement of Mr QW's claims against BN's estate; payments made, reduced, and not made by the trustees. Reference is also made to Mr RH's discussions over the BANK debt in respect of which Mr RH firmly denies representing that he was acting for either Mr QW or his mother.

[26] Counsel submits the complaint should be determined either by jurisdiction being declined, or pursuant to s 138 of the Act.

The Standards Committee decision

[27] The Standards Committee delivered its decision on [Date]. It traverses the issues Mr QW has raised, recognises the arguments put forward by Mr RH and records the Committee as having decided that further action on the various concerns raised by Mr QW in his complaint was not necessary, pursuant to s 138(2) of the Act.

[28] The Committee did not consider there was any evidence of Mr RH's professional conduct having fallen below a proper standard, and was of the view that the bulk of the allegations related to him carrying out his duties as a trustee.

[29] Mr QW disagrees with the decision and has applied for a review.

Application for review

[30] Mr QW filed an application for review on [Date], seeking a "correction" of the decision, and saying that "as discussed and agreed, supporting documentation will be forwarded shortly. Copies of documentation provided to the NZLS or attached to the accompanying emails". Mr QW attached correspondence from the complaints process, and letters regarding the trusts and various alleged acts and omissions on Mr RH's part.

[31] The analysis provided by Mr QW proceeds on the basis that "it can reasonably be assumed by any reader of [correspondence from Mr RH] that he was writing in his capacity as a lawyer and conveying the instructions that he as a lawyer had received

from himself and Mrs BN QW as executors, or trustees". That proposition is supported by the fact that Mr RH's correspondence was sent from the firm's email address, and on the firm's letterhead, and that cheques were issued from the firm's trust account. Mr QW refers to Mr RH "wearing two hats" and difficulties in distinguishing which hat he was wearing at any particular time. He refers to examples in the correspondence of Mr RH specifically referring to actions in his capacity as executor, and the conflation of his two roles.

[32] Mr QW refers to apparent authority, and Mr RH holding himself out as being able to bind the trustees then recanting, and not acting in good faith towards Mr QW.

[33] Mr QW describes omissions, inaccuracies and assumptions in the decision, and surmises the Committee may not have carefully considered all of the materials available to it. He refers to his own expectations of the benefits to which he considers himself entitled pursuant to BN's will and the trusts. He contends that Mr RH misled him into settling, at significant personal cost, and repeats the allegations about Mr RH having a close personal relationship with BN's widow such that he should step aside any activities as a lawyer involving the QW estate and trusts.

[34] Mr QW advised that Mr YC was instructed, and sought directions.

[35] Mr QW maintains the position that his mother always believed that she was speaking to Mr RH not as a trustee, but as a lawyer.

Mr RH's reply

[36] Mr BL was instructed to represent Mr RH. On Mr RH's behalf it was submitted on [Date] that there was no merit to Mr QW's review application, and it should be dismissed without delay. No further inquiry or investigation was said to be necessary, and a timetable was proposed to enable the review to be determined without a review hearing.

[37] In advance of the hearing on [Date], submissions were filed on behalf of Mr RH dated [Date] updating the position, particularly with respect to a proceeding brought by Mr QW's mother which had settled with the trustees' consent. Mr RH says no undertaking to provide financial support to Mr QW or his mother was given by the trustees. He says he could not have given, and did not give, any such undertaking in any other capacity. He says he could not provide information sought by Mr QW because he was bound by the trust deeds to keep their details confidential.

[38] Mr QW has challenged the trustees' refusal to disclose information in the High Court and taken that decision to the Court of Appeal. At the date of this decision, the parties await a decision on Mr QW's most recent appeal to the Supreme Court.

[39] The allegation of conflict of interest between the trusts and BN's widow is addressed by counsel for Mr RH on the basis that if there were a conflict, it is not for Mr QW to raise the allegation, or to raise it for the first time on review.

[40] The BANK issue is addressed on the basis that Mr QW's mother's legal costs were a discussion point between her and the trustees: there was no undertaking that the trustees would meet those costs.

[41] The allegation of misappropriation of trust funds by Mr RH is addressed on the basis that it lacks evidential support, and that the allegation cannot be properly addressed through this process of review.

[42] Mr RH's position is that the decision to take no further action is correct and should be confirmed.

Review Hearing

Requests for Adjournment

[43] Mr QW has declined to consent to this review being determined in his absence, and has protested the timing of the review hearing. Mr QW has expressed the view that this Office has favoured Mr RH's interests over his by declining his repeated applications for adjournment and proceeding with a review hearing, in his absence on [Date]. What follows explains the reasons for determining the review in Mr QW's absence without his consent.

[44] By [Date] Mr RH had consented to this review being determined in his absence. Mr QW did not so consent. The LCRO directed a review hearing be scheduled with both parties in attendance. The parties were notified by letter dated [Date] that a review hearing would be scheduled in due course, but that there were likely to be delays. Scheduling correspondence for Mr RH was copied to Ms VW, Mr BL's instructing solicitor, as well as to Mr BL.

[45] This Office proposed that Mr QW attend remotely because he said he was living overseas. Mr QW declined, saying he did not think he could properly present his case without attending in person and he wanted to be represented.

[46] Unsuccessful attempts were made to organise a hearing at a time when all parties would be available in 2015. Mr QW was asked to advise this Office if his travel plans changed so that it might be possible to schedule a hearing.

[47] In [Date], so that a hearing could be scheduled at a time he was in New Zealand, Mr QW offered to provide an accurate arrival time. On [Date] he did so. In his email to this Office of [Date] Mr QW said “I confirm that I will return to NZ on the [Date] for two weeks”.

[48] On the basis it was within the range Mr QW had indicated he would be in New Zealand so could attend a hearing, and Mr RH could attend a hearing, a hearing was scheduled for [Date].

[49] Notices of Hearing were issued on [Date].

[50] Unfortunately, it appears Mr QW had not checked on Mr KN's availability before he confirmed he would be available to attend a review hearing in the two weeks after [Date]. After receiving the Notice of Hearing, Mr QW asked this Office to provide a copy to Mr KN, so that he could instruct senior counsel to attend the review hearing.⁴ It appears that Mr QW believed it was necessary for him to be represented by senior counsel, because Mr BL had responded to the review application on Mr RH's behalf, and Mr QW wanted representation at the review hearing to proceed on an “equal footing”.⁵

[51] On [Date] Mr KN indicated he would not be available on [Date], and requested alternative dates. This Office advised the parties that it might be possible to convene a hearing in [Date] if they consented, but that the review hearing would otherwise proceed as scheduled on [Date].

[52] The parties did not consent to a hearing in [Date].

[53] As a result of the physical relocation of this Office, on [Date] the parties were advised that the venue for the hearing on [Date] had changed from 99 to 65–69 Albert Street, Auckland.

⁴ Email QW to LCRO ([Date]).

⁵ Email QW to LCRO ([Date]).

[54] Although he had not advised this Office that his travel plans included being in New Zealand on or about [Date], there is evidence that Mr QW was in New Zealand at that time.⁶

[55] After some delay, in response to the change of venue notice, Mr KN sent an email on [Date] repeating that he would not be available on [Date] and asking for the review hearing to be rescheduled to a time when both he and Mr QW will be in New Zealand. Mr KN repeated the concern that Mr QW would otherwise have to attend by telephone “during early morning hours without the support of counsel”. It therefore appears that Mr QW may have again changed his travel plans, although he had not advised this Office.

[56] Mr KN expressed the view that proceeding to a hearing in the absence of counsel and by phone in the early hours of the morning was “not satisfactory at all”. He referred to issues of “fairness and transparency of process from a lay client perspective” if Mr QW were required to proceed unrepresented, and at a time when Mr KN was not available. Reference was made to the imbalance perceived as arising from Mr RH being a senior lawyer, and being represented by senior counsel.

[57] This Office responded to Mr KN the same day, confirming that the review hearing would proceed on [Date].

[58] On [Date] counsel for Mr RH filed submissions and supporting documents. The supporting materials comprised pleadings, evidence,⁷ and a Deed of Settlement in proceedings brought by Mr QW’s mother against Mr RH and BN’s widow as trustees; and judgments in proceedings before the High Court and Court of Appeal brought by Mr QW against the trustees regarding the non-disclosure of trust documents, that are the subject of the recent appeal to the Supreme Court.

[59] Questions over whether there may have been good reason pursuant to s 208(2) of the Act not to disclose to Mr QW any of those materials, particularly matters that appeared to be private to Mr QW’s mother, were pre-empted by counsel for Mr RH having copied them directly to Mr KN at the same time as sending them to this Office.

⁶ At the review hearing on [Date], Ms VW indicated that on [Date] Mr QW attended the New Zealand Supreme Court hearing of his appeal in his proceeding against Mr RH and BN’s widow as trustees.

⁷ In particular Mr RH attached part of Mr ZA’s brief of evidence filed in Mr QW’s mother’s proceeding against the trustees. Correspondence variously between Mr QW, Mr ZA on his behalf, Mr RH and others was annexed as exhibits to Mr ZA’s brief. Mr RH says Mr QW had seen that brief albeit was filed in his mother’s proceeding and been given the opportunity to comment on its contents. Mr ZA’s brief reflects poorly on Mr QW in some respects, but as the focus of this review is on Mr RH’s conduct those comments are only of peripheral relevance.

[60] On [Date] Mr QW sent an email repeating his request for an adjournment. In support of his request, Mr QW:

- (a) Referred to emails in relation to this review since [Date];
- (b) Recited a précis of various unsuccessful attempts to convene a review hearing;
- (c) Acknowledged he had been told in [Date] that the review hearing would proceed on [Date];
- (d) Said his acceptance of the proposed hearing time was subject to the “proviso” that Mr KN be provided with the notice of hearing because he will be instructing senior counsel;
- (e) Criticised the role of this Office and Mr RH in delaying conduct of the review;
- (f) Alleged unfairness to him based on Mr RH:
 - (i) Being represented at the review hearing by a QC; and
 - (ii) Introducing new documentation which Mr QW says is beyond his “knowledge and capability” because his “legal counsel is in South America at this time”.
- (g) Alleged partiality by this Office in preferring Mr RH’s interests over Mr QW’s by proceeding with the review hearing while depriving Mr QW of counsel of choice;
- (h) Expressed the view that “natural justice will not prevail” if the hearing were to proceed on [Date];
- (i) Requested the decision not to adjourn the hearing be reconsidered;
- (j) Requested advice of the dates on which Mr RH’s QC would be available.

[61] Mr QW was advised on [Date] that his request for adjournment had been considered and declined as follows:

The LCRO's view is that the substance of the complaint and application for review is reasonably straight forward.

Mr QW indicated in June that Mr KN would be instructing senior counsel to attend and represent Mr QW at the review hearing.

Mr KN and Mr QW have had over three months to provide those instructions.

Whether or not Mr KN can attend a review hearing on [Date] is therefore of extremely limited relevance.

Assuming senior counsel has been retained to represent Mr QW, the materials so recently provided on behalf of Mr RH can be provided to senior counsel, or some other lawyer, in advance of the review hearing along with all the other materials on the complaint and review files.

It is open to the LCRO to allow parties to provide further information after a review hearing and to timetable the provision of further information.

That appears to meet Mr QW's concerns about natural justice.

In the meantime the LCRO's expectation is that Mr QW, with or without counsel, will attend the review hearing convened at his request as review applicant in order to progress his application.

Mr QW has not made out grounds for an adjournment.

His request is declined.

The hearing will proceed as directed on [Date].

[62] Later that afternoon Mr QW emailed again protesting that Mr RH had been shown preferential treatment by being allowed to retain his choice of counsel, and that Mr QW was being placed at a disadvantage by being deprived of Mr KN's representation in a way that jeopardised natural justice and was "inappropriate". Mr QW then said that Mr KN was his sole legal representative (so it appears senior counsel was not to be instructed), was overseas and therefore not available, and that he could not progress his application without representation by counsel. Mr QW requested confirmation that the hearing was adjourned, and advice of alternative dates.

[63] Mr QW's correspondence was considered, and a response emailed in the morning of [Date] along the following lines:

I have considered Mr QW's further request for an adjournment received by this Office at [Time].

Mr QW's complaint relates to conduct by Mr RH that occurred by early to [Date]. Further allegations of acts and omissions by Mr RH of a like tenor have accumulated over the past [Duration]. Mr QW's application for review is among the oldest review applications of which this Office has conduct.

Mr QW advised this Office that he would be available for a hearing in New Zealand from [Date] for two weeks. It appears he suggested those dates without first checking his lawyer would also be available.

This Office issued a notice of hearing to the parties on [Date] advising that the hearing had been set down for [Date] to accommodate Mr QW who said he would be in New Zealand and available on that date.

On receiving the Notice of Hearing, Mr QW asked that this Office send a copy to Mr KN, which it did, for his information, also on [Date].

On [Date] Mr KN asked if there were some alternative dates that he could discuss with Mr QW, because Mr KN was not available on [Date], which he described as the "proposed date".

This Office advised Mr KN, also on [Date], that the matter had been scheduled for [Date] because that was the only day that Mr RH and his counsel could attend in the window of time Mr QW had provided during which he was to have been in New Zealand.

Nonetheless, the parties were offered the alternative of an earlier date in [Date]. The Registry's email records that it had taken "nine months or organise a date that both parties can agree to". Mr QW was offered the alternative of attending a [Date] hearing by phone, and asked to confirm whether he would attend in person if the [Date] option was not taken up and the hearing proceeded, as directed in the Notice of Hearing in [Date].

The [Date] hearing did not eventuate. Thus [Date] has been a firm review hearing date since [Date].

Mr QW, and it appears Mr KN, have been aware for over 3 months that the review hearing is to proceed on [Date] if not before. If, as it appears, Mr QW did not check with Mr KN before suggesting a range of suitable dates, that is unfortunate. However, Mr QW has had ample opportunity to make suitable arrangements for representation, with Mr KN's assistance if necessary. It cannot be the case that Mr KN, and Mr KN alone, is capable of being instructed in respect of this matter.

This Office has a statutory duty to determine applications for review. Conduct of reviews cannot be delayed indefinitely to suit either party's convenience.

[Date] is, and has been since [Date], a firm fixture. If Mr QW does not attend or is not represented on [Date] the application for review may be determined in his absence. However, as previously advised, if the LCRO considers the review cannot be properly determined without further information, further information can be requested.

Mr QW's request for an adjournment is declined.

[64] Mr QW emailed again on [Date] repeating his concerns over being deprived of access to his preferred legal counsel and delays caused by this Office. He refers to any part he may have played in the nine months of delay being due to "exceptional circumstances" involving a "life threatening situation" faced by his mother in Switzerland, and to being "falsely accused of being in NZ" by this Office in [Date] when he says he was in Switzerland. Mr QW refers to responsibilities he has as the holder of his mother's enduring power of attorney, and his obligation to prioritise his responsibilities. He argues his ability to provide a "full defence" or defend his mother's

claims, provide submissions or respond to the documents filed on Mr RH's behalf on [Date] is compromised by the absence of his legal counsel.

[65] A response was sent in the following terms:

Mr QW appears to misapprehend the nature of the disciplinary process. This Office exercises jurisdiction over lawyers. The broad issue before this Office is whether there is any evidence that Mr RH's conduct as a lawyer has fallen below proper professional standards.

It is not a case of Mr QW having to defend himself, or be defended. The focus of the disciplinary inquiry is on the conduct of the practitioner, in this case Mr RH.

The purpose of the review hearing is to enable Mr QW to progress his application for review. He has asked for a hearing, a hearing has been scheduled, Mr QW has not made out grounds for an adjournment.

Having completed preparation for the hearing on [Date], LCRO's view is that this matter could be adequately determined in the absence of the parties, their representatives and witnesses, with both party's consent, pursuant to s 206(2) of the Act. It remains open to the parties to advise this Office that they consent to the review being conducted in their absence. If both parties consent, the hearing date can be vacated and the review will be determined pursuant to s 206(2) of the Act without further input from either party.

Mr QW's request for an adjournment of the hearing is declined.

[66] All of that correspondence was sent to both parties, as was a reminder of the hearing start time and venue. The parties were asked on [Date] to confirm who would attend the following day. For Mr RH it was confirmed that he and Ms VW would attend, but that if Mr QW consented to the review being determined in the parties' absence, Mr RH's instructions on that point would be sought.

[67] Mr QW replied again, protested the refusal to adjourn the hearing, and requested an explanation of how he could be on an "equal footing" with Mr RH when he would have the "inarguable advantage" of having his chosen QC present at the hearing. A response was sent to Mr QW in the following terms:

As you have previously been advised, the LCRO considers that you have had sufficient opportunity since receiving the Notice of Hearing to arrange representation in advance of tomorrow's hearing.

This Office has been advised that Mr RH will attend tomorrow's review hearing with his lawyer Ms VW. Ms VW is not a QC.

As you will be aware from the information provided to you earlier by this Office, the LCRO's jurisdiction is inquisitorial, not adversarial. The process of review is robust, not technical and relatively informal. It is not a counsel-led process with opening submissions, evidence being led, witnesses cross examined and closing submissions. The rules of evidence that apply in Courts of law do not apply on review.

Although there is no fixed format, it may assist you to know that the LCRO anticipates tomorrow's review hearing will proceed in the following way after introductions are made:

1. The LCRO will provide you as applicant with an opportunity to address your concerns;
2. Mr RH and/or his lawyer will have an opportunity to respond to your concerns;
3. You will have an opportunity to add any point of clarification or explanation.

As you have previously been advised, the LCRO may ask questions or request further information at any point in the review hearing, or thereafter, to promote proper conduct of the review.

A review hearing is not an opportunity to add fresh complaints or make new allegations.

The LCRO is aware that Mr RH and Ms VW are lawyers, and that you are a lay applicant. Your situation is not an unusual one. The Act obliges LCROs to perform their functions and duties, and exercise powers in a way that is consistent with the rules of nature justice. The review process is structured, and review hearings conducted, in a way that assists lay review applicants such as yourself have a proper opportunity to be heard, whether or not they are represented by a lawyer.

As requested in my earlier email, please confirm your attendance for tomorrow and whether you will be accompanied by a support person and/or lawyer.

[68] A copy of the correspondence was sent to Mr RH and Ms VW.

[69] Mr QW responded after close of business on [Date] maintaining his protests about the hearing scheduled for the following day, asserting that his ability to progress his mother's claims was compromised to the extent of non-existence and repeating his concern that "natural justice cannot prevail in the absence of the writer and his legal counsel".

[70] In the morning of the review hearing this Office sent an email to Mr QW offering him the opportunity to attend the hearing by telephone. No response was received before the review hearing commenced.

Review Hearing

[71] The review hearing proceeded as scheduled at 9.30am on [Date]. Mr RH attended with Ms VW. Mr QW did not attend, and was not represented. In Mr QW's absence, Mr RH confirmed he consented to the review being determined on the papers. At that stage Ms VW advised that she and Mr RH had seen Mr QW in New Zealand on [Date] at the Supreme Court.

[72] Shortly after the review hearing concluded Mr QW sent an email advising that he would not attend by telephone, and saying it “is unfortunate that the LCRO actions favour the respondent”.⁸

Nature and Scope of Review

[73] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁹

... 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.

[74] More recently, the High Court has described a review by this Office in the following way:¹⁰

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.

[75] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

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

⁸ Email QW to LCRO ([Date]).

⁹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Mr QW protests lack of natural justice

[76] Natural justice is an open textured concept with fairness at its heart, that cannot be disassociated from justice being done between the parties. The process of review under the Act is “informal, inquisitorial and robust”. It is a process that “involves the LCRO coming to ... her own view of the fairness of the substance and process of a Committee’s determination”.

[77] I have considered all of the concerns raised by Mr QW in his efforts to have the review hearing adjourned. I have also considered whether determination of this review would be assisted by the provision of any further information, including responses to information provided on Mr RH’s behalf on [Date].

[78] It appears from those documents that Mr QW’s mother has settled her claims against the trustees. As I read the Deed of Settlement it would preclude her from raising professional conduct concerns, but that alone would not rob the disciplinary process of its statutory ability to inquire if there were evidence of conduct by a practitioner that may be unsatisfactory or misconduct. To the extent that Mr QW has put forward evidence of such concerns on his mother’s behalf, those are addressed in the Analysis section below.

[79] The timing of this review hearing was such that the parties were awaiting a judgment from the Supreme Court relating to the exercise of the trustees’ discretion. The High Court, not this Office, exercises jurisdiction over trustees. The question before the Supreme Court relates to the trustees having resisted requests for disclosure of trust documents made by Mr QW. Disclosure of trust documents is a matter for the trustees’ discretion. The decisions by the High Court and the Court of Appeal indicate that more than one approach to the exercise of the discretion is available. The law is not settled. It is far from apparent that the exercise of the trustees’ discretion was so wrong that it raises issues about Mr RH’s suitability to practice as a lawyer. I therefore do not consider that judgment will make any difference to the outcome of this review.

[80] Mr QW has recorded his concerns at length, and added to those progressively over the past four years. Having carefully considered all of Mr QW’s correspondence, which contains a great deal of repetition, it appears unlikely that there is much more he could usefully add on the topic of Mr RH’s conduct as a trustee or as a lawyer.

[81] I do not consider that further information from either party would assist in determining this review. The focus of the review is on Mr RH’s conduct as a lawyer.

Analysis of review grounds

[82] In the course of the review, the omissions, inaccuracies and assumptions that Mr QW says mar the decision are taken explicitly or implicitly into account in what follows. I have carefully considered all of the material available on review.

[83] Mr QW plainly feels disserved by Mr RH, and that he made a bad bargain by apparently conceding his position in relation to BN's estate. Those concerns, and the difficulties his mother experienced, are grounded in decisions made by the trustees. Those are beyond the jurisdiction of this Office on review, as are the issues around disclosure to beneficiaries by trustees.

[84] For this Office to have jurisdiction, there has to be evidence of some conduct by the lawyer that falls below proper professional standards, or is conduct that reflects on a lawyer's fitness to practice.

[85] The analysis provided by Mr QW proceeds on the basis that Mr RH's conduct was conduct as a lawyer, not conduct as a trustee. The distinction is generally recognised as whether the lawyer was advising or the trustee was deciding. Obviously there is some overlap when a lawyer acts as trustee. Lawyers' acting as trustees are routinely guided by their knowledge of the law assimilated through practice as a lawyer. In many instances, that is precisely why people like BN appoint lawyers as professional trustees.

[86] So while there is a degree of overlap between the two roles, it cannot be assumed only from a lawyer's use of firm's letterhead or email address that the lawyer is acting as a lawyer. Obviously lawyers who draw cheques on the firm's trust account must follow the relevant rules and regulations, but there is no evidence of Mr RH having failed to do so.

[87] Mr QW maintains the position that his mother always believed that she was speaking to Mr RH not as a trustee, but as a lawyer. Although Mr QW refers to Mr RH "wearing two hats", he and his mother knew that Mr RH was a lawyer, and that he was a trustee/executor of BN's estate. There is no evidence of concealment or misdirection and no evidence of Mr RH having wrongly conflated the two roles. There is no evidence of Mr RH having misled or deceived anyone.

[88] Mr QW's mother has settled all her claims and potential claims against the trustees, Mr RH as "legal advisor" and personally.¹¹ Various arrangements have been

¹¹ Deed of Settlement dated [Date] at [3].

proposed at various times to benefit QW family members, but specifically excluding Mr QW. Mr QW's position is reflected in his mother's claims,¹² on the basis that she sees supporting him as of benefit to her,¹³ but that Mr RH and BN's widow lacked impartiality as between Mr QW and other beneficiaries. Their removal was sought, and obtained through the deed settling her claims.

[89] Mr QW's mother's claims include a claim that she signed an undertaking not to contest BN's will based on conduct that was "misleading or deceptive in respect of her rights" to the Estate.¹⁴ The trustees'/executors' position was that Mr QW's mother had signed the undertaking after taking independent legal advice which included discussions between her lawyer and Mr RH and others.¹⁵ The trustees denied the misleading and deceptive allegation.¹⁶

[90] The trustees'/executors' statement of defence include references to Mr QW having fallen out with BN, indicates an unwillingness on the part of the trustees/executors to deal with Mr QW as a representative of the interests of other family members and refers to the settlement involving Mr QW and Company 2. It also refers to an apparent rift between Mr QW and his mother and sister around [Date].¹⁷ The trustees/executors say the Trust Deed required them to make distributions for the personal benefit of Mr QW's mother, and not to Mr QW through her. The "extent of the acquisition by Mr QW of the funds distributed by" the QW Family Trust (of which his mother, but not he, was a beneficiary), and expenditure by Mr QW, are mentioned as reasons for the trustees reducing the payments to Mr QW's mother.

[91] Mr ZA's evidence included reference to Mr QW having benefitted to the tune of over \$100 million from BN's estate. Mr ZA says Mr QW wanted a separate trust to be established for his mother and sister so that he could rely on that as a precedent to support a Trust being established to enable him to benefit further from BN's estate.¹⁸ For various reasons, Mr ZA says, Mr QW considered himself entitled to disproportionately beneficial treatment, saw himself as head of the "QW family" following BN's demise and unsuccessfully sought to manipulate BN's widow, who was supported by Mr RH. With respect to the agreement Mr QW signed confirming he would not contest BN's will, Mr ZA says Mr QW "was comfortable with the modified wording of the acknowledgement before settlement".

¹² Fourth Amended Statement of Claim dated [Date] at [37].

¹³ At [39.a.iii].

¹⁴ At [17.d].

¹⁵ Statement of Defence to Fourth Amended Statement of Claim dated [Date] at [15] and [16].

¹⁶ At [17].

¹⁷ At [32].

¹⁸ Above n 2 at [65].

[92] On the basis of all the evidence on the subject, including Mr ZA' brief, Mr QW's argument that Mr RH coerced him into agreeing not to contest BN's will appears tenuous. Mr QW wanted money, and wanted it urgently to inject into his business. He was prepared to sign the deal offered by Mr RH to get it. It appears he may also have been prepared to try to go back on that deal later on if it suited him to do so.

[93] However, Mr QW's mother settled her proceeding, none of those claims, defences or allegations have been tested. Without her support for Mr QW's complaints, and, noting she has been legally represented at relevant times, in the apparent absence of complaint by her, she is taken to now be satisfied with Mr RH's part in events. There is no clear evidence of any professional impropriety by Mr RH in respect of his dealings with Mr QW's mother, and evidence that undermines the position Mr QW argues for. Much that Mr RH has done, he has done as a trustee. Beyond Mr QW's unsupported allegations, there is no evidence that calls Mr RH's fitness to practice as a lawyer into question.

[94] Mr QW has also been involved in proceedings against Mr RH and BN's widow in relation to their non-disclosure of trust-related documents. Trust A was settled in 2002 and wound up in 2010. Trust B was settled in [Date] and also wound up in [Date]. Mr RH and BN's widow were trustees of both trusts. When the trusts were wound up, no distributions were made to Mr QW who was a discretionary and final beneficiary of both trusts. Mr QW was bankrupt between [Date] and [Date, when he was discharged].¹⁹

[95] Mr QW has argued in the High Court and Court of Appeal that as a beneficiary of the trusts he has a right to certain disclosures. The trustees so far have successfully resisted those claims, but the matter currently rests with the Supreme Court.

[96] The arguments in the High Court revolved around whether the right to information is property that vested in the Official Assignee on Mr QW's bankruptcy, or whether it is a property right he has retained or that has returned to him upon his discharge from bankruptcy. The High Court decided Mr QW lacked standing to bring the application for disclosure, but, if that was wrong, concluded in the exercise of its discretion that in Mr QW's case, if he had had standing, the Judge "would nevertheless have exercised [her] discretion against requiring the trustees to provide the documents sought".²⁰

¹⁹ QW v QW [2015] NZHC

²⁰ At [62].

[97] Mr QW appealed to the Court of Appeal, contending that [Judge] had erred in holding that he lacked standing and in the exercise of her potential discretion against ordering disclosure. If his appeal were successful, Mr QW sought disclosure of specific documents.

[98] The Court of Appeal disagreed with Courtney J's approach to standing, and considered that Mr QW derived standing from his status (or capacity) as a beneficiary of the Trusts. The Court of Appeal did not consider that his bankruptcy altered or annulled his status, but also found it unnecessary to consider whether his right to seek disclosure from the trustees was a "property" right. On the status point, Mr QW's appeal succeeded.

[99] As to Mr QW's second appeal point, the Court of Appeal noted that "no beneficiary has an entitlement as of right to disclosure of trust documents". There is no presumption for or against disclosure; disclosure is a matter of discretion for the trustees. The Court of Appeal set out a series of questions for trustees to consider, noting that considerations depend on circumstances, and call for the trustees to balance relevant factors. No "mismatch" was observed in [Judge]'s approach, with the Court of Appeal saying that the circumstances were somewhat unusual, so "it was always going to be a fine judgment for the Court whether to order disclosure and, if so, its extent and terms". [Judge]'s decision not to order the trustees to make any disclosures to Mr QW was confirmed.

[100] As mentioned above, the appeal to the Supreme Court was heard shortly before the review hearing in [Date], and no judgment had issued at the time of this review.

[101] The extent to which the relevant law was traversed before the High Court and Court of Appeal supports the view that the position over disclosure to beneficiaries is not settled law. What can be said, however, is that questions of whether to disclose information, and if so what information to disclose, are matters for the trustees' discretion, which was found not to have been plainly wrong. In the circumstances, there is no substance to any concern that, in his professional capacity as a lawyer, Mr RH contravened any professional standards and no evidence that could support conclusion that he is unfit to practice as a lawyer.

[102] Mr QW also refers in his review application to apparent authority, and Mr RH holding himself out as being able to bind the trustees then recanting, and not acting in good faith towards Mr QW. Although Mr QW does not say how he considers Mr RH

might come to owe obligations to him as a lawyer, the professional obligations Mr RH did owe, as a lawyer, to Mr QW are discussed in greater detail in the Analysis below.

[103] Mr QW describes omissions, inaccuracies and assumptions in the decision, and surmises the Committee may not have carefully considered all of the materials available to it. There is no evidence of the Committee having failed as Mr QW describes, but if it did, any such deficiency is cured by this independent review, in the course of which I have taken into account all of the information that is available on review and carefully considered all of the concerns raised by Mr QW.

[104] Mr QW refers to his own expectations of the benefits to which he considers himself entitled pursuant to BN's will and the trusts. He contends that Mr RH misled him into settling, at significant personal cost, and repeated the allegations about Mr RH having a close personal relationship with BN's widow such that he should step aside from any activities as a lawyer involving the QW estate and trusts.

[105] As to Mr QW's assertions of a close personal relationship between Mr RH and BN's widow, there is no independent evidence that there was any such relationship. Nor is there evidence of any reason for Mr RH to have stepped aside from any role he may have played as lawyer in relation to BN's estate and the trusts. The fact that BN trusted Mr RH to assist his widow in administering the estate and trusts is a compelling reason for Mr RH to continue to do so, unless there is good reason for him not to. Again, those are matters for him as a trustee. There is no evidence that Mr RH was not independent or free from compromising influences or loyalties when providing services to his clients. The fact that his conduct has so inflamed Mr QW, whose interests appear not to have been coincident with those of the other beneficiaries, tends to support the proposition that Mr RH did a good job both as a trustee and a lawyer.

Review Issues

[106] Broadly, the question on review is whether there is evidence of Mr RH's conduct having fallen below a proper professional standard. That question is answered in the negative. Consequently, the decision is confirmed.

Analysis

Integrity, respect and courtesy

[107] Mr RH owed obligations as a lawyer first to the Court because he was an officer of Court at material times, and second to his clients. On Mr QW's evidence, Mr RH's clients included BN, his estate, and the trusts resulting from the administration of that estate, in the person of the trustees and executors of the estate. Mr RH's clients are entitled to confidentiality and privilege.

[108] Mr QW is not Mr RH's client. He and his mother have been in receipt of independent legal advice at various significant times since BN's demise. For the purposes of the Act and rules made under it, Mr QW and his mother are third parties. Mr QW's complaints about Mr RH's conduct as a lawyer must be viewed from that perspective.

[109] As Mr QW and his mother are third parties, rule 12 requires Mr RH, when acting in a professional capacity, to conduct dealings with them with integrity, respect and courtesy. Furthermore, when engaging in professional practice, rule 11.1 says that a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

[110] Mr QW contends that it was misleading for Mr RH to wear two hats, that of lawyer, and that of trustee/executor. That is an allegation of conduct in breach of rule 11.1, and an attack on Mr RH's integrity.

[111] There is ample evidence of Mr RH using his firm's email and letterhead. It would be difficult for Mr QW or his mother to say that they did not know he was a lawyer. They certainly knew he was BN's trustee and executor. What is lacking is any evidence that Mr RH misled Mr QW or his mother as to his status or otherwise at any time. It is also relevant to repeat that at material times, Mr QW had advice and assistance from his own lawyers.

[112] Mr QW says Mr RH promised him an income stream from the interest on investments. He contends he surrendered his claims against BN's Estate on the basis of that promise.

[113] Mr RH says he made no such promise.

[114] It is not sufficient for Mr QW to say that what Mr RH has done is not what BN would have done, or wanted. Trustees are charged with the ongoing management and

control of estates and trusts. They exercise discretion as circumstances arise based on their view of where the best interests of the beneficiaries lie.

[115] It is apparent that Mr QW was in a precarious financial position, and that he was bankrupt between [Date] and [Date]. It is also apparent from Mr QW's evidence that his mother has supported him. It is not the function of this Office to analyse her conduct. However, BN's widow appears to have considered there was a significant risk that any money that passed into Mr QW's hands may be swallowed up by his creditors. There is also some evidence of concern over whether Mr QW accurately represented the content of discussion he says he had with BN when he was alive. It is evident from the High Court and Court of Appeal judgments that BN's widow's version of events involving BN departed in some fundamental ways from Mr QW's recollections.

[116] It is difficult to see how the trustees could have met their duties to the other beneficiaries by allowing the diminution of trust funds just so that Mr QW's creditors could reap the benefits. More importantly, those are matters for the trustees' discretion. They are not matters that can be resolved by this Office on review.

[117] What can be said is that in the circumstances it is more likely than not that Mr RH did not promise Mr QW an income stream, whether from the interest on investments or otherwise. In the circumstances, whether a promise was made as lawyer or trustee is moot.

[118] There is no evidence of Mr RH's professional conduct having fallen below the standards expected of him as a lawyer. In particular, there is no evidence of Mr RH lacking integrity, respect or courtesy towards Mr QW.

Conflict of interest

[119] Mr QW's complaint about conflict of interest between Mr RH's clients, and others who are not Mr QW and his mother cannot be resolved by this process of review in the absence of any apparent complaint by any of those directly concerned in the alleged conflict. Mr QW's assertion that other beneficiaries will not stand up to Mr RH for fear of losing their benefits is unsupported. There is evidence of conflict between the interests of Mr QW and others who stand to benefit from BN's estate, including BN's widow. There is no cogent evidence of any conflict of interest between Mr RH's clients, whoever they may have been.

Summary

[120] I have carefully considered all of Mr QW's concerns about Mr RH's conduct, and all of the information available in the course of this review. I have been unable to identify any evidence of any professional impropriety by Mr RH. In the circumstances, further action is not necessary or appropriate. The Committee's decision is therefore confirmed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 18th day of October 2016

D Thresher
Legal Complaints Review Officer

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

Mr QW as the Applicant
Mr KN as the Representative of the Applicant
Mr RH as the Respondent
Mr BL as the Representative of the Respondent
Ms VW as the Representative of the Respondent
Mr TM as a related person as per section 213
[Area] Standards Committee
The New Zealand Law Society