LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 96

Ref: LCRO 174/2018

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
BETWEEN	**GL** Applicant
AND	**TE** Respondent

DECISION

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

Introduction

[1] Mr GL 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 TE, a lawyer in sole practice who in August 2012 acted for Mr GL on the creation of The R GL Trust, signed by Mr GL on 1 September 2012 (the trust).

[2] Mr GL, and his sister J had made a claim under the Family Protection Act 1955 against the estate of their father Mr C GL.

[3] In order to resolve that claim Mr GL's intention was that his share of the assets of his father's trust, The C GL Trust, be resettled on his trust. Mr GL, together with his four children, was a beneficiary of his trust, the sole trustee, and appointor of trustees.

[4] As will be explained in my later analysis, Mr GL's father had stipulated that Mr GL, and J would have use of the trust fund "during their retirement" by way of "loans or small capital distributions if required", and "access to income". They would not, however, have access to the capital during their lifetimes.[1]

[5] For that reason, before Ms HN, the lawyer who acted in the administration of Mr GL's father's estate and for his trust, would permit the resettlement, Mr GL was required to retire as trustee, and appointor of his trust.[2]

[6] On 25 October 2012, Mr GL signed deeds of nomination, variation and retirement, and appointment all prepared by Mr TE whereby Mr GL retired as trustee and appointor in favour of Mr BT, a long term friend of the GL family. Also, that day he signed a waiver of independent advice prepared by Mr TE.

[7] In December 2012, Mr BT, as trustee, agreed to the trust making a loan to Mr GL for the purchase of a residence in [suburb a], [City A] Australia (the [suburb a] loan). A year later, in December 2013, the trust made another loan to enable Mr GL to purchase a second property in [Suburb B, City A] (the [suburb B] loan).[3]

[8] On 16 December 2014, Mr BT informed (by memo) Mr TE that Mr GL "view[ed] the trust funds as his own", was making "unreasonable requests" for the use of the trust money, and was by then "six months in arrears" with loan payments due to the trust.

[9] Seven months later, on 9 June 2015, Mr TE provided (by letter) to Mr GL details of the arrears. Mr TE (a) referred to Mr GL's "repeated … attacks" on Mr BT including claims of "gross negligence", and "inexperience as a trustee", (b) rejected Mr GL's claim that because he "acted for [Mr GL] previously" he had a conflict of interest by continuing to act for the trust, and Mr BT as trustee, and (c) said Mr BT would not agree to the trust making further loans.

[10] In August and October 2016, Mr GL's Australian lawyer, Mr IG, (a) informed Mr TE, that the short time within which Mr BT had replaced Mr GL as trustee in October 2012 had not allowed for Mr GL to be independently advised, (b) suggested that to "cease ongoing tension" between Mr GL and Mr BT, Mr GL and his son [Y] replace Mr BT as trustee, and (c) said it was "absolute folly" for Mr BT to threaten legal action, at the trust's expense, to recover loan payments from Mr GL, "effectively the sole beneficiary" of the trust.[4]

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[1] Resolution of C GL (31 July 1997); Memorandum of C GL (September 2009).
[2] Ms HN, a partner with [Law Firm BB].
[3] Loan offer (14 December 2012); Loan offer (6 December 2013).
[4] Letters from Mr IG to Mr TE (25 August 2016, 26 October 2016).

[11] Mr GL sold his [suburb b] property in March 2017. Mr BT deducted from the sale proceeds money he claimed was owing to the trust by Mr GL in respect of both loans, together with other personal loans.[5]

[12] On 19 May 2017, Mr BT provided (by email) Mr GL with a "summary" statement in respect of the sale of the [suburb b] property showing NZ$667.84 owing by Mr GL to the trust in respect of the purchase of his [suburb b] property.

[13] Five days later, on 24 May, Mr TE informed (by email) Mr GL that Mr BT wanted a family meeting the following month in [State] to resolve "various concerns" about the trust.

[14] Mr GL subsequently raised queries about the deductions made by Mr BT from the sale proceeds of his [suburb b] property. He queried the exchange rate. He said $32,297.07 was owed to him by the trust. He requested a breakdown of $52,650 deducted for "legal and administrative costs".[6]

Complaint

[15] Mr GL lodged a complaint with the Lawyers Complaints Service (LCS) on 26 March 2018 on which he elaborated in subsequent communications to the LCS.[7]

[16] The outcomes he sought included (a) Mr TE and Mr BT to "have no further involvement in the administration of the trust", and the appointment of a temporary trustee; (b) an independent assessment of Mr TE's legal fees deducted by Mr TE from the sale proceeds of the [suburb a]property as shown on Mr TE's statement dated 9 May 2017; and (c) reimbursement of $3,000 representing legal fees incurred by him with his Auckland lawyer for legal advice on Mr BT's and Mr TE's respective roles in the administration of the trust.[8]

(1) Conflicts

Power of appointment – independent advice

[17] Mr GL claimed when acting for him from September 2012 to December 2012, during which time he stepped down as trustee and appointor of the trust, Mr TE had a

[5] Mr BT's 20 April 2017 statement.
[6] Emails from (1) Mr BT to Mr GL and Mr TE; (2) Mr GL to Mr BT and Mr LM (22 August 2017).
[7] Letter Mr GL to LCS (25 March 2018); and, in particular, in his emails to the LCS dated 8 May 2018 and 14 June 2018.
[8] Also, (d) correction of the trust's accounts, and a refund to him of $32,297.07 deducted by Mr BT from the sale proceeds of the [suburb a] property; (e) reimbursement of interest charges on personal loans from 19 November 2015 incurred because Mr BT would not allow him to repay the trust loans.

conflict of interest and ought to have referred him for independent legal advice before [Mr TE] assumed the role of appointor.[9]

[18] He said Mr TE advised him on 5 October 2012 he could make payments from the trust to himself as initial trustee, yet subsequently advised him he had "committed a fraud on the trust" by paying himself $30,000. He said in those circumstances, by replacing him as appointor on 25 October 2012 Mr TE had assumed that role by "duress and deception".

[19] He said Mr TE relied on Ms HN's 17 December 2012 and 24 October 2017 letters to Mr GL's daughter, Ms PF, and to Mr TE respectively to justify [Mr GL's] acceptance of the role of appointor. However, he said Ms HN did not appreciate "the extent of the poor quality and abusive nature involved in the administration of the trust".[10]

Conflict of interest

[20] Mr GL claimed Mr TE had a "perceived conflict of interest" by being appointor and "allowing [a] dishonest trustee", Mr BT, to remain trustee.[11]

[21] He said he wanted Mr TE "exclud[ed]" from "any further involvement" in the trust "to prevent any further conflict of interest occurring".[12] He suggested Mr TE "return the power of appointment of Trustees" to him, or a person nominated by his lawyer.[13]

(2) Settlement – Family Protection Act 1955 claim

[22] Mr GL claimed when Mr TE acted for him to settle his Family Protection Act 1955 claim against his father's estate, by advising him to create the trust on which his share of his father's estate would be re-settled, Mr TE had "negotiated away [his] natural rights of succession" by replacing [Mr GL] as trustee and appointor in place of independent persons, namely, Mr BT, and Mr TE.

[23] He said by not obtaining his children's consent to him being trustee, appointor as well as a beneficiary of the trust, Mr TE had "failed in his role" as his lawyer.

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[9] Mr GL said this aspect of his complaint was supported by advice in August and October 2016 from Mr IG, his Australian lawyer – letters from Mr IG to Mr TE (25 August 2016) and Mr GL (26 October 2016).
[10] Mr GL's quoted words from his complaint appear incomplete.
[11] Email from Mr GL to LCS (19 April 2018).
[12] Emails from Mr GL to LCS (8 May 2018, 14 June 2018).
[13] Letter from Mr GL to LCS (14 June 2018).

(3) Administration

Trust loans

[24] Mr GL claimed Mr TE, while appointor under the trust, "failed to ensure" administration of the trust in "a fair and reasonable and competent manner" by (a) "not allowing him to manage [his] properties to their full potential", (b) refusing repayment by him of the trust loans, (c) refusing to allow him to refinance his [Suburb b] property to enable repairs to prepare the property for sale, and (d) by preparing statements "contrary to the [suburb a] loan agreement" [Mr TE] had "allowed the illegal retention" of "the sale proceeds" of his [suburb b] property by the trust.[14]

Mr TE's fees

[25] Concerning the sale of his [suburb b] property, he described as "duress" Mr TE's refusal to release the trust's second mortgage, which secured loans made to Mr GL, unless he agreed to pay Mr TE's fees acting for the trust on that matter. He questioned whether Mr TE's fees were fair and reasonable.

Sale proceeds of [suburb b] property

[26] He said he had been "waiting since August 2017" for "a breakdown" of (a) "administration and legal costs incurred by the trust" of $52,615, and (b) $17,821 "charged against [his] loan accounts in the [trust's] 2016 trust accounts".[15]

(4) Request to replace trustee

[27] Mr GL said because he and the trust had "lost collectively about $200,000", he "believe[d] he ha[d] a right to protest about poor administration" of the trust in respect of which he provided a number of illustrations.

[28] He said in August 2015 he proposed that Mr DJ, another "respected family friend" of his father, replace Mr BT as trustee. He said that would have avoided the "need to lay any complaints", and "eliminated present issues of questionable legal fees" paid by his trust.

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[14] $32,297.07 – see Mr BT's 19 May 2017 email to Mr GL regarding the sale of the [suburb b] property.

[15] Emails from Mr GL to LCS (10, 19 April 2018) – Mr GL says these, and other figures "[were] under review by the NZ Institute of Chartered Accountants (NZICA)" – he refers to (1) his 16, 19 May 2018 emails to the NZICA; (2) the trust's 31 May 2017 accounts; (3) the trust's 31 March 2016 accounts; (4) the trust's 31 March 2017 accounts; and (5) income to the trust of $10,009 for the two-month period ending 31 May 2018.

Response

[29] I refer to Mr TE's response to Mr GL's complaint in my later analysis.[16]

Standards Committee decision

[30] The Committee delivered its decision on 17 August 2018 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

(1) Power of appointment

[31] The conclusion reached by the Committee was that Mr TE "did not deceive", or "force" Mr GL to "relinquish his power of appointment under duress". The Committee stated that Mr TE's 5 October 2012 advice to [Mr GL] was that the trust property was "owned and controlled" by Mr GL's trust, not Mr GL personally.

[32] The Committee stated that Ms HN's 17 December 2012 letter to Mr GL's daughter, Ms PF, provided the explanation why Mr GL's father insisted on the trust being independently controlled and managed before [Mr GL's father's] trust and estate funds could be settled on [Mr GL's] trust.

(2) Settlement – Family Protection Act 1955 claim

[33] The Committee decided that in the absence of Mr GL having provided details in support of his allegation that Mr TE had "negotiated away" his inheritance from his father's estate, this aspect of Mr GL's complaint was "without merit".

[34] In arriving at that decision, the Committee again referred to Ms HN's 17 December 2012 letter to Ms PF which explained that the settlement arising out of Mr GL's, and his sister J's claim against Mr GL's father's trust, was that money would be settled on trusts established individually by Mr GL and J, having terms similar to Mr GL's father's trust.

(3) Administration

[35] In the Committee's view, Mr TE "had no responsibility or duty" for administration of Mr GL's trust, and Mr GL's complaint could not "be used as a backdoor for attacking the actions of the trustee".

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[16] Letter from Mr TE to Lawyers Complaints Service (10 April 2018).

Trust loans

[36] The Committee explained that administration of Mr GL's trust, including "whether to make advances" to Mr GL, lay with Mr BT as trustee, not with Mr TE who acted for the trust on Mr BT's instructions.

Sale proceeds – [suburb b] property

[37] The Committee concluded that Mr GL's complaint was "without foundation" because (a) Mr TE's statements were prepared in accordance with the [suburb b] loan agreement, and (b) the decision to retain funds had been made by Mr BT as trustee, not Mr TE.

(4) Request to replace trustee

[38] The Committee decided that Mr GL's request to Mr TE to exercise his power of appointment to remove Mr BT as a trustee, due to Mr GL's dissatisfaction with Mr BT's administration of the trust, and Mr TE's legal fees charged to the trust, similarly concerned Mr BT, and not Mr TE.

[39] The Committee stated that because the High Court has jurisdiction of trust matters, Mr GL's concerns about Mr BT's role as a trustee, which did not concern Mr TE, were therefore "outside the scope of the disciplinary process".

Application for review

[40] Mr GL filed an application for review on 17 September 2018 in which he largely repeats and elaborates on his complaint allegations. He asks that the Committee's decision be overturned. He says Mr BT and Mr TE had since retired as trustee, and appointor respectively.

[41] He says without "examining" his contrary evidence, the Committee "accepted in good faith" that the information provided by Mr TE and Ms HN was "honest and reliable".

[42] He (a) asks that Mr TE be "disciplin[ed]" for having "misle[d]" the Committee, (b) seeks compensation for his "financial and emotional upset" caused by Mr TE's conduct, and (c) reimbursement of $3,000 representing legal fees incurred by him to recover the "excess sale proceeds" of his [suburb b] property – 100 per cent instead of 30 per cent – "retained" by Mr BT "against his will".

(1) Conflict

Power of appointment – independent advice

[43] Mr GL repeats that Mr TE did not advise him to first obtain independent legal advice before he was replaced by Mr BT, and [Mr TE] as trustee, and appointor respectively. He says Mr TE ought to have "insisted" it was in his "best interest" he retain the power of appointment.[17]

[44] He repeats his claim that Mr TE, having previously provided contrary advice in his 5 October 2012 letter, had by "duress" (a) "obtained" Mr BT's appointment as trustee, and (b) vested the power of appointment of trustees in [Mr TE].[18]

[45] He says retention of his role as appointor "would have ensured that unacceptable legal fees", and the actions of Mr BT as trustee, with whom he had a personality clash, would have been avoided.[19]

(2) Settlement – Family Protection Act 1955 claim

[46] Mr GL says the Committee overlooked he had agreed "not to contest" his father's will on the basis that Ms HN had, when attending to the resettlement on the trust, already "accepted" the trust deed as "originally written" by Mr TE with [Mr GL] as sole trustee, and appointor.[20]

[47] He says instead of "contesting" his father's will, Mr TE, without "clearly explaining" to him, "negotiated the formation of the family trust" which he "accepted … in good faith".[21]

[48] He claims Mr TE was requested to obtain his children's consent to the resettlement on his trust. He says Ms HN, on the mistaken belief Mr TE had done so, paid the resettlement funds to Mr TE which led to him relinquishing his positions as trustee and appointor of the trust in favour of Mr BT, and Mr TE respectively.[22]

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[17] Email from Mr GL to Legal Complaints Review Office (27 February 2020).
[18] Application for review (12 September 2018) at 2.
[19] At 1, last paragraph.
[20] Application for review (12 September 2018, received 27 February 2020), but see Ms HN's contrary statement in her 17 December 2012 letter to Ms PF at 3.
[21] Email from Mr GL to Legal Complaints Review Office (15 September 2019).
[22] Email from Mr GL to Legal Complaints Review Office (15 September 2019, received 27 February 2020).

(3) Administration

Trust loans

[49] Mr GL says had he not settled the sale of his [suburb b] property the purchaser could have taken action against him. For that reason, he regards Mr TE's (a) request that he repay "all trust advances" from the sale proceeds, and (b) retention of the balance acting for the trust as "duress".[23]

Sale proceeds – [suburb b] property, Mr TE's fees

[50] Mr GL says Mr BT's, and Mr TE's statements of account, which provided for deductions from the sale proceeds, were inconsistent with the loan agreements He also describes the retention of the sale proceeds by Mr TE, acting for the trust, as "misappropriation".[24]

[51] He questions how the Committee could have decided this issue without seeing the loan agreements he says the [suburb b] loan agreement provided for repayment only "if [he] refinance[d]" or "s[old]" the [suburb b] property he says Mr TE's "final settlement statement" also required repayment of the [suburb a] loan.[25]

[52] He says Mr BT relied on Mr TE to prepare statements "consistent with the loan agreements". He explained that having queried Mr BT's first statement, Mr TE "prepared a revised settlement statement" which Mr BT then complicated by preparing "another settlement agreement" which provided for repayment of "excess funds" for "conveyancing and other fees".

(4) Request to replace trustee

[53] Mr GL also questions Mr BT's fitness to be a trustee. He says he sought Mr BT's permission "to repay all trust advances" to the trust with the exception of the $35,000 he paid to himself when a trustee. He says Mr BT's failure to allow him to repay the loans had a "very negative outcome" by preventing him from obtaining "a debt free property".[26]

Response

[54] Mr TE refers to the need for him to respond to Mr GL's complaints about him, and Mr BT "at [their] consider[able] cost in professional time" which he seeks to recover

[23] He says his Australian lawyer, who acted for him on the sale, was similarly placed under duress by Mr TE's requirement to send the entire sale proceeds to Mr TE.
[24] Application for review (12 September 2018) at 1, para. 2; at 2, para 5.
[25] Application for review (12 September 2018) at 2, para. 2.
[26] Application for review (12 September 2018) at 2, para 4.

from Mr GL. He objects to Mr GL "attempt[ing] to try and go beyond" Mr GL's complaint issues considered by the Committee. He says these new issues must be struck out.[27]

[55] In his submission the review "must be restricted" to his role as the lawyer for, and appointor pursuant to the trust. He "refute[s]" Mr GL's allegations of "dishonesty and incompetence" which he says are intended "to colour and discredit" him and Mr BT.

[56] He submits that because of the elapsed time, Mr GL's review ought not to proceed, and should be closed. He says Mr GL declined Mr BT's suggestions to Mr GL that they meet "to discuss trust matters" in either Australia, or New Zealand He says Mr BT, having taken independent legal advice, had retired as a trustee, and with Mr GL's agreement, the trust is now administered by a trustee company.

[57] Referring to Mr GL's claim for reimbursement of $3,000 legal fees, Mr TE says because his "contact" with Mr GL's lawyer was "minimal", [Mr GL's lawyer] must have attended to other matters.

(1) Resettlement – Family Protection Act 1955 claim

[58] Mr TE says Mr GL's parents' respective estates "are not a relevant issue" to be considered. He explains that having obtained his advice, and without coercion, Mr GL "agreed to all terms and signed" the resettlement documents.

[59] Mr TE says Mr GL was "well aware" Ms HN would not implement the resettlement if Mr GL's father's requirements were not met. He says this included the settlement funds staying in New Zealand.

[60] He says he had "no contact" with Mr GL's children, who as final beneficiaries needed to be independently advised. He says Mr GL "took it upon himself to deal with" the children and report to Ms HN.

(3) Administration

[61] Mr TE explains that central to Mr GL's complaint is the tension between Mr BT, as trustee, and Mr GL, as beneficiary concerning the administration of the trust.

[62] He says Mr GL's complaints about Mr BT's administration of the trust "via [him]" is a "misuse of the complaints process, is "unacceptable", and a "frivolous waste of time" for the Complaints Service, and this Office.

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[27] Emails from Mr TE to Legal Complaints Review Office (26 September 2018, 2 March 2020).

[63] He says because, faced with Mr GL's "attacks", it was necessary for Mr BT to obtain legal advice, Mr GL ought to direct his concerns to [Mr GL's] Australian lawyers who acted for him throughout.

Trust loans

[64] Mr TE says he disagrees with Mr GL's comments concerning the trust's loans to Mr GL. He says Mr GL's statement [Mr GL] "would repay the loans in full" is unsupported by the written communications. He says Mr GL wanted to increase his borrowings secured by a first mortgage which placed the trust, as second mortgagee, "at risk".

Mr TE's fees

[65] Mr TE says the report of the Committee's cost assessor, who assisted investigating the complaint about Mr TE's fees invoiced to the trust concerning the sale of the [Suburb b] property, supports his position.[28]

Review on the papers

[66] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[67] Section 206(2A) requires that before a Review Officer reaches a decision as to whether a review can be adequately determined on the papers, he or she "must give the parties a reasonable opportunity to comment on whether the review should be dealt with in that manner".

[68] Having been informed by this Office that, after my initial consideration of the file – which includes Mr GL's complaint, Mr TE's response, the Committee's decision and file, Mr GL's application for review, Mr TE's response (to the application for review), and the accompanying material – I considered that the review could be adequately determined on the papers and directed the case manager to inform the parties.[29]

[28] I address this issue in my later discussion about jurisdiction.
[29] Letter from Legal Complaints Review Office to Mr GL and Mr TE (15 April 2019).

[69] Mr GL responded by stating that he "would like … an applicant only hearing" but did not put forward any specific objections to a determination on the papers in support of his request.[30]

[70] In those circumstances, and having again carefully read all of the file material referred to above, I directed the case manager to inform the parties that I remained of the view that this matter can be adequately determined on the papers in the absence of the parties.[31]

[71] To my mind, there are no additional issues or questions that necessitate any further submission from either party.

Nature and scope of review

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

> … 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.

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

> 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.

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[30] Email from Mr GL to Legal Complaints Review Office (23 April 2019).
[31] Letter from Legal Complaints Review Office to Mr GL and Mr TE (1 October 2019).
[32] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[33] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[74] 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

[75] The issues I have identified for consideration on this review are:

Settlement – Family Protection Act claim

(a) When acting for Mr GL on the settlement of his Family Protection Act claim against Mr GL's father's estate, did Mr TE:

(i) follow Mr GL's instructions?

(ii) act competently?

(b) Relatedly, ought Mr TE have insisted Ms HN, who acted in the administration of Mr GL's father's estate and trust, accept Mr GL as trustee, and appointor of his trust?

Conflicts

(c) Did Mr TE, knowing he would continue to act for the trust, have a conflict of duties, or interest that gave rise to a professional duty to refer Mr GL for independent advice before Mr GL appointed Mr BT, and Mr TE as trustee and appointor respectively?

Trust administration

(d) Did Mr TE owe Mr GL any professional obligations or duties in respect of Mr GL's claims that:

(i) Mr BT wrongly deducted money from the sale proceeds of the [suburb b] property, and retained that money for the trust?

(ii) Mr TE, as appointor, did not, as requested by Mr GL, remove Mr BT as trustee due to Mr GL's dissatisfaction with Mr BT's administration of the trust, which included payment by Mr BT of legal fees charged by Mr TE to the trust?

Jurisdictional issues

Creation of the trust – residency issue

[76] To the extent Mr GL's application for review includes new issues, Mr GL claims that on 5 October 2012, following the signing of the deed of trust on 1 September 2012, Mr TE advised him that as an Australian resident, he "may not be eligible" to be a trustee. He says Mr TE's "failure" to raise this with him when he signed the trust deed led to his "complaints", and the trust incurring legal costs "in excess of" $60,000.[34]

[77] The function of this Office is to review decisions of the Standards Committees which includes consideration of how the relevant Standards Committee dealt with a complaint, and whether its decision is soundly based on the evidence before the Committee.[35] This Office does not have jurisdiction to consider any matters that have not been previously considered and decided by a Standards Committee.

[78] For that reason, it is not open to me to consider this new matter raised by Mr GL in his review application. However, in declining jurisdiction, I make the observation that Mr TE, in his 5 October 2012 letter to Mr GL, recommended that because Mr GL resided in Australia, [Mr GL] should obtain "specialist [tax] advice", and register the trust with the Inland Revenue Department.[36]

Analysis

(1) Mr GL's father's estate – resettlement – issues (a), (b)

(a) Instructions

[79] The first issue is whether Mr GL agreed with Ms HN's requirements for resettlement of Mr GL's father's trust which he instructed Mr TE to implement.

(i) Parties' positions

[80] Mr GL claims Mr TE replaced him as appointor of the trust on 25 October 2012 by "duress and deception". He says Mr TE advised him on 5 October 2012 he could make payments from the trust to himself as trustee, yet subsequently told him it was wrong to have done so.

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[34] Mr GL later says he seeks (a) a refund of (i) "an estimated sum of NZ$5,000" legal fees paid to Mr TE for formation of the GL trust; (ii) NZ$7,853 in respect of the sale of the [suburb b] property; and (b) Mr TE repay the GL trust "approximately $60,000".
[35] Section 203 of the Act.
[36] Letter from Mr TE to Mr GL (5 October 2012).

[81] Mr TE denies he obtained the power of appointment "inappropriately". He said Mr GL's desire to replace Mr BT as a trustee appeared to be "the basis of [Mr GL's] attempts to review" the creation of the trust.

(ii) Context

[82] The events in the lead up to the nomination and appointment, by Mr GL, of Mr TE as appointor provide context for the discussion of these issues.

[83] On 31 July 1997, Mr GL's father created The C GL Trust which entitled Mr GL and his sister J to the income from the trust assets which on their death would pass to their respective children.[37]

[84] Mr GL's father said he regarded "the investments" he had "built up during [his] lifetime" as "family money to be used for the greater good of the family" of which he was "just a steward". He said his investments were not to be "squandered by [his] children or grandchildren", but "invested and used as a fund to provide assistance" for them.[38]

[85] In his September 2009 memorandum, Mr GL's father said his purpose was to (a) "confirm" his 31 July 1997 "directions", and (b) "update [his] wishes with regard to the long-term future of the C GL Trust". He expressed his "concerns" that Mr GL, and J, had "not been successful in providing for themselves financially". He referred to Mr GL's "financial difficulties".[39]

[86] He expressed his wish that the "money [be] retained in the trust for use by Mr GL and J during their retirement, with funds being made available to them by way of loans or small capital distributions if required", and "access to income". He said his will provided for "certain legacies" for them with the residue "passing to the trustees" of the C GL Trust.

[87] Mr GL's father said the trustees "may in their discretion on [his] death choose to resettle the trust" on "separate trusts, one for the benefit of" each of Mr GL, and J, and their respective children.

[88] Importantly, for the purposes of this review, Mr GL's father said the assets resettled on those "separate" trusts were "not [to] be paid out" to either Mr GL, or J, as applicable, "during their respective lifetimes". He said he "expect[ed]" Mr GL and J "to provide for themselves with the trust being a backup".

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[37] The C GL Trust, created by deed dated 31 July 1997.
[38] Resolution of C GL (31 July 1997).
[39] Memorandum of C GL (September 2009).

[89] As noted in the introduction, during August 2012, Mr TE, acting for Mr GL, prepared a deed of trust to create the [GL Family] trust which was signed on 1 September 2012. Mr GL was sole trustee, a discretionary beneficiary, the final beneficiary and held the power of appointment of trustees. On his death, the trust assets would pass to his four children in equal shares. Provision was made for the appointment of an advisory trustee.[40]

[90] On 5 October 2012, Mr TE explained (by letter) to Mr GL that (a) the assets settled on the trust would belong to the trust, not Mr GL, (b) the beneficiaries were "restricted" to Mr GL's "immediate family", (c) the power of appointment of trustees was vested in Mr GL, (d) the requirement that "a settlor or [sole] trustee" could not "make any distribution to benefit himself or herself" did not apply to Mr GL, but additional trustees would "need to be appointed", and (e) he had not advised "on the tax and GST implications", including the effect of Mr GL's Australian residency, in respect of which Mr GL would need to consult a tax accountant.

[91] In Ms HN's 17 December 2012 letter to Ms PF, Mr GL's daughter, referred to earlier, [Ms HN] expressed her "concerns" (a) with the trust deed submitted" by Mr TE under which Mr GL as sole trustee, and appointor "could distribute the assets for his sole benefit", and (b) Mr GL's Australian residency.

[92] Ms HN noted that because her "repeated requests for signed consents" from Mr GL's children had been "ignored" by Mr GL she had provided him with her firm's "own letters of consent".[41] She said "[d]espite [her] reservations", Mr TE produced the signed deed of trust without amendment she said she "again expressed [her] concerns" and "advised [she] would not resettle whilst [Mr GL] had sole control over the trust".

[93] Mr TE prepared deeds of variation of the trust, nomination, and retirement and appointment of trustee, which Mr GL signed on 25 October 2012, whereby Mr GL (a) conferred on, and vested in Mr TE the power of appointment of trustees, (b) retired as trustee in place of Mr BT, and (c) appointed himself as advisory trustee.

[94] Mr GL signed a "waiver" on 25 October 2012 whereby he "consent[ed] and agree[d]" to Mr TE "continuing" to act for the trust.

[95] Mr TE informed (by email) Ms HN that day he had discussed Mr GL's father's wishes with both Mr GL and Mr BT, and Mr GL was no longer trustee and appointor, having been replaced by Mr BT and [Mr TE] respectively.

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[40] The class of discretionary beneficiaries extended to "such persons [Mr GL] shall appoint".
[41] Letter from Ms HN to Ms PF (17 December 2012).

[96] On 5 December 2012, Mr TE advised (by email) Mr BT, and Mr GL, "the balance of the [resettlement] money" had been received from Ms HN, and he had prepared a statement, and invoice for his attendances.

(iii) Discussion

Mr GL

[97] Mr GL says Ms HN initially "accepted" the trust deed with him as sole trustee, appointor, and a beneficiary, but "subsequently imposed conditions" that his children "sign a consent form". He says in "breach" of the "out-of-court" settlement of his Family Protection Act claim, those consents were not provided to him. [42]

[98] He says following signature of the deed of trust on 1 September 2012 Mr TE advised him on 5 October 2012 that (a) because of his Australian residency he "may not be eligible" to be a trustee, and (b) the restriction on a sole trustee making a distribution to himself or herself did not apply to him.

[99] He says on the "mistaken belie[f]" Mr TE had obtained those consents, Ms HN paid the resettlement funds to Mr TE, but having later realised her error, asked Mr GL to step down as trustee and appointor of his trust. He says the "task" of obtaining his children's consents was then left to him, and was complicated by his son losing the consent form.[43]

Mr TE

[100] Mr TE explains that Mr GL's father had concerns about Mr GL's "monetary skills", and was "opposed" to Mr GL "having any control or management of the funds" to be resettled on the trust.

[101] His position is that Ms HN refused to attend to the resettlement from Mr GL's father's trust because with Mr GL as sole trustee, and appointor, the trust "did not meet" his father's "requirements" for resettlement. He says Mr GL "understood and accepted" that requirement, and agreed to Mr BT, and [Mr TE] replacing him in those roles.

[102] Mr TE says Mr GL (a) wanted the resettlement to be done urgently, (b) "volunt[arily]" agreed to step aside, and (c) agreed to "continue as an advisory trustee" with [Mr TE] "continuing to be involved" by acting for the trust.[44] He says he and Mr BT

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[42] Email from Mr GL to Legal Complaints Review Office (15 September 2019).
[43] Email, Mr GL to Legal Complaints Review Office (15 September 2019).
[44] Waiver of Mr GL (25 October 2012).

met with Mr GL who agreed with "Mr BT's approach" towards administration of the trust He says he informed Ms HN to enable the resettlement to take place.[45]

Consideration

[103] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions.[46] However, where the lawyer is unsure about the client's instructions then "… it is incumbent on the lawyer to obtain clarification of those instructions the lawyer may not proceed on an assumption the client agrees to a certain course of action".[47]

[104] A lawyer must respond to a client's inquiries in a timely manner, and disclose to his or her client information that is relevant to the retainer. A lawyer must also take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[48]

[105] As I have noted, Ms HN, in her 17 December 2012 letter to Ms PF sent independent of Mr GL and Mr TE, refers to having initially rejected the deed of trust with Mr GL as a trustee, and appointor.

[106] Ms HN stated (a) when the trust deed was again presented to her without amendment, following signature by Mr GL on 1 September 2012, she restated her requirement that Mr GL step aside from his roles as trustee and appointor, and (b) following "meetings" Mr GL and Mr TE "accepted finally" Mr GL's "inheritance from his father" was "a settlement of trust funds and estate funds bequeathed to [Mr GL's father's] trust, and not a personal bequest" to Mr GL.

[107] Ms HN added that Mr GL had "now accepted" that the trust deed (a) "need[ed] to have a completely independent trustee" who would manage the trust fund "in an orderly fashion", (b) take account of Mr GL's "capital and income needs for the future", and (c) in doing so, carry out Mr GL's father's wishes "where possible [by] conserv[ing] some capital for his grandchildren".

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[45] Email from Mr TE, to Ms HN (25 October 2012).
[46] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 291, para [10.3].
[47] At [10.3] – see r 1.6 of the Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 as to the manner in which a lawyer must provide information to a client. See also discussion in *Sandy v* Kahn [2009] NZLCRO 73 at [38].
[48] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 7, 7.1; rule 1.2 – a "retainer" is defined as "an agreement under which a lawyer undertakes to provide or does provide legal services to a client …".

[108] Ms HN also referred to Mr BT's "extremely long association with the GL family", and therefore his "good knowledge of the financial position of the various family members." She said the trust funds would "be invested in appropriate investments to return either income or some type of gain for the trust", not "high gain/high-risk opportunities", but "secure equities, bonds and bank investments". She said Mr GL did not have "access to any of the trust's bank accounts".

[109] Reading Ms HN's letter together with Mr GL's statements in his 25 October 2012 waiver, and Mr TE's advice (by email) that day to Ms HN that Mr GL had stepped down as trustee, and appointor, I do not consider there can be any suggestion that Mr TE forced Mr GL to comply with Ms HNn's requirements.

[110] On the contrary, Mr GL, fully aware of the position, as he acknowledged in his 25 October 2012 waiver, signed the deeds of (a) variation of trust, (b) nomination of Mr TE as appointor, and (c) retirement and appointment of trustee whereby he stepped down as trustee and appointor in favour of Mr BT and Mr TE respectively.

[111] As I have also noted, on 5 October 2012, three weeks beforehand, Mr TE advised Mr GL, among other things, that assets settled on the trust would not be Mr GL's assets.

[112] I do not consider there is support for Mr GL's contentions that (a) had Mr TE insisted, Ms HN would have accepted the trust deed with [Mr GL] as sole trustee, and appointor, and (b) [Mr GL] relinquished those roles under "duress and deception" by Mr TE.

[113] In my view, no professional issues adverse to Mr TE arise from this aspect of Mr GL's complaint.

(b) Act competently

(i) Parties' positions

[114] Mr GL also claims when settling his Family Protection Act claim against his father's estate, Mr TE "negotiated away [his] natural rights of succession" by conceding [Mr GL's] roles as trustee and appointor in place of Mr BT and Mr TE respectively.

[115] He says instead of "contesting" his father's will, without explanation to him Mr TE agreed to him stepping aside as trustee and appointor.[49]

[49] Email from Mr GL to Legal Complaints Review Office (15 September 2019).

[116] Mr TE says he advised Mr GL "of his rights" and "permitted [Mr GL] to review all matters". He says Mr GL "understood and accepted" Ms HN would not attend to the resettlement if Mr GL's father's requirements were not met.

(ii) Discussion

[117] To some extent, this aspect of Mr GL's complaint overlaps the previous issue.

[118] When "providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".[50]

[119] As discussed, Ms HN would not allow resettlement of the assets of Mr GL's father's trust on [Mr GL's] trust while Mr GL remained sole trustee, and appointor.

[120] Although Mr TE says Mr GL's parents' estates "are not a relevant issue" to be considered on this review, he accepts that the trust deed, as initially drafted by him with Mr GL as sole trustee and appointor, "did not meet the requirements" of Ms HN who, for that reason, would not allow resettlement of the assets from Mr GL's father's trust.

[121] Mr TE says he made Mr GL "well aware" of this. For that reason, he says Mr GL agreed to the appointment of Mr BT, a longtime family friend whom Mr GL approached, as replacement trustee, and to [Mr TE] holding the power of appointment.

[122] He says having obtained his advice, and without coercion, Mr GL "agreed to all terms and signed" the resettlement documents which included the settlement funds staying in New Zealand.

[123] Mr TE says he had "no contact" with Mr GL's children, who as final beneficiaries needed to be independently advised. He says Mr GL "took it upon himself to deal with" [his] children and report to Ms HN.

[124] Apart from disputing Mr TE's, and Ms HN's respective accounts of events, Mr GL has not provided evidence in support of his position that Mr TE "negotiated away" his inheritance from his father's estate and trust, and by doing so did not act competently.

[125] In my view, no issues of a professional nature adverse to Mr TE arise on this aspect of Mr GL's complaint.

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[50] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

(2) Conflicts – issue (c)

[126] There are two parts to this aspect of Mr GL's complaint. First, whether Mr TE had a conflict of duties by having acted for Mr GL on the resettlement of the assets of his father's trust, whereby Mr GL stepped down as trustee and appointor in favour of Mr BT and Mr TE respectively, and continuing to act for the trust with Mr BT as replacement trustee.

[127] Secondly, having accepted the role of appointor, and by continuing to act for the trust, whether Mr TE had a conflict of interest.

[128] Mr TE did not provide his comments to the Committee on these issues but briefly addressed them in his 9 July 2015 letter to Mr GL, produced to the Committee. For that reason, although it is open to me to refer these questions back to the Committee, I propose considering them on review.

(a) Conflict of duties

(i) Parties' positions

[129] Mr GL claims Mr TE ought to have referred him for independent advice before Mr TE prepared the deeds of variation, nomination, and retirement and appointment [Mr GL] signed on 25 October 2012 whereby he retired as trustee, and appointor, in favour of Mr BT, and Mr TE respectively.

[130] He claims reimbursement from Mr TE of all legal fees paid by the trust, and asks that Mr TE be "banned from operating a trust account".

[131] It is evident that at that time, Mr TE took the view he could accept the role of appointor while continuing to act for the trust without conflict.

(ii) Discussion

Duty of confidence

[132] A lawyer must protect and hold in strict confidence all information concerning the client, the retainer and the client's business and affairs acquired in the course of the professional relationship. By extending to former clients, the duty survives the lawyer-client relationship.[51] It follows that a lawyer "must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer".[52]

[51] Rules 8, 8.1.
[52] Rule 8.7.

[133] Relatedly, r 8.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides that a lawyer "must not act for a client against a former client of the lawyer" if (a) the lawyer "holds information confidential to the former client"; and (b) "disclosure of the confidential information would be likely to affect" the former client's interests "adversely"; and (c) "there is a more than negligible risk of disclosure of the confidential information"; and (d) "the fiduciary obligation owed to the former client would be undermined".

[134] The circumstances described in paragraphs (a) to (d) of the rule must all have been present for the prohibition, which would have prevented Mr TE from acting for the trust, to apply.[53]

Duty of disclosure

[135] As noted above, a lawyer must disclose to his or her client information that is relevant to the retainer.[54]

Mr GL

[136] Mr GL says Mr TE did not "insist" it was in his "best interest" to retain the power of appointment. He says he was "significantly disadvantaged" by Mr TE's conflicts of interest (a) acting for the trust on the one hand, and (b) being appointor under the trust, and by Mr BT being a friend of the GL family, on the other.[55]

Mr TE

[137] Mr TE stated in his 9 July 2015 letter to Mr GL, sent on Mr BT's instructions, "there [was] no evidence of a conflict" in September–December 2012.

[138] He said he acted for Mr GL on Mr GL's Family Protection Act claim against Mr GL's father's estate. He said Mr GL knew he would continue to act for the trust upon Mr GL's retirement as a trustee. He said if either he or Mr BT considered they had a conflict, then he would cease acting for the trust.

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[53] Rule 8.7.1.
[54] Rule 7.
[55] Email from Mr GL to Legal Complaints Review Office (15 September 2019).

Consideration

[139] From 25 October 2012, Mr GL relinquished the roles of trustee and appointor, thereby handing over his duties and obligations as administrator of the trust to Mr BT, as replacement trustee, for whom Mr TE was to act in that role.

[140] For the prohibition in r 8.7.1, referred to above, which prevents a lawyer acting against a former client, to apply, first, paragraph (a) requires that the lawyer concerned "holds information confidential to the former client".

[141] In identifying a former client's confidential information this Office has expressed the view that the information held by the lawyer "… that was used, or could have been used, against" the former client was information that "ought to have disqualified [the lawyer] from representing [the new client] …".[56]

[142] The burden for establishing that the lawyer or practice holds confidential information of the former client which is relevant falls on the former client, but is not a heavy burden.[57]

[143] Considerations which have assisted the courts to determine relevance include whether the former client has provided instructions on "a piecemeal basis", instructs other law firms, and whether the firm was fully briefed on the former clients.[58] The elapse of time "… since the earlier retainer and the narrow nature of the new retainer may make a lawyer's acceptance of a retainer less 'objectionable' to the former client.[59]

[144] A former client's disquiet about the former lawyer acting against the former client must be weighed against "a person's right to … solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally". Also relevant to the public interest is "mobility within the profession … [a]ccess to specialist services and market competition".[60]

[145] This information has been described as the "getting to know you principle". That is, information acquired "in the lawyer-client relationship and is confidential in the sense that it was not publically available …".[61] This Office has also explained that in a practical sense there must be "a sufficient relationship between the general matters" of the former

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[56] *Mansfield v Southwell* [2010] NZLCRO 29 (8 September 2010) at [32].
[57] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 at 527.
[58] *GBR Investment Limited v Seng Bou (Paul) Keung* HC Christchurch CIV-2009-409-1486, 19 March 2010 at [60].
[59] *Q v I* [2009] NZLCRO 26 at [14].
[60] *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 (CA) at 651.
[61] *GBR Investment Limited v Seng Bou (Paul) Keung*, above n 58, at [67].

client, and "the subsequent matters" in which the lawyer is acting against the former client.[62]

[146] Illustrations of a former client's information held to have been relevant include a lawyer's knowledge about the "… personalities ... weaknesses, fears and reactions" of several members of a family gained by having acted for them over the years where the client and the former client were involved in a family dispute over a will;[63] a former client's "… honesty or lack thereof ... reaction to crisis, pressure or tension … attitude to litigation and settling cases and tactics";[64] and knowledge of the former commercial client's business gained, having acted for the former client for 14 years.[65]

[147] The courts "have shown a greater sensitivity" towards the protection of confidential information in family law and criminal matters.[66]

[148] In his waiver signed on 25 October 2012, Mr GL stated he had "carefully considered", signed "freely, and accept[ed] full responsibility" for the waiver. He said he ceased to be a client of Mr TE, who, from then, would act for the trust.

[149] Mr GL stated that he (a) "waive[d] any potential or actual conflicts of interest or issue" by Mr TE "having acted" for him previously in his "personal capacity as a former client", (b) said there was "no information that the trust will receive" from Mr TE "having acted" for [Mr GL] that "the trust is not already aware of", (c) said there was "no detriment" to him "nor breach of any fiduciary duty" by Mr TE, (d) said he "accept[ed] full responsibility for [that] situation", and would "indemnify", (e) said he "wish[ed] to retain" Mr TE to "advise" the trust, and (f) "request[ed]" that Mr TE "continue to act" for the trust.[67]

[150] Mr BT, as a long-time family friend of the GL family, already "knew the family well and understood the specific history of the family and also Mr GL's [father's] views on [Mr] GL and money".[68] He knew Mr GL's father did not want Mr GL to have access to the trust's capital which he wanted preserved for his grandchildren.

[151] As noted above, the second limb of r 8.7.1 concerns circumstances where "(b) disclosure of the confidential information would be likely to affect the interests of the

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[62] *Mansfield v Southwell*, above n 56, at [24].
[63] *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408.
[64] *GBR Investment Limited v Seng Bou (Paul) Keung*, above n 58, at [65].
[65] *Torchlight Fund No 1 LP (In Receivership) v NZ Credit Fund (GP)1 Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [25].
[66] *GBR Investment Limited v Seng Bou (Paul) Keung*, above n 58, at [68].
[67] Mr GL's statement would not have relieved Mr TE from his professional obligations and duties which are binding on all lawyers: s 107(1) of the Act.
[68] Memorandum from Mr BT to Lawyers Complaints Service (17 September 2017).

former client adversely". This "focuses on the possibility of actual harm" to the former client.[69] For example, in a litigation context, "whether any of the information held by [the lawyer] is or may be relevant to the proceedings, …".[70] In doing so, the rule illustrates the tension between a lawyer's duty of disclosure to a client[71] and the duty of confidence owed to a former client.[72]

[152] As discussed earlier, Ms HN refused Mr GL's request to resettle his share of the assets of his father's trust on his trust while he remained trustee and appointor.

[153] Mr GL wanted the resettlement to take place. He put Mr BT forward to replace him as trustee. In compliance with his father's requirements, as communicated to Mr TE by Ms HN, Mr GL stepped down as trustee and appointor to allow the resettlement which occurred six weeks later on 5 December 2012.

[154] As evidenced from his waiver, and the documents he signed on 25 October 2012, Mr GL did not appear to have had any reservations or misgivings at that time about Mr BT, and Mr TE replacing him as trustee, and appointor respectively. He also agreed to Mr TE continuing to act for the trust.

[155] In summary, Mr GL stated in his waiver that there was no information about him which Mr TE possessed from acting for Mr GL that the trust was "not already aware of". Mr BT similarly refers to his knowledge of the GL family, in particular, Mr GL's father's "views on [Mr] GL and money".

[156] As well as his duty of confidence owed to Mr GL, Mr TE had a duty to disclose "all information" in his possession "relevant to" the trust's matters to Mr BT.[73] For that reason, it may appear that as both appointor, and the trust's lawyer, Mr TE was in a position where the information he had about Mr GL could, if disclosed to Mr BT, be used by Mr BT to Mr GL's disadvantage.

[157] However, whilst there can be little doubt there was a risk of Mr TE disclosing information about Mr GL to Mr BT, because of Mr BT's pre-existing knowledge of Mr GL, and Mr GL's family, it seems unlikely at that time that any disclosure may have affected Mr GL adversely.

[158] In that situation, as lawyer for the trust initially, when Mr GL was trustee, and continuing with Mr BT as replacement trustee, Mr TE's position was unlike circumstances

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[69] *Penzance v Runcorn* [2010] NZLCRO 2 (February 2010) at [10].
[70] *Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd*, above n 65, at [20].
[71] Rules 7, 7.1, 7.2 of the Rules.
[72] Rules 8, 8.1 of the Rules.
[73] Rule 7 of the Rules.

in which a lawyer acts for a client against a former client on the opposite side of a transaction, or in litigation where (a) the opposing party may not have the information, as Mr BT did, of the former client, and (b) therefore the risk of disclosure of the former client's information to the new client was less likely to affect the former client adversely.

[159] Moreover, as trustee, Mr BT was required to administer the trust for the benefit of the beneficiaries failing which it was open to the beneficiaries, including Mr GL, to apply to the High Court to compel performance by Mr BT of his trustee duties.

[160] From the information produced, on balance, it seems to me it was more probable than not that information held by Mr BT about Mr GL and his family was no less, and probably exceeded that held by Mr TE. In my view, that is the factor that saved Mr TE from having a conflict between his duty of confidence owed to his former client, Mr GL, and his duty of disclosure, referred to above, owed to Mr BT.

[161] In these particular circumstances, the conclusion I have reached is that it was unlikely Mr TE would have held information about Mr GL which Mr BT did not already have, and which, if provided by Mr TE to the trust and used by Mr BT in its administration, may have affected Mr GL's interests adversely.

[162] For that reason, I consider that any further action on this aspect of Mr GL's complaint is unnecessary or inappropriate.

(b) Conflict of interest

[163] In accepting the role as appointor, whilst at the same time acting for the trust, Mr GL also claims there was a "perceived conflict of interest" for Mr TE.

(i) Independence

[164] When "providing regulated services" to clients, lawyers must be "independent" and "free from compromising influences or loyalties".[74]

[165] More specifically, a lawyer must not act or continue to act for a client "if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act". If a lawyer has an interest that "touches on the matter" on which the lawyer is acting, "the existence of that interest must be disclosed" to the client "irrespective of whether a conflict exists".[75]

[74] Section 4(b) of the Act; Rule 5 of the Rules.
[75] Rule 5.4 of the Rules.

(ii) Consideration

[166] As appointor, the trust deed conferred on Mr TE powers including removal of a trustee "without assigning any reason", appointing a trustee, including himself, in place of the removed trustee, and appointing an additional trustee.[76]

[167] To my mind, any conflict of interest Mr TE had between his roles as lawyer for the trust on the one hand, and appointor on the other, concerned his client, Mr BT, who from 25 October 2012, as trustee, was responsible for administration of the trust.

[168] In that regard, by retaining a role as advisory trustee, albeit without the powers of a trustee, Mr GL retained an interest by way of a watching brief on the administration of the trust.

[169] If Mr GL, a beneficiary of the trust, had concerns about the way Mr BT performed that role, it was open to him to apply to the Court "to compel performance" by Mr BT. If the failure complained about constituted a breach of trust, Mr GL could have issued proceedings against Mr BT, or sought his removal and replacement as trustee.[77]

(3) Trust administration – deduction from sale proceeds – issue (d)(i)

(a) Parties' positions

[170] Mr GL claims that retention by Mr BT, for the trust, of $32,297.07 from the sale proceeds of his [suburb b] property was contrary (a) to the loan agreements, and (b) to Mr TE's 9 July 2015 letter that "funds would be available" to him if he "chose to sell one of [his] properties".[78]

[171] Mr TE disagrees. He says the written communications with Mr GL do not support Mr GL's statement [Mr GL] "would repay the loans in full". He says Mr GL wanted to increase his borrowings secured by first mortgage which placed the trust, as second mortgagee, "at risk".

(b) Discussion

[172] This aspect of Mr GL's complaint concerns the deductions required by Mr BT, as trustee, from the sale proceeds of Mr GL's [suburb b] property.

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[76] Clause 7 of the trust deed.
[77] Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (13th ed, LexisNexis, Wellington, 2018) at [12.2]; Trustee Act 1956, ss 67, 69.
[78] Mr TE stated in his 9 July 2015 letter that Mr BT "will have no issue if [Mr GL] decide[d] to sell one of the properties to rationalise [his] financial situation and to seek a discharge of the trust mortgage".

Mr GL

[173] Mr GL describes Mr BT, as "a mere puppet of [Mr] TE" whom he wants held "jointly re[sponsible]" for Mr BT's "unprofessional and [un]acceptable actions".[79]

[174] He says Mr BT's 20 April 2017 statement, which showed a net balance of $175,734.71, "excluded" loans made to him by the trust to purchase his [suburb b] property. He contends the [suburb b] loan was not due for repayment until "the sale of the property or [his] death". He described retention of that money by Mr BT, as trustee, as "financial abuse or theft".[80]

[175] He says Mr BT relied on Mr TE to prepare statements "consistent with the loan agreements". He says on 26 April 2016, two days after he queried that statement, Mr BT produced a second statement which (a) also deducted the [suburb b] loan, and (b) made deductions "to reimburse the trust for conveyancing … fees paid by the trust" on Mr GL's behalf.

[176] He claims this was "an attempt" by Mr BT "to fraudulently retain funds in the trust's bank account without [his] approval". He said Mr BT had since "admitted" to his New Zealand lawyer, that [Mr TE] had paid the deductions for fees "out of the sale proceeds, prior to the funds being transferred to Mr BT".

[177] Mr GL says the [suburb b] loan agreement provided that capital gain of his [suburb b] property would be shared by him as to 70 per cent, and the trust as to 30 per cent, yet the trust claimed 100 per cent the sale proceeds.

[178] He claims the [suburb b] loan agreement provided that the loan was "only repayable if [he] refinance[d]" or "s[old]" the [suburb b] property. He claims because the purchaser could have taken action against him had he not settled the sale, retention by Mr TE, for the trust, of the sale proceeds of his [suburb b] property was "misappropriation", and "duress.

[179] He says his Australian lawyer who acted for him on the sale, was similarly placed under duress by Mr TE's requirement to send the entire sale proceeds to [Mr TE].

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[79] Email from Mr GL to Lawyers' Complaints Service (7 April 2018).

[80] In support of his position, Mr GL refers to an email from Mr LR ([XX] Conveyancing) to Mr BT (19 November 2015) proposing, on Mr GL's behalf, refinancing of the first mortgage secured against his [suburb b] property without reduction of the amount owing on the trust's loan secured by the second mortgage to enable work before marketing that property.

Mr TE

[180] Mr TE rejects Mr GL's comment that Mr BT was "a mere puppet" of [Mr TE] which he says showed "no understanding" of the role of a trustee who "must be independent and act responsibly and make his [/her] own decisions".

[181] His position is simply that Mr GL's complaints about Mr BT's administration of the trust "via [him]" is a "misuse of the complaints process which he says is "unacceptable" and a "frivolous waste of time" for the LCS, and this Office.

Consideration

[182] I observe that Mr BT acknowledges he sought Mr TE's "legal advice and professional approach to the issues raised by Mr GL" with which he says he was "satisfied". Mr BT instructed Mr TE to engage an independent law firm in Australia, [Law Firm WW], to act on the release of the trust's second mortgage.

[183] The amount, NZ$214,221.44, Mr TE received from [Law Firm WW] corresponds with the figure shown on Mr BT's 19 May 2017 summary to Mr GL. Mr TE's 9 May 2017 statement to Mr BT shows a net figure, following deduction of Mr TE's invoices, of $203,631.94 due to the trust. Mr TE paid NZ$206,386.44 to the trust thereby leaving Mr TE's 8 May 2017 invoice for $3,024.50 owing by the trust at that time.

[184] Mr BT, as trustee, provided instructions to Mr TE who acted for the trust. For that reason, Mr GL's complaint about the deductions Mr BT made to repay both the [suburb b] and the [suburb a] loans concern Mr BT.

[185] In confirming the Committee's decision to take no further action on this aspect of Mr GL's complaint, as with the previous issue, if Mr GL had concerns about the way Mr BT, who as noted earlier Mr GL put forward as his replacement trustee, administered the trust which he could not resolve with Mr BT then it was open to Mr GL to apply to the High Court to compel performance by Mr BT of his trustee duties.

(4) Request to replace trustee – issue d(ii)

(a) Parties' positions

[186] Mr GL says he and the trust had "lost collectively about $200,000". He says he had "a right to protest about poor administration" of the trust.

[187] Mr TE says faced with Mr GL's "attacks" Mr BT sought his legal advice. He says he suggested Mr GL direct his concerns towards [Mr GL's] Australian lawyers who acted for him.

(b) Discussion

[188] As noted earlier, Mr GL maintains his proposal that Mr DJ, another "respected family friend" of his father, replace Mr BT as trustee would have "eliminated present issues of questionable legal fees" paid by his trust. He says Mr TE, as appointor, did not, as [Mr GL] requested, exercise that power to replace Mr BT.

[189] Mr TE says Mr BT had been "cooperative and helpful in responding to any requests", had "provided memoranda" on trustee matters, and "underst[ood]…the objectives" of the trust.

[190] As discussed, from 25 October 2012 Mr TE continued to act for the trust, but ceased to act for Mr GL who, as retired trustee and appointor, from that date had no influence on how Mr TE exercised his role as appointor.

[191] As with the trust administration issue, it was similarly open to Mr GL, if he so desired at the time, to apply to the High Court to compel Mr BT to perform his duties as trustee, or where a breach of trust was claimed, to ask for removal of Mr BT as a trustee.

[192] For that reason, any further action is unnecessary or inappropriate on this aspect of Mr GL's complaint.

(5) Sale of [suburb b] property – Mr TE's fees

[193] For completeness, Mr GL also sought an independent assessment of Mr TE's legal fees in acting for the trust when Mr GL sold his [suburb b] property.

[194] It is to be noted that those fees, invoiced by Mr TE to Mr BT as trustee of the trust, were the subject of a separate complaint by Mr GL. The Standards Committee which considered that matter decided on 20 July 2017 that no further action was necessary or appropriate.

[195] Mr GL applied to this Office for a review of that decision. As the Review Officer who considered Mr GL's application, I referred the matter back to the Committee to reconsider and determine whether Mr TE's fees invoiced to the trust, and paid by Mr GL by way of deduction, were fair and reasonable.[81]

[81] The Committee was also asked to consider and determine whether that deduction was authorised.

[196] In its decision dated 26 September 2019, that Committee determined that Mr TE's fees were fair and reasonable. Mr GL has not referred to having applied to this Office for a review of that determination. The case manager of this review informs me that this Office has no record of such an application.

[197] As far as I am aware, this is the second time Mr GL has claimed Mr TE's fees were not fair and reasonable. In that regard, the courts have expressed reluctance to allow a litigant to raise in later proceedings a cause of action which might properly have been brought in the earlier proceedings.

[198] While Standards Committees, and this Office, are not bound by the strict rules of issue estoppel or cause of action estoppel in this way, given their disciplinary and protective jurisdiction such considerations are relevant to the exercise of the discretion of both to take no further action under s 138 of the Act.[82]

[199] In saying this, I acknowledge that a person may, in rare cases, relitigate an earlier complaint such as where further and relevant evidence, not available when the first complaint was heard, is uncovered. In such circumstances, the Committee investigating the second complaint would be required to consider whether that information was relevant, and, if available, should have been produced at the hearing of the first complaint.[83]

[200] However, this does not mean that the complaints process "provides the opportunity to parties to bring complaints against the lawyer on an evolving basis". Taking into account the requirement in the Act that complaints must be dealt with expeditiously, there is a need for finality which otherwise would be compromised by the filing of further complaints.[84]

[201] This aspect of Mr GL's complaint has already been determined, and I decline jurisdiction to consider it further.

[202] Finally, although Mr GL also complains about other fees the trust has incurred with Mr TE whilst Mr BT was trustee, he has not produced details either to the Committee, or to this Office. That being the case, I am unable to take that aspect of Mr GL's complaint any further.

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[82] *UJ v OO* LCRO [2013] NZLCRO 14 (9 April 2013) at [50].
[83] *LO v RT* LCRO [2019] NZLCRO 10 (4 February 2019) at [55] - [60].
[84] Section 120(3) of the Act.

Decision

[203] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee to take no further action on Mr GL's complaint against Mr TE is confirmed.

Costs

[204] Mr TE seeks an order for costs for his time and attendance in having to respond to Mr GL's application for review.

[205] However, as stated in the Guidelines of this Office, bearing in mind the requirement of the Complaints Service to investigate complaints, and this Office to conduct reviews of Standards Committees' decisions, a costs order is unlikely to be made where the complainant has made the application for review. For that reason, Mr TE's request is declined.

Anonymised publication

[206] 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 18th day of June 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 GL, as the Applicant
Mr TE, as the Respondent
[Area] Standards Committee
New Zealand Law Society