

CONCERNING

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

AND

CONCERNING

a determination of Standards Committee

BETWEEN

CE

Applicant

AND

FG

Respondent

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

Introduction

[1] In August 2013 Mr JE lodged a complaint on behalf of his father CE about advice provided by Mr FG in relation to enduring powers of attorney (EPA), the validity of those documents, and Mr FG's conduct following receipt of a letter from CE cancelling the property EPA in which he had appointed his daughter (Ms HK) and Mr FG as joint attorneys.

[2] The Standards Committee determined that Mr FG had not breached any professional standards, and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action on the complaints.

Background

[3] In late 2004 Mr FG took instructions from CE and his wife, with regard to new wills, and on 4 November 2004 he sent a letter to them enclosing a draft of their wills.

He also recommended they should establish both property and personal care and welfare EPAs.

[4] Mr FG then met with Mr and Mrs CE on 16 December 2004 at which time he asserts they signed the EPAs. He also asserts that the EPAs were then signed by the attorneys by no later than 11 January 2005.¹ It was not noted however until August 2012 that Ms HK's signature had not been witnessed and at that time Mr FG arranged for the person who had witnessed Ms HK's signature to complete this formality.

[5] It would seem that at the time when the EPAs were documented and executed by Mr and Mrs CE, that JE may not have been in contact with them or his sister but subsequently he began to become more involved in his parents' affairs. Some disagreement then seems to have arisen between JE, CE and Ms HK over whether certain payments made by Mrs CE to Ms HK had been by way of gift or loan.

[6] Mr FG supplied copies of communications between him and Ms HK in March 2013 in which Mr FG volunteered to visit Mr and Mrs CE for whom he had acted for many years, and by whom he had been appointed attorney. In the email correspondence Ms HK expressed concerns about her parents becoming anxious and worried about their financial affairs.

[7] In an email dated 31 March 2013 to Mr FG Ms HK says: "I am sure that they will be delighted to see you, should you get the opportunity to call and see them".

[8] It would seem that Mr FG may have subsequently visited Mr and Mrs CE and made no charge for that as he regarded it as more of a social visit.

[9] Subsequently, a meeting which has been referred to by all parties as a "family meeting" took place on 12 July 2013 at which certain matters were discussed, including the payments made by Mrs CE to Ms HK. Ms HK asserted that the payments were gifts but agreed to repay them to save any family disagreement.

[10] During this time, and in the course of these meetings, Mr FG formed the view that CE may not have been wholly competent to manage his affairs, and that he was being manipulated by JE. In his letter in response to the complaint Mr FG says:²

CE is 93 and while I believe he is capable of having a rational conversation as to certain matters, I believe he may not be wholly competent to manage his affairs. I believe he is being manipulated by JE. Until JE arrived on the scene in 2009, I had

¹ Mr FG has provided a copy of an email from Ms HK dated 11 January 2005 in which she advised she had put "the paper work" for her parents in the post to Mr FG on that day.

² Letter FG to NZLS (30 August 2013).

had for many years a very good relationship with Mr and Mrs CE, and with their daughter HK. I record again that HK has never given me any cause to disbelieve what she has said or question anything that she has done. I have found my dealings with JE to be unsatisfactory. I regard him as domineering and manipulative, and believe CE is being manipulated by JE.

[11] Some correspondence passed between JE and Mr FG following the meeting, in which JE states he was communicating with Mr FG on behalf of CE as well as for himself as to the content of notes of the family meeting recording matters discussed and decisions taken. JE took particular issue with Mr FG's view of the payments made to Ms HK and JE essentially accuses Mr FG of acting at the behest of Ms HK.

[12] By letters dated 25 July 2013 CE revoked the appointment of Mr FG and Ms HK as his attorneys. Mr FG had concerns about CE's mental capacity to make such decisions and therefore whether or not the revocation was effective. He declined to accept as evidence of CE's capacity, a letter from CE's GP who did not have expertise in assessing capacity and instead requested CE to undertake an assessment by a psychogeriatrician. By that time CE had withdrawn instructions from Mr FG and instructed another solicitor to act on his behalf.

[13] Mr FG and his firm agreed that the only way to determine whether or not CE had the appropriate capacity to revoke the EPA was to apply to the Family Court for an order that CE be assessed by a psychogeriatrician.³ The application to the court had not proceeded at the time the Standards Committee made its determination but had been completed by the time of this review and I have been provided with a copy of Judge X's judgment dated 17 April 2014.

The complaints

[14] The Standards Committee recorded the complaints as being that Mr FG:⁴

- failed adequately to explain to the CE's the effect of an EPA and failed to ensure that the documents were executed and witnessed in accordance with the law (including an allegation that the EPA was executed in 2012 despite being dated 2004);
- acted without instructions - namely that he attended a family meeting at the request of a third party and failed to consult with the CE's prior to that meeting, including a failure to obtain instructions in advance concerning gifts or loans made; and
- subsequently failed to act on Mr CE's instructions regarding a wish to revoke his EPA.

³ CE had agreed with Mr FG previously to be assessed but seemingly withdrew agreement subsequently.

⁴ Standards Committee decision (31 October 2013) at [1].

[15] With regard to each issue it determined:

- (1) The Committee disagrees however that Mr FG, in arranging for the deeds to be perfected retrospectively in August 2012, in any way “circumvented” the provisions of the PPPR Act in its current form. Rather, the Committee notes that s 108AA(2)(b) of the PPPR Act specifically provides that s 95(1), as it read prior to the PPPR Amendment Act coming into force, continues to apply to all EPAs which were executed by the parties before the PPPR Amendment Act’s commencement date. Section 94A(1) of the PPPR Act specifically provides: *“This section applies only to a power of attorney executed after the commencement of section 7 of the Protection of Personal and Property Rights Amendment Act.”*⁵
- (2) Having had regard to the material before it, the Committee considers that Mr FG attended the family meeting on 12 July 2013 in his capacity as the complainants’ solicitor. Although the initial invitation to attend was extended by HK, the Committee finds that Mr FG was under the clear impression that HK had consulted with Mr CE before extending the invitation and that the latter was aware that he would be attending. This version of events is borne out by the fact that Mr CE appeared to have been expecting Mr FG and both he and his son were very welcoming.⁶
- (3) The Committee accepts Mr FG’s explanation that he did not disbelieve Mr CE but that he had no reason to doubt what HK said. In any case, HK has agreed to consider the payments as loans and has provided a written undertaking to repay them. In light of this, and of the discussions during the family meetings, Mr FG recorded details of the payments (and the fact they are to be treated as loans) in a file note sent to the complainants.

On this basis, in so far as the matter of the gifts/loans is concerned the Committee considers that Mr FG acted appropriately and in accordance with his obligations towards the complainants as his clients.

JE also notes that Mr FG referred to the possibility of Mr CE “losing his marbles.” The Committee acknowledges that this may have been an unfortunate choice of words and that it may have caused Mr CE some offense. The Committee notes however that the turn of phrase is a common colloquial expression and does not consider that Mr FG used it with ill-intent or that, in the context, he breached professional standards.⁷

Review

[16] CE applied for a review of the Standards Committee determination and authorised JE to represent him. However, the supporting reasons for the review application commenced with the words: “CE and JE would like to submit the following reasons for a review of the decision of the NZLS Standards Committee”. All comments are expressed as being made by both parties although it does seem to me that the supporting reasons and all communications with this Office have been authored by JE. This was an aspect of the review that I wanted to canvass with CE at the review

⁵ At [26].

⁶ At [40].

⁷ At [44]-[46].

hearing which was unable to take place because CE's health did not allow him to attend.

[17] Indeed, JE refers to CE's "failing memory" in his letter to this Office dated 19 August 2015 and clearly this raises a question as to how much of the complaint and/or review is in fact that of CE.

[18] In addition, it became apparent that JE had some misconceptions as to the nature of a review and on the day before the proposed hearing at which JE intended to attend accompanied by his wife as a support person, I wrote to him to clarify what I considered were misconceptions under which he was labouring. I wrote:⁸

The first misconception, is that you appear to hold the view that a review hearing is some sort of adversarial court hearing where parties can cross examine each other. A review by this Office, is an inquisitorial approach by the review officer, in this case myself.

What this means is that I review all of the material already provided to both the Standards Committee and this Office, and ask questions of either party to clarify any matters that are not clear to me.⁹

The second misconception is that I will be making rulings on the validity of the Powers of Attorney, and/or the capacity of the donor(s) to revoke the Power of Attorney. I must make it clear that the complaints process is not the forum for that, and such issues must be addressed in the Family Court. I have noted that you seemed to think the complaints process could be used as part of the overall litigation, and that is an abuse of the complaints system. The Court is not bound in any way by any comments made by this Office, and I do not in any event intend to make any comments on those issues, as it is beyond the jurisdiction of this Office.

[19] I then sought consent from the applicants for the review to be completed on the papers. Mr FG had previously consented to this.

[20] JE replied by email on 19 August 2015, advising that they would not be attending the hearing and making further comments. I have interpreted the content of that letter as providing consent to the review being completed on the papers.

[21] This review has therefore now proceeded by considering all of the material on the file which includes the Standards Committee file and all communications with this Office.

⁸ Email LCRO JE (19 August 2015).

⁹ JE had expressed an intention to question Mr FG at the review hearing.

Some general observations

[22] One of the issues raised by this complaint is an issue which lawyers often need to confront. Clients often appoint their lawyer as attorney, executors of their wills, or trustees of their trusts. This is because the client has faith in the lawyer appointed and often the client will appoint the lawyer as an impartial person who can be relied on to protect the interests of the client or to ensure that a client's wishes are carried out. Once a lawyer accepts such an appointment it would be a betrayal of the trust reposed in the lawyer by the client to surrender the appointment without good reason. Indeed, in cases such as the present, the easy option would be to readily surrender the duties accepted by the lawyer and there is no discernible reason why continuing to carry out the duties accepted by Mr FG would have constituted an "escape route" as suggested by JE.

[23] In cases of doubt, such as in this case, the proper course of action is to seek direction from the Court. That is what Mr FG did and his application was accepted by the Court as being the proper course of action to have taken. There is absolutely no reason to be critical of Mr FG's conduct.

[24] Leading up to this proposed hearing, JE questioned the provision by Mr FG of what he described as "the court papers".¹⁰ These comprised:

- (a) Reserved judgment of Judge X dated 17 April 2014 in relation to an application for directions made by FG and HK as attorneys in accordance with the Protection of Personal and Property Rights Act 1988 ('Family Court Judgment').
- (b) Minute of Judge X dated 25 November 2014 ('Minute').
- (c) Reserved judgment of Judge X dated 23 February 2015 in relation to an application for costs ('Costs Decision').

[25] Although all of these were dated after the determination of the Standards Committee, and were not considered by the Standards Committee, they were accepted by me as material relevant to this review. Although it is stated in the Guidelines for Parties to a review that generally no new evidence will be admitted on review, s 204 of the Lawyers and Conveyancers Act 2006 enables the LCRO to make further inquiries into a complaint, and to exercise any and all of the powers of inquiry or investigation that a standards committee may exercise.

¹⁰ Email JE to LCRO (19 August 2015).

[26] Most importantly, Judge X stated that the application by Mr FG and Ms HK for directions as to whether CE had the proper capacity to revoke the EPA was properly brought and was a proper exercise of the procedures provided by the Protection of Personal and Property Rights Act 1988 in such circumstances. This approval of the propriety of the application was subsequently reinforced by an award of costs against CE.

[27] These statements and findings make it quite clear that Mr FG acted appropriately in the circumstances and I refer again to the general comments made above. The circumstances which presented to Mr FG were difficult and I reinforce the finding of the Standards Committee that he did not, when applying to the Court, breach any professional standards.

[28] JE and CE are critical of Judge X's judgment and advise they intend to take the matter on appeal. That is the proper forum in which they may express their views and reasons for doing so and this Office will not be used as a means of reinforcing proposed litigation.¹¹ As noted in my letter to JE that is an abuse of the complaints process and in any event, it is far beyond the jurisdiction of this Office to be expressing any views on issues that should properly be addressed by the court.

[29] The same comments apply in relation to the question as to whether or not the formalities to create the EPA were validly attended to. The PPPR Act provides any number of instances where parties may apply to the Court for issues such as this to be determined, and again, I note, neither this Office nor the Standards Committees have jurisdiction to consider such matters.

The family meeting

[30] This complaint is that Mr FG attended a family meeting without being requested to do so by CE. Inherent in this complaint is the suggestion that Mr FG was acting at the behest of Ms HK.

[31] Much also was made of questions by JE and CE as to whether Mr FG attended the meeting as the CEs' solicitor or their attorney. I cannot understand the relevance of this line of complaint. The only question that arises is whether or not Mr FG should take any action in his capacity as attorney and he would have needed to be able to form a view as to whether he should take that step or not. In any event, he had previously paid Mr and Mrs CE a social visit which is perfectly proper and acceptable

¹¹ In Part 8 of the review application CE records as one outcome being sought "possible grounds for litigation".

conduct for a lawyer who has acted for clients for some 20 years. The telling fact also is that Mr FG did not get any sense from CE and JE that he was unwelcome at the meeting, and indeed, they corresponded with him in some detail subsequently with regard to the content of the notes of the meeting.

[32] Again, I reach the same view as the Standards Committee on this issue, that there was nothing in Mr FG's conduct which amounted to a breach of professional standards.

Summary

[33] To sum up therefore, I have reached the same conclusion as the Standards Committee with regard to all complaints raised by CE. Indeed, I suspect that the complaint and this review application have been largely driven by JE and derive from the poor relationship between JE and Ms HK, and that JE has formed the view that Mr FG was acting in support of and at the behest of Ms HK.

[34] This is another example of the many times that lawyers become embroiled in disputes between family members and the complaints process is engaged by a dissatisfied party in an attempt to vindicate that person's position. The Standards Committee has quite properly declined to engage in issues arising out of that dispute and indeed, ventured even further into making pronouncements on the validity of the EPA than was necessary, or even appropriate.

Decision

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

DATED this 27th day of August 2015

O W J Vaughan
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 CE as the Applicant
Mr JE as the Applicant's representative
Mr FG as the Respondent
Ms LN as the Respondent's representative
The Standards Committee
The New Zealand Law Society