LCRO 64/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [North Island] Standards Committee [X]
BETWEEN	**HK** Applicant
AND	**YS** Respondent

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

DECISION

Introduction

[1] Mr HK applied for a review of a decision by the [North Island] Standards Committee [X] dated 9 March 2012[1] in which the Committee decided that further action on Mr HK's complaint against Mr YS was unnecessary or inappropriate, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr HK's complaint arises because Mrs RV named Mr YS as a beneficiary in a will she made in May 2000 (the 2000 will), which halved what would otherwise have been Mr HK's entitlement as sole beneficiary under a will she had made in 1999 (the 1999 will).

[3] Mrs RV died on 29 January 2010. Mr HK challenged Mr YS's entitlement under the 2000 will. They reached a negotiated settlement over their entitlements as

[1] Standards Committee decision (9 March 2012).

beneficiaries, and signed a settlement agreement on 5 August 2011. As executor, Mr HK applied to the High Court for a grant of probate for the 2000 will, and Mr YS received a reduced benefit as agreed. However, the settlement agreement did not dispose of Mr HK's concerns that Mr YS had behaved unprofessionally when the 2000 will was made and in receiving a benefit, and he made a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[4] The Standards Committee made reference to the correspondence from the parties, including Mr HK's detailed complaint dated 23 November 2011,[2] further information contained in an opinion provided by Mr AB,[3] and Mr YS's responses.

2011 Conduct

[5] The Committee considered whether "Mr YS's presumed acceptance of some benefit of the will in the 2011 settlement" supported it enquiring into conduct concerns. The Committee's view was that because Mr HK had agreed to settle, with the presumed benefit of legal advice, the matter was "difficult to pursue", and the "Committee was reluctant to enquire into a confidential settlement".

[6] In all the circumstances, the Committee decided that further action was unnecessary or inappropriate on that aspect of the complaint, pursuant to s 138(2) of the Act.

1999/2000 Conduct

[7] The Committee also considered Mr HK's complaint about Mr YS's involvement with Mr ET when he drafted the 2000 will, purportedly with an inappropriate level of input from Mr YS as a prospective beneficiary.

[8] The Committee referred to the six-year time limit in s 351(2)(b) of the Act, and formed the view that it had no jurisdiction over this aspect of the complaint, because the events occurred more than six years before the commencement of the Act.

Application for Review

[9] Mr HK objected to both of those outcomes, and applied for a review on the basis that Mr YS concealed his knowledge that Mrs RV may have lacked capacity in 2000 so

[2] Complaint HK to the NZLS (23 November 2011).
[3] Letter AB to JJ (3 December 2010).

that he could obtain a benefit under her 2000 will. Mr HK says Mr YS's conduct is unsatisfactory and he should be censured, fined, and ordered to pay costs.

[10] Mr HK says Mr YS instigated Mrs RV making the 2000 will, and was instrumental in its drafting. He says the change from the 1999 will was major and Mr YS was under an obligation to disclose the change to Mr HK, as Mrs RV's attorney from 2001 onwards.

[11] After Mrs RV died, Mr HK's view is that Mr YS should have disclaimed his share under the will. Instead he says Mr YS's decision to accept his share was motivated by self-interest and greed, and his conduct in that regard is inconsistent with his obligations as a lawyer.

Role of LCRO

[12] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of Review

[13] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Hearing

[14] Both parties attended and were represented by counsel at a review hearing in [City] on 28 January 2015.

Mr YS's Position

[15] Mr YS's evidence at the review hearing was that Mrs RV had told him she did not want to leave the whole of her estate to Mr HK, and when it became apparent that she intended to name him as a beneficiary, he put her in touch with Mr ET so she could obtain independent legal advice on her will.

[16] Mr YS says he did nothing to influence the drafting of the will, or Mrs RV. He had input as any beneficiary might, but did nothing to influence Mrs RV's choice of beneficiaries, and was not present when she executed the 2000 will.

[17] Both Mr YS and Mr HK acknowledge that in 1999 and 2000, Mrs RV was quite capable (although not necessarily in a legal sense) of making other wills, appointing other trustees and executors, and naming different beneficiaries, without either of them knowing.

Dr GG's Evidence

[18] In the course of the review, further evidence came to light. In June 2012 Mr HK's lawyers submitted evidence that had not been before the Standards Committee, in the form of an affidavit by Dr GG, who had been Mrs RV's GP for a number of years before she was hospitalised in 2001.

[19] Mr HK says he was previously unaware that Dr GG had been Mrs RV's GP, and only met him by chance at a social function in 2012. When the two of them struck up a chance conversation, the doctor says that Mr HK introduced the subject of Mrs RV. Dr GG found himself able to disclose confidential patient information to Mr HK relating to Mrs RV. He deposed to being "appalled" by the discovery that Mr YS had benefited under her estate, when Mr HK told him about that.

[20] The general thrust of Dr GG's evidence is that Mr YS had contacted him a "few weeks" after "about early 2000", and they had discussed Mrs RV's mental capacity.[4] The doctor said that he could "recall making it clear to Mr YS that [he] did not consider that she was at that time competent to make a will", because he had concluded that "she could be easily influenced and could make irrational decisions which were not in her best interests".

[21] I have carefully considered the evidence provided by Dr GG, who, at the time of his conversation with Mr YS, had over twenty-five years of experience as a GP. Dr GG does not say that he is a specialist with the necessary expertise to form a reliable professional opinion on legal capacity and dementia sufferers. His affidavit reports a conversation he had over the phone one evening with Mr YS. He does not say that he undertook any tests on Mrs RV to ascertain whether she had legal capacity. Nor does he say Mr YS (or Mr ET) asked him to do so.

[4] Mr YS's evidence is that the conversation occurred in the context of him seeking reassurance in respect of Mrs RV executing an EPOA in favour of Mr HK in 2000.

[22] Although Dr GG describes Mr YS's enquiry in his affidavit as a request for an "opinion" about her mental capacity, the conversation he describes sounds more like a preliminary enquiry. Dr GG's "opinion" is unlikely to be able to withstand robust interrogation especially this long after the events he describes.

[23] Counsel for Mr HK emphasises the doctor's evidence that when he told Mr YS he did not consider Mrs RV was competent to make a will at that time, Mr YS "appeared deflated" at the news. I consider that evidence is highly speculative, and at risk of having been tainted by Mr HK's account of events in conversation with the doctor.

[24] Overall, the doctor's evidence carries little weight. It is unreliable because 12 years had passed since the conversation he reports. The doctor has provided no contemporaneous record to support his recollections. As counsel for Mr HK says the affidavit was prepared by his office, I have no doubt that if any such record had been available, the doctor would have referred to it in his affidavit. Finally, I am concerned that in the course of their conversation, Mr HK communicated his concerns about Mr YS's motivations, thereby tainting the doctor's recollections albeit inadvertently.

[25] I emphasise that none of my comments should be taken as a criticism of Dr GG or Mr HK; they are not the subject of this decision. Mr YS's conduct between 2000 and 2011 is.

Discussion

Time bar

[26] Mr HK's position is that the statutory bar to making a complaint in respect of conduct that occurred before 1 August 2002[5] is overridden by s 351(1) of the Act. That is not correct. The Act is clear that no person is entitled to make a complaint against a lawyer if the conduct complained of occurred more than six years before s 351 commenced. That section commenced on 1 August 2008, so 1 August 2002 is the cut-off date for complaints to be made under the Act.[6]

[27] On review, counsel for Mr HK argues that even if the six year time limit on complaints is an impenetrable barrier to Mr HK making a complaint, it remains open to a Committee under s 130 of the Act to commence an investigation of its own motion, and that Mr YS's conduct in 2000 was such as to justify a Committee making such an enquiry.

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[5] Lawyers and Conveyancers Act 2006, s 351(2)(b).
[6] LCRO 261/2012 at [16]; LCRO 263/2012.

[28] The statutory position under ss 130 and 351 of the Act, was considered by the LCRO in *EA V Wellington Standards Committee 2*[7] which the LCRO considered "whether the Standards Committee has jurisdiction to institute an own motion enquiry into conduct which took place prior to 1 August 2008".[8] The LCRO considered lengthy and careful written and oral submissions by the applicant in that case, and took into account the decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in *Auckland Standards Committee 1 v Brett Dean Ravelich.*[9]

[29] In *Ravelich* the Tribunal discussed the availability of an own motion process under s 99 of the Law Practitioners Act 1982, and the availability of a similar process under s 130 of the Act, saying that the Lawyers and Conveyancers Act appears to adopt the policy of not reaching back before 1 August 2002. The Tribunal found it "difficult to discern any rational basis for only applying that policy to some disciplinary proceedings for conduct under the former Act, and not other such proceedings".[10] It observed that the: [11]

> …six-year limitation is not a moving six years, related to a period prior to the date of discovery of any conduct that should be examined under the disciplinary process. The limitation period is fixed, and has been since the commencement of the Lawyers and Conveyancers Act. It excludes conduct prior to 1 August 2002. That is the relevant date whenever a matter may come to light, whether now or some years in the future.

[30] The Tribunal discerned:[12]

> …the intention of Parliament to be that all pre-1 August 2008 conduct, back as far as 1 August 2002, is to be dealt with under the transitional provisions of section 351, no matter when discovered.

[31] The Tribunal also made reference to the discretionary aspect of s 138(1) which enables a Standards Committee to take no further action if it considers that the length of time has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable. I note that pursuant to s 211(1)(b) of the Act, the same discretion is available to an LCRO on review. I also note that, if necessary, other avenues may be available to address concerns arising from lawyers' conduct before 1 August 2008.

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[7] LCRO 11/2011.
[8] At [29].
[9] Auckland Standards Committee 1 v Ravelich [2011] NZLCDT 11 (29 April 2011).
[10] At [59].
[11] At [61].
[12] At [62].

[32] Previous decisions of the LCRO and the NZLCDT are not binding on me, but I have found the information in the decisions referred to above helpful in considering the historical aspects of this review application.

[33] The jurisdiction to consider a complaint about conduct that occurred before 1 August 2008 only arises if the conduct complained of could have lead to disciplinary proceedings being taken against Mr YS under the Law Practitioners Act. Before disciplinary proceedings could be taken, the conduct would have to reach a high threshold of wrongdoing. It would have to be conduct that can be described as "misconduct" or "conduct unbecoming". The conduct would have to be capable of being described as "reprehensible" (or "inexcusable", "disgraceful" or "deplorable" or "dishonourable"). If the conduct involved negligence, the negligence would have had to be of a degree of seriousness or frequency such as to reflect on a practitioner's fitness to practice.[13]

[34] The uncontested evidence available on review indicates that by 2000 Mrs RV may have been easily influenced, and capable of behaving irrationally and impetuously. However, there is no compelling evidence that Mrs RV lacked testamentary capacity at that time, nor is this process of review the appropriate forum in which to determine that question.

[35] In his affidavit in reply sworn on 23 July 2012, Mr YS avers that he did not act for Mrs RV with respect to her will (that was Mr ET), but only acted for her in relation to the enduring power of attorney (EPOA) in May 2000. It was that instrument that enabled Mr HK to act as her attorney over personal care and welfare.

[36] Mr HK has referred to correspondence Mr ET sent to Mr YS inviting comment on the terms of Mrs RV's will, the inference being that Mr YS was taking instructions from, and perhaps also advising and influencing Mrs RV on the terms of her will, before responding to Mr ET. Evidently Mr HK has access to that correspondence, because it was referred to in Mr AB' letter, but he has not provided it either to the Committee or on review. If the correspondence compelled the conclusion Mr HK and his counsel argue for, I would have expected Mr HK, or his counsel, to produce it to the Committee, or seek to introduce it on review. As that has not occurred, I am unwilling to draw such an inference.

[13] Atkinson v Auckland District Law Society NZLPDT (15 August 1990).

[37] Mr YS acknowledges there was correspondence, but says it was open and transparent. His position is that he did nothing wrong, he and his children were friends to Mrs RV. He says he believes she enjoyed more value and benefit from their personal relationship than from their professional one.[14] He says he did not, and does not, know Mrs RV lacked capacity in May or June 2000, either to make a will or an EPOA.

[38] Mr HK confirmed that he did not consult Mrs RV's GP or obtain any other medical evidence before agreeing to settle the dispute over the 2000 will and applying for probate on it. If Mr HK genuinely had doubts about Mrs RV's capacity, I consider it more likely than not that he would have investigated her medical records before he settled his dispute with Mr YS, and certainly before he applied for probate over the 2000 will, which was substantially less beneficial to him than the 1999 will had been.

[39] As Mr HK appears not to have been overly concerned about Mrs RV's capacity in 2000, even though he had known her for so many years, it is difficult to conclude that Mr YS, who had known her for a relatively short time, should have been on high alert.

[40] The usual presumption is that a person has capacity, unless there is reason to believe they do not. Any concerns about Mrs RV's capacity to make a will were for Mr ET to address. There is no evidence of him registering any concerns, before or at the time he saw Mrs RV and she executed the 2000 will. No record of his attendances leading up to her signing the will, or his attendance on her at the time she signed, is available on review. Neither Mr HK nor Mr YS was there at the times he executed the 2000 will.

[41] Again, if substantially helpful information from Mr ET's file had existed, it should have been presented to the Committee either with Mr HK's complaint or in the course of correspondence with NZLS in the complaint process.

[42] Mr YS is firm in his position that he did not act for Mrs RV in respect of the 2000 will. There is no compelling evidence that he did. His recollection of his conversation with Dr GG is that it related to Mrs RV's ability to sign the EPOA appointing Mr HK on 4 June 2000, and upon which Mr HK then acted. He says he recently recovered his recollection, and it is unsupported by any contemporaneous record. In the circumstances, Mr YS's recollections are no more reliable than Dr GG's.

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[14] Affidavit by YS dated 23 July 2012.

[43] Counsel's submission that the Committee could have commenced an own-motion enquiry relies heavily on Dr GG's evidence which, for the reasons discussed above, carries little weight.

[44] I am satisfied that the evidence is insufficiently reliable to support the commencement of disciplinary proceedings against Mr YS.

[45] Given that Mr YS did not act for Mrs RV, referred her to Mr ET for independent advice on her will, and the paucity of any other persuasive evidence to support Mr HK's position, I do not consider that the conduct complained of could give rise to disciplinary issues against the standards that applied in 2000, or that proceedings could be commenced on the available evidence.

[46] In addition to the jurisdictional time bar, the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the further evidence in support of the complaint was provided means that investigation of the complaint is no longer practicable or desirable.

[47] In all the circumstances, the Committee's decision that it had no jurisdiction to consider the complaint about Mr YS's conduct in 2000 is confirmed.

2011 Conduct

[48] Mr HK says the Committee was wrong to dismiss his complaint about Mr YS's conduct in 2010 and 2011. He says Mr YS carried that guilty knowledge with him, and was under an obligation to him at various times from 2000 onwards to disclose the changes between the 1999 will and the 2000 will.

[49] Mr HK says that Mr YS owed him an obligation because he was acting as Mrs RV's attorney at various times, including when he sold Mrs RV's house in March 2002, at which time Mr YS acted on his instructions as attorney.

[50] Mr HK believes Mr YS should have disclaimed his interest under the 2000 will, and remains critical of him for taking an aggressive stance in their negotiations, and insisting on taking his full entitlement under the 2000 will. I note from the settlement agreement that Mr YS accepted a reduced entitlement.

[51] Counsel for Mr HK submits that:[15]

[15] Submissions OD to LCRO (23 December 2014) at [7.4b].

> … All that is required is for the LCRO to be satisfied that Mr YS had knowledge in 2010, that Mrs RV lacked testamentary capacity at the time her 2000 will was signed. If he had that knowledge then plainly there is a case to answer in respect of the allegations made.

[52] That is the nub of the matter, and as set out above, I am not satisfied, as Mr OD puts it, there is a case to answer.

[53] The evidence is that Mr YS received a benefit under Mrs RV's will. Although there was a professional risk to him in doing that simply because he is a lawyer,[16] there is insufficient persuasive evidence to support a finding that he conducted himself at any stage in a way that suggests his conduct should be addressed on review.

[54] There are no other circumstances that provide good reason to interfere with the Standards Committee's decision that further action is unnecessary and inappropriate with respect to this aspect of Mr HK's complaint.

[55] Pursuant to s 211(1)(a), the decision of the Standards Committee is confirmed.

Outcome

[56] The Standards Committee's decision that it lacked jurisdiction over Mr HK's complaint about conduct before 1 August 2002, is confirmed, as is its decision to take no further action regarding Mr HK's complaint about Mr YS's conduct in 2010 and 2011.

Costs

[57] The LCRO has discretion to consider costs pursuant to s 210 of the Act and the LCRO's Costs Orders Guidelines.

[58] Mr HK was entitled to apply for a review. There is no reason to make an order for costs against him.

[59] There has been no adverse finding for Mr YS either before the Committee or on review. There is no other reason to order him to pay costs on review.

[60] No costs orders are made on review.

Decision

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[16] Duncan Webb *Ethics Professional Responsibility and the Lawyer* (2nd ed, Lexis Nexis, Wellington, 2006) at 229-230.

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

DATED this 17th day of February 2015

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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 HK as the Applicant
Mr OD as the Applicant's representative
Mr YS as the Respondent
Mr PC as the Respondent's representative
[North Island] Standards Committee [X]
New Zealand Law Society