

LCRO 104/2016
LCRO 192/2016

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

LP

Applicant

AND

PR

Respondent

DECISION

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

Introduction

[1] Mr LP has applied for reviews of two decisions by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of the bulk of his complaints concerning conduct on the part of Mr PR. The Committee concluded in its first decision dated 31 March 2016,¹ that Mr PR's failure to provide a copy of his terms of engagement and report to both trustees, instead of only one, was unsatisfactory conduct as that term is defined in s 12(a), (b) and (c) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee censured Mr PR and in its second decision dated 19 July 2016,² which is also the subject of this review, ordered him to pay \$1,500 in compensation to Mr LP for the anxiety and stress those professional failings caused to Mr LP.

¹ LCRO 104/2016.

² LCRO 192/2016

[2] Mr LP challenges the first decision for its reliance on evidence with which he disagrees, want of logic, irrelevance and mistake over the applicability of principles that relate to reverse briefs. Mr LP wants more than the \$1,500 the Committee ordered Mr PR to pay him in the second decision and consideration to be given to publishing Mr PR's name to deter him from engaging in similar conduct in future.

Background

[3] Mr LP is a Chartered Accountant. His uncle is Mr DJ. Mr LP and Mr DJ (the Trustees) were the only trustees of the DJ Family Trust (the Trust). Mr DJ was also a beneficiary of the Trust and says he did most of the Trust administration.³ Mr LP was also a director and shareholder of companies in which Mr DJ also had interests.

[4] In October 2001, Mr DJ was in a relationship with Ms AW. Mr DJ bought a winning Lotto ticket. Substantial winnings were paid out on [Date] and made their way into the Trust's bank account. Mr DJ and Ms AW later separated and became embroiled in a dispute to which rights in the Lotto winnings were central. Ms AW commenced proceedings in the Family Court in 2006. She named Mr DJ and the Trust as respondents, said the value of the Lotto win was \$1.9 million and claimed an entitlement to half of that amount on the basis the winnings were relationship property.

[5] Mr DJ rejected Ms AW's claims and represented his own interests before the Family Court.

[6] The Trustees instructed [T&G] to make an application removing the Trust as a party. Mr LP filed evidence in support of that application. The application was not successful. The Family Court found in favour of Ms AW on the status of the Lotto winnings.

[7] Mr DJ decided to appeal the Family Court decision and instructed Mr PR and Mrs YL (since deceased) (the lawyers).

[8] Mr LP describes the arrangement as a reverse brief, on the basis that Mr DJ approached and met with Mrs YL before he contacted Mr PR. Mrs YL's brief of evidence, dated 24 June 2013, records that she met with Mr DJ on 19 November 2008 at her chambers.

[9] The formalities Mr PR and Mrs YL complied with in early December 2008, indicate that Mr DJ instructed Mr PR's firm to represent his interests and (to the extent those did not conflict with Mr DJ's) the interests of the Trust. Mr PR's firm instructed

³ File note, PR, 20 November 2008.

Mrs YL as counsel. Mrs YL addressed her invoices to Mr PR, rather than to Mr DJ or Mr LP. Mrs YL's understanding was that she was acting for Mr DJ and the Trustees, and Mr PR would hold and obtain further money to meet her fees but would not be liable for them. That is consistent with the position she advanced to the Court on 12 December 2008 and was the understanding she gave to Dobson J, who records her appearance as counsel for Mr DJ and the Trustees of the Trust in his decision of 19 December 2008.

[10] Representation of Mr DJ and the Trust began to visibly separate towards the end of January 2009 and had been accomplished by 27 April 2010. Mr LR independently confirmed he had commenced acting for the Trustees, Mr DJ and Mr LP, in April 2010, when he took over from Mrs YL, who had been acting on instructions from Mr PR in Mr DJ's dispute with Ms AW. Mr LR says he continued acting for the Trust in that matter until his instructions came to an end on 6 December 2010.

[11] Acting on instructions provided by Mr DJ, the lawyers prepared and filed an application to the High Court seeking leave to appeal out of time and adduce fresh evidence. Mr PR says he also provided Mr DJ with advice in respect of trusts and companies with which Mr DJ was involved.

[12] The applications for leave to appeal out of time and adduce new evidence were successful. Mr DJ's interests were not fully aligned with those of the Trust in every way. That resulted in Mr DJ and the Trust having separate representation in respect of some of the steps in the proceeding that followed. Nonetheless, there was some overlap because both were opposed to Ms AW's claim to be entitled to a half share in the Lotto winnings. The evidence available on review indicates there was a reasonably high level of cooperation between Mr DJ's representatives and the Trust's.

[13] Mr LP, who had been actively involved in the Family Court proceeding in his capacity as a trustee, was also actively involved in the appeal. Although it seems most of the instructions came directly from Mr DJ, Mr LP acknowledged in correspondence to [Law firm A] dated 3 December 2009, that Mrs YL was "looking after the relationship property matters for [the Trust]".⁴ It is assumed that excludes any areas of conflict between the interests of Mr DJ and the Trust.

[14] Having secured leave to appeal and call fresh evidence, Ms AW raised arguments over discovery of Trust files. Mrs YL resisted those, advancing arguments over admissibility and privilege of Trust documents. When the Court made discovery orders in relation to Trust documents, Mr LP liaised with Mrs YL over discovery of

⁴ Email LP to CK, 3 December 2009.

documents in his possession and control. Mr LP sought advice from Mrs YL on his obligations to disclose trust and other documents that are presumed to have come into his possession or under his control through his involvement with Mr DJ's affairs.

[15] It is evident from emails exchanged in late November 2011 that Mr LP's relationships as a trustee with Mr DJ, Mrs YL and others were under some strain. By that stage, Mr MP (a lawyer) had been appointed as a trustee of the Trust. Mr DJ was not happy with that and was looking for a second opinion. Mrs YL wanted to be paid. It seems little was going the way Mr DJ wanted.

[16] Mr LR had been engaged to represent the separate interests of the Trust until 6 December 2010. Mr LP says he resigned as a Trustee on that date. It seems from his description of what followed that Mr LP may not have had a viable indemnity when he resigned his position as a trustee of the Trust.

[17] A number of contemporaneous documents, including a notice of change of representation in respect of Mr DJ and the Trust, signed by Mr DJ on or about 9 December 2009, demonstrate that he and Mr PR understood that whoever else might be involved, at that stage, Mr PR was to remain as lawyer on the Court record for both Mr DJ and the Trust.

[18] By 10 December 2010, if not before, Mr DJ had told Mrs YL he wanted to change lawyers and she had written to Mr PR accordingly. Mr DJ requested invoices and files, and Mrs YL dealt with her part in that.

[19] Mr LP says he was formally removed as a trustee in May 2011.

[20] Mr PR says the retainers with Mr DJ and the Trust continued until 2011.

[21] In 2012, Mr PR commenced debt recovery proceedings against Mr DJ and the Trustees of the Trust to recover his fees, costs and disbursements, which included Mrs YL's fees (the debt recovery proceeding).

[22] Mr LP opposed the application. He denies the existence of a retainer between the lawyers and the Trust, and says the Trust is not liable for the lawyers' fees, costs or disbursements. Based on his view that the Trust is not liable, Mr LP considers the Trust and its Trustees (one of whom at the relevant times was him) should not be burdened with any cost.

[23] By February 2013, Mr LP had arranged for Mr LE to represent his interests as a trustee in the debt recovery proceeding, separately from Mr DJ's interests,⁵ and made complaints about the conduct of both lawyers to the New Zealand Law Society (NZLS).

Complaint

[24] Mr LP's position is that Mr PR should pay back everything he received from the Trustees. The arguments Mr LP made to the Committee in his complaint are generally premised on the contention that as he was unaware of any retainer between the lawyers and the Trust, the Trust cannot be liable for the lawyers' fees. In essence, Mr LP's view is that liability for all costs rests on Mr DJ, who now has no way to pay.

[25] Mr LP says Mr PR:

1. did not provide written information to the Trustees pursuant to rr 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;
2. was not instructed to act for him personally or as a Trustee;
3. gave false sworn evidence of meetings with him that did not occur; and
4. in purportedly acting for the Trust, failed to:
 - (i) protect the interests of the Trust by checking the Trust deed to ensure the Trustees complied with it;
 - (ii) report to Mr LP on the progress of the litigation; and
 - (iii) advise the Trustees on their options, in particular that they could minimise costs by abiding the Court's decision.

[26] Mr LP said Mr PR's conduct has caused him to incur substantial legal fees in defending his own actions and until Mr PR sought to recover his fees from the Trust, Mr LP had no idea any such bills existed. Mr LP observed that the issues he raised in his complaint were also the subject of High Court proceedings from which further complaints may yet emerge.

⁵ Mr LP says that Mr DJ was declared bankrupt around [Date].

[27] Mr PR's response (and that of Mrs YL) was to seek an extension to allow the High Court to conclude the matters Mr LP had raised in his complaint.

[28] Mr LP added to his complaint on 2 October 2013, advancing his case from the perspective of his former trusteeship and referred to events in the course of the debt recovery proceeding. Mr LP's allegations included the lawyers having lied, delayed the debt recovery proceeding, ignored proper process,⁶ and purported to represent the Trust's interests without instructions from him.

Standards Committee Decision

[29] The Committee summarised Mr LP's complaints as:

- a) he never agreed to Mrs YL or Mr PR acting for the Trustees;
- b) Mr PR failed to obtain the necessary authority to act for the trustees, including the consent of all Trustees;
- c) Mr PR failed to issue an appropriate letter of engagement and failed to keep him informed as to the progress of the proceeding or obtain his instructions, which denied Mr LP an opportunity to confirm whether he authorised Mr PR and Mrs YL to act on behalf of the Trustees;
- d) Mr PR failed to obtain his consent or to consult with him in relation to the commercial property matters, failed to protect the relevant interests of the Trustees and claimed costs in the absence of a valid basis to do so;
- e) Mr PR failed to protect the Trustees' interests in the appeal by failing to advise them that they could simply abide by the decision of the court which would leave Mr DJ to act in his personal capacity, therefore avoiding liability for costs;
- f) Mr PR had no legitimate basis to commence and maintain the fee proceedings against him;
- g) Mr PR provided misleading and false evidence in the fee proceedings, including his evidence that he was authorised to act on behalf of the trust and that he had previously met with Mr LP; and
- h) Mr PR failed to conduct the fee proceedings in an appropriate manner by unnecessarily delaying matters, failing to provide appropriate discovery and misleading the court as to his ability to settle the costs awarded.

⁶ This allegation relates to a complaint Mr DJ made to NZLS about the lawyers' fees which was determined by a Committee and, according to Mr DJ, reviewed by this Office. Mr LP says the lawyers "failed to acknowledge" the review to the High Court and advised it that there was "no such appeal". Mr DJ is said to have asked the High Court to have the proceeding withdrawn as the fees were disputed. It is assumed this is an argument about the effect of s 161 which provides for a statutory stay, not for dismissal or withdrawal.

10. Mr LP also complained that he had incurred considerable costs in defending the fee proceedings, which should never have been brought. Mr LP sought ... reimbursement of all the costs he had incurred and an apology.

[30] The Committee adjourned the complaint enquiry process, “to prevent any possible prejudice to the fee proceedings” brought by Mr PR in the High Court, then considered Mr LP’s complaint under three headings:

- a) can the Standards Committee resolve the conflict over whether Mr PR and Mrs YL were instructed to act on behalf the Trustees?
- b) did Mr PR breach any of his professional obligations in relation to the fee proceedings?
- c) did Mr PR breach any of his professional obligations in relation to the remaining aspects of the complaint?

[31] In relation to the first issue, the Committee considered the evidence supported a finding that Mr PR and Mrs YL were instructed to act for the Trustees, although that was “essentially a question of contractual liability that needed to be argued and decided on in Court”. The Committee described this as “a central facet of Mr LP’s complaint”, describing it as, in essence:

an allegation that Mr PR had colluded with Mrs YL to pursue Mr LP for a debt that they knew they had no legitimate basis to pursue. This was a serious allegation and the Standards Committee initially sought to await the outcome of the fee proceedings and the findings that were likely to be made.

[32] However, as the fee proceedings were discontinued and would be resolved with evidence given at a hearing, the Committee considered it was unable to resolve the conflict on the available evidence, on the balance of probabilities. That left open the question of whether Mr PR and Mrs YL were instructed to act for the Trustees and the Trust.

[33] The Committee considered the evidence was inconclusive on that point, including it:

1. did not interpret Mr PR’s 20 July 2012 email to Mrs YL as an admission that Mr PR never considered he was acting for the Trustees;
2. was not persuaded by Mr LP’s contention that as he had not been provided with a letter of engagement, had not given instructions, been consulted or received correspondence relating to the appeal;

3. did not infer from the fact that it did not have a record of the Trustees' unanimous agreement to instruct, that lawyers were not instructed for the Trust; and
4. was not persuaded that a retainer with the lawyers was entirely precluded by the fact that Mr LR, Mr OV and Dr YL (Mrs YL's husband) had (also) acted for the Trustees.

[34] The Committee noted Mrs YL's involvement in advancing the position of the Trust and Mr DJ, to the extent their interests coincided, and its inability to test her account of events after she passed away. It also did not accept that Mr PR's email of 10 July 2012 could only be interpreted as an admission that he was never authorised to act on behalf of the Trustees. The Committee was not persuaded the absence of a letter of retainer was conclusive evidence that no retainer had come into existence, particularly as there was more than one trustee of the Trust.

[35] At [25] of the decision the Committee said that while it:

had significant sympathy for the position Mr LP found himself in, it was more likely that the conflict between Mr LP and Mr PR was a result of the failure to establish a clear written consensus on who was acting for the trustees of the Trust. This led to misunderstandings between the parties and conflicting accounts of what was agreed in relation to the appeal. This was regrettable, but not sufficient to establish that Mr PR colluded with Mrs YL to pursue Mr LP for a debt which Mr PR knew he had no legitimate basis to pursue.

[36] The Committee considered that while the lawyers "may have been instructed to act on behalf of the trustees of the Trust", it could not resolve this aspect of the complaint which was essentially an issue of contractual liability.

[37] The Committee:

was satisfied that Mr PR had breached his professional obligations in relation to his failure to provide an appropriate letter of engagement and his failure to keep Mr LP informed as to the progress of the appeal.

[38] Its view was that while Mrs YL:

had general conduct for the appeal, this did not absolve Mr PR from complying with his professional obligations as the trustees' solicitor.

[39] The Committee:

was satisfied Mr PR had failed to take sufficient steps to ensure that Mr LP, as his client, was [kept] properly informed as to the progress of the appeal. The Standards Committee was also of the view that this failure had played a significant role in the subsequent conflict and misunderstanding that had arose (sic) as to Mr PR and Mrs YL's role in the appeal and the steps that were taken on behalf of the Trustees. If Mr LP (sic) had issued an appropriate letter of

engagement and ensured that regular steps were taken to keep Mr LP informed as to the progress of the appeal, with this confirmed in writing, then it was highly likely that any misunderstandings would have been addressed at an earlier stage in the appeal.

[40] The Committee concluded the failure to provide an appropriate letter of engagement and ensure that Mr LP was kept informed were sufficiently serious failings to amount to unsatisfactory conduct pursuant to ss 12 (a), (b) and (c) of the Act. The Committee was satisfied that a censure was the appropriate response and invited further submissions on compensation.

[41] The Committee noted that although Mr PR had not kept Mr LP informed about progress of the appeal, "it was not satisfied that his interests were not protected in the proceedings". In particular, the Committee "was not satisfied, with sufficient certainty, that Mr LP was not consulted on the merits of simply abiding by the decision reached in the appeal, or that he would have done so in any case". It noted that Mrs YL had met with Mr LP and discussed the matter. The Committee also considered it arguable that the Trustees properly should have played a role in the proceedings given the significant sums that were at stake. It considered Mr LP had "derived a benefit from Mrs YL's actions" and was unable to conclude, on the available evidence, that there was a failing in the advice provided to the Trustees.

[42] The Committee censured Mr PR but was otherwise satisfied he had not breached any professional obligations in the course of the debt recovery proceeding. The Committee determined, pursuant to s 138(2) of the Act that no further action on the complaint was necessary or appropriate.

[43] After receiving submissions, the Committee issued the second decision ordering Mr PR to pay compensation to Mr LP. In that decision, the Committee considered the breaches of the Act, namely the absence of a letter of engagement from Mr PR and his failure to keep Mr LP adequately informed about the progress of the appeal. The Committee was:

Satisfied that Mr PR's conduct had caused Mr LP anxiety and stress as indicated by Mr LP's comment made in his submission that: "...*compensation is not something I feel unemotionally able to quantify*":

[44] The Committee was satisfied that Mr LP had suffered anxiety and distress as the direct result of the actions of Mr PR, in that his failings had given rise to uncertainty which in turn resulted in anxiety and distress to Mr LP. It considered Mr PR's conduct "fell within a moderately serious band" and ordered him to pay \$1,500 to Mr LP.

[45] No other orders, including publication, were considered warranted.

[46] Mr LP disagreed and applied for a review.

Application for review

[47] The grounds of Mr LP's application for review of the first part of the decision are:

1. In a situation where the Trustees provide no instructions to a barrister or solicitor and one of those parties commences a Court action in the Trustees name without authorisation the decision offers no protection for the Trustees
2. The Committee has relied upon the word of Mrs YL which was not supported by evidence of written instructions or acknowledgement from the Trustees
3. The Committee effectively asserts that the late Mrs YL's word is factual despite any evidence supporting her position being produced and then bases its decision on that notion
4. Mr PR was not able to provide any dates or times when meetings were held with me or meeting notes, timesheets or appointment records. If Mr PR was acting honestly surely he would have attempted to provide supporting records when challenged
5. The unsupported arguments such as those listed in two and five above that resulted in the Strike Out proceedings (as mentioned in paragraph 30) being dismissed is bad logic in reaching a decision
6. The Strike Out proceedings were followed by Discovery. Prior to that time I held no records of the court proceedings as I was not a known participant. It was from the Discovery that the evidence disproving Mrs YL and Mr PR's position was discovered. It was not possible to cite this evidence prior to that time and this reinforces why the reliance on the Strike Out proceedings dismissal should be considered irrelevant to the decision of the Committee
7. It should be noted that Mrs YL submitted a fee invoice to Mr DJ for work to date after Mr PR and Mrs YL ceased to be the named Solicitor and Barrister on the High Court proceedings. I understand that that invoice was paid. Only after a significant period of time had passed and Mr DJ had ended his engagement with Mrs YL, did the invoices in question arise. Mrs YL knew Mr DJ had no assets and this was the reason for the factious [sic] claim. This logic should have been considered by the Committee.
8. If Mr PR had not fulfilled his professional obligations as found in Issue C then he must have failed in his professional obligations in respect of a downstream process such as the fee proceedings therefore the professional obligations core to Issue B were not met
9. Regarding paragraph 32 I note that there was direct judicial criticism of the actions of the parties taking the proceedings in the High Court
10. Also regarding paragraph 32, at the time of the claim for costs I was advised by my counsel that the cost of pursuing an indemnity based settlement would cost significant funds with no guarantee of success.

Given the personal funds I had outlaid to date, I was not in a position to pursue this course of action

11. At paragraph 36 I note that the Committee had relied upon the notion of a reverse brief, but has failed to consider that case law requires that the Barrister be instructed in writing to provide protection for the Trustees (to protect the interests of parties who are not requesting to be parties to any action). No instruction was ever given in writing (or orally) meaning that the notion of a reverse brief cannot or should not be considered
12. The Committee asserts in paragraph 41 that Mrs YL “had met and discussed the matters with Mr LP on a number of occasions” but there is no evidence to support such a statement other than submissions from Mrs YL. Mrs YL’s position has been refuted but the submissions provided by Mrs YL appear to be considered with a greater weight in the Committee’s decision
13. In paragraph 42 the Committee noted that Mrs YL’s fees had previously been considered and upheld in a previous complaint. However due to Mrs YL’s death, the Committee felt it necessary to discontinue on the premise that the principle of natural justice could not be upheld (despite all submissions having already been provided in writing). This does not appear to be a fair basis to base a decision on
14. Finally, in respect to the commercial matters the fact that the Solicitor for the opposing party had to contact me (through mutual parties) to advise of the claim for costs expiring that very day (on the basis that they did not believe I had been advised) should have raised further concerns of misconduct by the Committee

[48] Mr LP also says that Mr PR was supposedly instructing Mrs YL in a claim by the Trustees of the [AC] family trust against Mr LP and Mr DJ as Trustees. He notes that Mr PR is “not clear as to what these other matters are”. Mr LP says he was not consulted at any time in respect of proceedings or after the decision on costs was made against him and Mr DJ. Mr LP says he had no notice of the costs risk until the deadline for payment arrived. Mr LP is critical of Mr PR for his failure to communicate directly with him.

[49] Mr LP says this Office should consider the timeline as represented in the court documents. He denies the existence of any kind of brief, reverse or otherwise, and challenges the relevance and validity of arguments advanced by Mr PR. He is critical of Mr PR for not acknowledging all of his professional failings and considers he should be held to account.

[50] In his application for review of the second part of the decision, Mr LP says:

Mr PR at no time made any attempt to recover the funds directly and instead adopted legal proceedings. This led to costs which should not have been borne by the applicant. Mr PR did not bear any costs as a result of his actions with costs being covered by third parties. No costs in relation to the complaint to the NZLS were ordered as reimbursed to the applicant despite Mr PR being found guilty of misconduct. The amount awarded to the applicant is

inappropriate in relation to conduct Mr PR carried out, which should not be discounted for a promise not to engage in such malpractice again.

[51] Mr LP would like this Office to consider ordering Mr PR to pay costs and compensation and publishing this decision.

Mr PR's reply

[52] For his part, Mr PR instructed counsel who filed submissions. It is apparent from the materials, including her email to Mr OV on 29 January 2009, that Mrs YL understood from her dealings with Mr DJ that she was instructed to act for the Trust as well as Mr DJ personally and that Mr PR was to be, and became, her instructing solicitor.

[53] Counsel for Mr PR refers to and adopts submissions made on his behalf by counsel to the Committee dated 18 September 2015. In those submissions Mr PR says he met with Mr DJ on 20 November 2008 to discuss the relationship property appeal (also referred to as a re-hearing), Mr PR having acted for Mr DJ in an unrelated matter a couple of months earlier. Mr DJ told Mr PR he had spoken to Mrs YL who needed an instructing solicitor. Mr PR's understanding was that Mr DJ wanted to instruct him, and did instruct him, to retain Mrs YL so she could act on the appeal and hold money on account of her fees.

[54] Mr PR says he was not privy to the documents filed in court. From what Mr PR says, it seems Mr DJ drew no clear distinction between himself and the Trust in terms of their status as parties to the litigation and did not explain that the Trust was also a party to the litigation separate from him.

[55] Mr PR's lawyer highlights evidence that supports the view that Mrs YL understood from Mr DJ she was instructed to act for the Trust in the proceeding, as well as for him personally. Reference is made to an email from Mr LP to a Ms CK (a lawyer who had been acting for Mr DJ and the Trust on other matters) of 3 December 2009, which attaches another email, in which Mr DJ says:

I have met with [Mr LP] and we have decided to merge these proceedings along with the relationship property proceedings.

As Ms YL is looking after the relationship property matters for the [DJ]FT we see time benefits from meeting on all matters at once with her... I request that you forward your files on the matter to Ms YL (my barrister) and YL Chambers.

[56] As a result of Mr DJ and Mrs YL not telling him that Mr DJ and Mr LP were also party to the litigation as trustees, Mr PR was unaware he was expected to instruct Mrs YL for the Trustees as well as Mr DJ personally. Mr PR prepared his letter of

engagement to Mr DJ on the basis that he was only acting for Mr DJ personally. Mr DJ signed Mr PR's letter and the fee agreement dated 20 November 2008 on that basis. I interpolate, there is no reason to believe Mrs YL would or should have seen Mr PR's letter of engagement.

[57] Mr PR said that although Mr DJ had mentioned the Trust, Mr PR did not realise it was a party to the proceeding. Mr PR accepts he may have misunderstood who Mrs YL was appearing for as counsel. Given his distance from the work Mrs YL was doing, that misapprehension did not become apparent to him, and therefore was not addressed by him, for some time.

[58] Meanwhile Mrs YL had conducted the appeal and carried out other work on the understanding she was acting for the Trustees, as well as Mr DJ personally, and had had input from both Mr DJ and Mr LP at various times. Mrs YL had, for example, prepared an affidavit on instructions from Mr LP, in which he attested that his belief, like Mr DJ's, was that the Trust was the "true winner" of the Lotto prize money. Mrs YL had also contacted Mr OV to connect the Trustees with him on the basis that Mr OV would instruct her husband to provide the Trustees with what is assumed to have been independent advice, perhaps on a discrete issue where there was conflict between Mr DJ and the Trust. It appears Mrs YL was proceeding on the basis that it mattered little whether Mr DJ or his trust paid her fees.

[59] By mid-December 2010, as Mr DJ had expressed his dissatisfaction with Mrs YL, her involvement in the appeal was at an end and she had rendered her invoices to Mr PR.

[60] It is argued for Mr PR that Mr LP cannot distance himself from his responsibilities as a trustee when, in a number of ways, his conduct suggested he agreed to Mr PR and Mrs YL acting. The argument is premised on the view that it was too late for Mr LP to deny he had authorised Mr PR and Mrs YL to act by the time they took steps to recover Mrs YL's fees. As far as Mr PR was concerned, Mrs YL's fee notes were properly rendered for services she had provided to the Trust. Mr PR's lawyers say that even though Mrs YL was no longer available to give evidence, it was acknowledged by the Court that arguments were available on both sides and that the parties may simply have been at cross purposes as to the identity of the client. Those were among the factors that were relevant to Mr PR's application for summary judgment not proceeding.

[61] Mr PR says he discontinued the proceeding after Mrs YL passed away because her evidence was pivotal and she was no longer available to give it. Mr PR

says Mr LP was awarded costs. It is contended that it would not be appropriate to order Mr PR to pay a fine or compensation, or to publish details identifying him.

[62] Counsel for Mr PR submits the Committee's finding was appropriate given all of the evidence available to it. Mr PR accepts the Committee was correct to find the available evidence inconclusive as to whether he and Mrs YL were instructed to act for the Trustees. Aside from that, it is submitted on behalf of Mr PR that the correct course for this Office is to confirm the Committee's decision and make no order for costs on review. Mr PR does not challenge the determination of unsatisfactory conduct or orders made against him.

Review on the papers

[63] The parties agreed to this review being dealt with on the papers pursuant to s 206(2) of the Act (as it then was), 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, which I do.

Nature and scope of review

[64] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁷

... 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.

[65] More recently, the High Court has described a review by this Office in the following way:⁸

⁷ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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.

Discussion

[66] It is helpful to note at the start that Mr PR cannot be held professionally responsible for failings that may be attributed to trustees. Much of the substance of Mr LP's complaint about failings attributed to Mr PR could equally be addressed to his co-trustee. It is not for this Office to apportion responsibilities between Mr PR and the Trustees. While it is accepted that Mr LP felt he had been excluded from quite a lot of what went on while he was a trustee of the Trust, as between themselves, trustees are expected to cooperate, communicate and abide by the principle of unanimity. It is implicit in the concerns expressed by Mr LP in his complaint that there were difficulties in aspects of the Trustees' relationship.

[67] As to the underlying premise of Mr LP's complaint, it is relevant to note that this Office has jurisdiction over fees, pursuant to s 132(2) of the Act. That jurisdiction is limited to consideration being given to a complaint made by "any person who is chargeable with a bill of costs", which allows Committees and this Office on review, to consider quantum, as opposed to determining liability. This Office is no better placed to determine liability, in the sense of whether there was a retainer with the Trustees, than the Committee was. That issue was fully traversed by the Committee. Further discussion is unnecessary.

[68] If Mr LP were correct and the Trustees did not instruct Mr PR, it would follow that Mr PR was not the Trust's lawyer. If that were the case, Mr PR would owe little or nothing in the way of professional obligations to the Trustees and, by extension, may be unable to charge fees on the basis there was a retainer for legal services provided to the Trustees. However, it is clear from Mr LP's correspondence at the time that he knew Mrs YL was instructed to act for the Trust. Whether he knew of Mr PR's involvement as her instructing solicitor is something of a side issue.

[69] The thrust of Mr LP's complaint is that he contests liability. Complex arguments over liability cannot be satisfactorily resolved by this Office and in this case cannot be resolved without input from Mr DJ and Mrs YL. As noted above, most of the instructions appear to have come directly from Mr DJ. Mr LP's acknowledgement in his correspondence to [Law firm A] of 3 December 2009 that Mrs YL was "looking after the relationship property matters for [the Trust]" is noted. There are other indications

throughout the contemporaneous materials that tend to undermine the position Mr LP later sought to establish through his complaint and again in this review process.

[70] Unpalatable though it may be, it is too late now for Mr LP to backtrack. As Mr LP was not present during many of the interactions between Mr DJ and the lawyers who received his instructions at various stages of his dispute with Ms AW, Mr LP is not terribly well placed to give reliable evidence.

[71] It is also unfortunate that Mr LP's arguments are advanced on logically flawed grounds. For example, the contention that one trustee did not receive documents is not evidence that another trustee did not receive documents, nor is it evidence that documents were not sent to the trustees.

[72] Mr LP's objections rely on a number of assumptions, for example that trust money is impregnable to third parties unless the trustees unanimously decide otherwise. Another example would be that trust money is protected against claims made by third parties by the ignorance of one or more of its trustees. Mr LP also suggests that trustees can protect trust assets against claims by third parties by not communicating with one another. No legal authority has been advanced to support any of those assumptions. I doubt those assumptions are well founded.

[73] Mr LP says this is a situation where the Trustees provided no instructions to Mr PR. In whatever capacity, Mr DJ did provide instructions to Mr PR. As Mr DJ is not a party to this review, his evidence cannot be tested in this forum.

[74] Mr LP says the Committee relied upon the word of Mrs YL which was not supported by evidence of written instructions or acknowledgement from the Trustees. While that is accurate to some extent, there are materials (referred to above) that tend to support the position advanced by Mrs YL, namely that she was instructed by Mr DJ to act for the Trust and Mr LP knew at the time that was the case.

[75] Mr LP is critical of Mr PR for having failed to provide documentary evidence to support his recollections of having met with Mr LP. If Mr PR has no documents to support his recollection, it would be far worse if he were to create evidence or pretend he did have documents when he did not, than to accept all he could rely on was memory.

[76] Mr LP refers to strike out proceedings and Mr PR's conduct in the course of debt proceedings. Mr PR was no longer providing regulated services to Mr DJ, or the Trustees (if at all) by that stage. No disciplinary issue arises.

[77] Mr LP refers to an invoice Mrs YL submitted for fees after her retainer had ended. It is impossible to follow the logic of Mr LP's submission on this point.

[78] Mr LP says that as Mr PR did not fulfil his professional obligations in issuing a letter of engagement to the Trustees, his proceeding to recover fees must fail. The logic is flawed. There is more than one way to evidence the existence of a retainer. A letter of engagement helps, but the absence of one is not determinative.

[79] Mr LP says the Committee overlooked the prejudice to him as a trustee arising from the reverse brief. Again, there is no particular logic to be able to follow through on that submission.

[80] Mr LP is critical of comments regarding evidence given by Mrs YL. She is no longer able to participate. While that may leave Mr LP with a lingering sense of injustice, there is nothing to add in terms of this review.

[81] Mr LP is concerned that Mr PR did not advise him that the Trustees were facing a deadline for paying costs and says that suggests misconduct on the part of Mr PR. In my view, that tends to support the view that discussions that should have been going on between trustees were not. Mr PR has explained his position in that regard in his submissions. That is accepted and does not raise concern over misconduct.

[82] There is nothing in the materials Mr LP has provided on review that supports this Office forming a different view to that reached by the Committee. There is no basis on which to order Mr PR to pay back everything he received from the Trustees. Mr PR accepts the proper course is to confirm the Committee's decisions. There is no reason to do otherwise.

[83] The decisions are confirmed.

[84] The delay in issuing this decision is regretted. An apology is appropriate and is extended to the parties.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decisions of the Standards Committee are confirmed.

DATED this 27TH day of June 2019

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 LP as the Applicant
Mr PR as the Respondent
Ms NU as the Representative for the Respondent
[Area] Standards Committee [X]
New Zealand Law Society