

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

Ref: LCRO 34/2020

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

KL

Applicant

AND

OP

Respondent

DECISION

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

Introduction

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

Background

[2] OP is a lawyer. He drafted a trust deed pursuant to which the HGM Family Trust (the trust) was constituted on 11 February 2008. Mr KL and his former partner (Ms JS) are named in the trust deed as settlors, and along with Mr OP, as trustees. Mr KL and Ms JS are also named among the discretionary beneficiaries, a group that also includes the child of their relationship, NE.

[3] Mr KL says he had independent advice from his own lawyer at the time the trust was formed, and that lawyer has received confirmation from Mr OP that the deed was properly executed at the time.¹

[4] Mr KL says he and Ms JS formally separated in 2016 and have been unable to finally resolve their differences over parenting and property. At the time of Mr KL's complaint to the New Zealand Law Society (NZLS) in August 2019, the trustees had yet to reach unanimity over, and formally document, arrangements regarding trust property. Mr KL invited NZLS to look into what he describes as "the poor conduct of" Mr OP, whose only residual role at that stage was as a trustee of the trust.

The complaint and the Standards Committee decision

[5] Mr KL's complaint relates almost entirely to issues between him and Ms JS that they have been unable to resolve since they formally separated in 2016. By extension Mr OP is caught up in those events because of his role as a trustee. Mr KL also touches very lightly on, but raises no complaint about, the documentation and advice OP provided around the time Mr KL and Ms JS settled the trust in early 2008. Mr KL does not say that the documentation or advice were deficient. His complaint is rather that Mr OP should exercise the discretions the trust deed created for the trustees in a way that meets Mr KL's preferences.

[6] Mr KL's complaint about Mr OP' conduct from 2016 on is as follows:

OP – Family Lawyer, our family trust independent trustee

- a. Failure of duty of care
- b. Breach of trust deed by acts of omission
- c. Breach of fiduciary duty to act in best interest of beneficiaries, particularly as it relates to providing for the well-being of the sole primary beneficiary, our 7-year-old son

[7] Mr KL is critical of Mr OP in his role as a trustee, including that he was uncommunicative, failed to exercise his discretion as a trustee, failed to act in accordance with the deed and did not respond appropriately to an alleged "conflict of interest in the other trustees". Mr KL says that at one stage Ms JS reported that trust property had sustained damage. Mr KL took that as another opportunity to direct criticism towards Mr OP, in the form of an allegation that he failed to ensure that trust property was protected and maintained.

¹ Mr KL, email to LCRO (22 July 2020).

[8] Mr KL says Mr OP' failings as a trustee include not acting in NE's interests and not putting his welfare first. Mr KL says Mr OP has failed to give effect to instructions from him, including those conveyed in the form of incomplete agreements purportedly between him and Ms JS but to which she appears not to have subscribed, and in correspondence sent by Mr KL's lawyers.

[9] Mr KL wants Mr OP to sign trustees' resolutions he has put forward, and to exercise his discretion as the independent trustee in various ways that will move Mr KL towards the finalisation of his disputes with Ms JS. Mr KL says Mr OP' failures or refusals to accommodate him, and on some occasions Ms JS, have cost Mr KL and Ms JS dearly.

[10] Mr KL also says Mr OP has failed to act in a way that is consistent with the advice Mr KL and Ms JS received when they settled the trust in 2008, and is in breach of the trust deed. Mr KL says Mr OP "has not met his duty of care of a prudent person, let alone a business person, not to mention he is a professional trustee". The overarching theme of Mr KL's complaint is that Mr OP should have taken matters into his own hands by now.

[11] Mr KL attached documents to his complaint which include an undated email sent to him by OP which says:

KL

I have been in agreement for the Place [1] property to be sold and the Trust distributed

And indeed this was agreed some two years ago

So why hasn't that happened?

Regards

OP

[12] The footnote to that email indicates it was sent after 1 July 2018, which is consistent with a chronology supplied by Mr KL.

[13] Although Mr KL lays responsibility at Mr OP' feet, he also says he and Ms JS still have not settled their disputes over parenting or property.

[14] The Committee was satisfied that Mr KL's complaint related to "the decisions made by, or lack of action by, Mr OP as trustee of the trust and not as a lawyer". In the circumstances the Committee considered Mr KL's complaint "is a matter for High Court, not a Standards Committee".

[15] In explaining its reasoning, the Committee referred to the Court of Appeal decision in *Hansen v Young* [2004] 1 NZLR 37 and a decision by this Office, *PY v SD* LCRO 217/2017 (26 March 2018) which discusses the separate roles of lawyers and executors/trustees and the distinctions between those roles.

[16] The Committee determined, pursuant to ss 138(1)(f) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr KL had an adequate remedy elsewhere and no further action on this complaint was necessary or appropriate.

[17] Mr KL disagrees and has applied to this Office for a review.

Application for review

[18] On review, Mr KL refocussed his complaint on the work Mr OP did in 2008 in forming the trust and accepting appointment into the role of independent trustee. Mr KL says when it came to implementing the terms of the trust deed in 2016, Mr OP refused to “stand behind his own legal advice”, and give effect to the clauses that envisaged Mr KL and Ms JS separating, and resettlement of the trust.

[19] Mr KL invites this Office to direct the trustees to attend mediation pursuant to s 201 of the Act, and says he would be happy for this Office to order Mr OP to follow his own advice by passing a resolution and resettling the trust as the trust deed contemplates. Mr KL proposes that this Office impose a censure and order Mr OP to pay costs to Mr KL so he “could commence a professional negligence claim to recover costs incurred due to his acts and omissions”, and/or reimburse Mr KL’s legal costs of \$60,000.

[20] Mr OP’s response of 16 July 2020 is brief. He says:

- 1) I was not consulted on the original complaint but endorse the Decision of the Standards Committee
- 2) I record that the vast majority of the assertions raised by the Complainant are palpably false in any event.

[21] Mr KL responded by email on 22 July 2020. He denied that his assertions are “palpably false”. Mr KL confirmed that he has now joined Mr OP as a trustee to a High Court action and that he maintains his objection to Mr OP’ exercise of, or as Mr KL sees it his refusal to exercise, discretion as a trustee in various respects.

Strike Out – s 205(1)

[22] Mr KL’s application for review has been determined pursuant to s 205(1)(d) of the Act which says:

- (1) The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—
 - (d) is... an abuse of process.

Nature and scope of review

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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.

[24] More recently, the High Court has described a review by this Office in the following way:³

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.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Discussion

Mediation

[25] Mr KL has asked this Office to make a direction to mediation pursuant to s 201 of the Act, which provides a LCRO with a statutory discretion to direct the parties to a review to explore the possibility of resolving matters by mediation.

[26] Section 201 does not provide for a LCRO to direct someone who is not a party to the review to explore that possibility. Ms JS is not a party to Mr KL's complaint or his application for review. This Office has no statutory authority to direct Ms JS to do anything, including exploring the possibility that Mr KL's complaint made under the Act regarding Mr OP' conduct in his role as trustee could perhaps be resolved at mediation.

[27] A direction to the parties made under s 201 inviting them to explore mediation is not the same as a direction to resolve matters at a mediation. As the complaint focusses almost entirely on Mr OP' conduct as a trustee, it is difficult to see how the position Mr KL contends for could be resolved at a mediation convened under the Act to resolve a complaint. That is because the processes of complaint and review under the Act are reserved for professional standards complaints made about lawyers. As the Committee has already explained, Standards Committees and this Office do not exercise jurisdiction over trustees only because a trustee is also a lawyer, unless the complaint or review application identify evidence of some professional standards issue for the lawyer concerned to address.

[28] Mr KL has failed to identify any such professional standards issue arising from Mr OP' conduct.

[29] There is no proper basis on which to make a direction pursuant to s 201 of the Act.

[30] As an aside, although Mr KL's request for a direction pursuant to s 201 is declined, that would not prevent any of the trustees from engaging in mediation privately or in the course of the High Court process to which Mr OP is now understood to be a party, if they so wished.

Professional Standards in 2008

[31] The closest Mr KL has come to identifying a professional standards issue is his references in the complaint to the documents Mr OP prepared, and the advice he provided, in and about February 2008 when the trust was constituted and Mr KL and

Ms JS appointed Mr OP as a trustee. At that point Mr OP was acting as their lawyer only in constituting the trust, and Mr KL was in receipt of independent legal advice, which is reassuring from a professional standards perspective.

[32] Before the Act and rules made under it came into effect on 1 August 2008, Mr OP' conduct was guided by the NZLS *Rules of Professional Conduct for Barristers and Solicitors*.⁴ With reference to client conflict, at that stage, rule 1.04 said:

A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.

[33] The commentary to r 1.04 included:

- (1) A conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them.
- (2) A practitioner should exercise careful professional judgment to ensure that a conflict of interest does not exist and is not likely to arise.

[34] Those rules and the present ones also contain restrictions on a lawyer acting for a former client or clients in certain circumstances, and impose duties of confidence.

[35] The fact that Mr KL has disclosed, albeit belatedly on review, that he was in receipt of independent legal advice when he agreed to form the trust in 2008 defeats all of his criticisms of Mr OP as the lawyer who drafted the trust deed in 2008.

[36] There is no evidence that suggests Mr OP was instructed to provide regulated services under the Act after the trust was formed, including when the parties separated in or about 2016. If he was not instructed to provide regulated services, it is that much more difficult to see how he could have breached the Act or any of the regulations or practice rules made under it.

[37] On that note, there is no evidence of misconduct on Mr OP' part, and no suggestion that Mr OP breached any of his professional obligations as a lawyer.

[38] The evidence is that while Mr KL and Ms JS may have been close to reaching agreement at one time or another, no binding agreement was actually reached, or if Mr KL is correct, agreement was reached but not implemented. That cannot be laid at the feet of Mr OP as a lawyer. His evidence is that he had agreed that the Place [1] property should be sold and the Trust distributed some two years before, presumably in 2016. He could only ask why that had not happened, from which it can readily be inferred that he had no information and no instructions.

⁴ New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (7th ed, New Zealand Law Society, Wellington, 2006).

Trustees Discretion

[39] A careful review of Mr KL's complaint and application for review lead to the seemingly inescapable conclusion that the application for review, like the complaint, relates exclusively to Mr OP' role as a trustee. This Office has no ability to oblige Mr OP to "stand by his own legal advice". The advice to which Mr KL refers relates to the trust deed and the exercise of trustee discretions on resettlement. On my reading of clause 9.2, those discretions cannot be exercised by a single trustee.

[40] Mr KL now says Mr OP has been joined as a party to a High Court proceeding.

Abuse of Process

[41] The three elements of Mr KL's original complaint: failure of duty of care, breach of trust deed and breach of fiduciary duty, are all matters for the High Court in the exercise of its jurisdiction over trustees.

[42] There is no evidence that Mr OP acted as the trust's lawyer, or provided regulated services to the trust, Mr KL or Ms JS, from 2016 onwards.

[43] The orders Mr KL incorrectly seeks from the LCRO can be sought from the High Court.

[44] Mr KL is not correct to conceive of this Office as a "circuit breaker" for deadlocked trustees. It has no jurisdiction to order trustees to make resolutions, resettle trusts, exercise trustees' discretion in particular ways, or generally make orders to offset a party's costs in litigation.

[45] If Mr KL were to have legal grounds to found a professional negligence claim arising from Mr OP's advice and drafting in 2008, that is not a claim that he can advance through this Office in the form of an application for review of a standards committee decision.

[46] In any event, Mr KL is equivocal about the establishment of the trust and the advice he received in 2008. His complaint is essentially a request that Mr OP give effect to the terms of the trust, and the sooner the better. It is not a complaint that the trust deed was defectively drafted or that the advice to constitute the trust in the terms it was established in 2008 was deficient. In any event, Mr KL received independent advice at that stage from another lawyer entirely, which makes it that much harder to lay responsibility on Mr OP.

[47] A careful review of all the materials demonstrates that Mr KL's application for review has no basis under the Act.

[48] The features of Mr KL's application for review referred to above persuade me that it is an abuse of the statutory process of review. It is ill-conceived and capable of being struck out in whole pursuant to s 205(1)(d) of the Act as an abuse of process.

[49] There is no apparent reason not to strike it out.

Outcome

[50] The whole of Mr KL's application for review is struck out pursuant to s 205(1)(d) of the Act.

[51] The Committee's decision is unaffected.

Anonymised publication

[52] 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.

Decision

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

DATED this 4th day of August 2020

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:

KL as the Applicant
OP as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society