

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

[2024] NZLCRO 044

Ref: LCRO 76/2022
LCRO 81/2022

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

PF

Applicant/Respondent

AND

BA

Respondent/Applicant

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

Introduction and scope of review.

[1] In a determination dated 20 April 2022, [Area] Standards Committee [X] determined that Mr BA had breached rr 3, 3.2, 3.3, and 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[2] This resulted in a finding of unsatisfactory conduct and imposition of penalties against Mr BA.

[3] Both Mr PF and Mr BA have applied for a review of the determination by the Committee. Mr PF sought a review of the penalties only, whilst Mr BA sought a review of the findings of breaches of the Rules and the penalties imposed.

[4] The role of this Office has been described in a number of High Court judgments. In *Deliu v Connell*, the Court said:¹

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.

[5] Consequently, and regardless of the limited outcomes sought by Mr PF, this decision follows my review of the findings and penalties imposed by the Committee.²

Background

[6] In April 1997, Mrs SF (Mr PF's mother) settled a trust known as the RST F Trust (the Trust).

[7] The trustees were Mrs SF together with two partners (Mr BA and Mr DV) of the [Town A] firm, [Law firm X].

[8] Paragraph [9] of the Trust Deed vested the power of appointment of new trustees in Mrs SF during her lifetime, and after her death in the executor of her Will.

[9] The beneficiaries of the Trust were Mrs SF, Mr PF, and his brother, NF, together with a number of related members of the family.

[10] The sole asset of the Trust at the time the events, giving rise to Mr PF's complaints occurred, was a residential property at [Property 1].

[11] In 2004, Mrs SF executed her Will, in which she appointed Mr PF as executor, and gifted the whole of her estate to the Trust.

[12] Clause 6 of the Will provided:

Appointment of new trustee of my Family Trust

Pursuant to clauses 17.1 and 17.7 of the Deed I appoint my sons PF and NF to be trustees of my Family Trust in my place.³

¹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

² I have not identified any defects in the Committee's procedures.

³ I note that the power of appointment of new trustees is contained in clause 9 of the copy of the Trust Deed provided.

[13] In July 2019, Mrs SF instructed Mr BA (who was then a partner in the firm of [Law firm Z]) to document a change of trustees, whereby Mr BA and Mr DV were to retire, and Ms EC was to be appointed a new trustee.

[14] The documentation could not be completed as the Trust Deed which had been held by [Law firm X] could not be located.

[15] Before the documents were completed and executed, Mrs SF was diagnosed (on 8 December 2019) as being mentally incapable due to dementia.

[16] On the same day, Mr PF made contact with Mr BA asking about the status of the documentation which he had become aware of from a letter that he had come across in his mother's documentation.

[17] Mr BA replied (on the following day) advising that the documentation had not progressed as he had been unable to locate the original Trust Deed.

[18] Following further communications from Mr PF, Mr BA confirmed that they could 'work with' the copy of the Deed that Mr PF had previously delivered to Mr BA's office.

[19] It is not clear what happened subsequently, until on 12 March 2020, Ms KR, a partner in the firm, advised that following further enquiries, all of Mrs SF's original Deeds had been found. These included the Trust Deed.

[20] Ms KR apologised for 'all the inconvenience and anxiety ... caused'. She advised:

I still think we ought to be able to deal with the removal of your mother as Trustee within a reasonable timeframe if we can get the application dealt with on paper.

[21] It would seem that nothing further occurred until Mrs SF's death on 15 October 2020.

[22] This triggered a series of communications between Mr PF and Mr BA in which the options relating to the Trust and the property were discussed.

[23] It is relevant to note here that Mr BA was advising Mr PF personally, as Mr PF had been appointed by his mother as one of the two new trustees (Mr PF and NF).

[24] On 20 November 2020, Mr BA sent an email to Mr PF in which he summarised the options available. As this email is critical to the events giving rise to Mr PF's complaints, I record the content of that email in full:

Hello PF,

I refer to earlier e-mails & have now considered options available for you. I set out a summary as follows:

1. Under the terms of your mothers Will you are appointed the trustee.
2. In addition you and NF are appointed as trustees of the Trust.
3. The Will provides that all the residue of your mother's estate (bank funds etc) are to be transferred to the Trust.
4. The Trust at present only owns the house.
5. The title to the Trust would be altered so that you & NF would be the Trustees, in your mothers place, and DV & myself would ultimately retire.
6. This would then mean you & NF would be governed by the Trust Law requirements to administer the Trust & the property and would need to act unanimously in relation to any decisions.
7. You indicated that you wanted to rent the property. The Trust would therefore need to complete tax returns etc.
8. Alternatively the property could be transferred to you & NF as beneficiaries & you would own the property in your own right (not as trustees).
9. If you owned the property individually you would need to complete a Property agreement that would set out how your relationship as equal owners would be governed.
10. If you transferred the property to yourselves you would also be subject to the "Brightline test" so that if you sold within 5 years there would be a tax liability.
11. Alternatively if you wanted to sell it would be better for the Trust to sell & distribute the sale proceeds to you as part of the winding up process.

I know you mentioned keeping the house however if a sale was a possibility you may want to look at that especially while the market is so buoyant at present.

I hope this summary assists you in deciding how you want to deal with the house.

If you need clarification please advise.

I look forward to your comments.

Regards

BA
Partner
[Law firm Z]

[25] After further communications between Mr PF and Mr BA, they, between them, agreed that the most simple and least involved option was to implement point 5 of that email.

[26] The documentation required to implement that arrangement was:

- A Transmission by Survivorship of Mrs SF's interest as trustee, to Mr BA and Mr DV.
- A Deed whereby Mr BA and Mr DV would retire as trustees, and Mr PF and NF appointed in their stead.

[27] After some delays,⁴ Mr BA advised (on 29 January 2021) that the documents had been prepared and sent to Mr DV for signing.⁵

[28] Preparation and completion of the documentation was being undertaken by Ms HZ, who advised Mr PF on 19 February 2021 that Mr DV had executed the documents and they had been emailed to NF for signing.

[29] At that time, Ms HZ sent an invoice addressed to Mr PF for \$1,200 plus GST and disbursements. This included the disbursement of \$240 for registration fees.

[30] Shortly thereafter,⁶ Mr PF sent an email to Ms HZ which read:

HZ,

Sorry I have another question now – related to clause 1.10 – restricted period. At this clause, it states that a “restricted period” is where “two or more of the discretionary beneficiaries may happen to be the only trustees”.

As NF and I are the only direct beneficiaries, and after the below changes, NF and I will be the only trustees, does this then mean the trust enters “a restricted period”? Which means basically the trustees are powerless to do anything?

If the above is correct, we are heading into a problem.

Is the above understanding correct?

And if it is correct, what is the solution? I would assume the solution is that another (3rd) trustee does need to be appointed now, so that we don't have the situation where the only trustees are also the beneficiaries.

Please advise.

Thanks.

PF.

[31] Clause 1.10 of the Trust Deed provided:

Restricted Period:

“Restricted Period” means any period or periods when the Settlor or one of the Discretionary Beneficiaries may happen to be the sole Trustee hereof or when

⁴ A certified copy of Mrs SF's death certificate was required to complete the Transmission which Mr PF delivered promptly to Mr BA when advised it was needed.

⁵ Mr DV had retired from the firm.

⁶ On 4 March 2021.

the Settlor or two or more of the Discretionary Beneficiaries may happen to be the only Trustees hereof.

[32] Ms HZ responded:⁷

Hi PF,

I haven't been asked to review the Trust Deed, but I have looked at what you have asked, and you are correct.

The Trust Deed anticipates an independent Trustee being in place, if you and NF are Trustees.

As Executor of your Mother's Will, you have the power to appoint a Trustee until the Estate is wound up, then the power shifts to the Trustees of the Trust. I would suggest if you are going to exercise your power, that before you do, you discuss that person's appointment with NF first, to ensure that he will be comfortable in working alongside them.

The new Trusts Act requires that the Trustees must be unanimous in their decisions, and that requirement overrides para 6 of the Trust Deed.

If NF is not happy with the person you suggest be appointed as Trustee, there could be further issues down the track.

I also suggest that you have the Trust Deed properly reviewed, particularly in light of the new Trusts Act which took effect on 30th January. ...

[33] This advice caused Mr PF some concern and implementation of the process that had been agreed upon was halted.

[34] Mr PF sought further advice from Mr BA as what to do to resolve the issue. A factor to be taken into account was whether the property was to be sold or tenanted, although it would seem that distribution of any rental income would also be prevented by cl 1.10 if Mr PF and NF were the only trustees.

[35] The relationship between Mr PF and Mr BA deteriorated, as Mr PF considered that the terms of the Trust should have been reviewed by Mr BA before offering his advice on 20 November 2020.

[36] Mr PF then instructed an alternative solicitor⁸ and ultimately the trustees of the Trust remained Mr BA and Mr DV, and the property was sold to Mr PF and his wife.

Mr PF's complaints

[37] Mr PF has raised two issues in his complaint:

1. Law firm misplaced documentation (and found it only six months later).

⁷ On 4 March 2021 at 9:17 am.

⁸ NF had been independently advised from the outset.

2. Wrong advice given by BA.

Misplaced documentation

[38] There are three aspects to this complaint:

- (i) Mr PF says that Mr BA ‘accused’ his mother of uplifting the Trust Deed.
- (ii) “For the lawyer to lose documents they are responsible to keep is poor”.
- (iii) Notwithstanding that the change of trustees could not be implemented because of the misplaced document, Mr PF was still invoiced \$640 by [Law Firm Z].

Wrong advice

[39] Mr PF refers to Mr BA’s email of 20 November 2020 in which, he says:⁹

[Mr BA] provided a set of options with advice specific to the situation with regards to my mum’s family trust. In email conversation, I selected an option that BA agreed was the option requiring the minimum effort, without “blocking” other options for the future.

[40] Mr PF said he had to halt implementation of his instructions as “it was ‘discovered last minute’ the approach chosen was totally inappropriate as it would have placed the Trust in a ‘restricted period’”.¹⁰

[41] He refers to the fact that the advice tendered by Mr BA was wrong and that he was then advised that the Trust Deed should be thoroughly reviewed. Mr PF says that this was despite “the requirement under section 23 of the NZ Trust Act 2019 that [Mr BA] understand the terms of the trust, and in spite of the detailed email dated 20th November 2020 providing detailed advice specific to the situation with this specific trust”.

[42] Mr PF summed up his complaint in the following words:¹¹

In summary, BA gave the wrong advice in November 2020. It was professionally negligent to have provided the advice given without understanding the Trust Deed (and without even telling me the Trust Deed had not been reviewed). Attempting to claim the advice was “general in nature” is absurd, when I had approached BA after the passing of my mother and needed specific advice on how to move forward – clearly I was not asking for “general advice” at such a time – and indeed his email of 20th November 2020 provided advice specific to my mum’s trust.

⁹ Complaint to Lawyers Complaints Service (17 August 2021), step 5 at [3].

¹⁰ At [4].

¹¹ At [5].

Mr BA's response

Misplacing documents

[43] Mr BA advises that he was not aware of Mrs SF's incapacity until Mr PF contacted the firm to discuss activating enduring powers of attorney. He says that Mrs SF had been reluctant to incur costs in managing the Trust and that was the reason that caused them to believe she had uplifted the Deed.

[44] Mr BA points out that the inability to complete Mrs SF's instructions was caused by Mrs SF's lack of capacity to enter into the documentation.

[45] He advises that the invoice included advice in emails and discussions between 5 June 2019 and 6 March 2020.

Wrong advice

[46] Mr BA advises that "the email of the 20th November was in response to Mr PF asking ... what options were available in relation to the Trust and the Trust property".¹²

[47] He says:

... The email set out options available. This included the transfer of Mr PF and his brother as Trustees pursuant to the Will. The Trust would not have been placed in a "restricted period" referred to. The discussion surrounded Mr PF and his brother remaining as Trustees. This would have been an issue however the discussion moved to Mr PF owning the property solely and hence the sale and winding up of the Trust was completed. We do not accept that the advice of the 20th November was incorrect.¹³

[48] Mr BA continues:

Subsequent to the completion of the Transmission and appointment of Mr PF and his brother as Trustees, there was additional work to ultimately enable Mr PF to become the sole proprietor of the Trust property having purchased his brother's "share" in the Trust. As a result the issue regarding the Trust and its continuation was not progressed. The Trust instead was wound up.

[49] Mr BA does not accept that there was 'wrong advice'.

The Standards Committee determination

[50] The Standards Committee identified four issues to be addressed:¹⁴

¹² Letter BA to Lawyers Complaints Service (13 September 2021).

¹³ I assume Mr BA means that it would not have been an issue if the property had merely been transferred to himself and NF.

¹⁴ Standards Committee determination (20 April 2022) at [19].

- a. Whether Mr BA's delay in acting on Mrs SF's instructions recorded in the letter of 2 July 2019 to replace existing Trustees with a new Trustee of the Trust could be considered a failure to act competently and in a timely manner.
- b. Whether Mr BA acted appropriately in relation to the alleged misplacing of original Trust documentation within [Law firm Z] for a period ending 12 March 2020.
- c. Whether the advice given to Mr PF by Mr BA in November 2020, after the death of Mrs SF, was adequate in the particular circumstances, including the terms of the Will and the Trust and Mr PF's questions?
- d. Whether Mr BA provided competent further advice regarding the proposed transmission of the Trust's residential property to Mr PF and his brother as successor trustees of the Trust.

[51] The Committee then identified that a consideration of these issues engaged the following Rules:¹⁵

- a. Rule 3: Competence and client service
- b. Rule 3.2: Respect and courtesy (timeliness)
- c. Rule 3.3: Respect and courtesy (material and unexpected delays)
- d. Rule 6: Client interests

Delay in implementing Mrs PF's instructions

[52] "The Committee noted that clients are entitled to the efficient action of their instructions and in this case the delay meant that the requested change of Trustees could no longer occur. The Committee considered that the delay encountered here constituted a failure to act competently and in a timely manner."¹⁶

[53] "The Committee was of the view that the delay was in all the circumstances "unacceptable incompetence" as described by Mr PF. The Committee considered that the delay also constituted a breach of Rules 3, 3.2, 3.3 and 6."¹⁷

Misplacing original Trust document

[54] "The issue was a significant concern for the Committee, as Mr BA had erroneously accused Mrs SF of uplifting the Trust documents when in fact, they were held by [Law firm Z] all along (and that this was not discovered for a full eight months)."¹⁸

¹⁵ At [20].

¹⁶ At [21].

¹⁷ At [22].

¹⁸ At [23].

[55] “The Committee considered that this conduct also constituted a breach of Rules 3, 3.2, 3.3 and 6.”¹⁹

Adequacy of advice

[56] “The Committee considered that the advice given by Mr BA was inadequate as it did not take into account the relevant provisions of the Trust Deed, thorough consideration of which should have been the first step in any advice regarding the Trust property.”²⁰

[57] “The Committee considered that the advice given constituted a breach of both Rules 3 and 6.”²¹

Competence of further advice

[58] “The Committee considered that Mr BA’s further advice and actions also lacked competence as these did not correct the original omission to address the specific provisions of the Trust Deed and continued the breach of Rules 3 and 6.”²²

Determination

[59] “The Committee, having considered the complaint and all information provided, formally determines that Mr BA has engaged in unsatisfactory conduct, pursuant to ss 12(a) and 152(2)(b) of the Act.”²³

Penalties

- [60] The Committee resolved to order that Mr BA:²⁴
- a. Apologise to Mr PF under s 156(1)(c) of the Act.
 - b. Refund the sum of \$640 to Mr PF charged in relation to the intended change in Trustees, under s 156(1)(g) of the Act.
 - c. Pay a fine of \$3,000 to the New Zealand Law Society under s 156(1)(i) of the Act; and
 - d. Pay costs to the New Zealand Law Society of \$2,500 under s 156(1)(n) of the Act.

¹⁹ At [24].

²⁰ At [25].

²¹ At [26].

²² At [27].

²³ At [28].

²⁴ At [29].

Applications for review

Mr PF

Invoice for \$1,517

[61] Mr PF applied for a review only of the penalties imposed by the Committee. He questions why Mr BA was not ordered to repay the invoice for \$1,517 as the Committee had determined that the advice provided by Mr BA was inadequate and that Mr BA had breached rr 3 and 6.

[62] He questions why the Committee ordered that the earlier invoice for \$640 be refunded but not the subsequent invoice.

Compensation

[63] Mr PF advises that as a result of Mr BA's unsatisfactory conduct, he had incurred direct financial consequences totalling \$26,614.

[64] He requests an order for payment of compensation for this amount and provides details as to how this figure is calculated.

Further legal costs – \$5,374

[65] He says these costs would not have been necessary had Mr BA acted competently.

Lost rental – \$6,240

[66] Mr PF says that because of the inadequate advice, settlement of the transfer of the property to himself and his wife took place four months later than would otherwise have occurred. He claims 13 weeks at the current weekly rental of \$480 = \$6,240.

Increase in purchase price – \$15,000

[67] Mr BA calculates this amount as being one half of the increase in value of the property between November 2020 to May 2021.

Change in Brightline test from five years to ten years – unquantified

Mental health

[68] Mr PF asks for consideration to be taken of the impact on him personally following the death of his mother during the COVID-19 outbreak necessitating him having to stay in a quarantine hotel for some time following his arrival from [Country], then to be followed by the difficulties that arose.

Mr BA's other clients

[69] Mr PF considers that Mr BA should be ordered to attend relevant retraining courses to ensure that he is up to date with the current legislation and the need for clients to be properly advised.

Mr BA's response

[70] Mr GD responded on behalf of Mr BA to the application for review. I have referred to this response as being from Mr BA but note the comment by Mr GD that although the complaint is directed at Mr BA, other members of the firm were also engaged.

[71] Mr BA does not accept Mr PF's claims.

Invoice \$1,517

[72] Mr BA says this invoice was done to implement the appointment of Mr PF and NF in accordance with Mrs SF's will.

[73] He says that this was therefore incurred as part of the cost relating to administration of Mrs SF's estate.

Compensation

[74] Mr BA says that it is misleading for Mr PF to refer to the costs of engaging another lawyer to enable matters to be resolved. He points out that it was necessary for Mr PF to instruct another lawyer as there was a clear conflict with [Law Firm Z] acting for the Trust and Mr PF in relation to his negotiations to purchase.

Lost rental

[75] Mr BA says that NF did not agree to the property being rented and as the property was owned by the Trust, all trustees had to agree. In addition, NF's lawyers had indicated they would be seeking to have Mr PF removed as a trustee.

[76] There were also delays in NF returning the documentation due to the COVID-19 lockdown in Auckland, and negotiations with Mr PF to purchase the property took further time.

Brightline test

[77] Mr BA does not accept any responsibility for changes in government regulations.

Mr PF's reply

[78] Mr PF disagrees with a number of assertions in Mr BA's response. Rather than unnecessarily extend this decision by recording the detail of Mr PF's response, I confirm I have taken note of the detail in Mr PF's reply.²⁵

Mr BA's application for review

[79] In his reasons in support of his application for review, Mr BA refers to specific paragraphs of the Committee's determination.

Paragraph 22

[80] The Committee found that Mr BA had breached rr 3, 3.2, 3.3 and 6. He says that Mrs SF was initially hesitant to proceed with her instructions due to the cost involved and that Mrs SF had advised him that she wished to consult with her son. As a result, Mr BA took no further steps until Mrs SF made further contact with him.

[81] Mr BA does not accept that there was a lack of competence and says that at all times Mrs SF was treated with respect and courtesy.

Paragraph 23

[82] Mr BA says that the lost documentation was due to a failure in the firm's systems. He disputes that he 'accused' Mrs SF of uplifting the documents but 'honestly believed that was the case'.

Paragraphs 25, 26, 27

[83] Mr BA says that the advice provided "was based on general trust rules due to the urgency Mr PF expressed".

²⁵ Email PF to LCRO (15 June 2022).

[84] Mr BA agreed that the proposal in point 5 of the email dated 20 November 2020 was the correct minimum at the time but there were contemporaneous discussions with Mr PF about purchasing the property.

[85] Mr BA does not believe it is fair to determine that he was in breach of rr 3, 3.2, 3.3, and r 6 in particular.

[86] He says:

At all times I treated Mr PF with respect and courtesy. The responses to him were immediate. I ensured Mr PF obtained independent advice when it was required and from that time Mr PF had his own separate advice.

Mr PF's response

Paragraph 22

[87] Mr PF says that the delay referred to in this paragraph was not related to the delay in completing the Deed. He emphasises that Mrs SF could not sign the Deed because [Law Firm Z] had misplaced the original Trust Deed. It was not because of any failure on the part of Mrs SF.

Paragraph 23

[88] Mr PF points out that he only formed the intention to purchase the property about a year after the death of his mother. He says that if Mr BA had understood his obligations as a trustee under the Trusts Act 2019, he would not have believed that Mrs SF had uplifted the Trust Deed.

Paragraphs 25, 26, 27

[89] Mr PF is not clear what urgency Mr BA is referring to. However, he disputes that urgency can be a reason for poor advice.

[90] Mr PF asks why it was not made clear to him that the advice provided in the email of 20 November 2020 was offered without having undertaken a full review of the terms of the Trust.

[91] He observes that the advice was not 'general', but specific.

[92] Mr PF advises that he sought advice from another lawyer after he had concluded that the advice he was receiving from Mr BA was inadequate.

Summary

[93] Mr PF says:²⁶

I find Mr BA's replies "remarkable". He still seems to fail to understand the established facts and clearly has timelines confused.

I suspect it is simply a strategy to obfuscate.

The more Mr BA writes, the more it becomes evidently clearer that he is unfit to be a lawyer.

I ask the review committee to uphold the determination. It is clear Mr BA has engaged in unsatisfactory conduct and has breached the Act. However, to make matters worse, Mr BA is now trying to obfuscate and/or is not able to understand his own failings. A "frightening" state-of-affairs whilst he continues to practice.

Nature and scope of review

[94] The High Court has described a review by this Office in the following way:²⁷

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.

[95] This review has been conducted in accordance with those comments.

[96] As noted at [5] above, I have undertaken a full review of the substance of the Committee's investigation and determination. This would have been the case once Mr PF had lodged his application for review in any event, notwithstanding his indication that he wished to only review the orders made by the Committee.

Process

[97] This review has been completed on the basis of the material before the Standards Committee and received from the parties in connection with this review.

²⁶ Response (6 June 2022).

²⁷ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Review

Misplaced documentation/delay

[98] In July 2019, Mrs SF instructed Mr BA to prepare documentation to effect the retirement of himself and Mr DV as trustees of the RST F Trust, and to appoint Ms EC in their stead.

[99] On 12 July 2019, Mr BA advised Mrs SF of the costs to complete this, and advised:

We can now prepare the necessary documents and will be in touch.

[100] Following an enquiry from Mr PF in December 2019, Mr BA advised:²⁸

The retirement & appointment has not progressed as we were trying to locate the original Trust Deed.

[101] Mr PF considers that this amounts to incompetence and a breach of the Trusts Act 2019.

[102] In his letter to the Lawyers Complaints Service on 11 November 2021, Mr BA provides further reasons for the documentation not being completed. He says:

Subsequent to receiving Mrs SF's instructions we confirmed her instructions with her and advised the cost. Mrs SF was always cost averse and previously had delayed instructions as a result. We therefore wanted to ensure she was happy to proceed. She then called into the office and instructed our receptionist to delay the document. We contacted the new trustee and there was a subsequent delay due to instructions being unclear. We did advise Mr PF that these events regarding a new trustee was as a result of Mrs SF not wishing to incur ongoing trust administration costs. She was also reluctant to pay the costs for the retirement and appointment.

[103] The Deed would have been held by [Law firm X] after it had been executed in 1997. At some stage, [Law firm X] had merged with [Law firm Z]. This would either have required the physical relocation of the Deed, and/or entry of the record of documents held by [Law firm X] into [Law Firm Z]' system for recording documentation held by the firm.

[104] The fact that the records were not accurate is understandable. Responsibility for the updating of [Law Firm Z]'s records would have been a function to have been completed by the firm's administration staff and can not be laid at the door of Mr BA with a consequent finding of 'incompetence'.

²⁸ Email BA to PF (9 December 2019). This was after Mrs SF's death.

[105] The shortcomings were seemingly compounded when the firm expressed the belief that Mrs SF had uplifted the Deed, as when that occurs, a receipt should have been obtained from the person collecting the documents and held in the firm's records. If there was no such receipt, then the conclusion would have been that the documents were still held by the firm.

[106] Overall, this is not a matter which would support any findings against Mr BA.

[107] However, the fact that the matter had not progressed for some five months, for whatever reason, is a matter that does attract an adverse finding, and is a matter that Mr BA can be held responsible for.

[108] This finding results from breaches of the Rules 3 and 3.3:

Rule 3:

In providing regulated services to a client, a lawyer must always act competently and **in a timely manner** consistent with the terms of the retainer and the duty to take reasonable care.

Rule 3.3:

A lawyer must inform the client if there are any material and unexpected delays in a matter.

[109] It will be noted that I have not included here rr 3.2 and 6 as the basis for this finding. These Rules provide:

Rule 3.2:

A lawyer must respond to inquiries from the client in a timely manner.

Rule 6:

In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[110] It is self-evident why these Rules are not applicable.

[111] However, the number of rules that have been breached does not affect the fact that Mr BA had not met his obligations to Mrs SF.²⁹

[112] The determination of the Committee in respect of this issue is modified to exclude the findings of a breach of rr 3.2 and 6 but otherwise confirmed.

²⁹ In addressing this issue, I have not referred to the allegation by Mr PF that Mr BA had 'accused' his mother of uplifting the document.

Mr BA's advice

[113] The essence of this complaint is that Mr BA agreed that, rather than doing nothing, the least that should be done would be to implement the suggestion in point 5 of Mr BA's email of 20 November 2020.

[114] Point 5 of the email reads:

The title to the Trust would be altered so that you & NF would be the Trustees, in your mothers place, and DV & myself would ultimately retire.

[115] The proposal refers to Mr BA and Mr DV 'ultimately' retiring, not 'immediately'.

[116] However, in point 6 Mr BA goes on to say:

This would then mean you & NF would be governed by the Trust Law requirements to administer the Trust & the property and would need to act unanimously in relation to any decisions.

[117] This would then, as Mr PF subsequently observed, result in an inability³⁰ for himself and NF as trustees to make distributions to himself and NF as beneficiaries.

[118] Whilst I would not describe this as being an inability to administer the Trust,³¹ it would certainly have created a situation that prevented any distribution to them as was expected.

[119] Mr BA's advice has been described as 'general advice',³² given because of some perceived urgency. I am inclined to agree with Mr PF when he says that "urgency is never a reason, justification or excuse to cut corners and not do things properly".³³

[120] It is clear that Mr BA did not undertake a careful review of the terms of the Trust before setting out his thoughts to Mr PF in the email of 20 November. Mr PF says this should have been done. I agree.

[121] The Committee's finding that Mr BA breached the provisions of r 3 in this regard, is confirmed.

[122] The irony about this is that implementing point 5 on its own would not have caused the 'restricted period' to come into play.

³⁰ As it would activate the commencement of a 'prescribed period'.

³¹ Email PF to BA (4 March 2021).

³² Letter [Law firm Z] to PF (28 July 2021).

³³ PF response to BA application for review (6 June 2022).

[123] Mrs SF's Will directed that Mr PF and NF be appointed trustees. That would have resulted in their becoming trustees together with Mr BA and Mr DV.

[124] The confusion seems to have been created by the implication in point 6 that Mr BA and Mr DV would retire immediately. Indeed, that is the form that the document subsequently drafted would have effected.

[125] In addition, the situation could have been readily retrieved by Mr PF exercising the power to appoint a third trustee.³⁴ This would of course have needed recognition of the limitation imposed by cl 1.10 of the Deed.

[126] Unfortunately, it would seem that relations between Mr PF and Mr BA deteriorated quickly, resulting in an inability to address the issues constructively and objectively. The differences between Mr PF and his brother were also factors that added to the difficulties which arose.

[127] Ultimately, a solution was devised resulting in Mr PF and his wife becoming the owners of the property and the Trust being wound up.

Further advice

[128] The Committee made a further finding of breaches of rr 3 and 6 in relation to the further advice by Mr BA to appoint NF as a trustee and to then transfer the property to Mr PF and NF as executors.

[129] This would not have resolved the situation as Mr PF and NF would still have been unable to distribute any rental income from the property to themselves.

[130] Implementing this proposal would have, if anything, exacerbated the problems.

[131] I confirm the Committee's determination that this advice also amounted to a breach of r 3.

Decision

[132] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

1. I confirm the Committee's finding of unsatisfactory conduct against Mr BA by reason of the breaches of r 3, as identified in [108, 121] above.

³⁴ Clause 9 of the Trust Deed vested the power to appoint new trustees in the executor of Mrs SF's will. Mr PF was the executor of his mother's Will.

2. The finding is modified by reversing the finding of a breach of r 3 in relation to the misplaced Deed.
3. The determination is further modified by reversing the findings of breaches of rr 3.2 and 6.

Orders

[133] I turn now to consider the appropriate orders to be made against Mr BA. This is the reason that Mr PF has advanced for his application for review.

[134] The Committee imposed the following orders:³⁵

- a. An apology to Mr PF under s 156(1)(c) of the Act.
- b. Refund the sum of \$640 to Mr PF charged in relation to the intended change in Trustees, under s 156(1)(g) of the Act.
- c. A fine of \$3,000 under s 156(1)(i) of the Act; and
- d. Payment of costs to the New Zealand Law Society of \$2,500 under s 156(1)(n) of the Act.

Invoice \$1,517

[135] Mr PF asks for the invoice totalling \$1,517.30 to be refunded. He says:³⁶

Per paragraph #25 and #26 it was determined the advice given was “inadequate” and “breached rules 3 and 6”. Given this conclusion, why do the penalties not include a refund of the \$1,517 I paid for work that was determined “inadequate and in breach of rules 3 and 6.”

[136] The narration to invoice 251044-3 reads:

To our professional services in relation to the preparation of the Transmission by Survivorship, Deed of Appointment of New Trustee, Deed of Retirement of Trustee, Client Authority and Instructions form and Tax Statements, Overseas Investment forms, correspondence with the trustees to arrange for the signing of the documents, attending to registration of the changes to the Title to the Trust property, notifying Tasman District Council of the change in registered proprietors, and notifying the IRD and reporting to the trustees.

Mr GD, on behalf of Mr BA,³⁷ says this work related to the administration of the Estate.

[137] It was necessary to first complete a Transmission by Survivorship to Mr BA and Mr DV before the property could then be transferred to Mr PF and his wife. However, I question whether the remainder of the matters referred to in the invoice were undertaken,

³⁵ Committee determination, above n 14, at [29].

³⁶ PF application for review (23 May 2022) step 6 detail, at [1].

³⁷ GD email to LCRO (14 June 2022).

as I would expect that the property was then transferred by Mr BA and Mr DV to Mr PF and his wife. The major part of this documentation, and the registration fees, would have been invoiced by Mr PF's lawyer.

[138] The preparation and registration of the survivorship transmission would require minimal attendances, and rather than endeavour to separate out a fee for this work I direct that this invoice be cancelled. I note that the invoice was addressed to Mr PF, and consequently the amount of the invoice is to be refunded to him. Mr PF will need to correspond with Mr GD to make arrangements for this to be effected.

Apology

[139] Mr BA has been ordered by the Committee to apologise to Mr PF, and I consider that this is the appropriate means of achieving the acknowledgement of the impact on the events which occurred on Mr BA's well-being.

[140] The outcome of this review sought by Mr PF is:³⁸

- (i) An order for payment of further penalties / compensation, totalling \$28,131.
- (ii) Consideration of the impact to Mental Health and further penalties if considered appropriate;
- (iii) Consideration for Mr BA's other clients and whether he should be ordered to re-train.

Compensation

[141] Mr PF's claim for compensation is made up as follows:

Further legal costs	\$5,374
Lost rental	\$6,240
Increase in purchase price	\$15,000
	<hr/>
	\$26,614

Further legal costs

[142] Mr PF says he 'had no alternative other than to engage another lawyer to enable the matters to be resolved'. He says that he instructed the alternative lawyer before he made the decision to purchase the property.

[143] As noted in [126] above, relations between Mr PF and Mr BA deteriorated quickly and it is likely that this played a part in Mr PF's decision to go elsewhere. At the

³⁸ Review application, above n 36, step 7.

time Mr PF made the decision to purchase the property, it would have been necessary for Mr PF to instruct a new lawyer to avoid [Law Firm Z] becoming conflicted.

[144] Only the first four bullet points on the invoice from [Law Firm V] (LFV) would appear to relate to attendances concerning the Trust and the appointment of new trustees.

[145] At most, it might be appropriate to order a partial refund of the (LFV) invoice. However, there is insufficient evidence to support an order to this effect.

Lost rental and purchase price

[146] Mr PF says he incurred the additional costs and lost rental due to delays occasioned by the 'inadequate advice' provided by Mr BA in the November email. The Committee's finding of a breach of r 3 has been confirmed in relation to this. A breach of r 3 is not the same as a finding of negligence, which is a matter for the Courts. They are not matters that this Office or the complaints and disciplinary procedures are equipped to address.

Mental health

[147] Mr PF acknowledges that the effect on his mental health can not be quantified. The corollary to that, is that no payment can properly compensate for the effect on a person of adverse events.

[148] At most, any sum ordered can only be an acknowledgement that there has been a detrimental effect to Mr PF's health by the events that occurred. However, as he also acknowledges, the impact on him was exacerbated, or indeed primarily caused by the external factors of his mother's death, and the Covid quarantine regime in force at the time.

[149] As noted above,³⁹ I consider the apology ordered by the Committee is the appropriate response whereby Mr BA can acknowledge the impact on Mr PF's well-being.

Education

[150] Mr PF suggests that Mr BA should be ordered to re-train to ensure that Mr BA's clients receive 'the necessary service standard'.⁴⁰

³⁹ At [145].

⁴⁰ Review application, above n 36, at step 7.

[151] Mr BA is now consultant to a [Law Firm W] and as such, it is likely that he will not be directly involved in providing legal services to clients.

[152] An order to re-train is therefore unnecessary.

Decision as to penalties

[153] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

- (a) the penalties imposed by the Committee are modified to order that invoice 251044-3 in the sum of \$1,517.30 is cancelled;
- (b) the orders are otherwise confirmed.

Costs

[154] The costs orders guidelines issued by this Office provide that where a finding of unsatisfactory conduct is upheld against a practitioner, a costs order will usually be made against the practitioner in favour of the New Zealand Law Society.

[155] Although modified, the finding of unsatisfactory conduct against Mr BA has been confirmed. However, to acknowledge that Mr BA's application has been partially successful, there is no order for payment of costs.

Publication

[162] It is the common practice of this Office for decisions to be published in an anonymised format, unless to do so would lead to the possibility that the parties and any other person could be identified.

[163] There are no circumstances that prevent the usual practice in this instance being followed. Accordingly, pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published in anonymised format.

DATED this 13TH day of MAY 2024

O 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 PF as the Applicant/Respondent
Mr BA as the Respondent/Applicant
Mr GD as a related person
[Area] Standards Committee [X]
New Zealand Law Society