LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2024] NZLCRO 042

Ref: LCRO 173/2022

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**JV** Applicant
AND	**QR** Respondent

DECISION

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

Introduction

[1] The applicant, Mr JV, seeks review of a decision dated 14 October 2022 by the [Area] Standards Committee [X] (the Committee) to take no further action on his complaint, dated 13 June 2022, about the professional conduct of the respondent, Mr QR.

Background

[2] The applicant is the son of the late Mr MV (MV). His sister is Ms AH (AH). His nephew, AH's son, is Mr TH (TH). He has another sister, CV.

[3] Until late 2019, MV lived in a home in [area], [City], owned by him personally.

[4] AH and her family also lived in a home in [area] owned by the trustees of the [B Trust] (the Trust). The Trust had been established in 2002. The trustees were MV and his solicitor, Mr LB. The discretionary beneficiaries were MV, AH and AH's family members. The applicant was not a beneficiary of the Trust.

[5] In 2008, MV appointed AH as his enduring attorney for both property and personal care and welfare.

[6] The applicant lived overseas for many years. He returned to New Zealand in 2016 and saw MV regularly from then on.

[7] In mid-2019, MV was in his 90s. In June of that year, his mental capacity was assessed by a registered general medical practitioner for the purposes of the enduring power of attorney (EPA) in relation to personal care and welfare. She assessed him as having "deterioration in mental capacity over the past year, worsened in recent months, since a fall and hospital admission. Current MOCA score equals 18/30, indicating dementia".

[8] The doctor expressed her opinion that "… the donor is mentally incapable as he lacks the capacity to foresee the consequences of decisions about health needs or to foresee the consequences of any failure to make such decisions".

[9] In July 2019, MV suffered from double pneumonia. After this event, AH moved MV into a retirement home in the exercise of her powers as enduring attorney. (AH is not a party to the complaint, so there is no evidence from her.) The applicant states that it was not MV's choice to enter a retirement home and that he subsequently suffered from severe depression for which he was medicated.

[10] In mid-2020, the respondent was the lawyer acting for the trustees of the Trust, MV and Mr LB. Mr LB had retired as a solicitor and wished to retire as trustee of the Trust. A trust with individual trustees must have a minimum of two trustees. Mr LB therefore needed to be replaced as a trustee. The respondent states that MV instructed him that TH, his grandson, would be a suitable replacement.

[11] On 28 July 2020, the respondent wrote a letter of advice to MV. The letter traversed various relevant differences between the law under the Trustee Act 1956, which was then in force, and under the Trusts Act 2019, which was due to come into force on 30 January 2021.

[12] The respondent's advice was to proceed with the retirement of Mr LB and the appointment of TH under the 1956 Act and to defer the possible retirement of MV until the new Act had come into force. The letter also discussed the possibility that MV might

lack capacity by the time the new Act came into force, in which case the advice was that AH as enduring attorney could effect MV's retirement as trustee. The respondent noted that this was one of the legal changes brought about by the new Act.

[13] A Deed of Retirement and Appointment of Trustees was then prepared and executed. The Deed bears the date of 10 August 2020, which was the date the last of the three signatories signed it. The respondent advises that MV signed it on 31 July 2020. The respondent was the witness to all three signatories.

[14] An Authority and Instruction form (A&I form) for the necessary e-dealing for the transfer of AH's home was also signed. It is also dated 10 August 2020 and the respondent was again the witness. In witnessing the document, the respondent certified that "the client(s) appear(s) to be of sound mind".

[15] The transfer was duly registered and TH replaced Mr LB as registered proprietor jointly with MV.

The complaint

[16] In his complaint, the applicant described this course of events as "elderly abuse" of MV in relation to the signing of the Deed of Retirement and Appointment and A&I form "… given he had been declared not to be in a fit state to manage his affairs a year earlier".

[17] He stated further that:

(a) "On the 5th of June 2019 my father was deemed incapable to handle his affairs with both financial and health affairs handed over to [AH]"; and

(b) on the 10th of August 2020 he was transported from his retirement home to [the respondent's office] and asked to sign legal documents that benefited [TH].

[18] In essence, the applicant's complaint is that it was not professionally appropriate for the respondent to have certified that MV "appeared to be of sound mind" when he signed the A&I form. The outcome he sought from the complaint was expressed as follows:

> I would like to have the currently signed document(s) negated and follow a sound process where my father's interests are protected to ensure proper rule of law rather than pressure an old incapable man to sign documents he is not capable of understanding.

The Standards Committee decision

[19] The Committee found that there was "no conclusive evidence" about MV's capacity and "no evidence to support a conduct complaint" about the respondent. It commented also that issues relating to capacity are matters for a Court.

[20] The Committee decided to take no further action on the complaint pursuant to ss 138(1)(b) and 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act). Section 138(1)(b) enables a Committee to take no further action if "the subject matter of the complaint is trivial". Section 138(1)(f) enables it to do so if "there is in all the circumstances an adequate remedy or right of appeal, … that it would be reasonable for the person aggrieved to exercise".

Application for review

[21] In his application for review dated 4 November 2022, the applicant:

(a) clarified that it was not his view that MV did not have mental capacity but "merely my concern that he was taken advantage of";

(b) nevertheless stated that the "conclusive evidence" of his father's mental capacity was the medical certificate signed 14 months earlier "… declaring that my father had dementia and incapable in managing all his affairs";

(c) expressed concern that there was no evidence that the witness certifying that MV appeared to be of sound mind "… had any medical standing";

(d) stated that the Committee "… was never asked to consider or determine any issues [as] to capacity";

(e) stated he "would like to see some form [of] a written warning to [the respondent] regarding what I believe [was] unacceptable behaviour regarding handling Dementia situations".

[22] The respondent responded formally to the review application. His salient points, paraphrased, were that:

(a) it was MV who proposed the appointment of TH as replacement trustee;

(b) the applicant was not asserting that MV was without capacity;

(c) there could be no disadvantage to MV by allowing his co-trustee, Mr LB, to resign and replace him with TH;

(d) the medical certificate 14 months earlier related to MV's capacity at that time to make decisions about his health needs only and this had no bearing on his ability to replace a retiring co-trustee;

(e) the respondent had formed his own view of MV's capacity as the result of his own interactions with MV in July 2020, which included providing the written advice;

(f) his experience was that older people who have capacity issues fluctuate according to the time of day and degree of medication and major changes in their living circumstances;

(g) there was no prejudice to MV's financial interests by reason of the change of trustee;

(h) he correctly certified that MV appeared to be of sound mind when he attended him to sign the documents.

Review on the papers

[23] Section 206(2) of the Act allows a Legal Complaints Review Officer (LCRO or Review Officer) 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.

[24] After undertaking a preliminary, procedural appraisal of the file, the Deputy LCRO then dealing with the matter formed the provisional view that the review could appropriately be dealt with on the papers. The respondent had no objection to that course of action. The applicant stated his preference to appear in person. I decided that he should have that opportunity and that it was unnecessary to hear further from the respondent. The matter was therefore set down for an applicant-only hearing, which I conducted on 30 April 2024.

[25] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, and having heard from the applicant in person, there are no additional issues or questions in my mind that necessitate any further submission from either party.

Nature and scope of review

[26] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.

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

[28] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials and the applicant's submissions at hearing.

Issues

[29] The issues for consideration in this review are:

(a) What professional duties did the respondent owe to the applicant and is there any evidence that any such duty was breached?

(b) Did the respondent owe any other professional duty that is relevant to the circumstances?

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(c) Is there any evidence of breach of any such duty?

(d) Does the applicant have sufficient personal interest in the subject matter of the complaint?

(e) What is the appropriate outcome of the review?

Discussion

(a) What professional duties did the respondent owe to the applicant and is there any evidence that any such duty was breached?

[30] Most of the professional duties owed by a lawyer under the Act and under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) are owed by the lawyer to his or her client. The applicant was not the respondent's client.

[31] Limited duties are owed to non-clients in certain circumstances, particularly in relation to the manner in which the lawyer deals with them; for example, a lawyer must deal with other people with respect and courtesy. There was no allegation in the complaint of breach of any such duty.

(b) Did the respondent owe any other professional duty that is relevant to the circumstances?

[32] A lawyer has a general obligation, expressed in r 2 of the Rules, to uphold the rule of law. Within the general scope of that rule, there are various circumstances in which a lawyer may be required to provide a certificate as to a certain state of affairs. In this instance, the respondent certified that MV appeared to be of sound mind on 31 July 2020.

[33] In addition, a lawyer has a professional duty, expressed in r 7.1 of the Rules, to ensure that a client understands the nature of the retainer. This duty is usually regarded as being owed only to the client.

(c) Is there any evidence of breach of any such duty?

[34] On the basis of his complaint and review application, the applicant appeared to be in two minds as to whether he was arguing that MV lacked mental capacity to effect the change of co-trustee in mid-2020. He appeared to be arguing only that it was inappropriate for a lawyer to form a view about mental capacity.

[35] I explored this issue with the applicant at hearing. I pointed out to him that the respondent was clearly aware of potential capacity issues because he had referred expressly to that risk in his letter of advice to MV of 28 July 2020. I also noted the respondent's comments about older people with capacity issues fluctuating according to the time of day and degree of medication. The respondent made a similar comment about fluctuations in MV's capacity related to other health issues in a letter to the applicant's lawyer on 20 July 2020.

[36] The applicant explained the context. He said that MV had had a series of six seizures since late October 2019, the last being on 6 July 2020, and had later had a "huge meltdown" and been admitted to a mental care ward. He said that, during 2020, he saw MV on average about every ten days. He acknowledged that MV "waxed and waned" but said that overall, he was deteriorating. He agreed that some days, "he was there" and other days, he was "not quite there" and that his conversations were generally superficial. He said that he saw MV on 14 August 2020 and that he was "all over the place."

[37] In earlier submissions, the applicant had explained MV's marked deterioration in the months following the change of trustee resulting eventually in MV going into a psychogeriatric ward in November 2020.

[38] Against all of that background, the applicant could not accept that the respondent would not have been aware of the capacity issue and considered that he was therefore not sufficiently diligent in making appropriate enquiries. As a minimum, he questioned the respondent's judgement. This was expressed as "how could he not see it?" and "it doesn't smell right". He submitted that the respondent's conduct was therefore professionally unsatisfactory.

[39] I accept that the applicant firmly believes, by reason of his own experience of MV's fluctuation but declining condition, that he could not have understood what he was signing on 31 July 2020. He accepted that the respondent's contact was much more limited. I explained to him that the respondent had only certified as to how MV appeared to him on the day and that this was not a medical assessment of capacity.

[40] I note also that the applicant believed the documents had been signed by MV on 10 August 2020, four days before the applicant observed him being "all over the place", whereas the respondent's evidence was that this had occurred on 31 July 2020.

[41] Thousands of A&I forms are signed across New Zealand every day for property transactions of all kinds. The professional obligation of a lawyer witnessing an A&I form

is, relevantly, to satisfy himself or herself that the signatory "appears to be of sound mind" in order to provide his or her certificate to that effect.

[42] The respondent is correct that this does not imply any requirement that a lawyer obtain expert medical evidence of capacity before giving such a certificate. Nor does it imply an expression of medical opinion by the lawyer. The certificate is simply about how the client "appears" to the lawyer. The applicable threshold is quite low and is different from, for example, assessment of grounds for an EPA to come into effect.

[43] The respondent also submitted that his certificate was that MV was "… of sound mind in terms of understanding clearly that [Mr] LB was to retire as trustee to be replaced by his grandson, TH". This conflates two duties. Understanding the legal effect of a document is different from simply appearing to be of sound mind. A witness to an A&I form is not required to explain the effect of the document. The latter part of the respondent's comment relates more to his separate professional duty to ensure his client understood the nature of the retainer and, in this context, specifically the document he was signing.

[44] The conclusion I reach is that in circumstances where a lawyer has received instructions about a trust administrative matter, given written advice about a proposed transaction, met with the client to confirm the instructions and attended on execution, there is no objective, evidential basis to question the lawyer's certificate that the signatory appeared to be of sound mind.

[45] The respondent suggests that the medical certificate given 14 months earlier may have been given for the purpose of achieving a particular outcome in terms of MV's care arrangements. The comment is not something about which the respondent could have had any personal knowledge and is speculative. He is correct, however, that a medical certificate given in June 2019 regarding capacity to make decisions about personal care and welfare is not evidence of a lack of capacity in July 2020 to understand and make decisions about trust administration.

[46] The applicant had not fully appreciated until the hearing that the doctor's assessment in July 2019 was restricted to MV's capacity to make decisions about his health care needs. He thought that AH as enduring attorney for both personal care and property had full control of MV's affairs. This was not so. There is no evidence to suggest that AH's powers as enduring attorney for property had come into effect.

[47] In simple terms and without doubting the applicant's genuine concerns, there is no evidence that MV did not know what he was doing when he replaced his co-trustee. I make the same comment about a concern the applicant expressed that the idea of

appointing TH had come from AH, not from MV himself. The applicant may well be correct but this does not mean the respondent should not have acted on MV's resulting instruction.

[48] The respondent also notes correctly that there was no change to MV's own position and interests. He remained a trustee. Only Mr LB was being replaced.

[49] For completeness, I record a discussion I had with the applicant at hearing about the hypothetical scenario of the respondent having decided on 31 July 2020 that MV did not appear to be of sound mind and deferring the change of trustee until the 2019 Act came into force six months later. As the respondent had explained in his letter of advice on 28 July 2020, AH as enduring attorney could then have replaced Mr LB with TH as trustee without involving MV. The applicant readily agreed that he would not have had any cause to object to that course of action.

[50] I mention this discussion to make clear to the respondent that it was not the applicant's intention to interfere in the administration of the Trust. His motivation, as he expressed it, was that he had "undertaken to my father to keep an eye on things" and was of the very clear understanding that MV had always wanted an independent, professional trustee to be appointed.

(d) Does the applicant have sufficient personal interest in the subject matter of the complaint?

[51] The applicant had no personal interest in the administration of the Trust. He was not and had never been a trustee. He was not and had never been a beneficiary of the Trust. The manner of administration of the Trust was, in every sense, none of his business.

[52] The complaint does not relate to any aspect of the management of MV's personal affairs, in which the applicant might be argued to have a personal interest. The legal steps taken by the respondent had nothing to do with MV's property or the exercise by AH of her powers as enduring attorney for MV.

[53] The applicant had said that TH's appointment as a trustee was of benefit to TH. I explored this comment with the applicant at hearing. He clarified that his concern was more that MV had always had an independent, professional trustee involved and stated his belief that MV did not really want TH as a trustee.

[54] I infer that the applicant's related comment about MV being "taken advantage of" was directed more at AH than at the respondent and was also tied up with AH's role as enduring attorney for both personal care/welfare and property.

[55] The applicant acknowledged that, putting the professional trustee aspect to one side, it was logical for a member of AH's family to be a trustee of a trust that owned AH's house.

(e) What is the appropriate outcome of the review?

[56] I turn now to the grounds on which the Committee determined to take no further action on the complaint. After hearing from the applicant at hearing, I am not comfortable with either of them.

[57] The Committee's first ground, under s 138(1)(b) of the Act, was that the complaint was trivial. On the basis solely of the materials it reviewed, I acknowledge that it was open to the Committee to make that finding. As the applicant said at hearing and I agreed, however, putting something on paper is rather different from explaining it in person against a background of family dynamics. With the benefit of that discussion, I consider the Committee's finding to be unduly dismissive of the applicant's concerns. His complaint may be objectively unsound but I do not doubt that he was acting in what he perceived to be the fulfilment of his duty to his father.

[58] Section 138(1)(f) applies where the complainant has an adequate alternative remedy that it is reasonable for him to exercise. This begs a question as to a remedy for what. There is no evidence here of any wrongdoing or harm or loss for which the applicant might arguably need a remedy. This is certainly the case so far as the person complained about, the respondent, is concerned.

[59] Whatever concerns the applicant might have about the property affairs of the wider V family were properly directed either to MV while he had capacity, or to AH as MV's enduring attorney once the EPA came into effect, or (now) to the executors of his estate. Any concerns about the Trust were properly directed to its trustees. None of those concerns should be directed to the respondent as lawyer for the Trust. If that is what the Committee meant, then I agree with it. The open-ended wording of s 138(1)(f) and its passive expression appear to be wide enough to contemplate the availability of a remedy against someone other than the lawyer.

[60] I acknowledge also that the Committee may have been referring to the specific outcome the applicant sought, namely for the documents (being the Deed of Retirement and Appointment of Trustee and the A&I form) being "negated". That is plainly an outcome that could only be achieved, if there is a legal basis to do so, through Court action.

[61] Having said that, I find it difficult to identify any legal cause of action the applicant might have against AH and/or TH in relation to the affairs of a trust in which, as the applicant readily acknowledged, he had no interest. In any event, any such matter has nothing to do with the respondent.

[62] It follows that, so far as that specific outcome is concerned, the primary reason why no further action should be taken is that the applicant does not have sufficient personal interest in the subject matter of the complaint for the purposes of s 138(1)(e) of the Act.

[63] So far as the applicant's criticism of the respondent's professional judgement is concerned, for the reasons explained in this decision, I consider further action to be inappropriate.

Decision

[64] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee dated 14 October 2022 to take no further action on the complaint is confirmed and the grounds on which that decision is made are modified by:

(a) deleting reference to s 138(1)(b) of the Act;

(b) in respect of the specific outcome sought by the applicant of the documents being "negated", adding s 138(1)(e) (that the applicant does not have sufficient personal interest in the subject matter of the complaint) to the existing reference to s 138(1)(f) of the Act; and

(c) in respect of the criticism of the respondent's professional judgement and consequent allegation of unsatisfactory conduct for that reason, adding reference to s 138(2) of the Act.

Other matters

[65] At hearing, I asked the applicant whether he had had any discussion directly with the respondent about his concerns, before making his complaint. The applicant confirmed that he had not. He added that, based on his previous experience in endeavouring to obtain information from and otherwise deal with the respondent, "he was not a man to approach directly".

[66] I consider it unfortunate that this matter has gone through a complaint and then a review process over a two-year period without there being any such prior discussion. I am mindful of the comment made in the respondent's letter of 3 March 2023 that "this seems to be a matter that could be resolved by further discussion between the parties if the explanations previously given and the explanations above are accepted". It would perhaps not have been a giant leap for the parties to have engaged constructively with each other without such preconditions.

[67] I understood the applicant's reference to his "previous experience" to relate mainly to requests for information about the EPAs in favour of AH. I explained to the applicant that the respondent's solicitor-client obligation of confidentiality made it difficult for him to impart any meaningful information without instructions or permission to do so. In short, he was almost certainly being mindful of his professional duties rather than being obstructive. The correspondence I have read demonstrates a reasonable and informative approach within the strictures of the respondent's professional duties.

[68] It is not a lawyer's obligation to overcome impediments to communication directly between family members. Be that as it may, MV has now passed on and there is nothing to prevent the parties having a conversation at this point to "clear the air", should both so wish.

Publication

[69] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made to each of the persons listed at the foot of this decision.

[70] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public

interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[71] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

DATED this 6TH day of MAY 2024

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FR Goldsmith
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 JV as the Applicant
Mr QR as the Respondent
[Area] Central Standards Committee [X]
New Zealand Law Society