

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

[2023] NZLCRO 077

Ref: LCRO 36/2022

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

EY obo SG

Applicant

AND

LW

Respondent

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

Introduction

[1] In March 2022, Mr EY¹ applied for a review of the determination by [Area] Standards Committee [X] to take no further action on complaints about Mr LW.

Background

[2] Mr LW had acted for Mr SG for more than 20 years.

[3] In April 2015, Mr SG appointed Mr LW together with his financial adviser, Mr VM, joint attorneys in relation to property.²

¹ Mr EY was Mr SG's attorney.

² Mr VM was also Mr SG's attorney in relation to personal care and welfare.

[4] In May 2017, Mr SG was assessed as lacking capacity to make decisions concerning his property and the power of attorney was activated.³

[5] In June 2017, [Law firm A]⁴ (Mr ZR) wrote to Mr LW advising that he had been instructed to act for Mr SG. Enclosed with the letter was an authority to uplift all deeds, documents and files held for Mr SG. Mr ZR also enclosed a Notice of Revocation of both powers of attorney addressed (only) to Mr VM.

[6] Mr LW and Mr VM were concerned that Mr SG had been placed under pressure to take these steps. Mr LW advised Mr ZR that he considered the Notice of Revocation and authority to uplift were invalid, based on the earlier assessment by Dr MD that Mr SG lacked capacity to make such decisions.

[7] In November 2017, Mr RA, another director of [Law firm B], instructed Dr TB to make another assessment of Mr SG's capacity. Dr TB's opinion was that Mr SG had "regained the capacity to revoke and reappoint his EPOA".⁵

[8] In his response to the complaint, Mr LW says that his appointment as attorney was revoked and Mr EY was eventually appointed as a property attorney.⁶

[9] Mr EY, as attorney for Mr SG,⁷ lodged his complaints in August 2020.

The complaints⁸

[10] Mr EY requested that the New Zealand Law Society investigate invoices issued by Mr LW during the period from May 2017 to June 2018 and determine whether they are reasonable and justified. He says:

An audit may be required to inspect the accounts, assess what work was done and determine what funds were held or dealt with by the attorneys.

[11] With his complaint, Mr EY enclosed the invoices issued by Mr LW during this time and the firm's trust account ledger.

³ Certified by Dr MD.

⁴ [Law firm A] is a law firm located in [city].

⁵ Dr TB letter to Mr RA (sic) (4 December 2017).

⁶ Letter LW to New Zealand Law Society (18 September 2020).

⁷ Mr EY says that he was appointed joint attorney with Mr SG's then solicitor, Mr HV, but Mr HV's appointment had been revoked.

⁸ Mr EY's complaints included comments about Mr VM. Mr VM is not a lawyer or an employee of a law firm. The complaints about Mr VM were not addressed by the Committee and are not addressed in this review.

Mr LW's response

[12] Mr LW refuted the complaints. He provided copies of invoices rendered, trust account ledgers and his time records.

[13] Mr LW considered that the fees invoiced were fair and reasonable.

The Standards Committee determination

[14] The first issue the Committee was required to address was whether or not there were any 'special circumstances' allowing for the invoices to be the subject of the complaint.⁹ The Committee concluded that there were special circumstances by reason of the fact that Mr EY only had access to the invoices after being appointed Mr SG's attorney in June 2018 and prior to this, Mr SG was not properly managing his affairs.

[15] Prior to deliberating on this complaint, the Standards Committee appointed a costs assessor (Ms CJ) to complete this task.

[16] Ms CJ concluded:¹⁰

Mr LW was placed in an unenviable position but in the sole role, he should have protected himself more by copious file notes and greater management of Mr VM's billing.

He should have provided clearer evidence of his work on Mr SG's behalf. That was part of his professional role and he has a higher duty of care as a solicitor acting as an attorney than others. That he didn't exercise such care is the reason for my recommendation of the deductions above but I conclude his fees were otherwise fair.

[17] Ms CJ considered that a payment of Mr VM's fees (\$5,122) "was imprudent and fell short of [Mr LW's] duty of care as a property attorney". She recommended that this amount should be deducted from the fees rendered.

[18] When considering Mr EY's complaint about the quantum of Mr LW's fees, the Committee had regard to the various factors¹¹ that may be taken into account when setting a fair and reasonable fee. The Committee recorded its view in [27] of its determination:¹²

⁹ Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that a Committee must not deal with a complaint if the bill of costs was rendered more than two years prior to the date of the complaint or relates to a fee that does not exceed \$2,000 unless the Committee determines that there are special circumstances that would justify otherwise.

¹⁰ Cost assessor's report (3 June 2021).

¹¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Conduct and Client Care Rules) – r 9.

¹² Standards Committee determination (27 January 2022) at [27].

The Committee accepted Ms QF's recommendations and considered that reimbursement of these amounts would likely resolve the concerns about fees raised in Mr SG's complaint. With that in mind, it came to the preliminary view that, subject to confirmation that reimbursement had been made to Mr SG, it would be appropriate to take no further action in respect of his complaint.

[19] Mr LW agreed to this proposal, but Mr and Mrs SG did not.

[20] The firm to which Mr LW is now a consultant (Law firm B), advised that it held the sum of \$5,122 on interest bearing deposit to be refunded to Mr SG once details of the account into which payment was to be made was provided. Mr and Mrs SG declined to provide these details and Mr EY applied for this review.

Application for review

[21] The applicants do not accept the Committee's determination and say that the amount recommended by the Committee to be repaid (\$5,409) "is nowhere near the amount in question".

[22] The reasons provided in support of the application for review do not identify any errors made by the Committee.¹³ They express the view that "the Law Society's Standards Committee are looking after their own and ... they have double standards".

Mr LW's response

[23] Mr RA responded on behalf of Mr LW. He advised that they rely on the responses provided to the Standards Committee. He also confirms that the firm continues to hold the amount recommended by the Committee to be refunded to Mr SG.

Nature and scope of review

[24] The High Court has described a review by this Office in the following way:¹⁴

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.

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

¹³ Application for Review, step 6.

¹⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Process

[26] Some procedural issues have been encountered during the process of this review.

[27] Mr EY lodged the complaint as attorney for Mr SG. The copy of the power of attorney supplied has a page missing on which Mr EY's details and signature as joint attorney would have appeared.¹⁵ Consequently, there is no evidence that Mr EY was appointed as joint attorney with Mr HV. In addition, there is no evidence that Mr HV's appointment was revoked. However, I have proceeded on the basis that Mr EY's appointment was properly made and that Mr HV was no longer a joint attorney.

[28] During the course of the review, Mr SG passed away. Nevertheless, as any person may complain about the conduct of a lawyer,¹⁶ the review was able to continue on the basis that Mr EY himself was the complainant.

[29] Subsequently, Mr EY became ill and, it seemed, unable to continue his involvement with the review. Mrs SG sought approval to continue with the review herself and the review proceeded on that basis.

[30] An applicant only hearing was scheduled for 18 July 2023 and Mrs SG instructed Ms KN to act for her. However, on 11 July this year, Ms KN advised that the executor of Mr SG's estate had released her from her instructions. Ms KN also requested an adjournment to enable alternative counsel to be instructed.

[31] On 12 July 2023, I issued a Minute in which I recorded the passage of this review and advised¹⁷ that no further delays could be contemplated and that the review would be completed on the material to hand.¹⁸

Review

Preliminary comments

[32] Mr SG did not play a direct part in this review as all correspondence has been received from either Mr EY or, latterly, Mrs SG. The promotion of the complaint, and now this review, seems to have little regard for the seemingly satisfactory solicitor/client relationship that existed between Mr LW and Mr SG for 20 plus years. It can be inferred

¹⁵ When this was raised with the Standards Committee, the Legal Standards Officer expressed the view that it had been supplied with only one page of a two-page document.

¹⁶ Section 132 of the Lawyers and Conveyancers Act 2006.

¹⁷ Pursuant to s 206(2) of the Act.

¹⁸ The material to hand includes the full Standards Committee file.

from this that Mr SG himself was entirely satisfied with the service provided by Mr LW and the fees rendered. That satisfaction is reflected in the fact that Mr SG saw fit to appoint Mr LW as joint attorney with Mr VM.

[33] This is a factor to be borne in mind, but the invoices questioned were, of course, issued and deducted from funds held during the period when Mr SG was largely incapacitated.

[34] Another factor to be borne in mind, is that Mr LW (and Mr VM) assumed a significant responsibility when accepting appointment as Mr SG's attorneys. It is not a role that many lawyers would be prepared to accept as it involves much more than is involved in a usual solicitor/client relationship. It could be said that Mr SG was fortunate to have his legal and financial advisers who were prepared to accept this role.

[35] Question must also be asked whether Mr SG himself would have pursued these complaints but I acknowledge that there was a period of time when Mr SG had been diagnosed as having sufficient capacity, such that he would have been aware of the complaints.

The audit

[36] Following lodgement of the application for review, Mr and Mrs SG/ Mr EY commissioned an audit of the trust account ledgers held by [Law firm B]. The audit provided on review was not before the Standards Committee and information/evidence that was not before the Committee is not usually accepted on review. In this instance, however, the audit and the commentary accompanying it was accepted. All material received was forwarded to Mr LW.

[37] It does not seem that the auditor has any issue with the firm's trust account records or identified that funds had not been accounted for.

[38] Following receipt of the audit, the applicants raised a number of questions about various entries and also referred to the 'discovery of four other trust accounts that were not disclosed'.

[39] The trust account ledgers provided by Mr LW are:

SG

[redacted] – Property Matters (2017 and onwards)

SG Trust

[redacted] – continuing trust matters

[40] All trust account movements and invoices for the period from 16 February 2017 to 31 May 2018 are recorded in these ledgers. The query relating to 'four other trust accounts' needs to be addressed to [company].¹⁹

[41] The applicants have questioned the cash withdrawals shown in the ledgers from the [bank] account. By way of explanation, a lawyer has an obligation to 'ensure that, wherever practicable, all money held on behalf of any person by that practitioner ... earns interest for the benefit of that person...'²⁰ To achieve that, a lawyer will maintain a bank deposit account within the firm's trust account, and to ensure funds held accrue interest, client funds are moved into that deposit account.

[42] Mr LW complied with that obligation and deposited funds in the firm's deposit account.²¹ The [bank] withdrawals the applicants refer to are withdrawals from that account. They are not withdrawals from Mr SG's personal bank accounts.

[43] It seems that the applicants have an expectation that I will carry out yet another audit of the firm's trust account records. That was raised in the complaint to the Lawyers Complaints Service.

[44] Audits of a lawyer's trust account are carried out regularly by the Law Society's Inspectorate. Such audits are comprehensive and any discrepancies in a firm's trust account, particularly for funds not accounted for, will be detected by the Inspectorate.

[45] I can take these matters no further in this review.

Fees

[46] Mr EY also questioned the quantum of Mr LW's fees. The Committee appointed Ms CJ to undertake an independent assessment of the fees rendered by Mr LW.²² Ms CJ examined the 12 bills of costs rendered by Mr LW between 16 February 2017 and May 2018. She considered that the time spent by Mr LW was reasonable and noted that his hourly rate (\$375) was fair, given his experience. Ms CJ commented that the hourly rate was 'not at the higher end of an hourly rate for a solicitor of his experience'.

¹⁹ Law firms maintain a single trust account in which all client funds are held. Each client ledger will be for separate transactions. In this case, as Mr LW acted on a continuing basis for Mr SG and the SG Trust, it was appropriate to maintain a single ledger for each of those.

²⁰ Section 114 of the Act.

²¹ See, for example, deposit of \$36,339.76 on 21 July 2017.

²² A number of the invoices are titled 'interim' because Mr LW acted on an ongoing basis for Mr SG and the SG Trust.

[47] Ms CJ is a practising lawyer and will be far more attuned to whether a lawyer's fee is 'fair and reasonable' than myself.²³

[48] The Committee accepted Ms CJ's report and made recommendations accordingly. At this point, it is important to advise the applicants that members of the Standards Committee include a layperson and so the comments that the 'Standards Committee are looking after their own' is rejected.

[49] I concur with the Committee's determination to take no further action on Mr EY's complaints.

[50] The Committee did make a recommendation based on Ms CJ's report. It said:²⁴

However, the Committee also noted Ms QF's concerns about Mr LW's payment of Mr VM's invoice of 21 May 2017 and the fee charged for Ms MT's attendance on Mr SG on 2 September 2018. Ms QF considered that, in the absence of clear notes and a full narration for the costs charged, Mr LW should have declined to pay Mr VM's invoice. She also considered that Ms MT's attendance on Mr SG was a duplication of services.

In light of that conclusion, Ms QF had recommended that \$5,122 (including GST) be deducted from Mr LW's fees to address concerns about the payment of Mr VM's fee, and a further \$250 (plus GST) be deducted as the fee charged for Ms MT.

The Committee accepted Ms QF's recommendations and considered that reimbursement of these amounts would likely resolve the concerns about fees raised in Mr SG's complaint. With that in mind, it came to the preliminary view that, subject to confirmation that reimbursement had been made to Mr SG, it would be appropriate to take no further action in respect of his complaint.

[51] This recommendation was rejected by the applicants and resulted in this application for review. Nevertheless, it seems that [Law firm B] continues to hold that amount in its trust account and if Mr RA remains agreeable to refund that amount, the action recommended by the Committee could still be accepted. I endorse that proposal.

[52] It must be emphasised however, that the opportunity for the applicants to accept Mr RA's offer has long passed and Mr RA is under no obligation to act on the Committee's recommendations.

Decision

[53] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is confirmed.

²³ Rule 9 of the Conduct and Client Care Rules.

²⁴ Standards Committee determination, above n 12, at [25]–[27].

Publication

[54] In accordance with the usual practice of this Office, this decision may be published with all identifying names and facts anonymised.

DATED this 25TH day of July 2023

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 EY obo Mr SG as the Applicant
Mr LW as the Respondent
Mr RA as the Respondent Representative
Ms SG as an Interested Party
[Area] Standards Committee [X]
New Zealand Law Society