

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

[2023] NZLCRO 027

Ref: LCRO 42/2022

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [Area] Standards Committee [X]

**BETWEEN**

**QA**

Applicant

**AND**

**PATRICK KENNELLY**

Respondent

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

**Introduction**

[1] Mr QA has applied for a review of the determination by the [Area] Standards Committee [X] where the Committee made findings of unsatisfactory conduct.

**Background**

[2] GA's wife died in May 2017. GA was aged 88.

[3] The complainant (QA) is GA's son. Mr QA and GA's daughter<sup>1</sup> live in [country].

[4] The house in which GA and his wife were living at the time of her death was vested in a Trust for the benefit of his wife's two children, GA's stepchildren. Following his wife's death, GA became concerned about his accommodation and care in the future.

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<sup>1</sup> It is unknown whether this is QA's sister, but that is immaterial.

[5] Ms WM had been assigned by a public care provider to be Mrs GA's support person. Mr QA says that after Mrs GA died, "Ms WM arranged for GA to become a new client and for her care duties to be transferred to him".<sup>2</sup>

[6] Mr QA continues:

She still acted in this capacity at the time of the engagement of Patrick Kennelly. WM took control of GA's affairs and was the constant in his life, along with other fellow Support Workers assigned to GA's care.

[7] In the timeline provided by Mr QA with his complaint, he says that in August 2017, GA was "still stressed about money and asked WM if he can live with her".

[8] Ms WM put a proposal to GA, that he could live with her and her husband if he gifted them \$100,000 to be used for the purchase of a house. The amount was subsequently increased to \$130,000.

[9] To enable them to secure a loan to purchase the property, the bank required to see evidence of the cash contribution that the [M's] were making towards the purchase. That included the sum of \$130,000 that GA was gifting to them.

[10] To ensure that GA was committed to the arrangement, the [M's] needed GA to execute an appropriate document. Ms WM had been liaising with Mr QA about the arrangement and put forward names of lawyers in [suburb] who could act for GA. The list included Mr Kennelly.

[11] Mr QA made direct contact with Mr Kennelly and provided details of the proposed arrangement.

[12] Ms YN, a legal executive at [law firm], acted for the [M's]. On Monday, 28 August 2017, Mr Kennelly made contact with Ms YN and advised that he had been contacted by Mr QA. Mr Kennelly asked Ms YN to provide a draft agreement "to consider and advise GA on".<sup>3</sup>

[13] Mr QA says he asked Mr Kennelly to send him the proposed document before GA signed it. Later in the week,<sup>4</sup> Mr QA telephoned Mr Kennelly to find out what was happening and ascertained that GA had an appointment to meet with Mr Kennelly at 4 pm that day.

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<sup>2</sup> QA complaint at [1.2].

<sup>3</sup> Email Kennelly to YN (28 August 2017).

<sup>4</sup> Mr QA's timeline is dated Thursday, August 31, [country] time.

[14] Ms YN provided the document to Mr Kennelly on 30 August 2017. In the accompanying email, Ms YN said:

Is this o.k?. Can you please get signed as soon as possible as our Bank wants to see signed [sic] before approving finance.

[15] At 12:48 pm on 1 September, Mr Kennelly emailed Ms YN:

[Y],

I have just had a look at your deed and need to change it and get it to my clients son for approval.

The consideration is:

The Donors will provided [sic] during the Donee's lifetime accommodation and care until such time as an assessment is made by a GP or suitably qualified person that he is unable to be cared for by the Donor in the Donor's home.

In addition the Donee will pay \$250 per week towards his care and transport where required to attend appointments.

He is due in at 1:30 so I can meet him and make sure all is well with him.

Kind regards<sup>5</sup>

[16] Ms YN emailed the amended document to Mr Kennelly at 1:09 pm.

[17] GA attended the appointment with Mr Kennelly scheduled for 1:30 pm.

[18] In an email to Ms YN at 1:54 pm, Mr Kennelly said:

Have seen GA and just waiting for the ok from his son Mr QA and then deliver deed to you.

[19] The following communications then took place on 4 September 2017:

- Email QA to Kennelly:

Patrick,

It is my understanding that you met my father last Friday and have a contract available for distribution.

Can you please send a soft copy for review so I can give the nod to Dad to sign as soon as possible.

Many Thanks .. [Q]

- Email Kennelly to QA:

Sorry [Q] I thought I had sent this to you last Friday.

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<sup>5</sup> This email is correctly transcribed here. It contains errors. The 'donor' and 'donee' should have been reversed. The errors were corrected in the final form of the Deed.

I had your father sign it and said would witness and send to YN once you were happy with the deed.

- Email QA to Kennelly:

Patrick,

It is very brief but I suppose it does the job.

Two quick questions;

1. Is there any need to stipulate what happens on non performance, e.g. death of donees before donor. The donee [WM] had stipulated that her son and his partner would then take over care provision?
2. The deed is tied to a specific property, would the deed be invalidated if there was a decision to move or is the gift reflecting current state?

Regards .. [Q]

- Email Kennelly to QA:

It is brief.

But it is to enable the purchase of the property where they will care for your father. The gift is to provide care during the father's lifetime until he cannot be cared for in their home which would include another place they moved too.

It is a final gift subject to the weekly payments continuing while he is under their care.

Kind regards

- Email QA to Kennelly:

Sounds good on the property.

Although I am still not clear on what happens if the donees, i.e. HM and WM, should pre-decease my father, on the basis that this is highly unlikely I am happy for you to witness and send on.

Thanks .. [Q]

[20] GA paid over the sum of \$130,000 and the purchase proceeded. GA then moved in with the [M's].

[21] The arrangement did not work out and "GA's great niece reports problems with the arrangements and GA's treatment".<sup>6</sup>

[22] GA remained in [country] with Mr QA.

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<sup>6</sup> QA's timeline of events (application for review).

[23] Mr QA says that there were ongoing issues with the arrangement. Around July 2018, Ms WM travelled with GA to [country] but when it came time to leave Mr QA says his father 'begged' not to be sent back to New Zealand.<sup>7</sup>

[24] Further details of the unsatisfactory arrangement emerged and Mr QA began to investigate further. In the course of investigations, questions also arose as to whether Mr Kennelly had rendered an account and to whom. It was ascertained that Mr Kennelly did not render an account to GA and Mr QA says that Ms WM advised that she may have paid an account.

[25] GA passed away on 31 October 2020.

[26] Mr QA lodged his complaint with the Lawyers Complaints Service on 17 January 2021.

### **Mr QA's complaints**

[27] Mr QA complains that:<sup>8</sup>

... Patrick Kennelly failed to provide competent representation for his client, my father GA, and was negligent in not considering my concerns and ensuring protection for him in the execution of a deed of gift as donor. In effect the deed of gift might as well have been termed an 'Invitation To Abuse' given the consequences that ensued. ...

It is remarkable that the fate of my father should turn on a 20 minute meeting he held with Patrick Kennelly on Friday September 1<sup>st</sup>, 2017, followed by five brief emails and one phone call of no more than 5 minutes between myself and Patrick Kennelly, all on Monday September 4<sup>th</sup>, 2017.

After the meeting on Friday 1<sup>st</sup> September 2017 Patrick Kennelly failed to act competently and in accordance with instructions received in that he:

- failed to send the contract to myself as requested.
- had GA sign before I had seen the contract and against my stated wishes.
- failed to advise my father or myself that he had witnessed and sent the deed to YN, the solicitor representing WM who was a beneficiary of the deed of gift

In two subsequent calls, each less than 4 minutes, in March 2018 and March 2019, Patrick had no satisfactory answer to the questions about my father's confirmed assertion that he had not been invoiced nor his claim of Feb 23 2019 that WM may have been invoiced.

That there are deficiencies in Patrick Kennelly's record keeping is self-evident from his failure to;

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<sup>7</sup> Ibid.

<sup>8</sup> QA complaint to Lawyers Complaints Service (17 February 2021) at [1.1].

- invoice my father
- provide his client, my father, with any copy or document signed by the beneficiaries

[28] He continues:

In the call, Patrick Kennelly acted as if he was an advocate for the beneficiary of the deed saying she could only get the mortgage on the property in the deed if the gift was unconditional and he was otherwise unresponsive to my concerns. I found this odd as his response so closely corresponded with WM's statements on how she needed a letter to get the mortgage offer. Accordingly it prompted me to ask Patrick Kennelly if he know WM and he said yes he did know, or know of, her.

[29] Mr QA says he voiced concerns about "simply gifting the money away unconditionally" but that Mr Kennelly had assured him it was a 'good deal'. He says that he relied on the assurance from Mr Kennelly to 'give the go ahead to witness his father's signature'.

[30] Mr QA considers that Mr Kennelly "in effect ... acted to rubber stamp a contract drawn up by a counterparty with major life implications for his client in an offhand manner and dismissive or unresponsive to concerns raised by myself".

[31] Mr QA seeks:<sup>9</sup>

1. ... justice and redress from WM for the breach of the terms of the deed of gift and send a message that abuse is not to be condoned or swept under the carpet.
2. To do my utmost to improve outcomes in the future for other vulnerable clients who may find themselves in a similar situation to that my father found himself in.

[32] He then expands on the outcomes he seeks. I have not addressed these in detail as they are largely beyond the jurisdiction of the Standards Committee or this Office. It is to be hoped that on reading this decision, and that of the Committee, it will be clear to Mr QA the limitations of the complaints and disciplinary process to provide the redress that he seeks.

### **Mr Kennelly's response<sup>10</sup>**

[33] Mr Kennelly refers to the email from Mr QA, dated 4 September,<sup>11</sup> in which Mr QA confirmed that he was 'happy [for Mr Kennelly] to witness [GA's signature to the

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<sup>9</sup> At [1.3].

<sup>10</sup> Email Kennelly to Lawyers Complaints Service (28 April 2021).

<sup>11</sup> See [19] above.

Deed] and send [it] on.’ He says that Mr QA had made an error of judgment by agreeing to the arrangement and was seeking to transfer the blame onto himself.

[34] Mr Kennelly emphasises that Mr QA and his father had already come to the arrangement with Ms WM and that nothing that Mr QA had said “would disabuse [him] of the view that the money was [ever] anything else other than a gift”. He says “it was needed for finance for [law firm]’s client’s purchase’ and that this ‘was clearly understood by Mr QA as he was making the arrangements for his father”.

[35] Mr Kennelly is unsure how GA was transported to his office, and advises that he had arrived early for the appointment. He says this meant that Mr Kennelly did not have time to prepare the Letter of Engagement. He says:

I went through with him the deed of gift and I told him that [he] had spoken to his son and that he needed to approve it before [he] could send it on to be relied upon.

[36] Mr Kennelly says that the payment was “never a loan nor was it conditional”.

[37] He says that he did not render an invoice and that this was not unusual.

[38] In summary, Mr Kennelly submits that Mr QA had misled his family and was seeking redress and that the complaint should be dismissed.

### **The Standards Committee determination**

[39] The Standards Committee identified the issues for consideration to be:<sup>12</sup>

(a) Whether Mr Kennelly acted competently and in a timely manner in providing advice to Mr GA in relation to the Deed of Gift, as required by Rule 3 of the RCCC: and

(b) Whether prior to providing advice to Mr QA:

- (i) Mr Kennelly provided Mr QA with information on the principal aspects of client service, as required by Rule 3.4 of the RCCC; and
- (ii) Mr Kennelly provided a written copy of his client care and service information to Mr QA, including information about the work to be done and the way services would be provided, as required by Rule 3.5 of the RCCC.

[40] The first matter addressed by the Committee, was to determine who Mr Kennelly was acting for. It said:<sup>13</sup>

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<sup>12</sup> Standards Committee determination (16 February 2022) at [10].

<sup>13</sup> Standards Committee determination (16 February 2022) at [11].

The Committee proceeded in its enquiry on the understanding that Mr Kennelly had been instructed to act for GA. Late in the process, Mr Kennelly, had however, raised an alternative submission; namely that he had in fact been instructed by YN of [law firm] and that it was Ms YN (and not GA) who had been his client.

[41] Having established that Mr Kennelly was acting for GA the Committee then addressed the issues.

### *Competence*

[42] The Committee referred to further submissions made by Mr Kennelly on this issue:<sup>14</sup>

In particular, Mr Kennelly submitted that his recollection was that QA contacted him after YN had recommended him. Mr Kennelly said that Ms YN had recommended him previously to clients to provide independent legal advice and that it was normal for him to send his invoice to Ms YN in such circumstances. Mr Kennelly submitted it was his initial view that because the instructions benefitted the [M's], his instructions had come from Ms YN. Mr Kennelly said that he never got the impression he was being instructed by QA, but rather QA was providing him with the background information in relation to the arrangements that had already been agreed between GA and the [M's].

[43] That submission was rejected by the Committee.<sup>15</sup>

### *Rule 3*<sup>16</sup>

[44] The Committee considered that it was unacceptable for Mr Kennelly to have taken instructions from third parties on GA's behalf<sup>17</sup> and expressed concern<sup>18</sup> about the meeting between GA and Mr Kennelly on 1 September 2017. Its concern was that the time spent at that meeting (20 minutes) was insufficient for Mr Kennelly to have assessed GA's capabilities and vulnerabilities, and then to provide detailed advice about the merits and possible repercussions of the Deed.

[45] It considered that Mr Kennelly should have taken the "prudent step of providing GA with written advice after their meeting".

[46] At [24] of the determination, the Committee said:

The Committee was not persuaded by Mr Kennelly's attempt to absolve himself of the responsibility he had to provide GA with comprehensive advice. Mr Kennelly's role was not just a formality to ensure the Deed was executed, or to simply advise on the mechanics of the document. His role was to ensure that

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<sup>14</sup> At [12].

<sup>15</sup> At [13].

<sup>16</sup> All references to the 'Rules' and the 'Conduct and Client Care Rules' are to the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008.

<sup>17</sup> At [21].

<sup>18</sup> At [22].



GA received independent and considered legal advice in relation to the merits and repercussions of the Deed.

[47] I depart here from summarising the Committee's determination, to reinforce and confirm these comments by the Committee. As noted subsequently, and reflected in the Orders made in this decision, Mr Kennelly must take careful note of the Committee's comments.

[48] The Committee determined that Mr Kennelly's conduct amounted to unsatisfactory conduct by reason of breaches of the Conduct and Client Care Rules and the Lawyers and Conveyancers Act.

*Rules 3.4 and 3.5*

[49] The Committee noted Mr Kennelly's acknowledgement that he had not provided GA with the information required by these Rules.

[50] It then addressed Mr Kennelly's assertion that he considered Ms YN to be his client, and could therefore rely on the provisions of r 3.7, which do not require compliance with rr 3.4 and 3.5.

[51] The Committee noted<sup>19</sup> that "it would have been perverse for Ms YN to have instructed Mr Kennelly, as that would have undermined Mr Kennelly's position as an independent legal advisor."

[52] Again, I depart from summarising the Committee's determination, to reinforce and confirm these comments by the Committee.

[53] The Committee made a second finding of unsatisfactory conduct against Mr Kennelly by reason of the breaches of these rules.

*Orders*

[54] The Committee imposed a fine of \$3,000 on Mr Kennelly and ordered him to pay \$1,000 in costs.

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<sup>19</sup> At [34].

**Mr QA's application for review**

[55] Mr QA has applied for a review of the determination. He considers that the Committee had overlooked what he sees, as Mr Kennelly's 'active advocacy for the requirements of the beneficiaries' (Mr HM and Ms WM).

[56] He emphasises the direct involvement of Ms WM in facilitating the arrangement and execution of the Deed by GA in support of his contention that Mr Kennelly was promoting the interests of Mr HM and Ms WM over those of his father, Mr Kennelly's client.

[57] He seeks "explicit consideration of a contravention of the NZLS directive to 'protect and promote' the interests of clients, and 'the merits of the Deed's terms in light of [his] concerns regarding lack of protection for [GA] in a case of non-performance and in light of feedback from other professionals on its inherent deficiencies."

[58] He considers the fine of \$3,000 does not reflect, the "fundamental failure of Mr Kennelly to fulfil the most basic duties expected of a member of the profession."

[59] Mr QA requests publication of the determination as he does not "wish another client to be treated so cavalierly and incompetently."

**Mr Kennelly's response**

[60] Mr Kennelly does not consider that the Committee placed any weight on the fact that the arrangement had been discussed and agreed between Mr QA on GA's behalf, and Mr HM and Ms WM, and that the terms of the Deed reflected that arrangement.

[61] Mr Kennelly expresses this view a number of times and submits his 'instructions never extended to advising in respect of' the merits and repercussions of the terms of the document.'

[62] He says:

... the committee's decision completely and utterly ignores [the] scenario which played out for GA by the clear involvement of his son the complainant in this manner making decisions about his care.

[63] Mr Kennelly advises that he has never acted for the [M's], and disputes the inference drawn by Mr QA that Ms WM made contact with him when the [A] family were seeking to recover the money paid over by GA.

[64] He says that it is 'extraordinary' to suggest that he facilitated the arrangement to assist Mr HM and Mrs WM. He says the specific purpose of the arrangement was to allow Mr HM and Mrs WM 'to provide to their bank evidence that the cash contribution or part of it, was a gift and not a loan.'

[65] He considers that a meeting of 20 minutes was all that was needed to go through that limited point with GA.

[66] Mr Kennelly warns that the views of other professionals, as referred to by Mr QA, should be viewed with some scepticism unless the professionals referred to are identified.

[67] He submits that it is 'extraordinary' for the committee to come to the view that it was unacceptable for him to take instructions from third parties on GA's behalf and that this view is 'completely at odds with the time constraints that were being imposed.'

[68] Mr Kennelly submits that, what he sees as 'errors' by the committee, should be corrected on review, and the findings of unsatisfactory conduct should be dismissed.

### **Nature and scope of review**

[69] The High Court has described a review by this Office in the following way:<sup>20</sup>

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.

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

### **Review**

#### *Who was Mr Kennelly's client?*

[71] Mr Kennelly's submissions for this review are somewhat contradictory.<sup>21</sup> At [3] of his submissions, he acknowledges that he had been 'approached at a time when it was suggested that [Mr QA's] late father get independent legal advice'. At [5] he says that his instructions had come from Mr QA).

<sup>20</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

<sup>21</sup> Kennelly submissions 27 April 2022 at [3].

[72] It was GA, not QA, who was assuming the obligations recorded in the Deed. It was GA who came to Mr Kennelly's office. It was GA who signed the Deed, and it was his signature that Mr Kennelly witnessed.

[73] There can be no dispute that GA was Mr Kennelly's client.

[74] In his response<sup>22</sup> to the Notice of Hearing from the Committee, Mr Kennelly said:

It was my initial view that because the document benefitted the [M's] my instructions had come through a recommendation from [law firm] and in those circumstances I could rely on rule 3.7.

[75] Rule 3.7 provides that rr 3.4 and 3.5 do not apply where a lawyer is instructed by another lawyer.

[76] The Committee inferred from this that Mr Kennelly considered that Ms YN was his client. That was a reasonable inference for the Committee to make.

[77] The Committee has described this suggestion as 'perverse'. I agree.

[78] The submission by Mr Kennelly that Ms YN was his client is disturbing. Mr Kennelly advises that [law firm], and other solicitors, often refer clients to him for independent advice. If he has a view, that anyone other than the person entering into the obligations is his client, then this view needs to be firmly rejected.

[79] Mr Kennelly has said that Mr HM and Mrs WM were not his client. That is accepted insofar as it relates to the time when the deed was entered into. However, Mr Kennelly does say that Ms WM did 'come into [his] office to discuss matters in relation to communications they had received from QA' after GA had returned to [country].<sup>23</sup>

[80] Mr QA infers that this resulted in Ms WM responding to him to the effect that she and her husband were not committed to any obligations as they had not signed anything. This was a reasonable inference for Mr QA to draw.

[81] This raises the potential for a breach of r 8.7.1(d), which prohibits a lawyer acting for a client against a former client where the fiduciary obligation owed to the former client would be undermined.

[82] I refer to that possibility only to alert Mr Kennelly to the rule and as a requirement to be borne in mind for the future.

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<sup>22</sup> Letter Kennelly to Lawyers Complaints Service (29 September 2021).

<sup>23</sup> Email Kennelly to Lawyers Complaints Service (11 August 2021).

*The arrangement with Mr HM and Ms WM*

[83] The initial reaction to the general terms of the arrangement with Mr HM and Ms WM is one of surprise and concern:

- The sum of \$130,000 is not insignificant.
- The proposal to give this sum of money to an unrelated person is surprising.
- A gift of this amount will clearly affect the beneficiaries of GA's estate.
- It is most unusual to take a non-family elderly person into one's home with a commitment to care for them until it becomes impossible for that to continue.

[84] An immediate response to the proposal would have been to investigate the option of GA having a share in the ownership of the property. However, that would probably not be possible, as the balance of the purchase price was to be borrowed and the lender would require security which could only be provided by a charge over the property.

[85] Nevertheless, this option, and the reasons for not being able to achieve it, would be a matter that should be discussed.

[86] The proposed arrangement having engendered surprise and concern, it would be expected that in the first instance, the wisdom of entering into such an arrangement would be fully explored with the potential donor. Such enquiries would include:

- How well did GA know, in particular, Mr HM, and was he absolutely sure he could contemplate living in his home?
- Would this arrangement continue should Ms WM die, or Mr HM and Ms WM separate?
- Would there be someone in the home at all times to take action should GA suffer a health-related incident?
- What family did Mr HM and Ms WM have and would they be affected by having an elderly person living in their parent's house?
- Could members of GA's family, and friends, visit?

[87] These enquiries are only by way of example only. These are put forward to support the general proposition that the proposed arrangement was out of the ordinary and required to be carefully and fully explored and discussed with GA.

[88] It also demanded the preparation of a comprehensive document specifying, in particular, the obligations that Mr HM and Ms WM were to undertake, including what GA had agreed to.

[89] The consequences of non-compliance by Mr HM and Ms WM also needed to be carefully thought through and set out in the same document.

*The duty to be proactive*

[90] Mr Kennelly argues that his role was limited to explaining the terms of the document to GA.

[91] A lawyer has a duty to be proactive in offering advice. It was not enough for Mr Kennelly to say that his duty was limited merely to documenting the proposal put forward and explaining the terms of the document prepared by the donee's solicitor.

[92] Rule 3.5(a) of the Conduct and Client Care Rules provides:

3.5 A lawyer other than a barrister sole must, prior to undertaking significant work under a retainer, provide in writing to the client the following:

(a) a copy of the client care and service information set out in the preface to these rules; and

...

[93] The preface to the Rules includes a duty to:

Protect and promote your interests and act for you free from compromising influences or loyalties.

[94] Rule 3.5(c) provides:

(c) any provision in the retainer that limits the extent of the lawyer's or the practice's obligation to the client or limits or excludes liability. The terms of any limitation must be fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances.

[95] Mr Kennelly did not provide the information required by rr 3.4 and 3.5 and consequently can not rely upon any limitation to the scope of the advice he was providing.

[96] This is relevant to the consequences of the breach of r 3.5, making it more important than Mr Kennelly may contemplate.

[97] Chapter 5 of the text *Lawyers' Professional Responsibility*<sup>24</sup> discusses the scope of a lawyer's duty of care, both in professional terms and in tort. Even though much of the discussion relates to a lawyer's duties in tort, the duties discussed go to a lawyer's duty to protect and promote the interests of his or her client and to act competently and take reasonable care.<sup>25</sup>

[98] I include here some portions of the text that are particularly relevant to the situation that arose with regard to GA's circumstances and needs:<sup>26</sup>

The scope of the lawyer's duty of care is influenced by the client's apparent need for advice. An inexperienced client "will need and be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client". More may thus be expected of a lawyer regarding a client suffering a disadvantage (whether by reason of age, disability, business inexperience, lack of education or ignorance) or who is temporally fragile. The duty of care here may require the lawyer to more carefully explain the incidents of the representation. It may even dictate active steps that would not have been required had the client not been at a disadvantage; say, where a dealing within the retainer is improvident from the client's perspective, or otherwise where the lawyer believes the client may be unduly influenced.

[99] I recommend to Mr Kennelly that he acquaint himself with the discussion in that text.

*J v Auckland Standards Committee 1*<sup>27</sup>

[100] This was an appeal by J against a decision of the Lawyers and Conveyancers Disciplinary Tribunal.

In this case J had received funds in excess of the amount which had been agreed to be paid to J's client. J did not advise his client what the consequences could be if the funds were paid out, as instructed.

[101] In the judgment, the Judge recorded some of the comments made by the Tribunal:

[26] In considering the misconduct charge brought against Mr J, the Tribunal identified:

The central issue to be decided is what responsibility [Mr J] had to his client in respect of advice about the consequence of retaining the additional payment where he, [Mr J], was concerned about why the payment was made.

...

<sup>24</sup> G E Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Sydney, 2013).

<sup>25</sup> Preface to Rules, rr 3 and 3.5.

<sup>26</sup> At [5.40].

<sup>27</sup> [2018] NZHC 2706.

The question then becomes what level of seriousness is to be attributed to [Mr J's] failure to advise his client.

[27] [Mr J]'s failure to advise his client of the risks of retaining the additional payment without further enquiry and his action of subsequently applying the funds to his client's outstanding legal costs was serious to the degree that it is disgraceful and dishonourable.

[102] The Tribunal found a charge of misconduct proved.

[103] The ground of appeal was that the Tribunal had not provided any reason to support the finding. The Court referred to the appeal as a "general appeal ... conducted by way of a rehearing".<sup>28</sup>

[104] Further portions of the judgment are particularly relevant to this Review:<sup>29</sup>

[40] On the other hand, Mr J is not to be a 'nodding automaton' at the client's volition. ...

...

[42] Mr J's hindsight concession he ought to have been more proactive in providing the advice is not a counsel of perfection; it was the bare minimum demanded. ... I am clear Mr J's failure to advise the client of the risks presented by receipt of unexpected funds fell well short of the expected standard of competence and diligence, and would be regarded by lawyers of good standing as unacceptable. ...

### *Gilbert v Shanahan*<sup>30</sup>

[105] In this judgment, the Court said:

Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

### *YR v OS*<sup>31</sup>

[106] This decision includes the following comments:

[47] A lawyer must be proactive in offering advice ...

[48] In his email to AF (14 July 2015) advising of her removal as a Trustee, Mr OS says he "was always available" to her to provide advice about how Trusts operate. However, when asking a client or any other person, to sign a document whereby they assume significant responsibilities, it falls to a lawyer to volunteer

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<sup>28</sup> At [30].

<sup>29</sup> At [40] and [42].

<sup>30</sup> [1998] 3 NZLR 528 (CA) at 537.

<sup>31</sup> *YR v OS* [2020] NZLCRO 119 at [47]–[50].



advice and information or to ensure that person acquires advice and information independently.

[107] Mr Kennelly clearly had an obligation to tender advice to GA about the implications and deficiencies in the document provided to him for GA to sign.

[108] In addition to the matters relating to the general nature of the arrangement referred to in [82] to [85] above, I mention here some of the enquiries and advice that should have been discussed with GA (some of which are raised by Mr QA) and the need for additional documentation:

- The services that the [M's] were to provide for GA needed to be specifically spelt out. This would have involved considerable discussion with GA.
- The consequences of the [M's] failing to meet their obligations.
- A default by the [M's] in payment of mortgage instalments resulting in a mortgagee sale, and/or any decision by the [M's] to sell the property.
- GA's duties to his family and the extent of his wishes to ensure members of the family received an inheritance.
- The consequences of GA deciding that he wished to make other arrangements for his accommodation and care, as in fact happened.

[109] Matters for discussion were wide ranging and would have required significantly more time than the 20 minutes spent by Mr Kennelly with GA and maybe more than one meeting.

[110] Mr Kennelly has breached his duties to GA<sup>32</sup> as required by the Lawyers and Conveyancers Act 2006 and the Conduct and Client Care Rules<sup>33</sup>, namely:

Section 4(b) – obligation to be independent;

Section 4(c) – duty to act in accordance with all fiduciary duties and duties of care;

Section 12(a) – conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer;

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<sup>32</sup> The duties were owed to whoever Mr Kennelly was acting for.

<sup>33</sup> The Rules referred to are those that were in force at the time of the events.

Rule 3 – lawyer must act competently ... consistent with the terms of the retainer and the duty to take reasonable care;

Rule 5 – lawyer must be independent and free from compromising influences;

Rule 6 – lawyer must protect and promote the interests of the client to the exclusion of the interests of third parties.

[111] These breaches result in a finding of unsatisfactory conduct as that term is defined in s 12(c) of the Lawyers and Conveyancers Act 2006 Act.

#### *Rules 3.4 and 3.5*

[112] These Rules are set out in [27] and [28] of the Committee's determination. Mr Kennelly has acknowledged that he did not provide GA with the required information. Mr Kennelly's suggestion that he was exempt from complying with these rules has been rejected.<sup>34</sup>

[113] The finding of unsatisfactory conduct by the Committee for breach of these rules, is confirmed.

#### **Orders**

##### *Fine*

[114] Having made two findings of unsatisfactory conduct, the Standards Committee imposed a fine of \$3,000 on Mr Kennelly.

[115] I have found that Mr Kennelly has breached his duty to protect and promote the interests of his client.

[116] In *J v Auckland Standards Committee 1*, the Lawyers and Conveyancers Disciplinary Tribunal had found that the failure by a lawyer to protect and promote the interests of a client amounted to misconduct. This was upheld by the High Court. This reflects the fundamental obligation of a lawyer to protect and promote the interests of the client, and the seriousness with which the Tribunal and the Court regard a breach of this duty. This attracts a much greater fine than that imposed by the Committee.

[117] I have also identified three sections of the Lawyers and Conveyancers Act and three Conduct and Client Care Rules, breached by Mr Kennelly.<sup>35</sup>

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<sup>34</sup> Letter Kennelly to 'Auckland Complaints Service' 11 August 2021

<sup>35</sup> See [110] above.

[118] Section 156(1)(i) of the Lawyers and Conveyancers Act 2006 Act establishes that the maximum fine that can be imposed by a Standards Committee and this Office is \$15,000. Mr Kennelly's failure to identify and advise GA about the potential consequences of the arrangement he was entering into, resulted in his personal assets being reduced by the sum of \$130,000.

[119] Some weight must be placed on the fact that Mr QA and other members of the family had approved the arrangement, although they too, did not have the benefit of a careful consideration of the consequences that could flow from the arrangement.

[120] Mr Kennelly has been the subject of a number of adverse findings by both the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, Standards Committees, and this Office. A lawyer's previous disciplinary history is a factor to be taken into account when considering the penalty to be imposed.<sup>36</sup>

[121] I consider that a fine of \$14,000 reflects a balanced approach to these competing factors.

[122] I have given consideration as to whether there should be an order for compensation to be made to GA's estate. That is not appropriate for a number of reasons<sup>37</sup> and is a matter to be addressed by the Court.

[123] I have also given consideration as to whether Mr Kennelly should be ordered to take advice<sup>38</sup> from a senior practitioner about the importance of carefully considering, and identifying who he is acting for, and the extent of the advice that should be provided. This is particularly relevant given Mr Kennelly's statements that other lawyers often refer clients to him for independent advice. The reason for not taking this step is that it is to be hoped that this decision may, in itself, assist Mr Kennelly in this regard.

## **Decision**

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

- (a) the fine imposed by the Committee is increased to \$14,000;
- (b) in all other respects, the determination of the Committee is confirmed.

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<sup>36</sup> *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [181], [188] and [189].

<sup>37</sup> Quantification of the loss and causation being some.

<sup>38</sup> Pursuant to s 156(1)(l) of the Act.

**Costs**

[125] Pursuant to s 210 of the Act Lawyers and Conveyancers Act 2006 and the Costs Orders Guidelines of this Office, Mr Kennelly is ordered to pay the sum of \$1,800 costs to the New Zealand Law Society.

**Publication**

[126] The facts of this complaint and Mr Kennelly's conduct raises the question of whether this decision should be published, including identifying Mr Kennelly as the lawyer complained about.

[127] This is particularly relevant given Mr Kennelly's statement that lawyers often refer clients to him for independent advice.

[128] I invite submissions from the parties as to whether there should be publication of this decision. Any publication order would include an order that the identity of parties other than Mr Kennelly would be anonymised.

[129] Submissions are to be received within one month of the date of this decision. Given that I have allowed a significant period of time to provide these, the parties are advised that any extensions will only be provided in extraordinary circumstances supported by evidence.

**Enforcement of Orders**

The Orders for payment of the fine and costs made above are enforceable in the civil jurisdiction of the District Court.

**DATED** this 19<sup>TH</sup> day of APRIL 2023

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**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 QA as the Applicant  
Mr Kennelly as the Respondent

[Area] Standards Committee [X]  
New Zealand Law Society