

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

[2024] NZLCRO 025

Ref: LCRO 88/2022

**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**

**GX**

Applicant

**AND**

**EJ**

Respondent

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

**Introduction**

[1] Ms GX has applied for a review of the determination by [Area] Standards Committee [X] to take no further action on her complaints about Mr EJ.

**Background**

[2] Ms GX is the former wife of Mr OM.<sup>1</sup>

[3] Following the death of his father, Mr OM transferred the family farm to the OM Family Trust (the Trust) in March 1999.

[4] The trustees of the Trust were Mr OM and Mr PE, a partner in the law firm, [Law Firm A].

[5] Mr PE retired as a trustee in February 2019.

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<sup>1</sup> Ms GX and Mr OM were married in 1987. They separated in March 2020.

[6] Mr OM<sup>2</sup> held the power of appointment of trustees, and appointed Ms GX and [Law Firm A] Trustee Services [redacted] Limited (PQRS) as trustees. Mr EJ was not appointed personally.

[7] Mr EJ is a current partner of [Law Firm A] and a director of PQRS. From about November 2019, Mr EJ took over from Mr PE as the firm's primary contact for the Trust; and the director with management oversight within PQRS for services to the Trust.

[8] By a Deed of Variation dated 27 February 2019, the Trust Deed was amended to include Mr OM as a primary beneficiary of the Trust.<sup>3</sup>

[9] The Trust leased land to [Company A] which managed the orchards on the property. During the period covered by the complaint, Mr OM and Ms GX were the directors of [Company A] and they each owned 50 per cent of the shares.

[10] Following their separation in 2020, Ms GX and Mr OM entered into a Relationship Property Agreement which settled all claims between them.

[11] The terms of the agreement included:<sup>4</sup>

#### **7. [Company A]**

7.1 The parties agree in their personal capacities and as directors of [Company A] that on the Settlement Date:

- (a) GX will resign as a director of [Company A].
- (b) GX will transfer her shares in [Company A] to OM for OM to retain as his separate property.
- (c) OM will retain all the shares in [Company A] as his separate property.

...

#### **10. Settlement**

10.1 In full and final settlement of all claims under the Act or the Family Proceedings Act 1990, OM will pay GX or her nominated entity the settlement sum of \$10,000,000 (Settlement Sum).<sup>5</sup>

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<sup>2</sup> The power of appointment of new trustees was vested in the settlor, Mr OM.

<sup>3</sup> The other primary beneficiaries were Ms GX and the three daughters of the marriage.

<sup>4</sup> Dated 5 February 2021.

<sup>5</sup> Payment was to be made in three instalments over a period of 12 months.

10.4 On the Settlement Date:

...

- (b) GX will resign as a trustee of the Trust and renounce all interests in the Trust, including all and any interests she has as discretionary beneficiary of the Trust.

...

[12] Ms GX's complaints relate to matters arising during the time she was a trustee and beneficiary of the Trust.

### **Ms GX's complaints**

[13] Ms GX's complaints were received by the Lawyers Complaints Service on 20 May 2021. Her complaints are:

*i. Failing to be independent as a Professional Trustee in the provisions of services (refusal to retire when in conflict...)*

- "In February 2019 EJ/[Law Firm A] prepared an invalid document attempting to appoint OM as a beneficiary (Deed of Variation dated 27 February 2019 ("the Deed")). There is no power in the Trust Deed to do so."<sup>6</sup>
- As a result, Mr OM perceived all assets to be his own.
- Ms GX's lawyer considered the variation was invalid. Ms GX's view is that "EJ acted in a way to appease OM for [Law Firm A]'s mistake, currying favour with him including allowing OM to act as if he was the sole Trustee".<sup>7</sup>

*ii. Failing to protect my interests as a Trustee, and the interests of the Trust*

- The Deed of Variation did not protect Ms GX's interest 'as a trustee and the interests of the Trust'.

*iii. Acting incompetently (preparation of the Variation document and refusal to acknowledge the error; failure to prepare Trust resolutions and check for legality)*

*iv. Failing to treat me fairly, respectfully, and without discrimination*

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<sup>6</sup> Ms GX's complaint to LCS (18 May 2021), supporting reasons at [2].

<sup>7</sup> At [4].

[14] When considering these complaints, the distinction between Mr EJ personally, and as a director member of PQRS, comes to the fore immediately.

[15] As recorded above, the Committee referred to Ms GX's complaints as being 'about Mr EJ's role as the professional trustee'. This should more precisely refer to Mr EJ's role as a lawyer acting for the Trust, and as a director/shareholder of PQRS.

[16] With this distinction being borne in mind, I adopt the summary of Ms GX's complaints as the issues to be considered.

### **Mr EJ's response**

[17] [Law Firm B] responded on behalf of Mr EJ.<sup>8</sup> They describe Mr EJ's role with regard to the Trust, as being "the firm's primary contact for the Trust and the director with management oversight within PQRS for services to the Trust".

[18] They do not discuss the extent to which an individual lawyer can be treated as responsible for the conduct of an incorporated trustee, as is the case here.

[19] [Law Firm B] outline the duties undertaken by PQRS:<sup>9</sup>

3.6 Here, the Independent Trustee was involved in the administration and overall management of the Trust. [Law Firm A] provided advice and guidance on major decisions regarding distributions of capital and income, the sale and purchase of land, [Company C] purchases, and bank loans. It reviewed the Trust's annual financial statements and tax returns, which were prepared by the Trust's external accountants (BDO) and where appropriate, resolved to approve and adopt them. PQRS was not involved in the day-to-day management or supervision of the businesses operated from the Trust's properties (most recently kiwifruit and avocado orcharding).

[20] They do not provide evidence that any of this advice was tendered by the company after having been discussed by the directors and recorded in meeting minutes. The assumption must be that it was Mr EJ who tendered this advice on behalf of PQRS.

[21] [Law Firm B] do not accept Ms GX's allegations about the various shortcomings in administering the Trust. They respond to each of Ms GX's complaints comprehensively. I have not recorded any of the detail of their submissions here but refer to them as required when addressing each complaint.

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<sup>8</sup> Letter from [Law Firm B] to Lawyers Complaints Service (15 October 2021).

<sup>9</sup> At [3.6].

### **The Standards Committee determination**

- [22] The Standards Committee summarised Ms GX's complaints as being:<sup>10</sup>
- a. He acted incompetently in relation to the preparation of Trust documents (including the entry into the Deed of Variation which Ms GX states was invalid as there was no power to add a beneficiary, and loans to beneficiaries which were not properly documented) and the proper maintenance of Trust records.
  - b. He had a conflict of interest in that he had drafted the invalid Deed of Variation which favoured Mr OM and refused to retire as a trustee when requested.
  - c. He acted in the interests of Mr OM and not in the interests of all beneficiaries by, for example, refusing to permit Ms GX to access funds from the Trust and distributing funds to Mr OM.
  - d. He refused to release copies of documents to Ms GX when requested.
  - e. He did not treat Ms GX fairly and respectfully.
  - f. He failed to protect Ms GX's interests as a trustee and beneficiary of the Trust.

#### *The Deed of Variation/loans to beneficiaries*

[23] Ms GX's complaint relating to the Deed of Variation is that the Trust Deed did not authorise the trustees to appoint Mr OM as a primary beneficiary.

[24] The Committee noted that Mr EJ did not prepare the Deed. As a result, the Committee determined there was no basis on which Mr EJ's competence could be called into question.

[25] The Committee says that it was not provided with any evidence of a lack of competence by Mr EJ with regard to the loan documentation recording the loan to RR, one of the daughters of the marriage between Ms GX and Mr OM.

#### *Conflict of interest/refusing to retire as a trustee*

[26] Ms GX's complaint was that Mr EJ had a conflict of interest because he drafted the Deed of Variation. The Committee had previously noted that this was not the case and that PQRS had offered to step down as a trustee.

[27] The Committee noted that in any event, matters were resolved between Ms GX and Mr OM.

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<sup>10</sup> Standards Committee determination (13 May 2022) at [8].

[28] The Committee determined to take no further action on this complaint.

*Acting in the interests of Mr OM*

[29] Ms GX cites as an example in support of this complaint, the fact that Mr EJ had refused to permit Ms GX to access trust funds while distributing trust funds to Mr OM.

[30] The Committee could not find any evidence of Mr EJ favouring Mr OM over Ms GX. It “was satisfied that Ms GX received all of the information and correspondence which was sent to Mr OM, once she became a trustee”.<sup>11</sup>

*Administration of the Trust*

[31] “The Committee noted that Ms GX made a number of complaints relating to the administration of the Trust including the holding of meetings, the recording of minutes and the retention of trustee resolutions. These matters are not within the jurisdiction of the Committee as work conducted by lawyers acting as trustees does not constitute legal services under the Act. The High Court is the appropriate body for consideration of the conduct of trustees.”<sup>12</sup>

*Terms of engagement*

[32] Ms GX also complained that Mr EJ did not provide her with terms of engagement when she became a trustee. The Committee noted that “... [i]n any event Mr EJ was not acting for the Trust at the time Ms GX became a trustee.”<sup>13</sup>

**The Committee’s determination**

[33] The Committee determined to take no further action on any of Ms GX’s complaints.

**Ms GX’s application for review**

[34] Ms GX says:<sup>14</sup>

In general the Committee has not provided proper reasons for its findings based on the evidence provided. It has overlooked or not properly considered the evidence. It has therefore made incorrect factual findings. It has also failed to provide proper reasoning for its legal findings and made errors.

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<sup>11</sup> At [15].

<sup>12</sup> At [19].

<sup>13</sup> At [20].

<sup>14</sup> Application for review (13 June 2022) supporting reasons at [A], p 1.

[35] In her supporting reasons she does not refer to examples she considers the Committee has proceeded without referring to information that she has provided, or where it has wrongly applied the facts and information provided when reaching its decision. Instead, Ms GX traverses the material submitted in support of her complaints.

#### Poor legal work/incompetence

##### *Trust loan to RR*

[36] Mr OM and Ms GX agreed to assist RR, to purchase her first home. RR was in a relationship with her partner, HH.

[37] Ms GX says that Mr EJ did not enquire into whether or not the couple had entered into a Relationship Property Agreement. She says that Mr EJ initially prepared a document which operated as a gift to RR but neither she nor Mr OM had instructed him on that basis.

[38] The document needed to be amended after it had been viewed by Ms GX's new lawyer who advised that if RR and HH had separated, the Trust would not have been able to call up the loan.

[39] Ms GX says this is evidence of poor legal workmanship.

##### *Lease documents*

[40] Ms GX submits that Mr EJ should have undertaken a review of the leases which had been prepared by Mr OM. She says:<sup>15</sup>

... As the Trust's lawyer, Mr EJ was engaged to have legal documentation drafted correctly and ensure there was approval from Trustees to enter in to a major contract changing the structure of the Trust's operations. He did not give us any legal advice, verbal or written, as required by the Rules of Conduct and Client Care.

##### *No letter of engagement*

[41] Ms GX says:<sup>16</sup>

The Standards Committee is erroneous that [Law Firm A] was doing legal work in keeping with the generic annual trusteeship letter attached as [Law Firm A]'s letter of engagement. ...

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<sup>15</sup> At [2(c)], p 2.

<sup>16</sup> At [3(a)], p 2.

[42] She says that work undertaken by Mr EJ after she was appointed as a trustee “was not covered by the generic trusteeship letter of engagement”. She says that the new letter of engagement was only seen by her in Mr EJ’s second response to the complaint and had not been sent to her current email address.

*Minutes of AGM*

[43] Ms GX says that the draft minutes prepared by Mr EJ did not reflect matters discussed at the meeting and required extensive amendment.

*Denied opportunity for legal counsel*

[44] Ms GX says that PQRS should not have called a meeting to discuss the Deed of Variation without informing her and other attendees of their right to have legal representation at the meeting. She says that Mr EJ declined to allow Ms GX’s new lawyer to attend the company AGM.

*Information not provided*

[45] Ms GX considered that the Committee was incorrect in its finding that she received all information requested while she remained as a trustee. She also submits that the finding of the Committee “that one Trustee client can veto the right of another Trustee to hold Trust information is incorrect. Mr EJ’s conduct is unsatisfactory and is in breach of Rules 3.4 and 7 Lawyers Conduct and Care Rules”.<sup>17</sup>

Conflict of interest – as a lawyer (not a trustee)

[46] Ms GX rejects the Committee’s determination that Mr EJ was not conflicted. She specifies that the conflict she is referring to is:<sup>18</sup>

... [Law Firm A]/Mr EJ should not have continued to act **as lawyers for the Trust** when the documents prepared by [Law Firm A], namely the Deed of Variation of Trust, was challenged as being invalid. He was also aware that the Contracting Out Agreement prepared by [Law Firm A] was challenged.

[47] Ms GX says that she “still [has] no understanding why [Law Firm A] remained as a professional trustee after agreeing they were in a conflict position, or why they remained as the Trust lawyer.”<sup>19</sup>

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<sup>17</sup> At [6(a)], p 4.

<sup>18</sup> At [1(a)], p 4.

<sup>19</sup> At [1(b)], p 4-5.



[48] Ms GX identifies four instances of conflict:<sup>20</sup>

- [Law Firm A] provided the independent legal advice on the 1987 Contracting Out Agreement which was subject to challenge by me based on time lapse, the arrival of children, career changes, intermingling of assets, the sale and purchase of assets and the quality of legal advice provided by [Law Firm A]. As the certifying lawyer, [Law Firm A] would become witnesses in any application to set aside.
- Mr EJ protecting [Law Firm A]'s own interests against a negligence claim for preparation of an invalid document, namely the Deed of Variation (amongst others).
- Mr EJ acting as professional trustee.
- Mr EJ acting as lawyer for the Trust.

#### Bias – poor service

[49] Ms GX says that “after becoming aware of our separation, EJ took no steps to advise the trustees as to the “big picture” or the business strategy for our \$20m plus kiwifruit orchards, in terms of day to day operations, income, etc”.<sup>21</sup>

[50] She continues:<sup>22</sup>

Mr EJ never gave OM or I legal advice in respect of the Trust's ability to provide me, as a beneficiary, with income or a capital distribution pending our property division. I asked Mr EJ to raise both with OM on numerous occasions and he said he did and that OM said no. Why didn't Mr EJ provide us both with a legal view, a direction to us as trustees and clients?

[51] When Mr OM withdrew funds from the Trust, she says that:<sup>23</sup>

... Mr EJ took no steps to have OM return the Trust funds so as to secure the Trust assets. Again, there was no written or verbal legal advice as to OM's actions and our legal obligation under the Trusts Act. I felt like Mr EJ **did not see me, or hear me**, probably stemming back to my challenge of the Deed of Variation of Trust.

[52] Ms GX sees this as evidence of bias.

#### Outcome sought

[53] The outcome that Ms GX seeks from this review is:<sup>24</sup>

Reverse decisions of the Standards Committee, and make the following orders:

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<sup>20</sup> At [1(c)], p 5.

<sup>21</sup> At [1(a)], p 6.

<sup>22</sup> At [1(c)], p 7.

<sup>23</sup> At [1(d)], p 7.

<sup>24</sup> Application for review, above n 14, Step 7.

1. An Apology
2. A reprimand or censure
3. Compensation of \$25,000 for unnecessary legal fees due to his failings
4. A fine to act as a deterrent from his inappropriate conduct.

### **Mr EJ's response**

[54] [Law Firm B] responded to the application for review on behalf of Mr EJ, advising that Mr EJ supported the Standards Committee determination.

[55] I include here the response from [Law Firm B] to the matters raised by Ms GX in her application and acknowledge that Mr EJ's response to the Standards Committee forms part of the response to the application for review.

[56] [Law Firm B] also addresses a number of other matters which I shall refer to as necessary.

### Poor legal work – incompetence

#### *Trust loan to RR*

[57] [Law Firm B] say the various versions of the documentation prepared by Mr EJ reflect the changing instructions from Ms GX and Mr OM.

#### *Lease documents*

[58] [Law Firm B] say that Mr EJ was not instructed to advise on the leases prepared by Mr OM. They note that at that stage, Ms GX and Mr OM had instructed separate counsel.

#### *No letter of engagement*

[59] [Law Firm B]'s response to this complaint is that Mr EJ was not acting for the Trust in February 2019 when Ms GX was appointed as a trustee. Updated terms of engagement were sent to the client contact details held by the firm in July 2020. The client details had not been updated to include separate contact details for Ms GX.

#### *Minutes of AGM*

[60] [Law Firm B] advise that Mr EJ understands that Ms GX does not take issue with the final version of the minutes, after Ms GX had commented on the draft.

*Denied opportunity for legal counsel*

[61] Mr EJ did not consider legal counsel was required at the AGM as the purpose was to review the everyday operations of the Trust and not to discuss relationship property issues.

*Information not provided*

[62] Mr EJ considered that unless all trustees agreed, he could not release trust documents to Ms GX, and Mr OM did not agree.

Conflict of interest – as a lawyer (not a trustee)

[63] [Law Firm B] say that Mr EJ carried out duties on behalf of PQRS such as convening the AGM and signing trust documents. After it had been suggested that the variation was invalid, Mr EJ proposed that PQRS should retire as a trustee. He considered, however, that it would be unhelpful to do so until a new trustee had been appointed. Mr OM did not agree and as he held the power of appointment, PQRS remained as a trustee.

[64] From the time that Ms GX and Mr OM retained separate counsel, Mr EJ was not providing regulated services to Ms GX.

Bias – poor service

[65] Mr EJ denies these allegations.

*Distributions sought by Ms GX*

[66] “The distributions sought by Ms GX could not be made except by unanimous agreement of all trustees. Mr EJ raised Ms GX’s requests for distributions with Mr OM, but Mr OM did not agree. Mr EJ could not require Mr OM to comply with Ms GX’s requests.”<sup>25</sup>

[67] “PQRS could not unilaterally make a distribution to Ms GX either as a matter of law (it did not have the authority) or as a matter of practicality (it had no signing rights over the Trust bank accounts).”<sup>26</sup>

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<sup>25</sup> Letter [Law Firm B] to LCRO (8 August 2022) at [11.2].

<sup>26</sup> At [11.3].

### *Withdrawals from trust account*

[68] “Mr EJ denies that he allowed or acquiesced to Mr OM’s use of the Trust funds. Mr EJ did not have visibility of or authority to access the Trust’s bank accounts. He did not know of the withdrawals until 11 September 2020 when Ms UV notified him. Ms UV noted at paragraph 6 that Mr OM’s withdrawals were made ‘without reference or discussion to the other 2 trustees’. Mr EJ understood Ms GX/Ms UV were dealing with the withdrawals as part of the relationship property dispute.”<sup>27</sup>

[69] The remaining content of [Law Firm B]’s response will be referred to as necessary in this decision.

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

[70] The High Court has described a review by this Office in the following way:<sup>28</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.

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

### **Process**

[72] This review has been completed on the material to hand, which includes the Standards Committee file, with the consent of both parties.

### **Review**

[73] In her complaint Ms GX traversed many matters about which she was dissatisfied with the service and advice provided by Mr EJ. She collated these into four general complaints:

- (i) Failing to be independent as a professional trustee in the provisions of service.
- (ii) Failing to protect [her] interests as a trustee, and interests of the Trust.
- (iii) Acting incompetently.

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<sup>27</sup> At [11.7].

<sup>28</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(iv) Failing to treat [her] fairly, respectfully and without discrimination.

[74] The Committee summarised Ms GX's complaints in the six matters set out at [22] above.

[75] In this decision, I have followed the format used by Ms GX in her supporting reasons, namely:

- A POOR LEGAL WORK/INCOMPETENCE
  - 1. Trust loan to daughter RR
  - 2. Lease documents
  - 3. No letter of engagement
  - 4. Minutes of AGM
  - 5. Denied opportunity for legal counsel
  - 6. Information not provided to Ms GX as a client/trustee
- B. CONFLICT OF INTEREST – AS A LAWYER (NOT A TRUSTEE)
- C. BIAS – POOR SERVICE

[76] In this way I address Ms GX's issues of concern with the Standards Committee determination, which in effect, deals with all of the matters in Ms GX's complaint.

### **Incorporated Trustee v Individual**

[77] A preliminary, and important, issue that must be addressed at the beginning of this decision, is the extent to which Mr EJ is personally answerable for Ms GX's complaints.

[78] The trustee of the OM Family Trust was PQRS. Mr EJ was and is one of a number of directors of the company. He was not a trustee in his personal capacity.

[79] Ms FB and Ms SD (partner and senior associate in the firm, [Law Firm B])<sup>29</sup> describe Mr EJ's role as being "the firm's primary contact for the Trust and the director with management oversight within PQRS for services to the Trust".<sup>30</sup>

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<sup>29</sup> Ms FB and Ms SD are henceforth referred to collectively as [Law Firm B].

<sup>30</sup> Letter [Law Firm B] to Lawyers Complaints Service (15 October 2021).

[80] The personal liability of directors of a trustee company to beneficiaries is discussed in *Garrow and Kelly Law of Trusts and Trustees*.<sup>31</sup> Various comments from the cases referred to are noted:

- ‘...while a company acts through its director, that does not mean that where a breach of trust is committed by a company through its Board, a beneficiary can maintain any action against the directors in respect of the breach of trust.’<sup>32</sup>
- ‘[The Judge] held that directors of a trust company stand in a fiduciary position only to the company and not to strangers dealing with the company – not even to a stranger who can be described as a beneficiary of a trust of which the company is trustee.’<sup>33</sup>
- ‘It was argued that the ‘corporate legal veil’ of the private trustee company should be lifted and the directors seen as the real and only actors. The Court rejected this argument because there had been no deception or concealment regarding the nature of the trustee. No one thought it was other than an assetless corporate entity with no income – its sole function was managing and administering the estate.’<sup>34</sup>

[81] I acknowledge that while the comments above do not necessarily relate to complaints against a trustee/lawyer, I consider that the principle holds where complaints are made against a lawyer acting as a director of a trustee company. It becomes necessary therefore, to differentiate between the actions of Mr EJ as director of PQRS, and actions as a lawyer providing advice directly to Ms GX or to PQRS.

[82] I will endeavour to make the distinction in this decision.

### Poor legal work / independence

#### *The Trust loan to RR*

[83] Ms GX and Mr OM agreed to assist their daughter (RR) and her partner to purchase a home. Ms GX advises<sup>35</sup> that the sum of \$60,000 was initially advanced, and a further sum of \$60,000 was advanced after she and Mr OM had separated.

<sup>31</sup> Chris Kelly and others *Garrow and Kelly Law of Trusts and Trustees* (online looseleaf ed, LexisNexis) at [27.116].

<sup>32</sup> At [27.116], citing *Bath v Standard Land Co Ltd* [1911] 1 Ch 618 (CA) at 625-626.

<sup>33</sup> At [27.119], citing *HR v JAPT* [1997] OPLR 123 (HC) at 133-134.

<sup>34</sup> At [21.125], citing *HR*, above n 33, at 142.

<sup>35</sup> Letter Ms GX to LCS (11 November 2021).

[84] The advances were made by the OM Family Trust, and Ms GX asked Mr EJ to document those advances.

[85] On 6 April 2020, Mr EJ sent Ms GX and Mr OM drafts of a Deed of Gift (\$60,000 from the Trust to RR) and a Deed of Acknowledgment of Debt for \$60,000. This document wrongly recorded the Trust as the Debtor and RR and her partner as the creditor.

[86] On the following day, Mr EJ sent a revised Deed of Acknowledgement, correcting the error.

[87] Ms GX says that she pointed out to Mr EJ that the total of \$120,000 should be recorded as a loan to RR and her partner, rather than recording \$60,000 of that total as a gift. Following that,<sup>36</sup> Mr EJ prepared a Deed of Acknowledgement of Debt for \$120,000, which was signed by the parties and dated 24 April 2020.

[88] Ms GX says that Mr EJ did not protect Trust funds, and this was poor legal work.

[89] Ms GX has not provided a copy of any written instructions, and it would seem that instructions were given verbally, where misunderstandings can occur. In addition, as RR was a beneficiary of the Trust, it would not have been unusual for Ms GX and Mr OM to make a distribution to her,<sup>37</sup> rather than a loan.

[90] Ultimately the documentation reflected the instructions. The transposition of 'debtor' and 'creditor' is an error that can easily be made, and it would seem that Mr EJ prepared the initial documents in accordance with what he understood to be his instructions.

[91] Taking an overview of events, there is nothing in this complaint which supports an adverse disciplinary finding for lack of competence.

#### *Lease documents*

[92] The Minutes of the AGM held on 18 August 2020 recorded:<sup>38</sup>

QS and GX noted references by OM to lease arrangements between the Trust and [Company A] ...

EJ noted that OM has mentioned documentation is required for a lease ... and OM's Settlor Report proposes that leases ... should be put in place.

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<sup>36</sup> On 17 April 2020.

<sup>37</sup> As distinct from a 'gift in consideration of natural love and affection' as recorded in the drafts.

<sup>38</sup> At 3.4(b).

GX and QS made it clear that any decision making on such leases needs to be made by all trustees.

[93] The copy leases provided by Ms GX are dated 18 August 2020 are signed by Mr OM alone, for both lessor and lessee.

[94] Ms GX refers to this as “allowing”<sup>39</sup> Mr OM to act in this manner. Ms GX herself says in her complaint:<sup>40</sup>

The documents were deficient. EJ never sighted them before they were executed by OM.

[95] Ms GX also asserts:<sup>41</sup>

This is another example of Mr EJ’s passivity and inaction which amounted to bias and incompetence, and did not protect the assets of the Trust.

[96] The leases were not signed by PQRS. The documents as prepared and signed, were not valid. Mr EJ advised Mr OM that Ms GX’s consent was required to the leases. There was nothing further that Mr EJ could, or needed, to do. The Trust properties were not at risk as Ms GX asserts.

[97] There is nothing in this complaint that supports allegations of incompetence.

#### *No letter of engagement*

[98] Ms GX complains that Mr EJ did not provide her with a letter of engagement when she was appointed as a trustee. She says that Mr EJ has breached r 3.4 of the Conduct and Client Care Rules.

[99] This matter was raised by Ms GX in her reply to the response to the complaint by [Law Firm B], acting for Mr EJ.

[100] Mr EJ was not acting for the Trust when Ms GX was appointed in February 2019.<sup>42</sup>

[101] Updated terms of engagement were sent out in July 2020 following changes to the legislation governing trusts. The contact details recorded in the firm’s records had not been updated to include separate details for Ms GX.

[102] In this regard, it needs to be recognised that delivery (as distinct from preparation) of a standard form mailout such as terms of engagement, is a matter for

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<sup>39</sup> Complaint details (18 May 2021) at [9].

<sup>40</sup> ‘Failures as a professional trustee’ sub para (g).

<sup>41</sup> Letter GX to LCS (11 November 2021) at [4.6].

<sup>42</sup> At that time Mr PE acted for the Trust.



administration staff, who would not have been aware of the change in details of the trustees. Although it was Mr EJ's responsibility to notify the firm's administration staff of the change, an oversight of this magnitude does not attract an adverse disciplinary finding.

#### *Minutes of AGM*

[103] Ms GX's complaint is that minutes of the AGM, which took place on 18 August 2020, needed extensive correction.

[104] This complaint is readily answered by the fact that preparation of minutes of a Trust meeting does not constitute 'legal work' as that term is defined in s 6 of the Lawyers and Conveyancers Act 2006.<sup>43</sup>

#### *Denied opportunity for legal counsel*

[105] Ms GX says that Mr EJ did not allow Ms UV to attend the AGM with her. [Law Firm B] says that Mr EJ did not consider it fair if Mr OM did not have the ability to be accompanied by his lawyer. Mr OM's lawyer could not attend on the day the meeting was to be held.

[106] Ultimately, the meeting was held separately and Ms UV did attend the meeting with Ms GX.

[107] Again, Mr EJ was not providing regulated services to Ms GX at this time and in respect of this matter.

[108] This complaint does not support an adverse finding against Mr EJ.

#### *Information not provided to Ms GX as a client/trustee*

[109] Mr EJ did not act for Ms GX in her personal capacity. He acted for the Trust.

[110] Ms GX complains that Mr EJ would not release copies of the Trust files relating to the retirement of Mr PE as a trustee, the appointment of herself as a trustee, and the addition of Mr OM as a beneficiary. She says that Mr EJ would not release these without the consent of Mr OM, notwithstanding that Mr OM's lawyer had advised that they could be released.

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<sup>43</sup> A finding of unsatisfactory conduct requires that a lawyer must be providing regulated services at the time. The definition of regulated services devolves into a definition as being "legal work".

[111] [Law Firm B] advised that Mr EJ was unsure whether Ms GX continued to have access to Trust information, given that she was shortly to retire. [Law Firm C]<sup>44</sup> advised Mr EJ that their correspondence did not reflect agreement to the files/documents being released.

[112] By declining to release the files, Mr EJ avoided a conflict between the trustees. Ms GX's remedy was to apply to the Court for directions.

### Further complaints

#### *The Deed of Variation*

[113] [Law Firm B] say that the trustees of the Trust unanimously agreed to include Mr OM as a beneficiary. This is evidenced by the fact that the document was executed by all trustees.

[114] [Law Firm B] say that Mr EJ did not prepare the Deed. Mr EJ's only involvement would have been as a director of PQRS. Ms GX's complaint either lies with Mr PE or with PQRS.

[115] The Committee's determination to take no further action on this issue is confirmed.

### **Conflict of interests**

[116] It is difficult to discern the reasons that Ms GX puts forward to support her complaint that Mr EJ was conflicted. He did not have any conflict of interests as prohibited by rr 6 and 6.1 of the Conduct and Client Care Rules.<sup>45</sup>

[117] The 'conflict' that Ms GX refers to is a conflict of interest in continuing as a Trustee.<sup>46</sup> She refers to Mr EJ's letter of 3 August 2020 to [Law Firm C] (for Mr OM) and to Ms UV (for Ms GX) where he said:

4. However, given [Law Firm A] prepared and executed the Deed of Variation (and other Trust documents) and that PQRS is one of the Trustees of the Trust, OM and / or GX (whether in their personal capacity as beneficiaries of the Trust, or as Trustees) may consider PQRS should retire and / or be replaced as a trustee, with a new trustee to be appointed.

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<sup>44</sup> [Law Firm C] acted for Mr OM.

<sup>45</sup> Rule 6 requires a lawyer to promote the interests of the client to the exclusion of the interests of third parties. Mr EJ acted for the Trust. Rule 6.1 provides that a lawyer must not act for more than 1 client on a matter. Mr EJ was not acting for more than 1 client.

<sup>46</sup> GX complaint details at para 2(a).

5. Please take instructions from your respective clients regarding the issue noted in [4] above.

[118] As noted above,<sup>47</sup> Mr EJ did not prepare the Deed of Variation. In addition, this is a matter where the fact that the Trustee was PQRS, and not Mr EJ personally, is relevant.

[119] Both of these facts are sufficient, in themselves, to dispose of this complaint. However, I will discuss the allegations of conflict a little further.

[120] As best I can ascertain, Ms GX's assertions that Mr EJ was conflicted, rests on the view that the Trust Deed did not allow for the inclusion of Mr OM as a primary beneficiary. The conflict that Ms GX asserts existed, is that Mr EJ/[Law Firm A], asserted that the Deed of Variation was valid, and that they as Trustee, would proceed on that basis.

[121] Merely because Ms GX and Ms UV disagreed, did not automatically mean that Mr EJ/[Law Firm A] were wrong. The remedy available to Ms GX was to apply to the Court for an interpretation of the Trust Deed. The decision of the Court would then dictate how the Trustees proceeded.

[122] The other conflict that I perceive Ms GX to be asserting, is that the trustees favoured Mr OM over herself. This is not a conflict of interests. It is an allegation that the trustees have not acted equally and fairly between the beneficiaries (leaving aside the complaint that Mr OM's appointment was invalid).

[123] This is quite clearly an instance where the complaint lies against PQRS, and not Mr EJ personally. It is also a matter that cannot be addressed in the context of a complaint. It is a matter for the Court to decide.

[124] For these reasons, I do not accept Ms GX's complaint that Mr EJ was conflicted in any way.

### **Bias**

[125] Ms GX complains that Mr EJ lacked independence and was biased in favour of Mr OM. Included here are matters which Ms GX refers to by way of examples.<sup>48</sup>

The inappropriate bias in favour of OM as a Trustee was also shown by EJ's conduct in: advising OM eg. relating to my access to the bank account; taking no steps to ensure OM did not continue to act unilaterally as a Trustee eg executing contracts solely and without the knowledge of other Trustees; failing to ensure

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<sup>47</sup> At [112].

<sup>48</sup> Complaint form (18 May 2021), supporting synopsis at [8].

OM was not the sole signatory for withdrawals on the Trust bank account; and generally not setting any boundaries for OM. Ms GX refers to other matters subsequently.<sup>49</sup>

[126] These are matters which relate to the conduct of PQRS as trustee, and/or matters which PQRS could not implement without agreement of all trustees. They also include matters where Mr OM acted unilaterally and beyond the control of Mr EJ.

[127] In addition to the above, these allegations of bias are clearly an allegation that the trustee has acted unfairly.

[128] Again, that is not a matter to be addressed by the complaints process.

### **Referral to another law firm**

[129] Ms GX suggests that Mr EJ had a duty to refer the trustees of the Trust to another law firm for advice.

[130] PQRS offered to resign as a Trustee, but Mr OM (who had the power of appointment) did not want that to happen.

[131] It is unrealistic to expect that PQRS would remain a trustee but instruct another legal firm to act for the Trust.

[132] The status quo remained, and there is nothing to support Ms GX's complaints in this regard.

### **Decision**

[133] For all of the reasons discussed above, and pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee to take no further action on Ms GX's complaints about Mr EJ is confirmed.

### **Anonymised publication**

[134] This decision may be helpful to those law firms which operate trustee companies to ensure that all decisions are formally recorded and authorised by the directors of the company so that full protection afforded by incorporation is obtained.

[135] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published in anonymised format.

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<sup>49</sup> See details of complaints, section 3.

**DATED** this 2<sup>ND</sup> day of April 2024

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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:

Ms GX as the Applicant  
Mr EJ as the Respondent  
[Law Firm B] as the Respondent Representatives  
Mr SZ as a Related Party  
[Area] Standards Committee [X]  
New Zealand Law Society