

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

[2021] NZLCRO 030

Ref: LCRO 183/2020

**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**

**DX**

Applicant

**AND**

**SQ**

Respondent

**DECISION**

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

**Introduction**

[1] Mr DX has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint about the conduct of Ms SQ, a lawyer at the relevant time employed as a senior associate by [law firm A] (the firm).

[2] Ms SQ advised two of Mr DX's three sisters, Ms YX (YX) and Ms RX (RX) concerning the deceased estate of their father, Mr HX (HX). Mr DX's complaint concerns Ms SQ's endeavours, on behalf of YX and RX, to obtain for them a copy of HX's last will, and other information about HX's estate they had been unable to obtain from Mr DX.

[3] HX was born in [date]. In [date] he married NX who died in [date]. They had four children, Mr DX, YX, RX, and MX. HX died on [date] aged 87 survived by all four

children. He had made two wills. The first, on [day, month] 1998 (the 1998 will) in which he appointed the Public Trust as executor, and divided his estate equally among the four children. In his second will, dated [day, month] 2015 (the 2015 will), the only change HX made was to substitute Mr DX as executor.

[4] HX was admitted to hospital on [date] where, two days later, he was diagnosed with cancer.

[5] On [date], when visited by two representatives from the Public Trust, HX told them he had made another will since the 1998 will.<sup>1</sup>

[6] He returned home from hospital on [date]. A care roster was agreed whereby Mr DX and MX on the one hand, and YX and RX on the other would take turns looking after HX. On [date], MX overlooked telling YX and RX about a change in the roster. This led to an overlap, and to YX sending a text to MX later that day stating “[t]o avoid any more animosity and hostility” she and RX “are withdrawing from the roster” in the “hope this will make things easier”.

[7] It appears, upon hearing about YX’s text from Mr DX that day, HX told Mr DX he wanted to make a new will which he then dictated to Mr DX.

[8] HX was readmitted to hospital on [date]. The following day, [date], Mr DX printed out the will HX dictated (the 2018 will) which named Mr DX as executor, provided for one third of the fair value of HX’s home to be divided equally between YX and RX, and the residue of HX’s estate to be divided equally between Mr DX and MX.

[9] When HX returned home again from hospital on [date] Mr DX provided him with a printout of the 2018 will which he did not sign.

[10] On [date], one of the Public Trust representatives who visited HX in hospital told RX about HX having mentioned he had made another will. Mr DX says during January he informed the Public Trust of HX’s death, and provided a copy of the 2015 will to the Public Trust.

[11] As detailed in my later analysis, from [date] to [date] YX and RX, through their lawyers, initially Ms WD, and later Ms SQ, requested from Mr DX, without success, a copy of HX’s last will, and information about HX’s estate.

---

<sup>1</sup> The Public Trust held the 1998 will. YX, RX and MX were also visiting HX at that time - see my later analysis.

[12] On or about [date], Ms SQ made enquiries (by letter) of a number of banks, and other institutions, and arranged a meeting with the Public Trust on [date] to which she invited Mr DX and MX.

[13] On [date], Mr NF, a legal executive with [law firm B] informed (by letter) Ms SQ about the 2018 will. In response to Ms SQ's request (by letter) on [date], that day Mr NF stated (by letter) YX and RX were "not entitled to see" the [month] 2018 will.

[14] Mr MG, Mr NF's colleague, confirmed (by email) to Ms SQ on [day, month] that Mr DX had provided instructions to apply for validation of the 2018 will, and would not be applying for probate of the 2015 will.<sup>2</sup>

[15] YX's and RX's subsequent application for administration of HX's estate pursuant to the 2015 will was granted by the High Court which ordered the appointment of an independent executor and trustee. Mr DX's application to the High Court to have the 2018 will declared a valid will under s14 of the Wills Act 2007 was heard as part of those proceedings. The Court of Appeal dismissed Mr DX's appeal.<sup>3</sup>

## **Complaint**

[16] Mr DX lodged a complaint about Ms SQ with the Lawyers Complaints Service (LCS) on [date]. He sought (a) reimbursement of legal fees incurred by him in defending YX and RX's proceedings against him, and (b) copies of all information concerning HX's estate obtained by Ms SQ.

### *(1) Request for information*

[17] He claimed Ms SQ "conducted legal proceedings" against him in "a fraudulent and deceptive manner" to obtain information about HX's estate, and in doing so "made a series of flagrant misrepresentations" in an "attempt to take over the administration" of the estate.

[18] He said on [date], Ms SQ sent letters to a number of banks, and other institutions, details of which he produced, requesting information about HX in which he claimed Ms SQ "falsely" stated she was "administering" HX's estate.<sup>4</sup>

---

<sup>2</sup> Mr MG, senior associate at [law firm B].

<sup>3</sup> *YX v DX* [XXXX] NZHC XXXX; *DX v YX* [XXXX] NZCA XXX.

<sup>4</sup> Copies of Ms SQ's letters to the banks, the Public Trust, and State Insurance which display exhibit notes to Ms SQ's [date] affidavit filed in the proceedings, accompanied Mr DX's complaint, and review application. Ms SQ's affidavit has not been produced.

[19] He explained YX and RX, who operated HX's [bank] account, would already have told Ms SQ that HX banked with [bank].

*(2) Removal as executor*

[20] Mr DX also claimed Ms SQ, acting on YX's and RX's instructions, "illegally obtain[ed] private information" about HX's estate so YX and RX could "make an application for probate".

**Response**

[21] Following an initial assessment by the LCS, Mr DX's complaint was dealt with through its Early Intervention Process which I refer to later in this decision.

**Standards Committee decision**

[22] The Standards Committee delivered its decision on 19 August 2020 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[23] The issues identified by the Committee were (a) whether, Ms SQ, when acting for YX, and RX, did so in a fraudulent and a deceptive manner in order to obtain information about HX's estate with a view to removing Mr DX as an executor, and (b) if so, whether Ms SQ breached her professional obligations.

*(1) Request for information*

[24] The Committee concluded that (a) Mr DX's need, for personal reasons, to travel overseas did not excuse him from providing the information about HX's estate requested from him, and (b) Ms SQ's statements in her letters to the banks, from whom she requested information about HX, that she was assisting YX and RX in "the administration" of HX's estate, or "with the estate", were "not untrue or fraudulent".

[25] In support of that conclusion the Committee referred (a) to Mr DX not having provided to YX and RX information about HX's will, or the steps taken by him in the administration of HX's estate, thereby leaving it open to them to instruct Ms SQ to make inquiries on their behalf about HX's estate, and (b) to Ms SQ's 19 July 2018 invitation to Mr DX and MX to attend the meeting with the Public Trust on 24 July.

*(2) Removal as executor*

[26] In the Committee's view, there was "insufficient material" in support of Mr DX's allegation Ms SQ sought information about HX's estate to further YX's and RX's wish to remove Mr DX as an executor.

[27] The Committee observed although in circumstances where there was a conflict among members of a family it may be "appropriate for an independent person" to be appointed as trustee, that did "not reflect on" the honesty of the person whose removal is sought.

*(3) Court proceedings*

[28] The Committee stated that the copies of Ms SQ's letters to banks, the Public Trust, other institutions, and to YX and RX were exhibits to Ms SQ's affidavit in YX's and RX's proceedings against Mr DX, but the Committee had not been provided with a copy of either the proceedings, or the Court's decision.

[29] In conclusion, the Committee stated it had no jurisdiction in respect of any matter before the Court. However, if arising out of those proceedings the Court found Ms SQ had, when representing YX and RX, "acted improperly", Mr DX could make another complaint to the LCS about Ms SQ at that time.

**Application for review**

[30] Mr DX filed an application for review on [date]. He repeats his request for reimbursement of his legal expenses he says were incurred due to Ms SQ's conduct. He says he "consider[s] [it] unusual" the LCS did not provide him with a copy of Ms SQ's response to his complaint.

*(1) Request for information*

[31] He repeats his claims Ms SQ (a) had "no authority to make inquiries on behalf of the estate", and (b) was not "instructed" by YX and RX to "administer" HX's estate within the legal meaning of that word.<sup>5</sup>

[32] In his view, Ms SQ's "sole purpose" was to "obtain a copy" of the 2015 will, which he provided to the Public Trust in [date], so YX and RX could apply for probate.

---

<sup>5</sup> The meaning of "administer" provided by Mr DX, but without providing the authority or source, is "conduct or disposal of the estate of a deceased person".

He denies he “was not taking adequate steps” in the administration of HX’s estate, or in applying for probate of HX’s will.

[33] He says although, Mr NF, informed Ms SQ on 26 July 2018 he was applying for probate of the 2018 will, Ms SQ “continued to put forward an application for probate”.

[34] He refers to, and produces copies of communications from and to Ms SQ which he says evidences Ms SQ already knew HX had named him as executor. He says when Ms SQ made her enquiries during July and August 2018 he had already returned from his overseas trip having been away “for approx[imately] four weeks”.

[35] He refers to the High Court order that an independent person be appointed as executor and trustee “on the basis of conflict arising under s 13” of the Wills Act 2007 “rather than” the Court regarding “the steps [he] ha[s] taken to secure the estate and realise certain assets of the estate was in any way wrong or in breach of his duty to the estate and other beneficiaries”.<sup>6</sup>

*(2) Removal as executor*

[36] Mr DX refers to Ms WD’s [date] email to YX advising of (a) [Ms WD’s] telephone conversation with his lawyer at that time, Ms LD, who said he had not yet instructed [Ms LD] to apply for probate, and (b) Ms WD’s advice to YX and RX that “applications to the Court to have him removed as executor may be expensive” hence “need[ing] to know” the value of the estate.<sup>7</sup>

**Response**

[37] In her response Ms SQ does not address Mr DX’s allegations except to produce copies of the High Court, and Court of Appeal decisions in the proceedings issued by YX and RX against Mr DX seeking administration of the 2015 will, and Mr DX’s application to have the 2018 will declared valid.<sup>8</sup>

[38] Ms SQ refers to the High Court having ordered the appointment of an independent person as executor and trustee of the 2015 will, and Mr DX’s appeal against that decision, which, as noted earlier, was dismissed.

[39] Ms SQ also refers to Mr MG having informed the Court of Appeal that if Mr DX’s appeal “was unsuccessful in relation to the validity” of the 2018 will, then [Mr DX] did

---

<sup>6</sup> The High Court’s decision at [86].

<sup>7</sup> I refer to the other communications produced by Mr DX in my later analysis.

<sup>8</sup> Ms SQ, letter to LCRO (13 October 2020).

“no[t] challenge” the “orders made by the High Court under the Administration Act”. For that reason, the Court of Appeal stated it “d[id] not need to address that issue”.<sup>9</sup>

### **Review on the papers**

[40] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[41] I record that having carefully read the complaint, the response to the complaint, the Committee’s decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

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

[42] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>10</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[43] More recently, the High Court has described a review by this Office in the following way:<sup>11</sup>

---

<sup>9</sup> The Court of Appeal’s decision at [71].

<sup>10</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39] - [41].

<sup>11</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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

### **Preliminary**

[45] The LCS dealt with Mr DX's complaint through its Early Intervention Process. This involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[46] If the Standards Committee's preliminary view is that the complaint lacks substance, a Legal Standards Officer (LSO) will inform the lawyer concerned of the Committee's preliminary view, inviting response. Any response is noted in a file note and provided to the Committee, which then completes its inquiry into the complaint.

[47] On 17 August 2020, an LSO telephoned Ms SQ and informed her the Committee had reached a preliminary view on Mr DX's complaint. Having been asked whether she wished to respond to the complaint, Ms SQ said she would provide any further information required. In reply, the LSO said Committee had sufficient information to finalise its decision.

### **Issues**

[48] The Issues I have identified for consideration are:

- (a) Did Ms SQ, who acted for YX and RX, owe Mr DX, who had his own lawyers, any professional obligations or duties?
- (b) If so, did Ms SQ contravene such professional obligations or duties when requesting (i) information about HX's estate from banks and other institutions, and (ii) a copy of Mr HX's will from Mr DX's lawyers?
- (c) In particular, (i) was Ms SQ's purpose in making the requests a proper purpose, (ii) was her conduct in making the requests fraudulent and deceptive, and (iii) did she have authority to make the requests?

## Analysis

### *(1) Another lawyer's client – issue (a)*

#### *(a) Unsatisfactory conduct*

[49] Should a determination be made that a lawyer's conduct warrants a disciplinary response a finding can be made of either (a) unsatisfactory conduct pursuant to s 12 of the Act; or (b) misconduct pursuant to s 7.<sup>12</sup>

[50] There are three categories of unsatisfactory conduct which concern the conduct of a lawyer (or incorporated firm) when providing regulated services.<sup>13</sup> The second category concerns "conduct ... that would be regarded by lawyers of good standing as being unacceptable including— (i) conduct unbecoming ...; or (ii) unprofessional conduct".<sup>14</sup>

#### *(b) Professional rules*

[51] Although represented by his own lawyers, Mr DX complains about the conduct of Ms SQ who acted for the opposing parties, YX and RX, to a family dispute which led to YX and RX issuing proceedings against him.

[52] The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), as the name suggests, concern the way in which lawyers must first, conduct themselves, and secondly, act for their clients.

[53] The duties in the Rules fall into three broad categories.<sup>15</sup> First, those duties which directly concern the provision of legal services by lawyers to their clients;<sup>16</sup> secondly, duties which concern lawyers' dealings or interactions with other lawyers, and

---

<sup>12</sup> A misconduct finding can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

<sup>13</sup> Section 6 of the Act, definition of "regulated services", and the inter-related definitions of "legal services", "legal work", and "reserved areas of work".

<sup>14</sup> Section 12(b); the first category is conduct that "falls short of the standard of competence and diligence ... of a reasonably competent lawyer", per s 12(a); the third category is "... a contravention of [the] Act, or of any regulations or practice rules made under [the] Act that apply to the lawyer ... [when] ...provi[ding] regulated services ...", per s 12(c).

<sup>15</sup> See the Schedule to the Rules at Notes about the Rules: the Rules do not represent "an exhaustive statement of the conduct expected of lawyers", but "set the minimum standards that lawyers must observe and are a reference point for discipline".

<sup>16</sup> See also s 4 of the Act, specifying lawyers' fundamental obligations: (b) "be independent" when acting for their clients; (c) "...act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients".

third parties; and thirdly, duties which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.<sup>17</sup>

*(c) Non-clients*

[54] There may be times when a lawyer owes a duty, other than a professional duty, to persons for whom the lawyer does not act, for example, a duty of care in negligence. Generally, however, a lawyer acting for a client would not owe a duty to a person who was an opposing party in litigation, or on the opposite side of a transaction.<sup>18</sup>

[55] For that reason, "the existence of a duty" owed to a non-client has been described as "exceptional".<sup>19</sup> Where a lawyer acts for a party to a transaction, the different interests possessed by each party explains the Courts' reference to policy considerations why that lawyer does not owe a professional duty to the opposing party.<sup>20</sup>

*(d) Duties owed to clients*

[56] This position can be contrasted, as noted above, with the professional duties lawyers owe their clients included in the first category of the Rules.

[57] To illustrate, the duties owed by Ms SQ to her clients, YX and RX would have included the duties to act competently (r 3); to treat them with respect and courtesy (r 3.1); to respond to their inquiries promptly (r r 3.2, 7.2); to provide them with information on the principal aspects of client service and client care at the commencement of a retainer (rr 3.4, 3.5);<sup>21</sup> to be independent (r 5); to protect and promote their interests to the exclusion of third parties' interests (r 6); to consult with them (r 7.1); to hold their information in confidence (r 8); and to charge them fees that are fair and reasonable (rr 9, 9.1).

*(e) Broader duties*

[58] As also noted above, there are professional duties and obligations of a broader nature included in the second category of the Rules which concern lawyers' dealings or

---

<sup>17</sup> Also s 4 of the Act: (a) "uphold the rule of law and facilitate the administration of justice in New Zealand"; ... (d) "protect [clients'] interests" subject to "overriding duties as officers of the High Court".

<sup>18</sup> Unless, for example, where a lawyer acting for a client on a transaction provides an undertaking, say, to pay rates, or water charges, or a certificate for e-dealing purposes in Landonline, or to a bank: see rr 2.5 and 2.6 of the Rules.

<sup>19</sup> Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3], referring to *Burmeister v O'Brien* [2010] NZLR 395 (HC) at [234].

<sup>20</sup> Webb, Dalziel and Cook at [5.4.3], referring to *Burmeister v O'Brien* at [234].

<sup>21</sup> Rules 3.4A and 3.5A apply to barristers sole.

interactions with other lawyers, and third parties; and in the third category which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.

[59] Duties in the third category include to use legal processes only for proper purposes (r 2.3), to promote and maintain proper standards of professionalism in the lawyer's dealings (r 10); not to engage in misleading or deceptive conduct on any aspect of lawyer's practice (r 11.1); and when acting in a professional capacity conduct dealings with others, including self-represented persons, with integrity, respect, courtesy (r 12).

*(2) Applicable professional duties – issue (b)*

*(a) Context*

[60] To provide context for consideration of this issue, I first set out the events that led to Mr DX making his complaint about Ms SQ's conduct.<sup>22</sup>

[61] As noted in the introduction, on [date], one of the Public Trust representatives who visited HX in hospital on [date] told RX that during the visit HX mentioned having made another will. RX later said she, YX and MX were also visiting HX that day, and when asked about the reason for the Public Trust visit, MX said Mr DX was HX's executor.<sup>23</sup>

[62] On [date], YX asked Ms WD for advice. YX told Ms WD about HX having mentioned a "more recent" will, than the 1998 will. She said Mr DX and MX had been "obstructive" by not keeping them informed about HX's medical treatment, having delayed 24 hours before telling them of HX's death, and not including them in making HX's funeral arrangements.<sup>24</sup>

[63] In response, on [date], Ms WD said she could request a copy of HX's will from HX's lawyer, or YX could ask Mr DX and MX. Alternatively, Ms WD advised a copy of probate, when granted, could be obtained from the High Court. She added if probate had not been granted, and YX had concerns whether HX made his will "under duress or undue influence or did not have testamentary capacity", [Ms WD] could lodge a caveat with the High Court to prevent the grant.

[64] On [date], Mr DX says he provided "a copy of [HX's] will" to [bank] which placed a "deceased hold" on HX's accounts.<sup>25</sup> Ms WD spoke (by telephone) to Mr DX on [date]

---

<sup>22</sup> Unless otherwise stated, the communications referred to were by email.

<sup>23</sup> RX, email to Mr OJ ([date]).

<sup>24</sup> YX, email to Ms WD ([date]). Ms WD, director of [law firm C].

<sup>25</sup> Ms WP of [bank], letter (emailed) to Mr DX ([date]).

and reported to YX that day that Mr DX held a copy of HX's "last will", and intended instructing his lawyer at that time, Ms LD, to apply for probate.

[65] On [date], Ms WD told YX she had "wr[itten] again" to Mr DX, and "sent two letters" to Ms LD, without reply. Later that day YX instructed Ms WD to lodge a caveat if Mr DX "doesn't respond promptly".

[66] On [date], Ms WD told YX that Ms LD had spoken to Mr DX, but [Ms LD] "d[id] not have the will, or instructions to apply for probate". Ms WD explained applications to the Court to remove an executor "may be expensive" hence her request for details of the estate.

[67] On [date], Ms SQ, then acting for YX and RX requested (by letter) from a number of banks, including [bank], information about HX's accounts. Ms SQ arranged a meeting with the Public Trust for [date]. On [date] she informed YX and RX that the Public Trust, which held "the only will" she was "aware of", was named as executor.

[68] Although invited (by letter) by Ms SQ on [date], Mr DX and MX did not attend the [date] meeting. On [date], Ms SQ informed (by letter) them the Public Trust had agreed to renounce executorship to allow YX and RX to apply for letters of administration of the 2015 will. She asked Mr DX and MX to sign the accompanying consents to that application.<sup>26</sup>

[69] On [date], Mr NF informed (by letter) Ms SQ that Mr DX, as executor of the 2018 will, was "taking steps to apply for probate of the [2018] will".

[70] On [date], Ms SQ sought (by letter, email) confirmation from Mr MG that Mr NF had received Mr DX's instructions by [date]. She said YX and RX were entitled to see the 2018 will, and to know whether an application for probate had been made.

[71] In response that day, Mr NF denied (by letter, email) an allegation he did not have instructions to act for Mr DX as executor. He said YX and RX were "not entitled to see" the [month] 2018 will, or "any other document" held by Mr DX "unless and until" the document is "either the subject of court proceedings or becomes available following a grant of probate".

---

<sup>26</sup> Also that day, Ms SQ sent (by letter) to the Public Trust renunciation of probate, a copy of her [date] letter to Mr DX and MX, and YX's and RX's consents to that application.

[72] Mr NF said Mr DX, as HX's son, not an executor, had arranged HX's funeral, and was not refusing to apply for probate. He described Ms SQ's meeting with the Public Trust as "unnecessary" and "pointless" concerning "a misguided proposed application" for administration of the will. He said Mr DX was "continuing to take steps to establish the validity of the will [Mr DX] held".

[73] On [date], in response to Ms SQ's letter that day, Mr MG said Mr DX's instructions were to apply to have HX "unsigned [2018] will validated", not to apply for probate of the 2015 will. He said Mr DX had taken out new insurance on HX's former home, and asked how Ms SQ had "obtained the insurer's correspondence" she referred to.

*(b) Proper purpose*

[74] Of those duties, referred to above, which may have applied to Ms SQ when she requested information about HX's estate, r 2.3, which requires that lawyers use legal processes "only for proper purposes", deserves consideration.

*(i) Legal processes*

[75] Rule 2.3 provides that:

A lawyer must use legal processes only for proper purposes. A lawyer must not use or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

[76] A helpful description of the rationale for r 2.3 is that "public interest in the due administration of justice necessarily extends to ensuring that the court's processes do not lend themselves to oppression and injustice".<sup>27</sup>

[77] Examples of the application of r 2.3 in the footnote to the rule include issuing a statutory demand under the Companies Act 1993 without justification, registering a caveat where there is no caveatable interest, and serving documents on a person in a way that embarrasses a person, or damages the person's reputation, interests, or occupation.

---

<sup>27</sup> GE Dal Pont *Lawyers' Professional Responsibility* (6th Edition, Thomson Reuters, Sydney, 2017) at p585 and fn 244.

[78] Explanations of the rule include that it “constrains lawyers to use legal processes more broadly only for proper purposes”.<sup>28</sup> Therefore, if a lawyer uses the law for a purpose which is quite contrary to that for which it was intended, the lawyer will be guilty of using the law for an improper purpose.<sup>29</sup>

[79] In this context, the likely meaning of the word “proper” means “genuine”, “conforming to recognised social standards or etiquette, seemly, decent, decorous”, “respectable, correct, [especially] excessively so”.<sup>30</sup>

[80] The rule contemplates the possibility of more than one purpose. In such circumstances, it has been observed that “[i]f there was a second purpose and this was the predominant purpose then, if such purpose was improper, there would be a breach of [r] 2.3”.<sup>31</sup> It follows that r 2.3 would be contravened “where there is only one purpose, and that is improper”.<sup>32</sup>

*(ii) Discussion*

*Mr DX*

[81] Mr DX says he said he had been “dealing with” the Public Trust about HX’s estate. He says HX, when in hospital in [date], informed the Public Trust [HX] had “updated his will”.

[82] He says “just over a week before” HX died, [HX] instructed him “to write” the 2018 will. He says in [month] 2018 he informed the Public Trust of HX’s death, provided the Public Trust with a copy of the 2015 will, and obtained from the Public Trust information about the tasks an executor “needed to action” in respect of which he then took legal advice.

[83] He says in response to Ms WD’s request to him on the telephone on [day, month] 2018 for a copy of HX’s will, he told Ms WD that HX had “updated his will” and [Mr DX] was the executor, and had not yet obtained legal advice. He says he did not respond to Ms WD’s follow-up email.

---

<sup>28</sup> *BU v DG* LCRO 276/2011 (17 September 2013) at [43].

<sup>29</sup> *Webb, Dalziel and Cook*, above n 19 at [13.5]: “[w]hen it is clear the action taken is not intended to affect any legal rights, but to achieve some collateral purpose the action is inappropriate and an abuse of legal process”.

<sup>30</sup> Oxford English Dictionary <[www.oed.com](http://www.oed.com)>. Conversely, “improper” means “[u]nbecoming, unseemly, indecorous”.

<sup>31</sup> *Alloa v Ullapool* LCRO 159/2009 (10 June 2010) at [19].

<sup>32</sup> *BU v DG*, above n 28 at [44].

[84] He says his lawyer advised him (a) so long as he “was taking steps in administering the estate”, which he says he was, he could begin the process of applying for probate “within six months to a year” of HX’s death, and (b) as sole executor under both the 2015, and 2018 wills, he was “not ... oblig[ed] to show anyone the will ... [he] held until probate [was] granted”.

[85] He says with “an urgent matter” to attend to in [country] during [period] he intended returning “before the six month period was up”, and “then start [his] application for probate”.

[86] He says although, on [date], Ms SQ invited him and MX to a meeting at the Public Trust on [date], he was advised not to attend because the 1998 will, held by the Public Trust, had been revoked by the 2015 will he had provided to the Public Trust.

[87] He explains Ms SQ’s request for information led to “18 months of legal action, and triggered” an internal investigation within the Public Trust, an audit of [bank] by the banking ombudsman, and an internal audit in State Insurance.

[88] He says neither [City] District Health Board nor [hospice] provided information requested by Ms SQ. He notes Ms SQ did not respond to Mr NF’s request for her authority to make enquiry of [bank], or her similar enquiry of State Insurance.

[89] He says “on or around” [date] he received YX’s and RX’s proceedings against him from which he learned that “from the outset” they wanted to remove him as executor of the 2015 will, and obtain administration of HX’s estate themselves.

#### *Ms SQ*

[90] As noted above, Ms SQ elected not to respond to either Mr DX’s complaint made to the LCS, or, with the exception of her reference to the High Court and Court of Appeal decisions, his review application. However, in her request letters for information about HX’s estate, and in her written communications with Mr NF, and Mr MG, she explained why YX and RX wanted that information.

[91] In her [date] letter to banks, including [bank], and other institutions, Ms SQ stated YX and RX, “two of [HX’s] children”, (a) had “instruct[ed]” the firm “in the administration” of HX’s estate, and (b) were “anxious to establish which bank [HX] had accounts with”, and the “requirements necessary” to close those accounts.

[92] As noted above, on [date] Ms SQ informed YX and RX that “the only will” she was “aware of”, which appointed the Public Trust as executor, was held by the Public

Trust. She explained that probate was required to administer HX's estate. She said except for the Public Trust's reply, their advertisements for "other wills" had gone unanswered, Mr DX had not responded to Ms WD's requests for a copy of HX's will, and the banks she wrote to appeared not to have been notified of HX's death.

[93] Ms SQ advised YX and RX if the Public Trust renounced executorship, the residuary beneficiaries could apply for probate of the 1998 will hence inviting Mr DX and MX, and their lawyers, to attend the [date] meeting. She explained probate, if granted for the 1998 will, could be recalled if a later will was produced.

[94] She said two banks had responded that neither held accounts for HX, a third bank sought further information, and she was waiting to hear from two other banks, including [bank].

[95] As noted earlier, Mr DX and MX did not attend the [date] meeting. The next day, Ms SQ informed them the Public Trust had agreed to renounce executorship to enable YX and RX to apply for administration of the 2015 will.

[96] Ms SQ explained (by letter) to State Insurance on [date] she was "assisting" YX and RX with HX's estate, and enquired about insurance on HX's home and contents, and any insurance on HX's life.

[97] As noted above, on [date] Mr NF informed (by letter) Ms SQ that Mr DX, as executor of the 2018 will, was "taking steps to apply for probate of the will". On [date] Ms SQ asked Mr MG whether by [date] Mr DX (a) had instructed Mr NF, and (b) was "taking steps" to apply for probate. She said YX and RX were entitled to see the 2018 will, and to know whether an application for probate had been made.<sup>33</sup>

[98] Referring to their [date] telephone conversation, Ms SQ noted Mr MG had spoken about "a few complications re the will" for which an application to the High Court may be required. She requested "an outline" of an application to the High Court "to establish the [2018] will's validity", or "for a grant of probate or administration".

### *Consideration*

[99] In summary, Mr DX contends it was wrong for Ms SQ, when requesting information from the banks and other institutions to say she was acting for YX and RX

---

<sup>33</sup> Ms SQ added Mr DX "gave directions" for HX's funeral thereby "accept[ing] his role as executor" if so appointed, and if he had "intermeddled" in the estate could not refuse to apply for probate or administration.

“in the administration” of HX’s estate when her purpose in making the requests was to enable YX and RX to apply for administration of the 2015 will.

[100] Mr DX says YX and RX already knew HXs had bank accounts with [bank] because they operated those accounts for HX. He says since [date], when representatives from the Public Trust visited HX in hospital, they knew HX had made a will more recent than the 1998 will which the Public Trust held for safe keeping.

[101] However, from my analysis, although MX told YX and RX on [date] Mr DX was executor, and the Public Trust told RX on [date] that HX had mentioned another will, despite their subsequent requests, Mr DX did not provide them with copies of the 2015, and 2018 wills.

[102] YX and RX’s requests of Mr DX were initially made by Ms WD on [date], a follow-up, and two subsequent enquiries of Ms LD. By 28 March Mr DX had acknowledged the existence of another will, but had not provided details.

[103] That remained the position when Ms SQ began acting for YX and RX from [date] and led Ms SQ (a) to tell YX and RX that “the only will” she was “aware of” was the 1998 will, which named the Public Trust as executor, (b) to ask for information about HX’s estate from banks and other institutions, (c) to arrange the [date] meeting with the Public Trust at which the Public Trust agreed to renounce executorship, and (d) then following that meeting to inform Mr NF on [date] YX and RX intended to apply for administration of the 1998 will.

[104] It wasn’t until the following day, [date], that Ms SQ found out from Mr NF about the 2018 will, and Mr DX’s intention to apply for probate of that will. On [date], Mr NF declined Ms SQ’s request of Mr MG that day for a copy of the 2018 will.

[105] This formed the background to Ms SQ’s request to the banks for details about HX’s accounts. Ms SQ stated that her purpose, or reason for her requests was to obtain “the necessary requirements to have those accounts closed”.

[106] In her letter to the Public Trust, Ms SQ stated she understood the Public Trust “has a will” for HXs, and enquired on behalf of YX and RX why an application for probate has not been made. It is clear from that letter that YX and RX, and hence Ms SQ, had not yet seen a copy of the 1998 will, let alone the 2015, and 2018 wills. As such, Ms SQ could not therefore have been acting for the executor “in the administration” of HX’s estate.

[107] In summary, it is evident from the information produced that YX's and RX's purpose or reason, and hence Ms SQ's purpose or reason, for requesting information about HX's estate was driven by their requests of Mr DX for information about their father's estate being declined. All YX and RX appear to have known at the time Ms SQ made the requests was that HX had made a will, subsequent to the 1998 will, which named Mr DX as executor. They would, as stated by Ms SQ in her letter to the banks, have been "anxious" for details.

[108] Faced with Mr DX's refusal to disclose information about HX's estate, as requested, the fact that Ms WD had earlier advised YX and RX that an application to the High Court to remove an executor "may be expensive" does not in my view taint Ms SQ's later request for HX's account details, her request for insurance details, or her enquiry of the Public Trust about probate.

[109] The date YX and RX commenced their proceedings against Mr DX is not disclosed in the information produced both to the Committee, and on review. This leaves me with the impression that in the absence of Mr DX producing information about HX's estate, YX and RX issued their proceedings in the High Court in which they succeeded in obtaining a grant of administration of the 2015 will but with the appointment of an independent executor and trustee.

[110] Although, in terms of r 2.3, there is room for doubt whether Ms SQ's request for information about HX's estate formed part of a legal process as explained in the footnote to the rule, nonetheless, I consider, in these particular circumstances, her purpose or reason for the request was justifiable, and therefore proper.

*(b) Fraudulent and deceptive, authority*

[111] However, Mr DX also alleges Ms SQ's conduct in making her requests was "fraudulent and deceptive". He takes issue with Ms SQ's statements to the banks she acted for YX and RX "in the administration of their father's estate". He says that statement could have misled the banks into thinking Ms SQ was acting for HX's executors. He says Ms SQ's request to [bank] resulted in that bank providing details of HX's accounts to the firm.

[112] Ms SQ did explain in her requests first, to the banks and the Public Trust that she acted for "two of [HX's] children", and secondly, to State Insurance that she was "assisting [HX's] two daughters", but did not say whether or not YX and RX were executors.

[113] I accept that Ms SQ's statement to the banks without further explanation, except for the qualification "to have those accounts closed", may have left room for ambiguity in the mind of the reader as to whether YX and RX were HX's executors, and whether probate had been applied for, granted, or otherwise.<sup>34</sup>

[114] In my view, it would have been preferable for Ms SQ to have explained to the banks, as she subsequently did in her letter to State Insurance, that she "has been assisting" YX and RX with HX's estate, but with further background. For example, YX and RX, as two of HX's four children, (a) understood they were beneficiaries of HX's will, (b) understood their brother, Mr DX, was HX's executor, but (c) Mr DX had provided them with little detail about HX's estate.

[115] For a person's conduct to constitute civil (as opposed to criminal) fraud, there must be an act of dishonesty.<sup>35</sup> Whether or not a person's conduct is misleading or deceptive "is substantially a question of fact and degree" determined by the Courts "to be objectively assessed".<sup>36</sup>

[116] However, for the purposes of this review, having carefully considered the context in which the requests were made, as I have detailed, on balance, the conclusion I have reached is that Ms SQ was imprecise when she stated she acted for YX and RX "in the administration" of HX's estate. As I suggested above, Ms SQ could preferably have stated she was making enquiries for them, as two, of four, beneficiaries of HX's estate and so on.

[117] Whilst I consider Ms SQ ought to have been more careful in the way she framed her requests for information about HX's estate, on balance, I do not consider her conduct in making the requests in these particular circumstances reaches the threshold that could be regarded as unacceptable or unprofessional deserving a disciplinary response. In reaching that decision I take comfort from the fact that Ms SQ's requests were put before the courts in YX's and RX's proceedings against Mr DX without adverse comment in the Courts' decisions.<sup>37</sup>

[118] For completeness, I also refer to r 11.1, referred to earlier, which prohibits a lawyer from "engag[ing] in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice". However, the commonly held view of the scope of this rule is that it "concerns matters such as the lawyer's practising

---

<sup>34</sup> [Bank], letter to Mr DX (1 November 2018): [Bank] provided "account information", and changed the "estate's address" to the firm.

<sup>35</sup> *Waimiha Sawmilling Co Ltd (In Liquidation) v Waione Timber Co Ltd* [1926] AC 101 (PC).

<sup>36</sup> *Des Forges v Wright* [1996] 2 NZLR 394 (HC) at p401.

<sup>37</sup> Section 12(b) of the Act.

certificate status, expertise in particular areas of the law, the existence of an association, affiliation or endorsement, or fee charging practices”, not the lawyer’s “misleading and deceptive conduct” in advocacy which is addressed by another rule.<sup>38</sup>

[119] In conclusion, although the determination of matters concerning the duties of executors reside in the courts, not with a Standards Committee, or a Review Officer on review, I observe that in *Wills and Succession (NZ)*, the commentator notes that “[all] [residuary] beneficiaries... are entitled to receive, and should be provided with, a copy of the last will (and any codicils) at the earliest opportunity”.<sup>39</sup> Relatedly, in a recent decision the High Court, in awarding costs against executors for withholding the terms of the will from potential beneficiaries, stated “by keeping the terms of the Will secret until probate had been granted, the executors contributed to the costs of determining the validity of the will”.<sup>40</sup>

### **Decision**

[120] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee to take no further action on Mr DX’s complaint is confirmed.

#### *Anonymised publication*

[121] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

**DATED** this 26<sup>TH</sup> day of FEBRUARY 2021

---

**B A Galloway**  
**Legal Complaints Review Officer**

---

<sup>38</sup> Paul Collins, commentary on the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008; r 13.1, the absolute duty of honesty to the court.

<sup>39</sup> *Wills and Succession (NZ)* (looseleaf ed, LexisNexis) at [12.4].

<sup>40</sup> *Farn v Loosely* [2017] NZHC 1951 at [15]; *Loosely v Powell* [2018] NZCA 3 at [117], [121], and [123].

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr DX, as the Applicant  
Ms SQ, as the Respondent  
Mr FU as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society