

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

[2022] NZLCRO 054

Ref: LCRO 158/2020

**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**

**SA**

Applicant

**AND**

**KC**

Respondent

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

**Introduction**

[1] Mr SA has applied for a review of the determination by [Area] Standards Committee [X] to take no further action on his complaints about Mr KC.

**Background**

[2] Mr SA<sup>1</sup> has three siblings: BA, CA and DA.

[3] Mr SA and TA were the parents of the four children. The family lawyer, Mr FG, was, at that time, a trustee of the SA Family Trust (with Mr SA) and the surviving trustee of the TA Family Trust. Mrs TA had died in July 2014.

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<sup>1</sup> In this decision Mr SA will be referred to as "S". The nomenclature, "Mr SA", will be applied to S's father.

[4] Mr SA died on 26 February 2018.

[5] The two Family Trusts owned the cross-leased property at [Property 1 address], which had been occupied by Mr SA and Mrs TA. S owns the other cross-lease property at [Property 2 address].

[6] Shortly after Mrs TA's death, Mr SA moved into an apartment at [Retirement Village].

[7] Mr FG held a written authority from Mr SA directing that he wanted the property sold.<sup>2</sup> However, disagreement between the four children resulted in Mr SA's wishes not being carried out and the property remained unsold.

[8] Mr KC's involvement came about when Mr RB<sup>3</sup> referred Mr SA to Mr KC for independent advice.

[9] Mr KC initially met with Mr RB, BA and CA on 21 May 2015 after first having reviewed all background material provided to him by Mr RB. He says:<sup>4</sup>

... During the meeting I agreed to meet with SA so that I could see for myself how he was. I asked BA and CA to be present. SA was 92, had lost his wife, his lifelong partner, in July 2014, had moved recently from his home to the [Retirement Village], and his memory was failing. In my view SA needed to be accompanied by close family members when he first met me. It was not appropriate or fair to SA for me to meet him on his own. My Memorandum sets out clearly the background to and details of the meeting. I knew before I met SA that there were differences between family members and that SA's health was gradually deteriorating. Contrary to S's comment that, "As soon as Mr KC realised there was a dispute in the family he should have ...", I knew there was a family dispute. It was why I had been asked to assist in the beginning. I knew it when I agreed to meet with SA. Because of the differences amongst the children I wanted to find out how SA was and what he wanted.

### **S's complaints**

[10] S identifies eight complaints:

- (i) Mr KC met with his father with CA remaining to 'fill in the gaps'. He considers Mr KC should have asked CA to leave the room, and if Mr SA was unable to answer questions adequately, Mr KC should have referred the matter to a gerontologist.

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<sup>2</sup> This information is derived from a memorandum prepared by Mr KC relating to meetings on 21 May 2015 and 21 June 2015.

<sup>3</sup> The circumstances relating to the involvement of Mr RB are well known to the parties and recited in LCRO 157/2020.

<sup>4</sup> Letter from KC to Lawyers Complaints Service (27 May 2020) at [9.1].

- (ii) Mr KC listened to heresay. S had not refused to sell [Property 1, address], but Mr SA had dementia and could not fulfil his role as a trustee of the SA Family Trust.
- (iii) Mr KC did not contact S or DA for comment.
- (iv) Mr KC suggested that S's nephew replace Mr FG as a trustee. His nephew was at that time living in [overseas].
- (v) Mr KC either did not know his nephew was in [overseas] or was unconcerned to advise that he knew S's nephew was returning to New Zealand.
- (vi) Mr KC did not send a draft of his memorandum to his father for comment.
- (vii) Mr KC charged his father for the time spent discussing matters with Mr RB.
- (viii) Mr KC had increased the amount of his invoice beyond the value of time recorded.

### **Mr KC's response**

[11] After providing some background information, Mr KC responded to S's complaints:

- (i) Mr KC considered that it was not appropriate, or fair, to meet Mr SA on his own.
- (ii) S's complaint that Mr KC had wrongly accused him of not agreeing to sell his father's property is not correct. The memorandum records that S 'was unable to commit to a sale ...'
- (iii) He says he sent his memorandum to all four siblings to inform them about the meeting and Mr SA's wishes, together with his suggestions as to how matters could be resolved.
- (iv) Mr KC says he was in no position to 'replace Mr FG' as Mr SA's personal lawyer.
- (v) Mr KC notes that the Deed of Family Arrangement ultimately signed by all, appointed S's nephew as a member of the committee to oversee the sale of the property.

- (vi) Mr KC did not send the memorandum to Mr SA as the proposals put forward by him did not require Mr SA to be involved.
- (vii) Mr KC made contact with Mr SA to check matters that he needed to clarify.
- (viii) He stopped recording time in August 2015 when it became clear it would be a long time before matters were resolved. He thinks CA may have included extra time when the figure of \$10,600 was included in the final Deed to pay his account.

### **The Standards Committee determination<sup>5</sup>**

[12] The question addressed by the Standards Committee was whether Mr KC had “breached any of his professional obligations in relation to work undertaken for or on behalf of Mr SA Snr”.<sup>6</sup>

[13] Having considered all of the information provided, the Committee could not find any evidence that Mr KC had breached any of the Conduct and Client Care Rules<sup>7</sup> and could not identify any evidence to support a conclusion that Mr KC did not act in Mr SA’s best interests.

[14] The Committee accepted Mr KC’s reasons for the delay in issuing his invoice.

[15] The Committee also noted that S had been independently advised before he signed the Deed and negotiated variations to his benefit.

[16] Having made these observations, the Committee determined to take no further action on S’s complaints.

### **The application for review**

[17] S submits that the Committee’s determination is ‘manifestly incorrect’ and ‘based on several incorrect interpretations of the Conduct and Client Care Rules.’

[18] He considers that Mr KC’s investigation and ‘report’ were biased, by reason of the fact that he did not seek input and the views of S and DA. He considers this to be a basic breach of the professional standards required of a lawyer.

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<sup>5</sup> Standards Committee determination (21 July 2020).

<sup>6</sup> At [8].

<sup>7</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[19] He disagrees with the Committee's determination that the reasons advanced by Mr KC for the delay in rendering his final account, were acceptable. He considers this to be a "gross breach of rule 9.6".<sup>8</sup>

### **Mr KC's response**

[20] Mr KC did not make any further submissions beyond those presented to the Standards Committee.

### **Process**

[21] The review progressed by way of a hearing by audio-visual means on 12 May 2022. In attendance were S, Mr KC and Mr RB.<sup>9</sup>

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

[22] The High Court has described a review by this Office in the following way:<sup>10</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.

This review has been conducted in accordance with those comments.

### **Review**

[23] A major issue causing dissent between the siblings was the proposed sale of [Property 1 address], and distribution of the proceeds. In Mr KC's memorandum he says that Mr FG held a written authority from Mr SA directing that he wanted the property to be sold, and that Mr SA had confirmed this at the meeting.

[24] Mr KC's memorandum also records in some detail, the discussions between himself, Mr SA and CA at the meeting, about distribution of the proceeds of sale. This included payment of funds to Mr SA for future needs.

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<sup>8</sup> SA's supporting reasons at p 3.

<sup>9</sup> S has also applied for a review of the Standards Committee determination of his complaints about Mr RB arising out of the same circumstances. All three parties agreed for the hearing to address both reviews at the same time.

<sup>10</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

*Elder abuse*

[25] S complains that Mr KC has 'participated in elder abuse' by BA and CA. This is a somewhat emotive term and I do not consider that Mr KC's conduct approaches conduct that can be termed as such. However, issues arising out of Mr KC's involvement need to be addressed.

*The meeting on 21 June 2015*

[26] Mr SA was brought to the meeting with Mr KC at his office by CA and BA. BA did not remain for the meeting. Mr KC had reasons for not meeting with Mr SA on his own.<sup>11</sup> CA was in favour of the property being sold and remained at the meeting. Mr KC however, did flag the need to ensure that Mr SA had capacity to make any final decisions.<sup>12</sup>

*Mr KC's instructions*

[27] Mr KC was aware that Mr FG had been Mr and Mrs SA's lawyer for many years and that Mr FG was a trustee of both trusts.

[28] Paragraph [10] of Mr KC's memorandum records:

**Ownership of [Property 1 address]**

As mentioned, the [A Trusts] own this property in equal shares. Q is the surviving trustee for the TA Family Trust ("T's trust") and Q and SA are the trustees of the SA Family Trust ("S's trust"). It is understood that the only asset owned by the trusts is [Property 1 address]. The latest [City] Council valuation as at 1 July 2014 has the land value at \$780,000.00, the improvements at \$370,000.00 for a capital value of \$1,150,000.00.

[29] Mr RB had recommended that Mr KC be asked to act as an independent lawyer to attempt to resolve the disagreement between the family relating to the sale of the property. The sale of the property, and distribution of the proceeds, were decisions for the trustees, for whom Mr FG acted. Mr KC's instructions did not extend to replacing Mr FG as Mr SA's personal lawyer. He confirms that in [9.4] of his response to the Lawyers Complaints Service<sup>13</sup> where he says:

I was in no position to replace Mr FG.

[30] Mr KC made contact with Mr FG at an early stage of his involvement. Mr FG had been endeavouring to resolve matters for some time previously without success,

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<sup>11</sup> Above n 4 at [9.1].

<sup>12</sup> KC's memorandum at [22].

<sup>13</sup> Above n 4.

and did not object to Mr KC's involvement. Thereafter, Mr FG was involved throughout in reviewing and commenting on Mr KC's proposals and draft deeds.

[31] Mr KC's instructions were limited to the narrow role of endeavouring to provide a solution to the disagreements which had arisen within the family. His brief was general in nature, and necessarily resulted in the fact that any proposal was for the whole family to consider. In that sense, Mr KC was not acting for any particular member of the family.

[32] In this regard, I do not consider that Mr KC's actions breach any professional obligations.

### *Bias*

[33] S complains that Mr KC was biased. That complaint proceeds from the premise that Mr KC had been engaged to assume the role of a mediator, charged with presenting a balanced proposal which met the requirements of all parties.

[34] That was not the case. Mr KC had been asked by Mr RB to assist in finding a way forward for the family. To do so, he needed to ascertain the views of Mr SA. Having done that, he produced a memorandum which could form the basis for discussion and subsequent agreement. The parties were free to accept or reject the proposals.

[35] In alleging that Mr KC was biased, S is attributing a role to Mr KC that he did not assume.

### *The letter of engagement*

[36] At the review hearing, Mr KC advised that he had issued his letter of engagement<sup>14</sup> to BA. The copy provided by him following the meeting is addressed to:

SA  
Apartment ?  
[xxx] Retirement Village  
Suburb  
City

[37] With the covering email forwarding the letter of engagement to this Office following the hearing, Mr KC says:

This is an unsigned copy. I may have given an original CA when she came to see me with SA snr on 03 06 2015. I am emailing CA to see if she has this amongst her paperwork.

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<sup>14</sup> As required by rr 3.4 and 3.5 of the Conduct and Client Care Rules.

[38] Nothing further has been received. Whether or not the letter of engagement was passed on to Mr SA by CA is unknown.

[39] No copy of a letter of engagement addressed to BA has been provided, and it would be unusual for a lawyer to issue two separate letters of engagement in respect of the same set of instructions.

[40] The evidence relating to this matter is unsatisfactory but what can be established, is that a letter of engagement was issued.

[41] There is no evidence to support a conclusion that Mr KC has breached rr 3.4 and 3.5.

#### *Rule 9.6 Conduct and Client Care Rules*

[42] Rule 9.6 provides:

A lawyer must render a final account to the client or person charged within a reasonable time of concluding a matter or the retainer being otherwise terminated. The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

[43] Mr KC's involvement ceased in August 2015. He says he did not issue any invoice because:<sup>15</sup>

I did not invoice for my attendances in 2015 because I was unsure when the account would be paid. Also I did not want to incur a GST liability for [Law Firm C] for an account which might be unpaid for some time. I was aware that efforts to resolve the SA family issues continued and time passed.

[44] Mr KC's invoice was issued on 31 July 2019 and is addressed to:

The Trustees  
SA Family Trust and the estate of SA  
C/- RB  
RB Law  
PO Box [X]  
[Suburb]

[45] In addition to the reasons put forward by Mr KC<sup>16</sup> I suspect that it is likely he was uncertain as to who to issue the invoice to until agreement had been reached.

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<sup>15</sup> Above n 4 at [5].

<sup>16</sup> See [9].



[46] Given all the uncertainties and disagreement between the siblings, I have come to the view that in these circumstances, it would be unreasonable to make an adverse finding against Mr KC for breach of r 9.6.

## **Conclusion**

[47] Having regard to all of the information and evidence provided by the parties, it is my view that, in reality, Mr KC's instructions came from BA and CA. Mr KC met with Mr SA on one occasion and formed the view that Mr SA did want the property to be sold with the proceeds being distributed in the manner discussed.

[48] Mr FG had been engaged throughout Mr KC's period of instructions as a trustee of both Trusts. He also acted for both Trusts. There is no clarity around who would have advised Mr SA on a final version of any agreement, but it is reasonable to assume that this would have been Mr FG, as Mr SA's long standing lawyer.

[49] It follows from the views expressed above that Mr KC's invoice should have been addressed to BA, CA and the two Trusts.

[50] Paragraph [2] of the Deed executed by all parties and dated 15 November 2018, provides for payment of Mr KC's invoice from the proceeds of sale of the property. At the time of executing the Deed, S had separate legal advice and if he held any misgivings about who should be liable for Mr KC's fees, it was open to him or his lawyer to ask for a copy of the invoice before signing the Deed. He says, however, that he had not seen the invoice prior to signing and that when he did see the invoice it became clear to him that it should have been directed to BA and CA.

[51] However, the Deed of Family Arrangement made provision for payment of the invoice, and whomever it was addressed to has little, if any, significance.

[52] Any challenge to the terms of the Deed can not be addressed in this review, nor in the context of a complaint engaging the disciplinary process.

[53] Having considered all of the material on the Standards Committee file and provided by the parties on review, and having heard from the parties in person, I reach the same conclusion as the Standards Committee.<sup>17</sup>

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<sup>17</sup> The Standards Committee determined pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 to take no further action on the complaints.

**Decision**

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

**Publication**

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

**DATED** this 27<sup>TH</sup> day of MAY 2022

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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 SA as the Applicant  
Mr KC as the Respondent  
Mr VW as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society