

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

[2022] NZLCRO 095

Ref: LCRO 49/2022
LCRO 93/2022

CONCERNING

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

AND

CONCERNING

determinations of [Area] Standards Committee [X]

BETWEEN

WU

Applicant

AND

MQ obo CT

Respondent

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

Introduction

[1] Mr WU has applied for a review of two determinations by [Area] Standards Committee [X] in which the Committee made findings of unsatisfactory conduct against Mr WU and imposed orders.

Background

Mr CT

[2] Mr CT is single and has no children of his own. Mr MQ advises that he and his mother lived with Mr CT for a time as a family. Mr WU says that Mr MQ could be regarded as Mr CT's stepson.¹

¹ WU affidavit (8 June 2020) at [8].

[3] Mr CT has had a history of mental illness and “understood that mental health was a feature of his life”.²

[4] Mr MQ describes Mr CT’s mental health issues as being ‘episodic’³ but by the time Mr MQ affirmed his affidavit in August 2020, Mr CT had been diagnosed with dementia.

Mr MQ

[5] After Mr MQ’s mother and Mr CT separated, Mr MQ says that he continued to have a close relationship with Mr CT who, Mr MQ says, “began to rely on [him from 2012] as his attorney for property and as director of the company to help organise his business affairs”.⁴

[6] Mr CT executed the power of attorney for property on 21 May 2012. It became operable only when Mr CT became mentally incapable.⁵

[7] The appointment was activated in October 2018 following an assessment by Dr Worrall.

The [CT] Trust

[8] By Deed dated 12 September 1997, Mr CT established the [CT] Trust. The present trustees are Mr WU, Mr MQ, Mr BM⁶ and Ms MP.⁷

[9] The power of appointment of new trustees is vested in Mr CT during his lifetime “and after his death in the person(s) named as the Appointer in his will or, in default of any valid appointment, in his administrator or the executors or trustees for the time being of his will”.⁸

[10] Following the hearing, Mr VG provided me with a copy of Mr CT’s will, in which Mr CT appointed Mr WU, Mr BM and Mr EL⁹ to hold the power of appointment of trustees.

² RN submissions (11 August 2022) at [9].

³ MQ affidavit (27 August 2020) at [9]–[10].

⁴ At [8].

⁵ Enduring Power of Attorney (21 May 2012), cl 4.

⁶ Mr BM is a long-time friend of Mr CT.

⁷ Ms MP is Mr CT’s niece.

⁸ Deed of Trust (12 September 1997), cl 13.

⁹ Mr EL is Mr CT’s accountant.

CT Farms Limited

[11] CT Farms Limited was incorporated in November 1966. Mr MQ is now the sole director of the company.

[12] The [CT] Trust holds 97 per cent of the shares in CT Farms Limited. Mr CT holds the remaining shares.

[13] The major asset of the company is a farm in [town]. The total assets of the company were valued in excess of \$12M in the directors' report presented in 2019.

[14] At the time of presenting the 2019 report, Mr MQ advised the trustees that the company had advanced \$500,000 to JKL Company Limited,¹⁰ a company owned by Mr MQ and another. This was the first time that the trustees became aware of the advance.

[15] The trustees became concerned to improve the governance of the company and proposed that an independent director should be appointed. Although Mr MQ agreed with this proposal, he rejected the appointment of the director proposed by the trustees.¹¹

[16] The trustees then applied to the court for directions concerning the directorship of the company. This resulted in consent orders being made by [judge] on 9 November 2020 whereby the appointment of an independent director was to be decided by the president of the Council of Independent Directors if the trustees could not agree.

[17] However, that process did not result in the appointment of an independent director and the trustees filed an amended statement of claim in February 2021, seeking that Mr MQ be removed as a trustee of the [CT] Trust and/or a replacement trustee appointed.

[18] Mr MQ lodged the complaints with the Lawyers Complaints Service in March 2021.

Mr CT's complaints

[19] Mr MQ lodged the complaint on behalf of Mr CT¹². He says he felt he had an obligation to raise his concerns with the appropriate authorities.

¹⁰ In an affidavit sworn on 8 June 2020, Mr WU deposes that the advance was made to Mr MQ who had on-lent the money to JKL Company Limited.

¹¹ Mr ST.

¹² Complaint (2 March 2021) section 2.

[20] Mr CT's main complaint is that Mr WU did not carry out Mr CT's instructions to amend his will so that the power of appointment (and termination) of trustees was vested in Mr MQ after Mr CT's death. Mr MQ asserts that Mr CT instructed Mr WU in July and December 2015 to do so, but Mr WU had not carried out Mr CT's instructions.

[21] Mr MQ advises that in February 2017, Mr WU "played fast and loose"¹³ with Mr CT when Mr CT executed bank documentation to increase the facility available to CT Farms Limited. In his complaint, Mr MQ says:¹⁴

It is obvious that {WU} has seen an opportunity in a wealthy client, with a history of mental illness, who has no natural offspring, to take control of his assets for his own advantage.

[22] Mr MQ asserts that Mr WU "is not looking after his client's welfare, or appropriately considering his client's wishes ... and that [he] has an obligation to raise these concerns with the appropriate authorities".¹⁵

[23] Mr MQ says that if the parties "were to go to mediation, the best result for [CT] would be that [WU] agrees to the appointment of an independent law firm to act as executor of CT's estate".¹⁶

[24] Mr MQ considered Mr WU was:¹⁷

... obviously conflicted so should do the right thing and step aside. [WU] should also resign from his position as a trustee in the [CT] Trust. [CT] wants [WU] to have nothing to do with his estate or his trust, but as [CT] has now lost capacity he can not use his power to dismiss trustees. [WU] is currently wasting more trust resources in litigation in an attempt to gain more control of the trust and its assets, it has gone far enough and must stop.

Mr WU's response

[25] Mr WU commenced his response to the complaint by describing his long-standing relationship¹⁸ with Mr CT. He says that the matters raised by Mr MQ in the complaint are "essentially the same issues or derivative issues that have been raised in [the] proceedings".¹⁹

¹³ MQ complaint (2 March 2021), section 5.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ At section 8. It is noted that Mr CT is still alive and so no appointment is required at this time.

¹⁷ Ibid.

¹⁸ In excess of 30 years.

¹⁹ WU letter to Lawyers Complaints Service (23 April 2021) at [4].

[26] In Mr WU's view [Mr MQ] has made the complaint for collateral purposes endeavouring to apply pressure on [him] generally and perhaps in an attempt to have [him] abandon the proceedings and resign as a trustee".²⁰

[27] "[Mr WU] rejects entirely the allegations made by Mr MQ in relation to [his] advice to [CT] and [his] alleged motivation."²¹

The Standards Committee determination

Mr CT's instructions

[28] The Standards Committee proceeded on the basis that Mr MQ's complaint was lodged on behalf of Mr CT.²²

[29] The complaints identified by the Committee were:²³

- a. Mr WU has not acted in the best interests of Mr CT in not acting in accordance with his instructions that he wished to change his will;
- b. Mr WU has inconsistently relied on an alleged lack of capacity of Mr CT to further his own interests and not of his client;
- c. Mr WU is making decisions in relation to the trust which are not in the interests of Mr CT;
- d. Mr WU has a conflict of interest in his capacity as trustee of the trust and acting for Mr CT.

[30] The Committee distilled these complaints into the following issues to be determined:²⁴

- a. Whether Mr WU breached his obligations under Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) in relation to the instructions of Mr CT to change his will; and
- b. Whether Mr WU breached his obligations under Rule 3 of the Rules in relation to the signing of the loan documents in February 2017; and
- c. Whether Mr WU breached Rule 5 of the Rules in continuing to act for Mr CT in circumstances where he did not change Mr CT's will as he instructed.

[31] The Committee first considered details of the events that occurred at the meetings between Mr WU and Mr CT, with particular reference to the content of Mr MQ's affidavit.²⁵

²⁰ At [5].

²¹ At [6].

²² Mr MQ has emphasised this by requesting that the review refer to Mr CT as the respondent.

²³ Standards Committee determination (22 February 2022) at [10].

²⁴ At [13].

²⁵ MQ affidavit (20 October 2020).

[32] It then noted details of the communications between Mr WU and Mr MQ.

[33] The Committee considered decisions by this Office but in particular the Supreme Court judgment in *Sandman v McKay*²⁶ where the Court said:

...

It is certainly arguable that once the steps set out above have been taken it would not be up to the solicitor, who is not a medical expert, to decide whether a client has testamentary capacity and thus to decide whether to follow his or her instructions. The position arguably is that a solicitor, even if he or she does not think a client has capacity, would nevertheless be obliged to prepare and arrange for the execution of the will. The issue of actual capacity would then be decided after the client's death, on the basis of the evidence including expert medical evidence.

[34] Having considered this material, "the Committee was satisfied that the instructions were given to Mr WU".²⁷ "The Committee accordingly considered that Mr WU's obligation was to give effect to Mr CT's wishes to make the change to the appointment power in his will".²⁸

[35] The Committee formed the view that if Mr WU had doubts about Mr CT's capacity to give instructions to amend his will, he ought to have recommended an assessment of Mr CT's capacity by a medical practitioner.

[36] In addition, the Committee considered that Mr WU's file notes were inadequate, in particular with regard to recording what steps Mr WU had taken to satisfy himself that Mr CT lacked capacity and why he had formed the view that he had.

[37] As a result, the Committee determined that Mr WU had breached r 3 of the Conduct and Client Care Rules²⁹ in a number of ways which amounted to unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) and "that the conduct fell short of the standard of competence and diligence that would be expected under s 12(a) of the Act".

The loan documentation

[38] Mr WU had prepared loan documentation to increase the bank facility for CT Farms Limited, which Mr CT was required to sign as a director of the company and as guarantor. This documentation had been prepared on the basis that it would be

²⁶ *Sandman v McKay* [2019] NZSC 41 at [81].

²⁷ Standards Committee determination, above n 22, at [27].

²⁸ At [29].

²⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

signed by Mr MQ as Mr CT's attorney and Mr WU had obtained approval from the bank for this.

[39] However, when Mr WU attended on Mr CT, he formed the view that Mr CT had the requisite capacity to be able to sign the documentation himself.

[40] The Committee noted that by that time,³⁰ Mr WU was aware that Mr CT had been diagnosed as having dementia and that Mr CT's condition was deteriorating. The Committee determined that proceeding without obtaining a medical assessment of Mr CT's condition amounted to a breach of r 3 of the Conduct and Client Care Rules.

[41] In addition, it again noted that Mr WU's file notes were inadequate in the circumstances. It also considered that it would have been appropriate for Mr WU to have put the bank on notice about Mr CT's condition and that if the bank had been so informed, "it would almost certainly have taken further steps to ensure that its ability to enforce was not compromised by an allegation of lack of capacity".³¹

[42] The Committee determined that Mr WU's conduct amounted to unsatisfactory conduct pursuant to s 12(a) of the Act and s 12(c) by reason of a breach of r 3.

The alleged conflict

[43] The Committee addressed Mr MQ's complaints that Mr WU was conflicted in terms of r 5 of the Conduct and Client Care Rules, which provides that a lawyer must be independent and free from compromising influences or loyalties.

[44] It said:³²

The Committee was satisfied that once Mr WU failed to act on Mr CT's instructions to change his will Mr WU had a conflict of interest. The Committee considered that Mr WU was in breach of his duty to Mr CT in not following his instructions, and in failing to seek advice from a geriatrician or suitably qualified medical professional. His conduct in the matter gave rise to the risk of legal action that a potential claim may be made against Mr WU by Mr CT or his estate. In such circumstances Mr WU should have advised Mr CT to seek independent advice or ceased acting.

[45] Having made this observation, the Committee determined that Mr WU had breached r 5 and this amounted to unsatisfactory conduct pursuant to s 12(c) of the Act.

³⁰ February 2017.

³¹ Standards Committee determination, above n 23, at [39].

³² At [44].

[46] The Committee, “having considered the matter and held a hearing on the papers, formally determined that Mr WU had engaged in unsatisfactory conduct pursuant to section 152(2)(b)(iii) of the Act for the reasons set out above”.³³

[47] The Committee then called for submissions on penalty and publication.

Orders

[48] The Committee’s determination on penalty and publication is set out in a subsequent determination dated 11 May 2022.

[49] Submissions were received from Mr RN QC, counsel for Mr WU, Mr VG, as counsel for Mr MQ, and Mr MQ himself. The Committee took note of a number of factors:

- Mr WU had not expressed any recognition of his conduct and breaches of the rules but the Committee did not place significant weight on this factor as it was aware that Mr WU had sought a review of the Committee’s determination.
- “Mr WU had not provided any explanation as to why he did not seek appropriate medical advice on any of the occasions when Mr CT was instructing him that he wished to change his will...”³⁴
- “the Committee considered that Mr WU acted deliberately and with intent when he took Mr CT aside and then advised Mr MQ that they had both decided Mr CT did not have capacity.”³⁵
- Mr WU did not gain personally from his actions.
- Mr WU had not had any other disciplinary findings made against him.
- “Serious consequences arose from Mr WU’s conduct given that Mr CT has lost the opportunity to change his will This will have a significant impact on the operation of the trust after Mr CT’s death.”³⁶
- “Potentially serious consequences could have arisen in respect of the loan agreements if the [Bank] had questioned Mr CT’s capacity or there had been any default under the agreement.”³⁷

³³ At [46].

³⁴ Standards Committee determination (11 May 2022) at [4]b.

³⁵ At [4]c.

³⁶ At [4]f.

³⁷ Ibid.

[50] Having considered these factors, the Committee:

- (a) Censured Mr WU.
- (b) Imposed a fine of \$7,500.
- (c) Ordered Mr WU to pay costs in the sum of \$1,000.

[51] The Committee declined to make orders for any future costs incurred by Mr MQ or reimbursement of legal fees associated with the complaints.

Mr WU's application for review³⁸

[52] Mr WU has applied for a review of both determinations. He says:³⁹

Issue (a)

The Committee was wrong to find at [19] that Mr CT had given "firm" instructions to Mr WU to amend his will. ...

...

Issue (b)

The Committee was wrong to find at [42] that the advice Mr WU gave to Mr CT in respect of the execution of the 2017 loan document and his record of that advice was in breach of Rule 3 and amounted to unsatisfactory conduct under sections 12(a) and (c) of the Act.

...

Issue (c)

The Committee was wrong to find at [44] and [45] that Mr WU had a conflict of interest after he failed to act on the instruction to amend the will.

...

[53] Mr WU says that the Committee has made a number of factual errors and mistakes which raises concern that the Committee has not "fully reviewed or understood the material that was before it". He then provides examples to support this submission. He also asserts that the Committee has not complied with the principles of natural justice.

[54] Mr WU says that the penalties imposed are excessive in the circumstances of the case.

³⁸ The reasons presented by the parties in support of, and against, the applications for review are not included in any detail in this decision but have been considered in full in the course of completing this review.

³⁹ WU grounds of review.

Mr MQ's/Mr CT's response³⁷

[55] The initial issue raised by Mr VG on behalf of Mr MQ is that the party to the review should be identified as being Mr CT.

[56] With regard to the findings of the Committee, Mr VG says:

- The Committee was correct to find that Mr CT had instructed Mr WU to prepare a codicil to his will.
- Mr WU's file notes support that finding.
- Mr MQ was present at the meetings in July and December 2015, and it was therefore in order to take note of his evidence.
- The Committee was correct to make a finding of unsatisfactory conduct with regard to the [Bank] documentation.
- Mr WU had a duty to properly explain the documentation to Mr CT and to make a full record of that advice.
- Mr WU had a conflict of interest when failing to act on Mr CT's instructions to prepare the codicil to his will, resulting in Mr WU remaining as a trustee.
- Mr VG disagrees that the determination contains factual errors and says that any omissions do not affect the determination.
- Mr VG considers the Committee was fair in its process and has complied with the rules of natural justice.

Nature and scope of review

[57] The High Court has described a review by this Office in the following way:⁴⁰

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.

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

⁴⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Process

[59] The review proceeded by way of a hearing in person on 11 August 2022. Present were Mr MQ, represented by Mr VG and Ms HK, and Mr WU, represented by Mr RN QC.

The standard of proof in disciplinary proceedings

[60] At the commencement of this review, it must be noted that the making of a complaint against a lawyer brings the disciplinary processes of the Lawyers and Conveyancers Act 2006 into play. A complaint against a lawyer is not a matter to be lightly dismissed or ignored. It follows then that care must be taken to ensure that the required standard of proof is reached when conducting a review.

[61] Section 241 of the Act provides that the standard of proof to be applied by the Disciplinary Tribunal⁴¹ when consideration of charges of misconduct or unsatisfactory conduct, is on a balance of probabilities.

[62] In *Z v Dental Complaints Assessment Committee*,⁴² the Supreme Court applied a gloss to this standard. In that case, the majority decision was issued by McGrath J who said:⁴³

There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. We are satisfied that the rule is long established, sound in principle, and that in general it should continue to apply to civil proceedings in New Zealand.

[63] That is the standard applied by me in this review. In doing so, it must be emphasised that the seriousness of the matters to be provided and the consequences of proving them are elements to be considered.

The seriousness of the matters

[64] If it is accepted that Mr CT had instructed Mr WU to draft a codicil to his will whereby the power of appointment of trustees was vested in Mr MQ, it can not be disputed that this was a serious matter.

⁴¹ Lawyers and Conveyancers Disciplinary Tribunal.

⁴² [2008] NZSC 55.

⁴³ At [112].

The consequences

[65] A finding of unsatisfactory conduct is a serious matter.⁴⁴ There is no question that an adverse finding at this stage in a long career⁴⁵ would have significant consequences for Mr WU from a personal perspective.

A step back

[66] In *Ragg v LCRO*,⁴⁶ the Court of Appeal urged Review Officers to take an objective view of complaints, and to step back to consider whether an adverse finding against a lawyer is necessary to further the objectives of the Act⁴⁷ and/or bring a measure of resolution to the parties.

[67] It has been said on many occasions, that the purpose of a penalty in disciplinary matters is not punitive.⁴⁸ The same can be said of the finding itself and there is no doubt that practitioners regard a finding of unsatisfactory conduct, in itself, to be a serious matter, as noted by Hinton J in *Wilson*.⁴⁹

[68] In *Ragg*, the Court said:⁵⁰

When assessing the case against Mr Ragg it was necessary for the Review Officer to consider whether protection of the interests of the community and the profession justified taking the formal step of making a finding that Mr Ragg was guilty of unsatisfactory conduct. The possibility of deciding to take no further action under s 152(2)(c) of the Act needed to be considered. The Review Officer failed to take this step.

[69] In *Wilson v LCRO*,⁵¹ Hinton J expressed her views as to how the Conduct and Client Care Rules should be applied. She said:⁵²

This Court has said on several occasions that the Rules are to be applied as specifically as possible. In my view, they are also to be applied as sensibly and fairly as possible. These are practice rules, not a legislative code.

So, for example, r 4.4.1 requires a lawyer to “act upon” a written request, but this must sensibly be read as attending to the request to uplift, not some more limited action, which Mr Brant argued. Also, although it was not argued otherwise, the rule talks of a request to uplift, not of a request to uplift and deliver, but the latter is clearly incorporated, within reason. However, correspondingly, the rules should not be enforced in an unduly technical manner. The conduct alleged should clearly offend. A finding of unsatisfactory conduct is a serious matter.

⁴⁴ See [68] supra.

⁴⁵ Mr WU has not had any other adverse disciplinary findings against him.

⁴⁶ [2021] NZCA 579.

⁴⁷ Section 3 Lawyers and Conveyancers Act 2006

⁴⁸ See for example, *Wellington Standards Committee 2 v Harper* [2020] NZLCDT 29 at 24.

⁴⁹ See [68] supra.

⁵⁰ At [40].

⁵¹ [2016] NZHC 2288.

⁵² At [43]–[44].

[70] The Court has also said that not every professional lapse is sufficiently serious to require disciplinary intervention (*Perera v Medical Practitioners Disciplinary Tribunal* District Court, Whangarei MA 94/02, 10 June 2004, Judge Hubble at para 42).

[71] By way of summary therefore, those considering complaints, after a full consideration of the facts and the issues, must take a step back and consider whether an adverse finding against a lawyer will further the objectives of the Act and/or bring some measure of resolution to the parties.

Review

[72] At the review hearing, Mr MQ advised that he had discussed the complaints with Mr CT and that Mr CT had indicated, in a general sense, that he approved Mr MQ's actions on his behalf.

[73] Mr CT has been diagnosed now with dementia. It is not possible to place any particular weight on Mr MQ's assurances in this regard.

[74] Mr MQ's/Mr CT's complaints are somewhat contradictory. In the main, they say that Mr CT wished Mr MQ to have the power of appointment of trustees after his death rather than it being vested in Mr WU. There are three executors of Mr CT's will and the power of appointment does not vest in Mr WU alone. Elsewhere⁵³ Mr MQ/Mr CT assert that what Mr CT wanted was for Mr MQ to be the executor of his estate.

[75] The difference is subtle, but important, and it would have taken some careful explanation to ensure Mr CT comprehended the difference. It would also raise the level of understanding required of Mr CT.

[76] In considering this question, it is perhaps of some relevance, that the focus of the complaints has been on the power to appoint trustees, coming, as they do, at the same time as proceedings are before the Court to have Mr MQ removed as a trustee of the trust.

The file notes

[77] The primary evidence in this review is the content of Mr WU's file notes.

[78] In *Sandman v McKay*, the Supreme Court said:⁵⁴

⁵³ MQ letter to Lawyers Complaints Service (7 May 2021) at [1].

⁵⁴ *Sandman v McKay*, above n 26, at [80]–[81].

When acting for a client, solicitors have a duty to follow their clients' instructions. Solicitors also, however, need to provide the relevant advice and information to ensure the client is in an appropriate position to give informed instructions. Where the instructions are to prepare a will in circumstances where there might later be issues raised about capacity, the lawyer should carefully document the advice given and the steps taken. In this regard, it would be prudent for a solicitor to suggest that a medical certificate be obtained. It would also be prudent to document the reasons for the provisions of the will and the process involved in taking instructions and in ensuring that the instructions had been correctly understood.

It is certainly arguable that once the steps set out above have been taken it would not be up to the solicitor, who is not a medical expert, to decide whether a client has testamentary capacity and thus to decide whether to follow his or her instructions. [58] The position arguably is that a solicitor, even if he or she does not think a client has capacity, would nevertheless be obliged to prepare and arrange for the execution of the will. The issue of actual capacity would then be decided after the client's death, on the basis of the evidence including expert medical evidence.

[79] In a footnote to these comments, the Court said:

We use the term prudent because we do not need to decide for the purposes of this appeal the extent of the duty of a solicitor in these circumstances. Any views we express on solicitors' duties in this context are necessarily tentative as we have heard no detailed argument on this.

[80] Taking these comments into consideration, the matters to be addressed in this review are:

1. Did Mr CT instruct Mr WU to prepare a codicil to amend his will to provide that the power of appointment of trustees of the [CT] Trust was to vest in Mr MQ after Mr CT's death?
2. The degree to which the statements and evidence provided by Messrs MQ and WU can be taken into account in this review.
3. The directions and recommendations made by the Supreme Court in *Sandman v McKay*.
4. An examination of the events which occurred at the times when Mr WU met with Mr CT and the file notes made by him.

[81] At all times, the standard of proof required (a balance of probabilities applied flexibly) must be borne in mind.

[82] Following a consideration of all of the material, the provisions of the Lawyers and Conveyancers Act, and the Conduct and Client Care Rules, I must then take a step back and consider the factors referred to in [66–69] above.

The evidence

[83] Given that Mr CT is unable to provide evidence himself, the evidence provided by Messrs MQ and WU assumes a significant degree of importance in this review. Section 200 of the Lawyers and Conveyancers Act provides:

The Legal Complaints Review Officer must conduct any review with as little formality and technicality, and as much expedition, as is permitted by—

- (a) the requirements of this Act; and
- (b) a proper consideration of the review; and
- (c) the rules of natural justice.

[84] Consequently, a review is not constrained by the same principles of admissibility of evidence as is the Tribunal⁵⁵ but the evidence must be treated with caution.

Did Mr CT instruct Mr WU to amend his will?

[85] The answer to this question must be decided with reference to what took place at the three meetings between Mr CT and Mr WU, the file notes made by Mr WU, and the evidence provided by both Mr MQ and Mr WU.

[86] A question that arises generally with regard to Mr MQ's/Mr CT's allegations is why the focus was on the power of appointment that would arise after Mr CT's death. Mr MQ says that Mr CT was in poor health and getting older and was concerned.

[87] Mr MQ also says that Mr CT had lost faith in Mr WU.

[88] If that were the case, it would be expected that Mr CT would exercise the power of appointment (which at that time was vested in himself) to appoint Mr MQ as sole trustee at that time and/or to vest the power of appointment in him immediately. Instead, Mr CT appointed both Mr MQ and Ms MP as trustees, resulting in there being four trustees.

[89] Mr MQ says that Mr CT had shown him a copy of his will "which appointed Mr WU as his executor".⁵⁶ That is not correct. Mr WU is one of three executors.

The meeting on 16 July 2015

[90] Mr MQ was present at this meeting and in the complaint says that Mr CT verbally requested Mr WU to amend his will. In his affidavit affirmed on 27 October

⁵⁵ Section 239, Lawyers and Conveyancers Act 2006.

⁵⁶ MQ affidavit (27 October 2020) at [7].

2020,⁵⁷ Mr MQ does not say that he heard Mr CT instruct Mr WU to amend his will. He says that, at some other time, Mr CT had expressed a wish to vest the power of attorney in Mr MQ.

[91] Mr WU disputes that Mr CT instructed him to prepare a codicil to effect this change. He says the purpose of the meeting was to discuss a proposed loan to Mr MQ for the [redacted] business which he was establishing.

[92] Mr WU's file note of that meeting does not make any mention of an instruction to amend the will.

[93] In the chronology attached to Mr VG's submissions for the review hearing, Mr VG says that Mr CT raised the issue at the end of the meeting and that "Mr WU's response was to the effect that they would discuss it next time". In fact, Mr WU says that he has "no record or recollection of any discussion at that meeting in respect of Mr CT wishing to change his will".⁵⁸

[94] The evidence is variable, and it can not be said, on a balance of probabilities that Mr CT instructed Mr WU at this meeting to amend his will.

The meeting on 10 December 2015

[95] In the complaint, Mr MQ/Mr CT say:

On the 10th of December 2015 [CT] again requested that [WU] make this amendment. On this occasion, after [WU] had had five months to consider his response, he took [CT] aside and they discussed testamentary capacity.

[96] In response to this, Mr WU says:⁵⁹

- a. I do not accept that I received any instructions from Mr CT in July 2015 to amend his will to grant the power of appointment of trustees to [MQ] MQ. ... I confirm that I had a discussion with Mr CT at a meeting on 10 December 2015 wherein he advised me that he was considering changing his will to grant the power of appointment of trustees to [MQ]. We had a discussion concerning Mr CT's will and Mr CT was to consider my advice and come back to me with his instructions.
- b. There were no concluded instructions for me to act on.
- c. For the above reason Mr CT's capacity was not an issue.
- d. As capacity was not an issue the question of external advice did not arise.

...

⁵⁷ At [7].

⁵⁸ WU letter to Lawyers Complaints Service (19 July 2021) at [1].

⁵⁹ WU letter to Lawyers Complaints Service (17 September 2021).

[97] Mr WU's file note of this meeting primarily relates to the proposed loan to Mr MQ and refers to a number of matters including:

- Security for the loan.
- The amount required.
- A source of funds.
- The interest rate.
- The need for a budget (presumably of the borrower).

[98] The file note includes the words:

Will

[MQ] – appointor [CT] Trust

[99] There is no record of the discussion between Mr CT and Mr WU when Mr WU took Mr CT aside. There seems to be some criticism of Mr WU for taking this step. It was important for Mr WU to be sure that Mr CT was not being influenced in any way by Mr MQ in his requests for the will to be amended. The authors of the text *Assessment of Mental Capacity* say:⁶⁰

It is common, and often helpful, for the client to have a support person with them, and this should generally be encouraged. However, the lawyer should conduct an assessment with the client without other support persons or family members being present. It should not be assumed that anyone accompanying the client has their best interests at heart, or that the client will disclose their true wishes and preference in the presence of others. It may be useful to observe how any relative or friend who has accompanied the client behaves towards the client (and vice versa) to identify whether there is a possibility of undue influence or pressure.

[100] Mr MQ prepared and sent an email to himself on the same day which Mr MQ says, reinforces his assertions that Mr CT did instruct Mr WU to amend his will. In that email, Mr MQ wrote:

[place]. [WU] will draft a letter to [GL].

Get QS quantity surveyor

Form a fixed price contract with [QA].

Look at other builders. [DEF Company] etc

[CT] trust.

Final Beneficiaries can be in 40 years but doesn't need to.

⁶⁰ At [14.5.3].

3 Final Beneficiaries. Charities. 1/3 each.

Banking Mandate. [CT] trust. Send [AR] deed of trust.

Get back to [WU] with amount of loan and interest rate. More budgeting. Go to see share broker.

Make [MQ] appointee of trust in [CT]'s will.

[101] To conclude the discussion about this meeting, Mr MQ asserts that Mr CT instructed Mr WU to amend his will. Mr WU was a party to the conversation and says that matters were left on the basis that Mr CT would consider matters and let Mr WU know his final decision.

[102] Mr MQ was not a party to the discussion between Mr WU and Mr CT. The memorandum Mr MQ sent to himself does not add anything to support his/Mr CT's allegations.

[103] I also observe here that if the intention was to vest the power of appointment in Mr MQ, it is surprising that Mr MQ did not raise the matter with Mr WU until some nine months later in September 2016.

[104] It can not be said, on a balance of probabilities, that Mr CT instructed Mr WU at this meeting to amend his will.

The meeting on 20 April 2016

[105] Mr WU's next meeting with Mr CT was on 20 April 2016. Mr WU says he was shocked at the change in Mr CT's demeanour and his lack of desire to discuss matters relating to the farm when he had previously been keen to do so.

[106] Mr MQ was not present at this meeting.

[107] In his statement to the Complaints Service, Mr WU says:⁶¹

The discussion was relatively general but also included a discussion about his earlier proposal to grant the power of appointment of trustees to [MQ]. [CT] told me that he was still thinking about doing that. I asked [CT] several questions about his intentions in forming the [CT] Trust, what the power of appointment was for and the circumstances in which it was used. [CT] was unable to provide me with the kind of coherent response to these questions that he would normally have. [CT] was quite disconcerted about his inability to recall these matters. I advised [CT] as gently as I could that I was concerned as to his testamentary capacity. He replied that he agreed with me.

⁶¹ Statement of WU, at [24].

[108] In the file note dated 21 November 2016, Mr WU records that both he and Mr CT agreed not to make any amendments to Mr CT's will as there was a risk that they may be challenged due to Mr CT not having testamentary capacity. Mr WU did not act 'prudently' and make any detailed notes as to how he formed this view.

[109] However, a lack of 'prudence' does not, in itself, attract an adverse disciplinary finding.

Summary

[110] Mr MQ made his complaints on behalf of Mr CT about Mr WU in March 2021, some five years after the meetings discussed above. It would be expected that a client who had instructed a lawyer to amend his or her will would have taken steps much sooner to ensure that his or her wishes were carried out.

[111] If Mr CT had lost faith in Mr WU and considered that Mr WU was being obstructive, the option was to uplift his files and documents and instruct a new lawyer to make the necessary changes, which presumably would have included the power to appoint new trustees of the Trust.

[112] None of that happened, and tensions grew between Mr MQ and the trustees to the extent that the trustees lodged proceedings in court.

[113] It is easy to draw the inference that the complaints were made as a result of these tensions and that the complaints have been made for the reasons expressed in Mr WU's reply to the Complaints Service.

[114] Having considered all of the material provided to the Committee and for this review, and having conducted a hearing with the parties, I have come to the view that, on a balance of probabilities, the complaints that Mr WU failed to carry out Mr CT's instructions can not be supported.

[115] In reaching this view, I place some emphasis on the fact that there was no follow up to Mr CT's purported instructions for some nine months and then nothing further when Mr WU still did not prepare documents to put the alleged instructions into effect.

The [Bank] documentation

[116] The facts relating to execution of the [Bank] documentation are well known to the parties. They assume relevance only insofar as they relate to Mr CT's capacity. Mr WU formed the view that Mr CT had the appropriate degree of understanding so that

he could execute the documents himself, rather than them being signed by Mr MQ as attorney.

[117] Prior to Mr WU's attendance on Mr MQ and Mr CT to have the documents signed, Mr WU had obtained approval from the bank that it would accept execution of the documents by Mr MQ as Mr CT's attorney. This evidences the fact that Mr WU clearly had a change of mind when he met Mr CT. He was satisfied that Mr CT did have sufficient capacity at that time to understand and sign the documents.

[118] Nothing more turns on those events.

[119] Although no direct evidence has been provided, I expect that the additional funding for CT Farms Limited had been arranged by Mr MQ. Mr CT was incurring significant additional obligations when this funding was put in place by reason of the guarantee that he provided. It was not unreasonable, and in Mr CT's interests, that Mr WU made sure that Mr CT himself agreed to assume this additional obligation rather than to have Mr MQ execute the documents as Mr CT's attorney.

[120] I consider that Mr WU acted properly in this matter.

Sandman v McKay

[121] The judgment of the Supreme Court in *Sandman v McKay* is a leading judgment when considering the role and duties of a solicitor where testamentary capacity of a client is in question.

[122] Mr WU accepts that he did not act on Mr CT's stated wish in April 2016 to have the power of appointment vested in Mr MQ after his death. Mr WU declined to do so because, in his view, Mr CT did not have sufficient capacity to give those instructions and to comprehend the impact of his requests, but Mr WU did not then take steps to obtain a medical opinion to confirm his view.

[123] The principles to draw from the Court's words are:

- (a) When instructed to prepare a will or other documentation, the presumption is that a client has sufficient capacity to provide instructions.
- (b) Even if a lawyer has some doubts about the client's capacity, he or she must act on the client's instructions, leaving the question of capacity to be determined at a later date.

- (c) If the lawyer proceeds whilst having doubts, he or she must carefully and fully record his or her views about the client's capacity and the reasons for proceeding to act on the client's instructions.
- (d) Provided there are no adverse timing consequences, the lawyer should recommend that the client undertakes an examination by a medical expert to ascertain whether the client has the necessary capacity.

[124] The question of whether Mr CT had capacity to give informed instructions only arose at the April 2016 meeting. Mr WU did not make any file notes of this meeting, and, in particular, his reasons for determining that Mr CT lacked capacity to give testamentary instructions at that time.

[125] In the words of the Supreme Court⁶², this amounts to a lack of prudence. However, a lack of prudence does not attract an adverse disciplinary finding.

[126] There was less, if any, reason for Mr WU to make a detailed file note when he formed the view in February 2017 that Mr CT did have capacity to understand and execute the [Bank] documentation. He was acting in accordance with the presumption of capacity and it was in Mr CT's interests that he should execute the documents himself, as he was incurring an additional liability for borrowing by the company, of which Mr MQ was the sole director.

Rule 5

[127] The Committee made a further finding of unsatisfactory conduct against Mr WU on the basis that he was in breach of r 5 of the Conduct and Client Care rules. This rule provides:

A lawyer must be free from compromising influences or loyalties when providing services to his or her clients.

[128] The finding by the Committee is founded on the basis that Mr CT had instructed Mr WU to amend his will. As I have come to a different conclusion, it follows that there has been no breach of this rule.

[129] It would seem that this complaint rests on the allegation by Mr MQ that Mr WU was seeking to 'take control of Mr CT's assets for his own advantage'.⁶³

⁶² *Sandman v McKay*, see [79–80].

⁶³ MQ original complaint (8 March 2021).

[130] Mr WU is not a beneficiary of the trust. He is one of four trustees. He will be one of three persons who will have the power of appointment of trustees after Mr CT's death. The duties of the trustees of the [CT] Trust, whoever they are, will remain the same.

[131] It is difficult to identify the 'compromising influence or loyalty' that Mr WU was subject to.

[132] Mr MQ also refers to r 5.4 which provides:

A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.

[133] Again, Mr WU has no personal interest in remaining as a trustee, or with the other executors of the estate, having a power of appointment of trustees.

[134] There can be no conflict between Mr WU's interests, and Mr CT's interests.

[135] The finding of unsatisfactory conduct founded on a breach of r 5 and its sub-rules, can not stand.

Conclusion

[136] Having canvassed the events which have taken place and considered all of the material provided by the parties, I must now step back and consider whether there should be an adverse finding against Mr WU, primarily because he failed to make adequate file notes and/or to recommend that a medical opinion should be obtained to determine whether or not Mr CT lacked capacity. In these circumstances, an adverse finding would not further the objectives of the Act.

[137] I have addressed above⁶⁴ the seriousness of Mr WU's alleged failings and the consequences of an adverse finding. Mr CT's alleged wishes have not been fulfilled but he had every opportunity to follow up with Mr WU to ensure that they were carried out or to instruct another lawyer to put his wishes into effect.

[138] Although it is accepted that Mr CT is the complainant, and the respondent in this review, it is impossible to ignore the part that tensions between Mr MQ and Mr WU, and the litigation in which they have been, and are, embroiled, has played. The issues involved in this review will be addressed to a greater or lesser extent in those

⁶⁴ At [64].

proceedings, and it is best that they be dealt with by the Court. It is hoped that the Court's decision will bring resolution to the parties.

Decision

[139] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

- (a) The determination of the Committee in part 1 of complaint no. 21670 is reversed; and
- (b) The penalties imposed in part 2 of the decision fall away.

Anonymised publication

[140] Pursuant to s 206(4) of the Lawyers and Conveyancers Act, I direct that this decision be published in an anonymised format on the website of this Office.

DATED this 25TH day of AUGUST 2022

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 WU as the Applicant
Mr MQ on behalf of Mr CT as the Respondent
Mr RN QC as the Applicant's Representative
Mr VG/Ms HK as the Respondent's Representatives
[Area] Standards Committee [X]
New Zealand Law Society