

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

[2022] NZLCRO 155

Ref: LCRO 59/2021

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

RY

Applicant

AND

QX

Respondent

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

Introduction

[1] Mr RY, a chartered accountant, has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr QX, at the relevant time a partner with [Law Firm A] (the firm).

[2] Mr RY's complaint concerns Mr QX having acted for two trustees of a trust in the removal of Mr RY as a trustee, and the appointment of a replacement trustee.¹

[3] On 1 December 2002, Mr LB PJ, a [Profession A], and his wife Mrs ES PJ, as settlors, created a trust. The funds in the trust were to make provision for themselves, their children and grandchildren. The trustees were Mr PJ, his son Mr VF PJ, and Mr RY, a professional and independent trustee whose accountancy firm provided accountancy services to the trust.²

¹ [Law Firm A], [City A].

² Deed of Trust, 1 December 2002 creating the [Trust A].

[4] Following Mr PJ's death on 10 April 2015, the surviving trustees, VF and Mr RY, appointed Ms OZ PJ, Mr and Mrs PJ's daughter, to take Mr PJ's place as a trustee.³

[5] Over the following two years, VF and OZ formed the view Mr RY was not acting in the best interests of the trust. At a meeting held in February 2017, they invited Mr RY to resign as a trustee.

[6] A year later, in February 2018, VF and OZ asked Mr QX for advice on how to remove Mr RY as a trustee and, on 21 May 2018, they again asked (by letter) Mr RY to resign. Six weeks or so later, on 6 July 2018, VF and OZ informed (by letter) Mr RY they intended to engage another accountant for the trust.

[7] The following month they complained about Mr RY's conduct to the New Zealand Institute of Chartered Accountants (NZICA).⁴

[8] On 20 November 2018, having received OZ's 5 September 2018 letter in which OZ explained she and VF no longer had a working relationship with Mr RY, Mr QX informed (by letter) the trust's lawyers that VF and OZ sought Mr RY's resignation. Mr QX asked the trust's lawyers to have Mr RY sign a deed recording his retirement, and the appointment of the firm's trustee company in his place.⁵

[9] Mr RY still refused to resign. On 20 December 2018, Mr QX consulted with a colleague about whether VF and OZ could remove Mr RY as a trustee pursuant to the power of removal and appointment contained in clause 12(2) of the Trust Deed.

[10] A month later, on 23 January 2019, VF and OZ signed a Deed Poll removing Mr RY as a trustee, and in a separate Deed of Appointment that day appointed the firm's trustee company in Mr RY's place.

[11] It was necessary to transfer ownership of the trust's properties to the new trustees, VF, OZ, and the firm's trustee company. For that purpose, VF and OZ signed the necessary Authority and Instructions (A&I) forms for themselves, as trustees, and for Mr RY claiming to be his attorney pursuant to the power of attorney contained in clause 12(2) of the Trust Deed.

[12] To enable electronic registration of the transfers by e-dealing on 1 March 2019, Mr QX certified he had authority on behalf of VF, OZ and Mr RY as transferor of those

³ Deed of Appointment of Additional Trustee (8 July 2015).

⁴ On 20 August 2019, the NZCIA recommended VF and OZ resolve their differences with Mr RY by alternative dispute resolution.

⁵ Law Firm B, Ms TK, acted for the trust.

properties, and VF, OZ and the firm's trustee company as transferee to effect registration.

[13] Mr QX informed (by letter) Mr RY on 12 March 2019 he had been removed as a trustee.

[14] Mr RY did not accept that position. VF and OZ say Mr RY subsequently, and without their authority, filed the trust's 2018 income and GST tax returns, refused to hand over the trust's files to the trust's new accountants, in May/June 2019 informed of the trust's bank he disputed his removal, and lodged caveats against the titles to the trust's properties. VF, OZ and the firm's trust company applied to the Registrar General of Land on 24 February 2020 to have the caveats removed.

[15] On 6 March 2020, Mr RY's lawyer informed (by letter) VF and OZ that, subject to receiving an indemnity from them, Mr RY, having signed a Deed of Retirement, would resign as trustee, would withdraw his caveats, and inform the trust's bank the dispute had been resolved.

Complaint

[16] Mr RY lodged a complaint with the Lawyers Complaints Service on 12 April 2021. In essence, he claimed Mr QX wrongly advised VF and OZ they could remove him as a trustee, and replace him with the firm's trustee company.

[17] He asked that his complaint be referred to the Disciplinary Tribunal for consideration, or for a finding of unsatisfactory conduct and orders including censure or reprimand, an apology, a fine, and reimbursement of his legal costs incurred in challenging Mr QX's advice to VF and OZ.

(1) Removal, appointment of trustee

(a) Authority

[18] Mr RY claimed clause 12(2)(a) of the Trust Deed did not authorise VF and OZ to (a) remove him as a trustee, and (b) appoint the firm's trustee company in his place, and therefore their exercise of those powers was invalid.⁶

[19] He said his position was supported by the trust's lawyer's legal opinion that:

- (a) pursuant to clause 12(1) of the Trust Deed:

⁶ As noted, on 23 January 2019 by Deed Poll (removal), and Deed of Appointment (appointment).

- (i) from the date of Mr PJ's death, 10 April 2015, he and VF as continuing trustees held the power of appointment of trustees; and
 - (ii) from 8 July 2015, the date he and VF appointed OZ as an additional trustee, the power of appointment of trustees vested in him, VF and OZ; and
- (b) on 23 January 2019, the date VF and OZ purported to remove and replace him as a trustee, none of the circumstances in ss 43(1) or 43(5) of the Trustee Act 1956 applied, and s 43(3) similarly did not authorise VF and OZ to remove him as a trustee, and appoint another trustee.⁷

(b) Ulterior motive

[20] Mr RY claimed, by advising VF and OZ they could remove him as a trustee and appoint the firm's trustee company in his place, Mr QX:

- (a) was "motivated" by "subjective reasons" arising from a previous dispute between him and Mr QX about an unrelated matter;
- (b) "lack[ed] ... objectivity"; and
- (c) "consider[ed] himself to be above the law and better than other [lawyers]".

(2) Transfer of properties - e-dealing certifications

[21] Mr RY claimed, because the power of appointment of trustees was vested in him, VF and OZ, not VF and OZ acting without him, for the purpose of transferring the trust's properties by e-dealing, Mr QX incorrectly certified he had authority to act for:

- (a) himself, VF, and OZ as transferor; and
- (b) VF, OZ and the firm's trustee company as transferees.

Response

[22] In his response submitted by his counsel, Mr QX said:

- (a) he refuted Mr RY's allegations;

⁷ Section 43(3) – concerns appointment of a replacement trustee, where a trustee has been removed "under a power contained in" the trust deed, "as if [the trustee removed] were dead".

- (b) he acted on VF's and OZ's instructions; and
- (c) his conduct in carrying out those instructions was "not personal against" Mr RY, and was not unsatisfactory conduct.⁸

Removal, appointment of trustee

[23] Mr QX said he "accept[ed]" VF, OZ and Mr RY were "the continuing trustees" in whom the power of appointment and removal of trustees was vested.

[24] However, he contended in these circumstances where Mr RY, as the third trustee, was "unwilling to cooperate" then pursuant to clause 12(2) of the trust deed, VF and OZ could remove Mr RY as a trustee and appoint the firm's trustee company in Mr RY's place.

[25] In support of this position Mr QX submitted:

- (a) due to Mr PJ not having made any such provision by deed, or in his will clause 12(1), 12(2) and s 43 of the Trustee Act 1956 had to be read together to establish who, on Mr PJ's death, would exercise the power of appointment of new trustees;
- (b) because clause 12(1) provided that the power of appointment of new trustees in such circumstances would vest in the person(s) so provided by the Trustee Act 1956, that power vested in VF, OZ, and Mr RY as continuing trustees;
- (c) pursuant to clause 12(2)(a), whereby "to facilitate such removal and to perfect the appointment of any such new trustee" each trustee appoints the other trustees as attorney, VF and OZ could remove Mr RY, who was "unwilling to co-operate" as a trustee, and appoint the firm's trustee company in Mr RY's place;
- (d) in circumstances such as these where the removal of a trustee was desired by the other trustee(s) this is the "only possible interpretation" of clause 12(2);⁹

⁸ Letter, Mr NH, Mr JC, Mr IU to LCS (12 March 2021).

⁹ Clause 12(2)(a): "To remove any Trustees or Trustee...and to appoint any person or corporation in place of the Trustees or Trustee so removed...and in the event of and to facilitate such removal and to perfect the appointment of any such new Trustee and Trustees and each of them hereby irrevocably appoint the [other trustee(s)] or personal representatives as the case may be to be their attorney for them and in their name to do make and execute all such acts deeds matters and

- (e) without the benefit of clause 12(2), VF's and OZ's "only option" would have been to apply to the Court to remove Mr RY; and
- (f) it followed his interpretation of clause 12(2) was therefore an interpretation "a reasonable practitioner in [that] position" might have reached.

[26] Mr QX explained, before he advised VF and OZ to "us[e] clause 12 to remove Mr RY as a trustee", he consulted a colleague who "advised" this was "a sensible interpretation" of the power in clause 12.

[27] He said whether his interpretation of clause 12 was "ultimately correct" was for a Court, not a Standards Committee, to determine, but until then his interpretation was "not so blatantly wrong" that it "[fell] short of the standard of competence and diligence ... expect[ed] of a reasonably competent lawyer".

[28] He said, apart from [Mr RY's] lawyer's and the trust's lawyer's opinions, Mr RY had not produced any authority in support of [Mr RY's] contrary position, and he was "not aware" of any such authority.

Ulterior motive

[29] Mr QX denied:

- (a) his conduct advising VF and OZ they could, in those circumstances, remove Mr RY as a trustee was "motivated by an earlier dispute" between him and Mr RY, and "lacked objectivity"; and
- (b) he regarded himself "above the law and better than" other lawyers.

[30] He said he noted Mr RY had not produced any evidence in support of these allegations, and until instructed by VF and OZ he had "no prior involvement" with the trust.

Disciplinary response

[31] In Mr QX's submission, taking into account the context in which he advised VF and OZ they could remove Mr RY as a trustee, if that advice was wrong, then his conduct did not warrant either referral to the Disciplinary Tribunal, or a finding of unsatisfactory conduct for the following reasons:

things necessary to vest transfer and assign all assets and investments or funds for the time being constituting the Trust fund ...".

- (a) his professional duty was owed to his clients VF, and OZ, the settlor's children, not Mr RY, the third trustee, with whom VF and OZ were in dispute;
- (b) VF and OZ had demonstrated to him Mr RY had "acted unreasonably in refusing to resign" as a trustee, and was "impeding the trust[s] affairs";
- (c) his view, "endorsed" by a colleague, VF and OZ could, in those circumstances, remove Mr RY as a trustee was "clearly arguable" and therefore could not be regarded as "so ill-considered and unfounded" as to fall below the standard that could be expected of a reasonably competent lawyer.

Transfer of properties - e-dealing certifications

[32] Mr QX's counsel did not address this aspect of Mr RY's complaint.

Standards Committee decision

[33] The Standards Committee delivered its decision on 12 April 2021 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.

[34] The issues identified by the Committee for consideration were whether Mr QX breached any of his professional obligations and duties:

- (a) in advising VF and OZ; and
- (b) when, for e-dealing purposes, he subsequently signed and certified the correctness of transfers of the trust's properties to give effect to the change of trustee.

[35] The Committee said the essence of Mr RY's complaint was Mr QX's legal advice was wrong, and therefore his LINZ certifications for e-dealing purposes were invalid.¹⁰

Removal, appointment of trustee

[36] The Committee concluded Mr QX "acted reasonably" in advising VF and OZ, and had "been prudent" by "obtaining the views" of another lawyer beforehand.

¹⁰ LINZ – Land Information New Zealand.

[37] In reaching that conclusion, the Committee:

- (a) noted the “differing interpretations” of the trust deed, and the “application” of the Trustee Act 1956 had given rise to VF and OZ seeking Mr QX’s advice;
- (b) noted lawyers owe their clients a duty “to take reasonable care”, and be competent, but that does not extend to a duty to be right;
- (c) observed lawyers “routinely reach differing views and interpretations” on matters but it is not the Committee’s role to determine whether a lawyer’s advice “is correct”;
- (d) stated it was similarly not the Committee’s role to determine, from “the range of contrary [legal] opinions” put forward by Mr RY, which opinion was correct; and
- (e) stated its focus was whether Mr QX’s advice to VF and OZ “was reasonably reached”, and whether a competent lawyer “could have reached the same conclusion”.

(2) Transfer of properties - e-dealing certifications

[38] The Committee concluded, because no professional issues adverse to Mr QX arose from his advice to VF and OZ, it followed Mr QX had “not breached any of his professional obligations” in subsequently certifying the correctness of the transfers of the trust’s properties to give effect to the change of trustee.

Application for review

[39] In his application for review, filed on 4 May 2021, Mr RY repeats his request that:

- (a) his complaint about Mr QX’s conduct be referred to the Disciplinary Tribunal for consideration, or
- (b) a finding Mr QX’s conduct was unsatisfactory, with orders against Mr QX to include reinstatement of ownership of the trust’s properties in his, VF’s, and OZ’s names as trustees.¹¹

¹¹ Application for Review, Mr RY (4 May 2021); accompanied by letter, Mr RY to LCRO (23 April 2021).

[40] Mr RY explains he applied for a review of the Committee's decision because the Committee did not consider his allegation that Mr QX, without authority, signed and certified the correctness of the e-dealings transferring the trust's properties on the change of trustee.

Removal, appointment of trustee

[41] Mr RY's submissions largely concern his claim Mr QX wrongly advised VF and OZ about the Trust Deed, and the Trustee Act 1956 authorised them to remove him as a trustee, and replace him with the firm's trustee company. He claims Mr QX:

- (a) knew VF and OZ "acting alone [as trustees] did not have the power of appointment and removal of trustees"; and
- (b) "had a reckless disregard for who held" that power.

[42] In support of his position, he submits that it is evident from the "[legal] opinions" he produced to the Committee that:

- (a) upon Mr PJ's death on 10 April 2015, the power of appointment of trustees vested in him, and VF as surviving trustees;¹²
- (b) upon the appointment by him and VF on 8 July 2015 of OZ as an additional trustee, the power of appointment of trustees vested in him, VF, and OZ;¹³
- (c) on 23 January 2019, Mr QX, acting for VF and OZ, prepared and had VF and OZ sign (i) a Deed purporting to remove him as a trustee, and (ii) a Deed of Appointment purporting to appoint the firm's trustee company in his place;
- (d) no evidence had been produced by Mr QX of the supporting "independent opinion" Mr QX claims he obtained from a colleague before he advised VF and OZ they could remove him as a trustee, and appoint the firm's trustee company in his place;
- (e) no evidence has been produced by Mr QX that the directors of the firm's trustee company agreed to the appointment of the trustee company as a trustee; and

¹² Trust Deed, clause 12(1); s 43(1) of the Trustee Act 1956.

¹³ Deed of Appointment prepared by the Trust's lawyers.

- (f) the Trust Deed provided that one trustee must not be an “associated person” of the settlors, or of any beneficiary.¹⁴

[43] Mr RY says having declined VF’s and OZ’s 21 May 2018 request he resign as a trustee, repeated by Mr QX on 20 November 2018 to the trust’s lawyers, on 6 March 2020 he signed a Deed of retirement of trustee.

(2) Transfer of properties - e-dealing certifications

[44] Mr RY submits that because both Mr QX’s advice to VF and OZ, and the documents Mr QX prepared to remove and replace him as a trustee were wrong in law, by signing and certifying the e-dealings to transfer the trust’s properties to give effect to the change of trustee, Mr QX:

- (a) contravened r 2.5 of the Rules¹⁵; and
- (b) by not correcting his error he also contravened r 2.6.

[45] He submits by signing and certifying the e-dealings for those transfers without his authority as one of the transferors, Mr QX wrongly certified the trust deed authorised VF and OZ to act as his attorney for that purpose. In support of his position, Mr RY contends:

- (a) in cases of doubt as to whether the power of appointment of trustees can be exercised it is “inappropriate” for a lawyer to sign and certify the correctness of an e-dealing which assumes, and depends on the advice being correct; and
- (b) by signing and certifying the e-dealings in those circumstances Mr QX failed in his duty owed to the Registrar-General of Land to maintain the integrity of the land registry.¹⁶

Response

[46] In his response, also submitted by his counsel, Mr QX largely repeats his position stated in his response to Mr RY’s complaint.¹⁷

¹⁴ Trust Deed, clause 12(2) - "associated person" has the meaning as defined in ss OD 7, and OE 8 of the Income Tax Act 1994.

¹⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

¹⁶ New Zealand Law Society Property Law Section Guidelines, Part 6: E-dealing guidelines at [6.2] to [6.5] referred to.

¹⁷ Letter, Mr NH, Mr JC, Mr IU to LCS (19 May 2021).

[47] Mr QX says the essence of Mr RY's complaint concerns [Mr RY's] removal as a trustee, and the appointment of the firm's trustee company in [Mr RY's] place as an independent trustee. He repeats this is "a matter of interpretation" for determination by the Court, not for a Standards Committee, or a Review Officer on review.

[48] In these circumstances, Mr QX submits his conduct did not "fall short of the standard of competence and diligence ... expect[ed] of a reasonably competent lawyer", and therefore did not constitute unsatisfactory conduct.

[49] In support of his position Mr QX says:

- (a) VF and OZ consulted him for advice on how to remove Mr RY as a trustee, and confirms he had no "ulterior motive" in providing that advice;
- (b) when Mr RY refused, as requested by VF and OZ, to resign they instructed him they wished to exercise the powers in clause 12 of the trust deed to remove Mr RY as a trustee and to use the power of attorney provision in that clause to do so; and
- (c) he "conferred" with a colleague who confirmed that "the power of removal and appointment existed and was validly executed".

[50] In Mr QX's submission, the validity of his LINZ certifications to transfer the trust's properties to effect the change of trustee "must be assessed in the context of the powers of removal and appointment of trustees contained in the trust deed".

[51] In that regard he says he "stands by the accuracy of his certifications and the advice" he provided to VF and OZ in respect of which he says:

- (a) he "took appropriate steps to ensure the accuracy" of his certifications having "reasonable grounds to believe" they were true;
- (b) having formed the view VF and OZ could, pursuant to clause 12 of the trust deed, remove Mr RY as a trustee and appoint the firm's trustee company in his place, in providing his certifications he "accepted" the authority and instruction (A&I) forms signed by VF and OZ "as attorney" for Mr RY;
- (c) he "made reasonable enquiries", and "was satisfied [with] all he was obliged to be satisfied [with]" before he made his certifications; and

- (d) apart from [Mr RY's] own view, and those of his trust's lawyers, Mr RY had not produced evidence suggesting his certifications were "false or misleading".

Review on the papers

[52] 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.

[53] 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

[54] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹⁸

... 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.

[55] More recently, the High Court has described a review by this Office in the following way:¹⁹

¹⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹⁹ *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.

[56] 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.

Issues

[57] The issues I have identified for consideration on this review are:

- (a) Did Mr QX owe any professional duties to Mr RY for whom Mr QX did not act?
- (b) Did Mr QX's conduct in advising VF and OZ as trustees they could (i) remove Mr RY as a trustee, and (ii) appoint the firm's trustee company in Mr RY's place, "fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer?
- (c) In providing that advice, did Mr QX use legal processes only for proper purposes, and not use the law for the purpose of causing unnecessary embarrassment, distress, or inconvenience to Mr RY's reputation, interests, or occupation?
- (d) Did Mr QX, when he certified as to the correctness of the e-dealings to transfer the trust's properties to effect the change of trustee (i) contravene r 2.5 by making inaccurate certifications, and (ii) if so did he correct his certificates as required by r 2.6?

Analysis

Professional duties owed to non-clients – issue (a)

Overview

[58] The Committee did not consider the fact Mr QX did not act for Mr RY despite, as noted above, being mentioned by Mr QX in his response to Mr RY's complaint. For that reason, before I consider the issues identified it is helpful to briefly explain why it is

only in limited circumstances a lawyer owes a professional duty to an opposing party in a dispute, or on the other side of a transaction.

Discussion

[59] The duties contained in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which, as the name suggests concern the way in which lawyers must conduct themselves, and act for their clients, fall into three broad categories:

- (a) those duties which directly concern the provision of legal services by lawyers to their clients;²⁰
- (b) those duties which concern lawyers' dealings or interactions with other lawyers, and third parties; and
- (c) those duties which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.

Duties owed to clients

[60] To illustrate, included among the professional duties lawyers owe their clients in the first category are, as could be expected, the duties to act competently, referred to below (r 3); to treat clients with respect and courtesy (r 3.1); to respond to clients' inquiries promptly (r r 3.2, 7.2); to be independent (r 5); and to protect and promote a client's interests to the exclusion of third parties' interests (r 6).

Non-clients

[61] A lawyer may owe a duty, other than a professional duty, such as a duty of care in negligence to persons for whom the lawyer does not act, but as noted above, generally a lawyer acting for a client would not owe a duty to a person who is an opposing party in litigation, or another party to a transaction.²¹

[62] This explains the description of "the existence of a [professional] duty" owed to a non-client as "exceptional".²²

²⁰ See also s 4 of the Act.

²¹ 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: rr 2.5, 2.6.

²² Duncan Webb, Kathryn Dalziel, 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, at [234].

Broader duties

[63] There are, however, professional duties of a broader nature in the third category which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court. These include the duty in r 2.3, discussed below, to use legal processes only for proper purposes.²³

*Competence – issue (b)**Overview*

[64] Mr RY claims Mr QX's conduct in wrongly advising VF and OZ they could remove him as a trustee, and replace him with the firm's trustee company was unsatisfactory conduct.

[65] Mr QX disagrees. He contends his advice was, in the circumstances, "a sensible interpretation" of the relevant provision, clause 12, of the Trust Deed.

Professional obligations and rules

[66] One of the categories of unsatisfactory conduct that may apply when the lawyer concerned is providing regulated services is contained in s 12(a) which concerns "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".²⁴

[67] There is also the corresponding professional duty in r 3 of the Rules, that lawyers "in providing regulated services to [their] client[s]... must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".²⁵

²³ The duties to promote and maintain professional standards in the lawyer's dealings (r 10); when acting in a professional capacity, treat all persons with respect and courtesy (10.1); and conduct dealings with others, including self-represented persons, with integrity, respect, courtesy (r 12).

²⁴ Lawyers and Conveyancers Act, s 6 "regulated services" defined as including "legal services" and "conveyancing services" which are themselves defined. A finding of misconduct (s 7) which applies to the more serious professional failings or shortcomings can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

²⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 1.2: "retainer" — "an agreement under which a lawyer undertakes to provide or does provide legal services to a client" is described as the recipient of legal services from a lawyer. The term "client", although not defined, is included in the definition of the term "retainer" in r 1.2.

Discussion

[68] At the heart of Mr RY's complaint is his concern Mr QX's conduct in wrongly advising VF and OZ, as two of the three trustees, they could, pursuant to clause 12 of the Trust Deed, remove him as a trustee and replace him with the firm's trustee company, was unsatisfactory conduct.

[69] However, as I have noted, Mr QX did not owe Mr RY, as a non-client, professional duties lawyers owe their clients which include the duty in r 3, noted above, to "act competently...".

[70] Therefore, if a finding of unsatisfactory conduct is to be made against Mr QX in respect of his advice provided to VF and OZ, Mr RY must prove on the balance of probabilities Mr QX's conduct, as provided in s 12 of the Act, "[e]ll short of the standard of competence and diligence" that could be expected from "a reasonably competent lawyer".²⁶

[71] Mr QX acknowledges that following the appointment of OZ as an additional trustee on 10 April 2015, the power of appointment of trustees vested in VF, OZ and Mr RY.

[72] Yet he contends, faced with Mr RY "acting unreasonably in refusing to resign", his advice to VF and OZ:

- (a) they could remove Mr RY as a trustee, and replace them with the firm's trustee company, and
- (b) to give effect to those powers of removal and appointment, VF and OZ could act as Mr RY's attorney granted to them in clause 12(2)(a) of the Trust Deed, was in those circumstances "a sensible interpretation" of clause 12.

[73] My understanding of the views expressed in the opinions of Mr RY's lawyer, and the trust's lawyer is that because the power of appointment was vested in all three trustees, VF, OZ and Mr RY:

- (a) it was not open to VF and OZ, without Mr RY, to exercise that power; and
- (b) the power of attorney granted by the trustees to each other in clause 12(2)(a) was a mechanism designed to enable the trustee to give effect to a decision of all three trustees to remove a trustee, and appoint a

²⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 65 at [112].

replacement, not a power in itself to remove a trustee and appoint a replacement.

[74] While I am attracted to the analysis in those opinions, which are contrary to Mr X's position, the difficulty Mr RY faces in proving his claim is that a determination whether or not the exercise of any power or discretion vested in a trustee was lawful is for the Court, not a Standards Committee or a Review Officer on review to decide.²⁷

[75] For that reason, it is not open to me to make a determination whether or not the exercise of the power of appointment in clause 12(2) by VF and OZ was lawful.

[76] Without a determination by the Court whether or not Mr QX's advice was lawful, and if unlawful then to a degree that reflects on his competence, I am unable to decide whether Mr QX's conduct in providing his advice to VF and OZ constituted unsatisfactory conduct.

[77] In concluding my consideration of this issue, I refer to Mr QX's response to Mr RY's complaint in which he says his advice was "endorsed" by a colleague whom he consulted, and whose view was that it was "clearly arguable" VF and OZ could, in such circumstances, remove Mr RY as a trustee.

[78] Mr QX has produced his handwritten file note of his telephone conversation with OZ on 20 December 2018 which records his "discuss[ion] with [a] colleague. Involves [power of attorney] clause in Deed [of trust] which we have used in similar case".

[79] In that regard, I make the observation that where a lawyer in Mr QX's position takes a precautionary approach by having his or her opinion peer-reviewed, then it is not only sensible but prudent to have the colleague's view detailed in writing in the event the lawyer's advice, as in this case, is subsequently challenged.

Proper purposes – issue (c)

Overview

[80] Although similarly not considered by the Committee, Mr RY's claim Mr QX's advice VF and OZ could remove him as a trustee and appoint a replacement by invoking the power of attorney provision in clause 12(2) of the Trust Deed, raises the question whether Mr QX "used [a] legal process" for other than "a proper purpose".

²⁷ Section of the 66 Trustee Act 1956 – since 30 July 2019.

Professional rules

[81] Lawyers are prohibited from using legal processes for other than their proper purpose. In particular, r 2.3 provides that:²⁸

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.

[82] A helpful description of the rationale for this rule 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".²⁹

[83] The rule contemplates the possibility of more than one purpose. The observation has been made 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".³⁰ It follows that "where the predominant purpose is improper, rule 2.3 is breached. That reasoning must apply equally to the situation where there is only one purpose, and that is improper".³¹

[84] To illustrate, 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".³² Equally, where the intention is not "to affect any legal rights, but to achieve some collateral purpose the action is inappropriate and an abuse of legal process".³³

[85] Because it may be challenging to "objectively" ascertain the distinction between using a legal process "to one's advantage" on the one hand, and "to gain an illegitimate advantage" on the other, it falls to the lawyer concerned "to determine the client's intentions and objectives", and if "the purpose is improper, the lawyer should refuse to assist".³⁴

[86] In *GZ v TE*, the circumstances in which the lawyer concerned was held to have contravened the rule include where a lawyer's "unwarranted threats" of contempt proceedings against another law firm "which would not in any way further [the] position" of the lawyer's client.³⁵

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

²⁹ *GE Dal Pont Lawyers' Professional Responsibility* (6th Edition, Thomson Reuters, Sydney, 2017) at 585.

³⁰ *Alloa v Ullapool* LCRO 159/2009 (10 June 2010) at [19].

³¹ Above n 28 at [44].

³² *Webb, Dalziel and Cook* at 350.

³³ *Webb, Dalziel and Cook*, at 352.

³⁴ *Webb, Dalziel and Cook*, at 353.

³⁵ *GZ v TE* LCRO 17/2011 (17 February 2012) at [79].

Discussion

[87] The approach recommended by Mr QX in his advice to VF and OZ was they could, pursuant to clause 12(2)(a) of the Trust Deed (a) remove Mr RY as a trustee, and appoint a replacement, and (b) give effect to that removal and appointment by invoking the power of attorney in that clause.

[88] Although perhaps not a legal process in the sense described in r 2.3, the power of attorney provision was nonetheless a mechanism to enable the persons in whom the power of appointment was vested, as stated in clause 12(2)(a), “to facilitate such removal” of a trustee, and “to perfect the appointment” of a new trustee.

[89] Mr QX contended the ability for VF and OZ to use the power of attorney in these circumstances was “clearly arguable” whereas Mr RY claims Mr QX’s advice to that effect, and VF’s and OZ’s use of the power of attorney was “wrong in law”.

[90] As noted above, it can be “difficult to detect objectively” the “dividing line” between “using” a legal process to “one’s advantage” on the one hand, and “abusing” a legal process to “gain an illegitimate advantage”.³⁶

[91] As I concluded in my discussion of the previous issue, neither a Standards Committee nor a Review Officer on a review has jurisdiction to determine matters, which include the exercise of any power or discretion vested in a trustee, reserved to the Court to decide.

[92] For that reason, as I have stated, while I am attracted to the legal analysis by the trust’s lawyer of Mr QX’s advice, and the action VF and OZ took in following that advice, I do not have jurisdiction to determine the question of the legality of that action and therefore am similarly unable to take discussion of this issue any further.

E-dealings certifications – issue (d)

Overview

[93] In Mr RY’s submission, Mr QX’s advice to VF and OZ (a) they could remove and replace him as a trustee, and (b) as Mr RY’s attorney, authorise and instruct Mr QX to give effect to his removal and replacement by transferring the trust’s properties, was wrong in law. For that reason, Mr RY contends Mr QX’s certifications for e-dealing purposes to transfer the properties by relying on that advice were therefore inaccurate and similarly wrong.

³⁶ Webb, Dalziel and Cook at 353.

[94] Mr QX says he “stands by the accuracy” of both his advice to VF and OZ, and his e-dealing certifications. He contends the validity of the certificates he gave “must be assessed in the context” of the power of removal and appointment of trustees in the Trust Deed.

Electronic land registration (e-dealing)

[95] Land transactions in New Zealand are administered by LINZ largely carried out electronically through Landonline by e-dealing.³⁷

[96] The New Zealand Law Society Property Law Section Guidelines (PLS Guidelines) emphasise that because the certification and signing by a lawyer of an e-dealing instrument “leads to an alteration” of the land registry, “prior to certifying a document” the lawyer concerned must “ensure that all matters are in order to justify a change” to the land registry.³⁸

[97] The PLS Guidelines draw attention to the certifying lawyer being responsible for “the consequences of the alteration” of the land registry “criminally, civilly and professionally”.

[98] Importantly, the certifying lawyer “must be reasonably satisfied” as to the identity, and legal capacity of the client, and that he or she has the client’s authority and instruction (A&I) to make the certification concerned.³⁹ Whilst the A&I does not create any contractual relationship, once registered, the instrument has the effect of a deed.⁴⁰

[99] Relevant to this review, a lawyer acting for the opposing party in a transaction “is entitled to rely upon the certifications” provided by the certifying lawyer “without the need for further enquiry”, and for that reason the certifying lawyer must “be satisfied on matters affecting ... the use of powers of attorney”.⁴¹

Professional rules

[100] For the purpose of reinforcing the responsibility assumed by a lawyer who signs and certifies any dealing, r 2.5 provides that:

³⁷ Introduced by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 57.

³⁸ Rule 11.4 – the lawyer concerned must also “take all reasonable steps to protect” the security of his/her Digital Certificate and accompanying password and passphrase.

³⁹ PLS guidelines at [6.41].

⁴⁰ Sections 27 and 31 of the Land Transfer Act 2017; regulation 7 of the Land Transfer Regulations 2018; PLS Guidelines, Part 8: Appendices.

⁴¹ PLS Guidelines at [6.10] - note, at [6.59] to [6.64] the prerequisites with which a certifying lawyer must comply where an A&I form is signed by an attorney.

A lawyer must not certify the truth of any matter to any person unless he or she believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.

[101] Moreover, r 2.6 provides if that lawyer “subsequently discovers” a certificate given “was or has become inaccurate or incomplete to a material extent”, then the lawyer “must immediately take reasonable steps to correct the certificate”.

Discussion

[102] This aspect of Mr RY’s complaint similarly relies on a determination Mr QX’s advice to VF and OZ was wrong, and therefore so too were his certifications for e-dealing purposes to give effect to that advice, namely, to assist them to transfer the trust’s properties to themselves and the firm’s trustee company as the newly appointed trustee.

[103] Because that determination is reserved to the Court, not to a Standards Committee, or a Review Officer on review, as with the previous issues, I can take no further action on this issue.

Decision

[104] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed but modified to also provide that pursuant to s 138(1)(f) there is an adequate remedy available to Mr RY.

Anonymised publication

[105] 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 bereft of anything as might lead to their identification.

DATED this 21ST day of DECEMBER 2022

R Maidment
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 RY as the Applicant

Mr QX as the Respondent

Messrs NH and FR-PI as Representatives for the Respondent

Mr WM as a Related Person

[Area] Standards Committee [X]

New Zealand Law Society