

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

[2022] NZLCRO 080

Ref: LCRO 76/2021

CONCERNING

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

AND

CONCERNING

a determination by [Area] Standards Committee [X]

BETWEEN

PJ

Applicant

AND

RK

Respondent

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

Introduction

[1] Mr PJ has applied for a review of the determination by [Area] Standards Committee [X] to take no further action on any of his complaints against Mr RK.

[2] The Committee's decision was made pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 "as there are other adequate remedies that are open for the complainant to exercise".¹

[3] The 'other adequate remedies' referred to by the Committee was that Mr PJ had an option to bring proceedings in negligence against Mr RK before the court.

¹ Standards Committee determination (22 April 2021) at [13].

Background

[4] In her last will dated 2 July 2009, Mrs PJ² appointed Mr RK and Mr UN executors and trustees of her will. Mrs PJ had also established a Trust³ in which she appointed herself and Mr VO as trustees. Clause 15 of the Trust Deed required the Trust to be distributed on Mrs PJ's death.

[5] Mrs PJ died on 15 June 2015.

[6] Mr RK⁴ conducted all communications with Mr PJ in connection with administration of Mrs PJ's estate and Trust.

[7] On 3 January 2020, Mr PJ made his first complaint about Mr RK.⁵ The Standards Committee determined to take no further action on Mr PJ's complaints.⁶

[8] Mr PJ lodged an application for review of that determination, but subsequently withdrew his application.⁷

[9] This review is a review of the determination by the Committee of Mr PJ's second complaint⁸ against Mr RK.

Mr PJ's complaints

[10] Mr PJ's substantive complaints about Mr RK are that Mr RK:⁹

- a. Was incompetent in his administration of the trust and in particular undertook unnecessary litigation;
- b. Failed to reply in a timely manner to emails;
- c. Breached his fiduciary duties as a trustee;
- d. Failed to provide invoices from 2015 until 2020 when asked by the Standards Committee;
- e. Charged an unreasonable amount;

² Mrs PJ is the applicant's mother.

³ Dated 1 May 1996.

⁴ Not Mr UN or Mr VO.

⁵ Complaint no. 20138.

⁶ Standards Committee determination 13 October 2020

⁷ Confirmed by LCRO minute (12 May 2021).

⁸ Complaint no. 21322.

⁹ Standards Committee determination, above n 1, at [4].

- f. Acted negligently including in relation to failing to further the main purpose of the trust; acting in a partisan manner; failing to understand the Trust Deed; withholding Trust documents; and failing to attempt a settlement of the issues.

Incompetence

[11] Mr PJ alleged incompetence on the part of Mr RK for:

- misunderstanding the Trust Deed.
- misunderstanding the purpose of the Trust.
- acting in a partisan manner as between the Trust and estate beneficiaries.
- withholding Trust documents.
- conducting unnecessary litigation.

Ignoring emails

[12] Mr PJ says that Mr RK did not respond to up to a third of Mr PJ's emails.

Breaches of fiduciary duties

[13] Mr PJ complains that Mr RK breached his duties to him as a beneficiary 'with a fixed interest' in the Trust.

Breach of Trust Account Regulations

[14] Mr PJ says that, as he had a 'fixed beneficial interest' and was a person having a legal and beneficial interest, Mr RK was obliged to send him copies of invoices before deducting fees from trust funds.¹⁰

[15] He says that Mr RK has breached reg. 9 of the Trust Account Regulations.¹¹

¹⁰ The term 'trust funds' encompasses both the family trust funds and estate funds.

¹¹ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

Fees

[16] Mr PJ asserts that Mr RK's fees were unreasonable and in breach of r 9 of the Conduct and Client Care Rules.¹² He asks to be reimbursed one fifth of the total fees charged by Mr RK.

Negligence

[17] Mr PJ complains that Mr RK "ought to have known that [the] beneficiaries would be harmed if he acted in the manner identified by Mr PJ, and therefore owed a duty of care not to do any of the above".¹³

[18] Mr PJ concludes his complaint on this aspect in the following manner:¹⁴

Taken together, R's said professional negligence squandered a significant part of our modest inheritance, and harmed family relationships. It was therefore "of such a degree" that it may be disciplined under Rule 1.4(c) and LCA 241.

Outcome

[19] Mr PJ says that he has "never had any interest in [Mr RK] being punished by disciplinary findings". He seeks to be compensated for his share of the fees rendered by Mr RK since the date of his mother's death.

Mr RK's response

[20] Mr RK asserted that Mr PJ's complaints traversed the same complaints as were made by Mr PJ in complaint no. 20138, which, at the time Mr PJ had made his further complaints, was the subject of review by this Office. Mr RK submitted that the new complaints should therefore be dismissed.

[21] Mr RK said that Mr PJ's second complaint was not 'in reality a complaint at all' as Mr PJ was not seeking any disciplinary outcomes. Instead, Mr PJ sought compensation in the form of a refund of his share of the fees invoiced by Mr RK.

[22] Mr RK argued that Mr PJ had remedies by way of court proceedings. He referred to the fact that "in any event, the four beneficiaries/children of the deceased were highly polarised and had visible and open conflicts".

¹² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹³ Mr PJ identifies 12 aspects of Mr RK's conduct which he says did not meet the required standard of care.

¹⁴ Complaint form supporting reasons, p 21.

[23] Mr RK denied that he has breached any fiduciary duties towards Mr PJ.

The Standards Committee determination

[24] "... the Committee's consideration was focussed on what it viewed as the key issue, namely whether the matters raised in the complaint made by Mr PJ are appropriate matters for decision by a standards committee."¹⁵

[25] The Committee noted:

- Mr PJ was seeking to be compensated.
- ... the matters raised are broad and wide ranging and have a particular focus on negligence, incompetence and breaches of fiduciary duty as well as other matters such as timeliness of response.¹⁶
- Section 12 of the Lawyers and Conveyancers Act 2006 sets out the standard under which lawyers may be found to have engaged in unsatisfactory conduct, with section 12(a) being "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". This is closely linked to the civil consideration of negligence.¹⁷

[26] The Committee referred to decisions of this Office in which comments have been made that allegations of negligence are properly pursued before the courts.

[27] The substance of the Committee's decision is found in [11] where the Committee said:

... while Mr PJ has raised a number of other matters such as failing to produce invoices and failing to reply in a timely manner which do relate to issues concerning Mr RK's professional obligations, findings on these issues are inextricably linked with the allegations of negligence and incompetence. Further it observed that the matters in respect of which compensation might be warranted are dependent on findings better made in a judicial process. The Committee also noted that while a standards committee can review the conduct of lawyers it cannot review the actions of a trustee, and one of Mr PJ's allegations is a breach of fiduciary duties as a trustee.

[28] The Committee determined to take no further action on Mr PJ's complaints as "there are other adequate remedies that are open for the complainant to exercise".¹⁸

Mr PJ's application for review

[29] The underlying reason for Mr PJ's application for review of the Committee's determination, is that the Committee did not address the professional conduct issues

¹⁵ Standards Committee determination, above n 1, at [5].

¹⁶ At [6].

¹⁷ At [8].

¹⁸ At [13].

raised by him in his complaints and instead determined to take no further action on all of his complaints on the basis that they were 'inextricably linked' to allegations of negligence which should be addressed before the courts.

[30] Mr PJ's supporting reasons are comprehensive and detailed. Rather than attempt to summarise these, it is best to state that I have had full regard to them when conducting this review and refer to them where appropriate in this decision.

Mr RK's response

[31] Mr RK's response is similarly comprehensive and detailed. Again, full regard has been had to these and there is little to be gained by attempting to summarise them. I refer to these where appropriate in this decision.

Nature and scope of review

[32] The High Court has described a review by this Office in the following way:¹⁹

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.

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

Process

[34] This review has been completed on the papers with the consent of both parties.²⁰

Review

[35] This review touches on two difficult issues:

- (a) Negligence of incompetence.
- (b) The duties of a solicitor as trustee/executor of a lawyer's professional duties.

¹⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

²⁰ PJ email to LCRO (11 November 2021) and SL obo RK to LCRO (16 November 2021).

Negligence of incompetence

[36] As has been recognised in a number of decisions by this Office, some of which were referred to by the Standards Committee in its determination, allegations of negligence are to be brought before the courts. Allegations of incompetence are addressed by way of a complaint.

[37] Section 12(a) of the Lawyers and Conveyancers Act defines unsatisfactory conduct as meaning:

conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is 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; ...

[38] Similarly, r3 of the Conduct and Client Care Rules provides:

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[39] Neither the Act or the Rules include ‘negligence’ as a matter to be dealt with by the complaints and disciplinary process. As noted in *The Law of Torts in New Zealand*⁷, “Negligence is a relatively straightforward and well-understood concept. It is defined in the Concise Oxford Dictionary simply as a lack of proper care and attention or carelessness.”

⁷ Stephen Todd (ed) *The Law of Torts in New Zealand* (6th Edition, Thomson Reuters, Wellington, 2013) at [5.1].

[40] Gross carelessness may fall within the category of incompetence but in every case the facts, and the context in which the events took place, will be relevant.

[41] The Standards Committee determination appears to be driven by the fact that the outcome sought by Mr PJ was to have his share of Mr RK’s fees refunded. The Committee adopted the view that the outcome sought was in the nature of damages and should therefore be dealt with by the court by way of a claim in negligence.

[42] Not every allegation of incompetence necessarily means that the allegation is one of negligence and one which should be before the courts. To adopt that view would be to discount the provisions of the Act and the Conduct and Client Care Rules.

[43] The authors of the text *Ethics, Professional Responsibility and the Lawyer*²¹ say:²²

It is important to note that a practitioner who was not negligent may still have breached a duty of client care. Thus, for example, it may not be negligent to fail to keep a client informed, to not respond to telephone calls, or to fail to explain fee arrangements. However, any of these failures may be a breach of the obligation of client care.

[44] The comments above immediately differentiate the decision in this review from that of the Committee.

[45] In its determination, the Committee referred to *SW (on behalf of Company 1) v RG, OL and HJ*.²³ In that review, the complainants had already commenced proceedings alleging negligence in the District Court. In this situation, the review officer deferred to the jurisdiction of the Court and declined to address the allegations of a lack of competency for the reasons that it was more appropriate for those complaints to be addressed in the proceedings before the Court. The review officer recognised however,²⁴ that if the court found negligence proven, then complaints alleging a lack of competency could be properly made.

[46] Having regard to the above comments, it is clear that not all of the complaints necessarily amount to allegations of negligence that could be pursued before the courts, and even if they were and Mr RK was found to be negligent, there may still be conduct which amounted to breaches of the Lawyers and Conveyancers Act or the Conduct and Client Care Rules.

[47] Consequently, each complaint must be considered and a decision made as to whether or not it amounts to a matter which ought to be considered by the Committee.

Mr RK's role as a lawyer of his role as a trustee/executor

[48] In *TE v Wellington Standards Committee 2 and NT*,²⁵ the lawyer (TE) faced charges of misconduct before the Lawyers and Conveyancers Disciplinary Tribunal. TE argued that conduct of a lawyer when acting as a trustee/executor was not conduct which

²¹ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016).

²² At chapter 11.3.

²³ LCRO 130/2014.

²⁴ At [36].

²⁵ LCRO 100/2010, 92/2011 and 153/2012.

was subject to disciplinary action and disagreed with the decision of this Office in *Shrewsbury v Rothesay and Firm A*²⁶ in which the Review Officer concluded:²⁷

[31] I conclude that where the services provided by a lawyer are services of a type that it is usual for a lawyer to provide, and they are provided in conjunction with legal work (as defined by paragraphs (a) to (c) of the definition of that term) they are properly considered to be incidental to that work and also “legal work”. In light of this the work of an executor/trustee who also acts as a solicitor for an estate will be regulated services. The services provided by Mr Rothesay in this case fall into that category.

[49] In *TE v Wellington Standards Committee 2 and NT*, I made the following comments:

[50] ... much of what a lawyer does in the administration of an estate when acting in the dual capacity of solicitor and executor/trustee can be considered to be conduct in either capacity, or can readily be identified as conduct in the capacity of lawyer for the Estate.

[51] A helpful approach when categorising the conduct would be to consider the conduct as being undertaken by two separate persons, and to then determine whether the conduct in question could be considered to be conduct of a lawyer acting for the Estate. If the conduct in question is conduct that a lawyer acting for the Estate would be responsible for, then it can be considered that the lawyer in that instance is providing regulated services and therefore subject to the disciplinary regime.

[50] I adopt that approach in this decision.

[51] In conducting the examination of each complaint, it must also be borne in mind that Mr PJ has previously made complaints against Mr RK in which the Committee determined to take no further action.

[52] In *LO v RT*,²⁸ the Review Officer discussed the principle that a lawyer should not be subject to multiple complaints about the same matters without some compelling reason to do so and said:

[35] The first question to consider is whether Ms LO’s second complaint replicates her first. This requires a brief discussion of the law concerning repeat claims or complaints. In general, it is not open to a complainant who has been unsuccessful with their complaint, to start the process again by the filing of a second complaint that rehashes the ground covered by the first. The general description of claims or complaints which are repetitive, is that they are an abuse of process.

[39] The critical point, as an English court has explained it, is that:⁹

No one ought to be twice troubled or harassed for one and the same cause.

⁹ *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54.

²⁶ LCRO 99/2009.

²⁷ At [31].

²⁸ LCRO 202/2017 (4 February 2019)

The complaints

[53] The process to be followed now is to examine each complaint and determine:

1. Was the matter complained about the subject of complaint in complaint no. 20138?
2. Is the conduct complained about, conduct by Mr RK in his role as a lawyer?
3. Can the complaint be addressed as a breach of s 12(a) of the Lawyers and Conveyancers Act?

[54] If the answer is 'yes' to question 1, or 'no' to questions 2 or 3, the complaint will be dismissed. If the response is the reverse for any question, the decision will be to return that issue to the Committee.

[55] In complaint no. 20138, the Committee identified Mr PJ's complaints as being:²⁹

Mr RK failed in his duty to distribute the funds "as soon as is reasonably practicable", as ordered by the High Court.

Mr PJ also alleged that Mr RK failed to treat him with respect and courtesy, and failed to respond to queries, particularly requests for financial and billing information.

[56] In the complaint under review, the Committee identified Mr PJ's complaints as being that Mr RK:³⁰

- a. Was incompetent in his administration of the trust and in particular undertook unnecessary litigation;
- b. Failed to reply in a timely manner to emails;
- c. Breached his fiduciary duties as a trustee;
- d. Failed to provide invoices from 2015 until 2020 when asked by the Standards Committee;
- e. Charged an unreasonable amount;
- f. Acted negligently including in relation to failing to further the main purpose of the trust; acting in a partisan manner; failing to understand the Trust Deed; withholding Trust documents; and failing to attempt a settlement of the issues.

²⁹ Standards Committee determination (13 October 2020), at [5]–[6].

³⁰ Standards Committee determination, above n 1, at [4].

[57] There is no overlap between the two complaints, and consequently, the answer to question 1 posed above is 'no' to each matter complained about in complaint no. 21322.

Incompetence

[58] Mr PJ has alleged that Mr RK did not have the appropriate degree of knowledge to undertake administration of the estate and the Trust, and made errors in interpretation of the Trust Deed. This complaint is clearly within the purview of Mr RK's role as a lawyer.

[59] The allegations are that Mr RK was incompetent and his decision to apply to the court for directions was unnecessary. They do not amount to allegations that Mr RK was careless or paid insufficient attention to the matters on which he was engaged which fall within the ambit of a claim in negligence.

[60] Mr PJ's allegations of incompetence must be returned to the Committee to reconsider.

Responding to emails

[61] This complaint was addressed in complaint no. 20138. It cannot be the subject of a further complaint.

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

Fiduciary duties as a trustee

[63] This complaint has been framed as a complaint against Mr RK when acting as a trustee. To some degree, this complaint overlaps with the allegations of incompetence as a lawyer. The elements of this complaint are to be addressed by the Committee when considering the allegations of incompetence.

Failing to provide invoices to the Committee

[64] This is a matter that would need to have been followed up by the Committee as an 'own motion' complaint. The Committee did not take that step.

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

Fees

[66] Mr PJ is a person 'chargeable' with Mr RK's fees.³¹ The complaint that Mr RK has charged fees that are more than fair and reasonable (and therefore in breach of r 9 of the Conduct and Client Care Rules) is definitely a matter to be considered by the Committee.

[67] The Committee's determination in this regard is reversed and it is returned to the Committee to reconsider.

Complaint f.

[68] The complaint identified by the Committee in [4]f of its determination incorporates a number of issues:

- Negligence.
- Partisanship (i.e. bias).
- Failing to understand the Trust documents (i.e. lack of competence).
- Withholding Trust documents.
- Failing to attempt settlement.

[69] The allegations of negligence are allegations to put before the court. Failing to attempt settlement falls within Mr RK's role as a trustee/executor.

[70] The remaining three matters are returned to the Committee to reconsider.

Conclusion

[71] The matters identified above which have not been addressed by the Committee are not matters which I wish to address and decide on review. They must be returned to the Committee to determine in the first instance. None of these complaints are likely to result in the outcome sought by Mr PJ, and he may elect to withdraw the complaints. The Committee would then need to make a decision whether to accept the withdrawal or determine that there are matters of public importance that require it to proceed with its consideration of the complaints.

³¹ Section 160(1) Lawyers and Conveyancers Act 2006.

Decision

- (a) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's determination to take no further action on the complaints recorded in [56](a), (c), (e) and the 2nd, 3rd and 4th bullet points in [68] is reversed.
- (b) Pursuant to s 209(1)(a) of the Act the Committee is directed to reconsider generally the matters raised in those complaints.

[72] Pursuant to s 211(1)(a) of the Act the Committee's determination to take no further action on the complaints recorded in [56](b), (d) and the 1st and 5th bullet points in [68] is confirmed.

Costs / publication

[73] Given that each party has been partially successful in this review, there will be no orders for payment of costs.

[74] The principles discussed in this decision will be of interest to the profession, and potentially the public. Pursuant to s 206(4) of the Act, this decision will be published on the website of this Office, with all names and identifying matters anonymised.

DATED this 19TH day of JULY 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 PJ as the Applicant
 Mr RK as the Respondent
 Mr SL as the Respondent's Representative
 Mr TM as a Related Person
 [Area] Standards Committee [X]
 New Zealand Law Society