LCRO 2/2011

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| **CONCERNING** | an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of the Canterbury-Westland Standards Committee 2 |
| **BETWEEN** | **RA and RB**<br>of Christchurch<br><br>Applicant |
| **AND** | **LZ**<br>of Rangiora<br><br>Respondent |

## DECISION

### Background

[1] The full background to this matter is set out in the Standards Committee decision, and covers in detail the matters comprising the complaint made by Mr RA against Mr LZ (the Practitioner). It is a thorough and well-written decision and runs to some 15 pages. The following is a brief overview to provide a backdrop of the complaints and the discussion.

[2] The Practitioner acted in the administration of the estate of Mr RC (for whom he had acted for many years). Mr RC had appointed his four sons as Executors/trustees. One is Mr RA (who eventually laid complaints against the Practitioner). After Mr RC's death it was discovered that there were two documents in existence which related to the distribution of the deceased's assets. One was a Deed of Family Arrangement which provided for all of the deceased's personal property to be equally divided between his four sons. A later one, a codicil to his Will, left bequests to each of his grandchildren and the remainder of his estate to one son only. (How this had come

about is not relevant to the dispute, but I note that this was not the result of any involvement of the Practitioner.)

[3] The personal property comprising the bulk of the deceased's wealth was largely in the form of valuable paintings. Under the codicil these would be inherited by the one son after the bequests to the grandchildren, whereas the Deed of Family Arrangement provided for equal distribution between the deceased's sons. These two documents clearly conflicted, having different beneficial consequences for the four brothers. The Practitioner pointed this out at the first meeting of the Executors, and there was some discussion at that time.

[4] The Practitioner's own legal opinion, which was supported by an opinion from a barrister with expertise in estate law, was that the Deed of Family Arrangement prevailed over the codicil. Mr RA disagreed. His view was that the codicil prevailed as it set out his father's wishes, a view he continued to hold. Despite efforts over the following months by the Practitioner to persuade Mr RA to seek legal advice about this, Mr RA held firmly to his view. The absence of consensus between the Executors on this issue prevented the final distribution of the estate, the main dissention apparently being between two of the Executors, Mr RA and his brother, Mr RD.

[5] Various avenues were explored to try and resolve the issue of which document prevailed. Mr RA declined to seek independent legal advice on the question, and refused to support an application for a Declaratory Judgment in the High Court. Mr RA later accused the Practitioner of not doing enough to ensure that Mr RD signed an agreement that Mr RA claimed had been reached between them.

[6] After a number of months, and it being evident that consensus was unlikely to be reached between the Executors, the Practitioner instructed a barrister to issue proceedings by two of the Executors (Mr RD and one other brother) against Mr RA and one brother, for their removal as Executors. In relation to that proceeding the Practitioner filed an affidavit in support of the application.

[7] The matter did not proceed to Court since the dispute was ultimately settled between the parties to the litigation. However, the court awarded neither party costs on the basis that the Judge characterised the litigation as a matter not concerning the estate, but as a "hostile litigation" between two beneficiaries against the other two beneficiaries.

[8] Meanwhile the Practitioner had rendered invoices against the estate for the estate work and for the litigation, and transferred the fees to the firm without the consent of all of the Executors.

**Complaints**

[9] Arising from the above events Mr RA made a number of complaints against the Practitioner, the essence of which alleged that the Practitioner had failed to act independently and in the best interests of the estate. There were various elements in the complaints but overall the following four broad allegations cover the majority of concerns that were raised:

- That the Practitioner was conflicted in his professional duties, and did not obtain the consent of all Executors to act in the dual capacity. It was contended that the Practitioner's professional duty toward the estate (as estate solicitor) was in conflict with the professional duty he owed to Mr RD who was a client in his personal capacity.

- That while acting as estate solicitor, the Practitioner inappropriately commenced High Court litigation on behalf of two Executors against the two other Executors.

- That the Practitioner failed to terminate his position as estate solicitor despite having been repeatedly asked to do so;

- That the Practitioner deducted fees from funds held in the estate funds without the consent of all Executors.

[10] The outcome Mr RA sought was orders cancelling the Practitioner's fees, both in relation to administration of the estate ($11,655.50) and a refund to the estate in the sum of $7000.00 which was the fee charged for the litigation.

**Standards Committee's decision**

[11] The Standards Committee noted that some of the conduct occurred prior to 1 August 2008, this being the date on which the Lawyers and Conveyancers Act 2006 commenced. With regard to conduct that occurred prior to that date, the provisions of the Law Practitioners Act continue to apply, as do the professional standards and penalties in that Act. The Committee noted that by virtue of section 351 of the Lawyers and Conveyancers Act, the jurisdiction of a Standards Committee arises only if the

conduct could have led to disciplinary proceedings against the Practitioner under the Law Practitioners Act.

[12] The Committee observed that the various elements in the complaints were 'inextricably linked'. The Committee addressed the various elements, explaining why it decided to not uphold some parts of the complaint.

[13] The Committee did not uphold the allegation that the Practitioner was acting in dual roles. While it was noted that the Practitioner had communications with Mr RD, these were noted to be in his capacity as Executor, and it was also noted that the Practitioner communicated with the other Executors as well. The Committee included a number of observations about the Practitioner's communications with the Executors and his actions in trying to progress the administration of the estate, none of which were the subject of criticism by the Committee.

[14] The Committee found the Practitioner guilty of unsatisfactory conduct in having breached rules 8.7 and 5.1 when, as estate solicitor, he gave instruction for High Court proceedings to be filed by two of the Executors, for the removal of the other two Executors. The Committee opined that the Practitioner ought to have removed himself as estate solicitor much earlier than he did, noting that Mr RA had expressed concerns in June 2008, which was the latest date that the Practitioner ought to have stepped down as estate solicitor. (The Committee's decision appears to contain an error in dating this communication in 2009).

[15] (I observe at this point that the above appears to be references to the Rules of Conduct and Client Care 2008, which were not applicable to conduct that occurred prior to 1 August 2008. However, equivalent rules applied in the Law Practitioners Act, and contained in the Rules of Professional Conduct for Barristers and Solicitors. The oversight is not relevant).

[16] The Standards Committee was also critical of the Practitioner in having given evidence in the litigation whilst being involved in the matter professionally. The Committee found this to be a breach of Rules 5.1, 6.1 and 13.5.

[17] The Committee noted that despite Mr RA's request in September 2008 that the Practitioner remove himself as estate solicitor after High Court proceeding had been filed, the Practitioner continued to act for the estate. The Committee accepted that the Practitioner's motivation was to try and resolve an impasse between the Executors; the Committee nevertheless considered the Practitioner's conduct amounted to *"a reckless contravention of the rules of conduct*". Notwithstanding this, the Committee accepted

that the Practitioner had not acted in self interest and with reference to the circumstances, the Committee determined that the Practitioner was guilty of unsatisfactory conduct rather than misconduct.

[18] The Committee was further critical of the Practitioner having taken fees by deduction without authority of all Executors, although noted that an invoice had been provided. The Committee referred to Rule 9 of the Lawyers and Conveyancers Act (Trust Accounting) Regulations 2008 which requires both the issuing of an invoice and the clients' consent before fees can be deducted. The complaint was that the fees charged against the estate were invalid charges and should never have been approved for payment. However, the Standards Committee considered that the fees charged to the estate were reasonable for the administrative work done, that the charges were properly incurred and that it was appropriate that the Practitioner be paid for the work.

[19] The Standards Committee considered separately the fees charged for the litigation work. The Committee did not order a refund of the $7,000 fees that had been debited against the estate, despite the Judge's comments that the litigation was not an estate proceeding. The Committee concluding that the litigation would have occurred in any event.

[20] The Committee concluded that the unauthorised deduction amounted to unsatisfactory conduct as defined in section 12(b) of the Act. It appears from the decision that this conclusion related only to the deduction of the litigation-related fees, although it also appears to have been the case that authority had not been given by all Executors for deduction of the estate fees.

[21] The Committee gave some consideration to whether the conduct (i.e. taking fees by deduction for the litigation) could be considered misconduct. The Committee was aware that the fees thus generated were the result of conduct on the part of the Practitioner that was found to be unsatisfactory conduct. The Committee described the conduct as serious, but did not warrant referral to the Disciplinary Tribunal.

**Review Application**

[22] Mr RA sought a review of the Standards Committee decision on two main grounds. The first ground was that the Committee had erred in finding that the Practitioner was not conflicted in acting as both estate solicitor and also being the solicitor for one of the beneficiaries in his personal capacity. He considered the error to be the Committee's failure to have considered the potential for the Practitioner's advice

to the Executors to be influenced by his role as lawyer for Mr RD, an interest which was perceived by Mr RA as being in direct conflict.

[23] The second ground related to the Standards Committee's failure to send the matter on for prosecution in the Disciplinary Tribunal, after having concluded that the Practitioner's conduct was a *"reckless contravention of the rules*". Submissions concerning this ground were forwarded by Counsel acting for Mr RA.

[24] The application for compensation was resurrected, particularly concerning the fees ($7,000) charged to the estate for the litigation work. Mr RA submitted that the Practitioner ought not to be allowed to keep fees incurred when he was acting in breach of his professional obligations. It was contended that the Practitioner's involvement and conduct altered the nature and duration of the litigation.

[25] A review hearing was held, and Mr RA attended with his Counsel. The Practitioner attended with his Counsel.

[26] Mr RA addressed at some length the submissions concerning the first ground of review. His Counsel addressed issues arising in relation to the second ground.

**Review hearing**

*Mr RA's submissions*

[27] For the review hearing Mr RA had prepared lengthy written submissions which he read out at the review. Many (if not most) of his submissions were in answer to the 29 July 2010 submissions that had been made by the Practitioner (via his counsel) to the Standards Committee. Mr RA identified various paragraphs that he believed showed inconsistencies in the Practitioner's account of events, particularly concerning the nature of the agreement between him and Mr RD.

[28] His focus was predominantly, and almost exclusively, on demonstrating that the Practitioner acted to benefit Mr RD rather than in the interest of the estate, and was conflicted. Most of his submissions were about his brother's refusal to sign a document intended to record various agreements that Mr RA contended had been reached between him and Mr RD in a telephone discussion (claiming that Mr RD had agreed to sign a written agreement). Mr RA perceived that Mr RD's refusal to sign was because of the influence of the Practitioner's advice.

[29] Mr RA referred to correspondence which he claimed proved that the Practitioner intended to deceive him (and other Executors) by denying that there had

ever been such an agreement. (This was with reference to correspondence wherein the Practitioner had referred to an 'agreement' between Mr RD and Mr RA, and later referred to Mr RD's withdrawal of his 'offer' which Mr RA took as implying there was no agreement.)

[30] The Practitioner (through counsel) strongly protested that there had not been any prior allegation of deceit, and objection was made to a new complaint being raised at the review. The Practitioner was entitled to take this view, because no part of Mr RA complaint to the Standards Committee involved an allegation of deceit. It is a most serious allegation against a lawyer and must always be taken seriously. (The accusations arose from Mr RA's perception about the influence he believes that the Practitioner had or may have had over Mr RD which led to Mr RD's refusal to sign a document that Mr RA alleged Mr RD had agreed he would sign.) It is not clear that Mr RA was fully cognisant of the impact of an allegation of this nature. However, I have found no evidence of any kind whatsoever of deceit on the part of the Practitioner, and it is an unfortunate allegation to have made.

*Submissions by Mr RA's Counsel*

[31] Mr RA's Counsel followed with submissions directed at the second ground for review, which essentially enlarged the grounds that had been forwarded in writing prior to the review. The crux of these submissions is that in characterising the Practitioner's conduct in terms of "reckless disregard" of the rules (the language of misconduct), the Standards Committee then had no choice but to refer the matter for prosecution. The submission was that the Practitioner ought to be prosecuted in the Disciplinary Tribunal.

[32] Reference was made to section 7 of the Lawyers and Conveyancers Act, and particularly section 7(1)(a)(ii) which defines misconduct as consisting of "a wilful or reckless contravention of any provision of this Act or of any regulation or practice rules made under this Act that apply to the lawyer...". Mr RA's counsel compared this with the definition of "unsatisfactory conduct" under section 12 of the Act, noting that section 12(c) defines as unsatisfactory "conduct consisting of a contravention of this Act, or of any regulation or practice rules made under this Act that apply to the lawyer...". Counsel's submissions rely primarily on the Standards Committee description of the conduct as "wilful contravention of the rules" to support the submission that a finding by the Committee of reckless conduct by the Practitioner ought to have led to a referral to the Disciplinary Tribunal.

*The Practitioner's response to the review application*

[33] The Practitioner denied that he was conflicted in the duties he owed to the estate and to Mr RD as a personal client. He submitted that his aim and all of his actions were directed at unlocking the impasse between the Executors so as to enable the estate administration to be completed.

[34] With regard to acting as instructing solicitor for two of the Executors issuing proceedings against the other two Executors, the Practitioner accepted there were serious professional failings on his part but denied that his conduct was wilful and he does not accept that he was reckless. At the review hearing the Practitioner submitted that he lost his perspective which affected his professional judgment, and led him to overlook the rules. He sought to have any professional failings on his part considered in this context. He submitted that his actions should be considered in their entirety, and did not involve any issues of ethics or dishonesty.

[35] The Practitioner's Counsel also submitted that the Practitioner's actions should be seen in the context of the entire transaction, and not as an isolated failing, and the failing should be considered in the context of very difficult circumstances surrounding the matters occurring at the time.

**Considerations**

*Review issue*

[36] On review, it is open to the LCRO to consider the way that the Standards Committee considered the complaint, as well as its final decision on the complaint. The possible outcomes to a review are described in the LCRO Guidelines which are sent to parties to the review.

[37] The ultimate issue for the review is whether the Practitioner's conduct reached a threshold that could lead to a finding of misconduct. Such a finding can be made only by the Lawyers and Conveyancers Disciplinary Tribunal.

[38] I have carefully examined the Standards Committee's decision, which at paragraph [43] sets out the centre of the review issue:

> For (the Practitioner) to continue acting as Estate solicitor in the circumstances, despite his motivation being to seek to resolve the impasse and progress the Estate administration, amounts to a reckless contravention of the rules of conduct and this amounts to serious unsatisfactory conduct in terms of section 12 of the

> Act. The Committee gave serious considerations as to whether (the Practitioner's) conduct in this regard would amount to misconduct pursuant to section 7 of the Act, but has determined, by a slim margin, that it does not. For the conduct to amount to misconduct, (the Practitioner's) conduct would need to amount to disgraceful, dishonourable, wilful or reckless actions. While the Committee has some sympathy with (counsel's) submission that (the Practitioner's) conduct subsequent to June 2008 was wilful or reckless, in terms of continuing to act in the face of clear objection from at least one of the Trustees that he remove himself, the Committee has determined that (the Practitioner's) conduct does not reach that threshold. However, (the Practitioner's) conduct is plainly unsatisfactory and falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. [The Practitioner's] conduct fails to meet the standards applied by competent, ethical and responsible practitioners and his conduct departs from acceptable professional standards. (Underlining added)

[39] The above underlined portions suggests that the Standards Committee perceived (a) that there had been 'reckless contravention of the rules of conduct' by the Practitioner such as to amount to serious unsatisfactory conduct; and (b) that the conduct did not reach the threshold for misconduct which required there to be, among other factors, reckless conduct.

[40] Mr RA's counsel submitted that the LCRO cannot revisit a finding of fact by the Standards Committee. If Counsel intended to suggest that the Committee's assessment that the Practitioner's conduct was 'reckless' cannot be reviewed, I cannot agree, since it is precisely such determinations that are reviewable by this office. (Section 194 of the Lawyers and Conveyancers Act 2006).

[41] The Standards Committee rightly found serious professional failings by the Practitioner when, as solicitor for the estate, the Practitioner initiated proceedings (as instructing solicitor) by two of the Executors of the estate against the other two (a proceeding later characterised as a 'hostile' proceeding between two beneficiaries against the other two beneficiaries), and further by giving evidence in contentious litigation.

[42] The review question is whether or not the Practitioner's failure was correctly described by the Standards Committee, and whether the matter should be referred for prosecution. Section 152 of the Lawyers and Conveyancers Act 2006 empowers Standards Committees to make various determinations, including a determination that the complaint or matter be referred to the Disciplinary Tribunal. This is a discretionary power. However, if a lawyer has engaged in conduct that can properly be described as a "*reckless contravention of the rules*", then a referral to the Disciplinary Tribunal may be appropriate. If the conduct is not so egregious as to justify such a referral, there is a question about whether it ought not to have been described as such.

[43] In considering the question I have taken into account the complaints and also the submissions of both parties. The Standards Committee considered that circumstances of the complaint were inextricably linked, and considered the complaints in the totality of the Practitioner's conduct, rather than isolated failings. I also accept that this is the proper approach.

*Applicable standard*

[44] Despite the conduct spanning over two legislative timeframes, for the purposes of the review there is no need to distinguish between the Law Practitioners Act and the Lawyers and Conveyancers Act 2006. 'Reckless disregard' of the professional rules could, under either Act, lead to prosecution of a practitioner in the Disciplinary Tribunal and a finding of misconduct. I nevertheless observe that the allegations concerning conflict arose while the Law Practitioners Act was still in force. The conduct involving the Practitioner as instructing solicitor and as a witness in the proceeding occurred under the Lawyers and Conveyancers Act 2006.

[45] The definition of 'misconduct' in section 7 of the Lawyers and Conveyancers Act extends to "*a wilful or reckless contravention of any provision of the Act or of any regulations or practice rules made under this Act...".* 'Misconduct' generally involves some moral failure on the part of a Practitioner which could properly be considered as egregious. A 'reckless contravention' of the professional rules would be a proper basis for a referral to the Tribunal.

[46] A useful discussion about reckless conduct may be found in the Australian authority of *Aaron Zaitman v Law Institute of Victoria*, an unreported 2004 decision.[1] There Justice J D Phillips interpreted the meaning of "wilful or reckless contravention" in relation to misconduct, explaining that *"the definition required that the contravention itself – not merely the conduct said to constitute the contravention – will be wilful or reckless*." It was enough that the lawyer be shown to have acted, not in the actual knowledge, but with a reckless indifference, not caring whether what he did, or failed or omitted to do was a contravention of the Act, rules or regulations.

[47] On the concept of recklessness, it was said (at page 52):

> It is implicit in what I have just said that while the solicitor, who does not knowingly act in contravention, must be shown to have foreseen that what he was doing might amount to a relevant contravention, there is no need to go further and establish that the solicitor foresaw the contravention as "probable"; it is enough that he foresaw it as "possible" and then went ahead without checking. ...

[1] (VSC) 9/12/1994, J D Philips.

> [I]t will be enough if the solicitor ... is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was so or not. In other places of the judgment, the notion of "reckless indifference" was not confined to a situation where the Practitioner is cavalier about his or her obligations under the rules, but extended to a situation in which the warning lights were visible but the Practitioner had not checked. When that obligation arises to check, and what constitutes sufficient checking, will depend on the circumstances.

[48] And elsewhere,

> On the other hand, the word "reckless" should be taken as requiring no more than the solicitor be shown to have acted...with reckless indifference, not caring whether what he does, or fails or omits to do (as the case may be) is a contravention of the Act, the rules or the regulations. The solicitor must, I think, have appreciated the possibility that his conduct (whether it be an act or omission) might amount to a breach of the Act, the rules or the regulations.

[49] With the above factors in mind, I have considered whether the Practitioner's conduct in this case could properly be described as 'reckless'. I have taken into account all of the information on the Standards Committee file, information and submissions provided for the review, and the submissions made at the review hearing. I also refer to additional information provided by Mr RA after the review hearing.

*First ground of review – conflict of duties*

[50] The Practitioner was not party to the telephone exchange between Mr RA and Mr RD, and the first reference to an 'agreement' is recorded in a letter that Mr RA wrote on 15 April 2008 in which he informed the Practitioner that he and Mr RD had reached agreement on a number of matters (including the "*situation in respect of the paintings*") and that as long as the Practitioner *"draws up the appropriate agreements*" nothing further would hold up progress (this was a reference to completing the estate administration), and that upon Mr RD signing the agreement first, then he (Mr RA) would come and sign it.

[51] A few days later (22 April) the Practitioner wrote to inform Mr RA that he had discussed the 15 April letter with Mr RD. He set out Mr RD's view, confirming Mr RD's 'offer' to accept the situation in respect of the paintings to preserve family harmony, but adding that Mr RD was not willing to sign a formal agreement to that effect as he was unwilling to put his signature to an agreement with which he fundamentally disagreed. In many letters that followed Mr RA insisted that Mr RD had agreed to sign the written document recording their agreement, with the Practitioner responding that Mr RD refused to sign such a document and denied having agreed to do so.

[52] At the review Mr RA identified the 'worst thing' that the Practitioner had done was failing to ensure that Mr RD signed the document setting out the terms of their telephone agreement. Mr RA explained Mr RD's refusal to sign as being due to the Practitioner's advice to not do so, the Practitioner's advice being based on Mr RD's personal interests as a beneficiary. The signed agreement would, in his view, have removed all obstacles to the final distribution of estate assets. In this light he perceived the Practitioner to be responsible for the ongoing delays in concluding the estate administration. Mr RA alleged that the Practitioner was conflicted between his duty to act in the interests of Mr RD (a personal client) and his duty as solicitor for the estate, adding that the Practitioner's general advice to the estate was influenced by his efforts to protect the interests of Mr RD.

[53] It is difficult to see how the Practitioner could have had any duty to promote the agreement, or to have persuaded or pressured Mr RD to sign a document he did not wish to sign and denied having agreed to sign. Although Mr RA considers that Mr RD should have been asked (by the Standards Committee and presumably this Office) to confirm this personally, there is nothing to indicate that Mr RD did not see the correspondence being sent out by the Practitioner. If Mr RD disagreed with it he had many opportunities to have corrected any erroneous impression, either with the Practitioner or by directly contacting Mr RA. Alternatively Mr RA could presumably have contacted his brother if he wished to obtain further clarification of this matter, a step apparently not taken.

[54] Mr RD's view is fully explained on the basis that he accepted the legal position as had been explained by the Practitioner and another lawyer who had some expertise in estate matters. These views were not accepted by Mr RA. However, there is nothing in the file to suggest that the Practitioner would not have followed the instruction of the Executors if all had been able to reach an agreement.

[55] I have taken into account all of the surrounding events and read the relevant correspondence and can find no evidence to support the allegation that Mr RD's refusal to sign was on the Practitioner's advice. Nor is there any indication of a conflict between the interests of the estate and Mr RD. Overall I have seen no evidence to support the allegation that the Practitioner was conflicted in his duties towards the estate and Mr RD respectively. I therefore agree with the Standards Committee conclusions that there was no conflict.

*Second ground of review – whether there should be a referral to the Disciplinary Tribunal*

[56] The Standards Committee's criticisms (and its adverse finding) related to (a) the Practitioner being the instructing solicitor in the High Court proceeding where two of the Executors sought the removal of the other two Executors, and (b) the Practitioner giving evidence for the Plaintiffs in that proceeding. The Committee described this conduct as *"reckless contravention of the rules of conduct*". The Committee nevertheless concluded that overall the conduct did not reach a threshold for a finding of misconduct.

[57] The Practitioner's explanation was that he lost his direction as his attention was diverted to an extent that he became caught up in trying to deal with the issues as they arose which were preventing his ability to administer the estate. The Practitioner, who had acted for the F family (at least the parents) for some 40 years, said he was much distressed by the dissention between the brothers, and in particular in relation to Mr RA's behaviour. He acknowledged that in becoming drawn into these matters to a point that his judgment was impaired, caused him to lose his professional objectivity and perspective as the lawyer to the estate.

[58] The *Zaitman* test is whether it could be said that the lawyer foresaw that what he was doing might amount to a contravention of the rules and proceeding regardless. There is clearly a mental element involved. I have considered all of the surrounding circumstances in order to get a full understanding how these events occurred. The Practitioner's role commenced in early 2008 soon after the death of Mr RC. From an early stage it became apparent that the Practitioner's legal advice about the status of certain documents was unacceptable to Mr RA, who also declined to follow the Practitioner's recommendation that he should obtain his own legal advice. Intensive exchanges of correspondence between them were already underway in April 2008, and these intensified over the following three months during which time Mr RA's letters became increasingly personally critical of the Practitioner.

[59] There appear to have been two main flashpoints. The first arose when Mr RD refused to sign a document that Mr RA insisted should be signed by him. I have dealt with that above in the context of the allegations of conflict. For the purposes of this part of the discussion it is pertinent to note that the large numbers of email exchanges which were on occasions intense, due to the impasse arising with Mr RA's insistence that Mr RD had agreed to sign the written agreement and the Practitioner advising that Mr RD refused to do so and denied having said he would.

[60] I could find no wrongdoing on the part of the Practitioner in relation to his engagement with Mr RA in regard to this matter. I observe that Mr RA's repetitive insistences did little to advance matters, and required the Practitioner to address the same objections repeatedly. Eventually the Practitioner proposed that there should be a meeting of the Executors.

[61] The proposal for a meeting led to the second flashpoint. Before Mr RA would attend a meeting he wanted to be supplied with all of the estate related documents in *"the one complete bound bundle".* There were numerous exchanges of correspondence between them in which Mr RA repeated his demand for the one complete bundle of documents, and the Practitioner repeating his advice to Mr RA that he had all of the information in his possession already but could come and inspect the estate files. Elements of frustration are evident in some of that correspondence.

[62] The above led the Practitioner to perceive Mr RA as obstructing the administration of the estate, and to the suggestion (in August) that Mr RA should be removed as Executor, which the Practitioner saw as an inevitable step.

[63] The Standards Committee perceived that the latest point at which the Practitioner should have immediately terminated the retainer was after receiving Mr RA's 23 June 2009 (in fact a 2008 letter) letter expressing grave concerns about the Practitioner's conduct and conflicts. In that letter Mr RA expressed a number of concerns, which included concerns about the Practitioner's treatment of his father whilst still alive (paragraph 1), and the Practitioner's treatment of the estates of both of his parents since then (paragraph 2). There were three more paragraphs alleging a conflict on the Practitioner's part in respect of his role as estate solicitor and as solicitor acting for Mr RD personally.

[64] Having considered that letter and surrounding correspondence I cannot agree with the Standards Committee's view that the Practitioner was alerted, by means of the 23 June 2008 letter, to a conflict that ought to have led him to consider his position. The wrongdoing as alleged concerned the Practitioner's treatment of his parents, and the conflict as alleged concerned the Practitioner's roles as estate solicitor and solicitor for Mr RD. The Practitioner did not perceive himself to be conflicted (the Committee found no conflict) and did not accept the allegations about his treatment of Mr RA's parents.

[65] In related correspondence the Practitioner had informed Mr RA that a declaratory judgment would be sought in the High Court to ascertain which of the two

documents should prevail. This was met with strong opposition from Mr RA who gave the Practitioner clear notice that any instruction given to a barrister for that purpose was to be immediately rescinded. There is no evidence on the file that a barrister had been instructed to file such a proceeding, and no such application was ever filed.

[66] The first reference to Mr RA being removed as Executor appeared in a letter that the Practitioner sent to Mr RA in June. This letter proposed the meeting between the Executors (ref para [60] above); the Practitioner also making reference to the possibility of the other Executors taking steps to remove him as executor due to his obstructing the administration of the estate. Had steps then been taken to act on the suggestion, the Practitioner would have been obliged to remove himself from the proceeding. However, the letter proposed a meeting of the Executors, and Mr RA responded that before he would attend such a meeting he wanted to be provided with all of the estate documents in one complete bundle.

[67] I referred above to correspondence in which Mr RA repeated his demands for documents to be provided to him in "*the one complete bound bundle*", and the Practitioner repeated his response that Mr RA had all documents already but could come and inspect the estate file. This theme dominated correspondence between them from 24 June to 29 July 2008 during which time some 15 items of correspondence were exchanged. The regularity of the correspondence increased and tensions became more apparent as Mr RA's allegations became more personal against the Practitioner, alleging that the Practitioner's refusal to comply with his request was in order to *'hide a dark secret'* from the Executors. The meeting (scheduled for 1 August) did not take place, and Mr RA was still insisting that the documents be supplied to him in "*the one complete bound bundle*" on 10 August. Proceedings were filed later that month.

[68] I can find no criticism in the manner of the Practitioner's responses to the correspondence he received from Mr RA. What I have gleaned from the exchanges is that the Practitioner's focus over many months was trying to find a solution to the impasse between the Executors. While it may be said for Mr RA, that he was also trying to find a way forward that he saw as proper, there was clearly a conflict in views about what constituted proper administration of the estate. I could find no basis for criticising the views expressed by the Practitioner, or the approach he took in the matter, noting also his repeated suggestions that Mr RA seek independent legal advice, which Mr RA declined to do. Nor did it appear from the evidence that Mr RA was willing to allow the Court to resolve the status of the documents.

[69] By the time the Practitioner perceived that the impasse would not be resolved except by litigation, the Practitioner ought then to have referred the Executors to another lawyer. From the evidence this position appears to have been reached in August 2008, this also being the culmination of intensive rounds of email communications as outlined above. The Practitioner was clearly in breach of Rule 8.7.1 of the Rules of Conduct and Client Care when he instructed a barrister to file proceedings on behalf of two of the Executors.

[70] The Practitioner submitted that the major focus of attention was dealing with the disagreements between Mr RA and Mr RD about whether or not Mr RD had agreed to sign a document (this was supported by Mr RA who identified the Practitioner's failure to have ensured Mr RD signed the document as the worst thing that the Practitioner had done), and then dealing with Mr RA's demands for documents that were already in his possession. The Practitioner admitted that in the course of trying to address these matters he lost his focus on his professional position, and failed to recognise the need to step back when two of the Executors embarked on litigation against Mr RA.

[71] I formed a clear impression from the file that the Practitioner's constant focus was on trying to address the obstacles to administering the estate. He was obliged to deal intensively with one Executor, Mr RA, who took a different view of what amounted to proper administration. The correspondence on file, by volume and content, suggests that the Practitioner became significantly drawn into the matter, as Mr RA's accusations started focusing on the Practitioner himself. My impression is that as the Practitioner attempted to address the specific issues raised by Mr RA he became oblivious to where matters were heading from a professional standpoint.

[72] There was evidence that the Practitioner had earlier sought advice as to what steps might be taken with regard to the impasse (letter to the barrister 29 July 2008) and following a telephone discussion between them, the Practitioner wrote again to the barrister on 4 August 2008 with a general discussion of the situation and asked for advice as to court processes to remove Mr RA (and another brother) as executor/trustees. No part of those exchanges indicated that the Practitioner gave any thought to his professional position, nor that the barrister whose opinion and advice he sought was himself alert to the Practitioner's position then, or later when he acted on the Practitioner's instructions to file proceedings.

[73] The lack of appreciation of his situation is further demonstrated by a letter the Practitioner wrote to the barrister on 22 January 2000, stating, *"notwithstanding, as I have previously indicated, I am prepared to step down as solicitor for the Estates if it*

*will assist in progressing this matter to an acceptable solution*." The Practitioner's offer to step down was clearly about whether this would assist to resolve the matter, continuing to overlook his professional position. The extent to which the Practitioner was oblivious to his professional position is, in my view, further demonstrated by his having filed an affidavit in a proceeding where he was the instructing solicitor. I have also considered that the barrister who represented the plaintiffs on the instruction of the Practitioner also appeared not to have recognised the problem with the Practitioner's position, either as instructing solicitor or as a witness in the proceeding.

[74] Against the above background the question is whether the Practitioner's conduct is properly described as '*reckless disregard'* of the professional rules that govern the conduct of lawyers. The *Zaitman* test requires an awareness (by the lawyer) of the possibility that what he is doing or failing to do might be a contravention of the professional rules, and the lawyer nevertheless proceeding with a reckless indifference as to whether or so this is the case.

[75] The Standards Committee accepted that the Practitioner's attention was focused on the matter of trying to find a way through the impasse between the Executors so that he could complete the administration of the estate. The Committee noted that the numerous efforts made by the Practitioner to resolve matters, "*advising parties to obtain independent legal advice throughout the course of his attendance, suggesting many meetings and providing Mr [RA] with unfettered access to all estate administration files.*" The Committee noted that Mr RA *"became fixated on his demands that* [the Practitioner] *provide him with 'the one complete bundle of documents'"*, a request that puzzled the Committee which has considered the evidence. Over a number of paragraphs the Committee noted that the Practitioner was at all times endeavouring to advance the interests of the estate.

[76] Having considered the above in terms of the *Zaitman* test I have some difficulty in seeing that the mental element to support a finding of 'reckless disregard' of the rules is present in this case. To do so it would be necessary to show that the lawyer appreciated the risk that his conduct in a particular instance might amount to a breach of the rule, and knowing that risk, proceeded regardless. This is not a case where the Practitioner held a *bona fide* belief that the conduct did not amount to a contravention of the rule. Rather, from the evidence he appears to have given no thought to the professional rules applicable in the circumstances that arose as matters moved forward.

[77] Recklessness requires some moral failing to have occurred. I accept with the considerable assurance derived from all of the evidence that the Practitioner's focus on trying to find a way through has resulted in him losing direction when it came to considering his professional position in the matter. That he ought to have maintained a degree of distance such that his independence was not compromised is not in doubt, but that is a different issue. In all of the circumstances I am unable to find the requisite element of recklessness in the Practitioner's conduct that would support a prosecution case. Much was noted by the Standards Committee, when it concluded that the conduct of the Practitioner could not be considered to reach a standard capable of being considered as misconduct.

[78] It is unfortunate that the Committee's decision created confusion by describing the Practitioner's conduct in terms of a reckless contravention, because clearly the Standards Committee, having seen the same evidence as I have seen, did not accept that there was a case sufficient for prosecution.

[79] The result is that I agree with the Standards Committee conclusion that the Practitioner's conduct amounted to unsatisfactory conduct but that it did not reach the necessary threshold for the matter to be referred to the Disciplinary Tribunal.

*Deduction of Fees*

[80] Mr RA objected to fees having been deducted without the agreement of all the Executors. He sought to have the estate-related fees wiped. He contended that the Practitioner was conflicted as from the first day that they had met (1 February 2008) and that any fees generated by him should not be payable by the estate.

[81] The Standards Committee found the Practitioner's charges to be reasonable for the work done, but concluded that there had been unsatisfactory conduct in relation to the deduction without consent. No orders were made against the Practitioner in relation to this finding. It would have been open to the Committee to have ordered a refund of the fees to the estate and then to have sought the consent of the Executors, and it may well have taken this step if it had perceived concerns about the fees. This would not have resulted in no fees being chargeable since it is clear from the file that the Practitioner did a significant amount of work for the estate, much of it with the consent of Mr RA. It is also apparent that much of the estate-related matters (and costs) were generated by Mr RA himself. In all of the circumstances I do not see any proper basis for taking a different approach to that taken by the Committee. The Practitioner had an adverse disciplinary finding made against him for the conduct.

[82] Mr RA also objected to the Practitioner charging litigation fees of $7,000 against the estate, also without the consent of all Executors. He submitted that the Practitioner should not benefit from his wrongdoing, and that he should not have been able to retain fees that ought not to have been generated in the first place.

[83] There is merit in the submission that a wrongdoer should not be allowed to keep a benefit from the wrongdoing. In the course of the review I was informed that the $7000.00 has in fact been acknowledged by the plaintiffs in the litigation as being their personal costs (presumably following the Judge's description of the proceeding as hostile) and that they have agreed that this money should be deducted from their eventual share of the estate. All parties have agreed that this resolves that matter and I need not consider it further.

[84] Having considered all of the main review issues, I have come to the conclusion that the Standards Committee ultimately decided the matter correctly and that its finding of unsatisfactory conduct was the appropriate decision.

*Other matters raised by Mr RA*

[85] For the sake of completion I should refer to other complaints raised by Mr RA which were not upheld by the Standards Committee. He referred to various actions taken by the Practitioner that had not been with the express instructions of all Executors. I have already noted that the Standards Committee made a finding of unsatisfactory conduct in relation to his instructing the issuing of Court proceedings and providing an affidavit.

[86] The Committee found no other basis for criticism of the Practitioner's actions, noting that much of the estate work performed by the Practitioner was work routinely associated with administration of an estate. I agree with this comment, but also observe that Mr RA himself gave instructions to the Practitioner as to how he considered the estate should be administered, as recorded in a number of letters he sent to the Practitioner from the outset.

[87] Mr RA raised a further concern about a Deed of Indemnity that he signed when he received the shares for his children. The document is a standard deed and has no relevance beyond the indemnity granted by Mr RA as its signatory. No disciplinary issues arise in respect of it.

[88] I mention at this point that soon after the review hearing Mr RA forwarded additional submissions to my office on the matter of 'reckless' in relation to the

Practitioner's conduct. These matters did not provide any additional substance from what had already been raised either by Mr RA himself, or by his counsel in their extensive submissions to my office, and it was not necessary to forward on this to the Practitioner.

[89] Mr RA sent further submissions two months after the review hearing, explaining that his posting contained new information, and raised additional allegations against the Practitioner. The Legal Complaints Review Officer is not an office for a first step investigation. The role of this Office is to review decisions made by the Standards Committees of the New Zealand Law Society. I have given no consideration to any part of that letter.

**Decision**

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act, the Standards Committee decision is confirmed.

**DATED** this 22nd day of August 2012

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Hanneke Bouchier
**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:

RA and RB as the Applicants
RE as Counsel for the Applicants
LZ as the Respondent
LY as Counsel for the Respondent
The Standards Committee
The New Zealand Law Society