

LCRO 109/2015

**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

**BETWEEN**

**RKX**

Applicant

**AND**

**SDC**

Respondent

**DECISION**

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

**Introduction**

[1] Mr SDC made a complaint concerning the conduct of Mr RKX in respect of which the [Area] Standards Committee made a finding of unsatisfactory conduct. Mr RKX has applied for a review of the Committee's decision.

**Background**

[2] Mr SDC, his mother, Mrs ILC, and his sister, Ms JMC, were involved in a dispute concerning the administration of two family trusts, [Trust 1], and [Trust 2]. Each trust owned a tenanted commercial building.

[3] Mr SDC issued proceedings against Mrs ILC, and Ms JMC who later issued proceedings against him.<sup>1</sup> Both proceedings were settled by mediation.<sup>2</sup> A number of lawyers were instructed to act for the parties in the dispute.

[4] The settlement agreement provided, among other things, that:

- (a) Each of Mr SDC and Ms JMC would nominate a person for appointment as an independent trustee.<sup>3</sup>
- (b) "... the two trustees ...shall remain independent and make their own decisions independent of any advice received from family members".<sup>4</sup>
- (c) The remuneration of each trustee would "... not exceed \$15,000 plus GST ...per annum (in total for both trusts) while they hold office". If "... a Trustee will not accept appointment for that remuneration then [the appointor] shall be obliged to either subsidise the fee down to the level of \$15,000 (plus GST) from their own resources ...".<sup>5</sup>
- (d) To pay the legal fees of the lawyers who acted for the parties in the dispute, the trustees were to "pay [KB & Co] \$150,000 plus GST in respect of legal fees" incurred by Mr SDC, and his children, Mr PGC and Ms LJC. [KB & Co] were to "procure and provide invoices for the \$150,000 (plus GST)".<sup>6</sup>
- (e) Mr SDC "shall be paid \$250,000 as follows: (i) \$125,000 as soon as practicable and in any event no later than the settlement of sale of the [Property 1]; (ii) \$125,000 on settlement of sale of [Property 2]".<sup>7</sup>
- (f) The trusts were authorised to borrow funds from the [BANK] to enable these payments to be made.<sup>8</sup>

[5] Mr RKX, then and now a partner at [BFV Lawyers], is known for his experience in trust matters. He was approached by Mr NUP, a barrister who on instructions from STO had acted for Mrs ILC and Ms JMC in the family dispute, to

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<sup>1</sup> CIV 2011-485-854; CIV 2011485-2190.

<sup>2</sup> Settlement Agreement, as amended (26 March 2012).

<sup>3</sup> Clause 4.1.

<sup>4</sup> Clause 4.2.

<sup>5</sup> Clause 4.7.

<sup>6</sup> Clause 4.8.

<sup>7</sup> Clause 4.3(a).

<sup>8</sup> Clauses 4.5.

gauge Mr RKX's interest in being appointed as an independent trustee as Ms JMC's nominee. Mr SDC put forward Mr HWK, a consultant with [KB & Co] (now [KPR Legal]) as his nominee. Both Mr RKX and Mr HWK were appointed as trustees on 11 April 2012 ([Trust 1]), and on 13 April 2012 ([Trust 2]).<sup>9</sup>

[6] Mr RKX and Mr HWK, as trustees of [Trust 1], agreed to borrow the sum of \$300,000.00 from the [BANK]. For that purpose, they signed a [BANK] Property Plus Term Loan Facility Letter dated 14 June 2012. The loan was uplifted and paid into [KB & Co]'s trust account on 22 June 2012.

[7] By memorandum dated 26 June 2012, subject "[C] Trust Payments", Mr RKX and Mr HWK, as trustees, authorised a number payments described as "settlement claims". These payments included the fees of three of the lawyers who had acted in the family dispute, the mediator's fee, and payment to Mr SDC of \$125,000.00. Also described were payments to Mr RKX for \$6,537.00 and \$4,123.75, and to [KB & Co] for "approx. \$15,000.00 max to be verified including disbursements".

[8] The payments to Mr RKX corresponded with his two invoices, each on BFV Lawyers invoice paper dated 21 June 2012 for the months of April 2012 and May 2012 respectively. The invoices were addressed to the two trusts and sent by email to Mr SDC, Ms JMC and to Mr RKX. Each invoice contained a narration of attendances and stated that the fee represented an estimate of Mr RKX's time at his stated hourly rate of \$350.00 plus GST.

[9] Mr RKX's invoices were paid by [KB & Co] into BFV Lawyers trust account on 2 July 2012 by bank transfer.

## **Complaint**

[10] Mr SDC lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 15 October 2014.<sup>10</sup>

[11] In essence, he complains that Mr RKX, without authority to do so, authorised and received payment of his trustee's fees from the trust's funds held in [KPR Legal]'s trust account which had been borrowed from the [BANK] for a particular purpose, namely, to make certain payments including the fees of the lawyers who had acted in

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<sup>9</sup> Deed of Retirement of Trustees and Appointment of New Trustees in respect of each trust.

<sup>10</sup> Complaint, SDC (14 October 2014).

the family dispute. Mr SDC termed this action as “misappropriation”. He referred to Mr RKX’s “(inflated) fees ...”.

[12] He also alleges that Mr RKX, together with his co-trustee, Mr HWK, unilaterally agreed to hourly rates of \$350 in respect of their trustee’s fees without approval from Mr SDC and Ms JMC.<sup>11</sup>

[13] In support of his complaint Mr SDC states that:

- (a) Mr RKX “agreed remuneration” for that appointment was \$15,000 plus GST per annum to be paid by monthly instalments of \$1,250 plus GST.<sup>12</sup>
- (b) The settlement agreement provided that “[i]f necessary, the Trust shall be authorised to jointly borrow funds from the [BANK] to enable payments ... to Mr SDC, and to the lawyers for their fees in respect of their involvement in the family litigation”.<sup>13</sup>
- (c) For that purpose, Mr RKX and Mr HWK, in their capacity as trustees of [Trust 1] borrowed the sum of \$300,000 which was lodged in the trust account of [KPR Legal].<sup>14</sup>
- (d) Mr RKX’ authorisation of payment of his trustee’s fees in the 26 June memorandum had resulted in there being insufficient funds to pay the fees of the lawyers who acted in the family dispute.
- (e) Because Mr RKX resigned as a trustee on 23 August 2012 his trustee’s fees were restricted to four months at \$1,250 plus GST per month, namely, \$5,000 plus GST. This ought to have been invoiced as such to, and paid by, the trust’s administrator from the trust’s bank account.

### **Standards Committee decision**

[14] The Standards Committee delivered its decision on 17 April 2015.

[15] The Committee determined, pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr RKX conduct contravened r 3 of the Lawyers

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<sup>11</sup> Memorandum SDC to RKX, HWK (10 July 2012).

<sup>12</sup> Settlement agreement, cl 7; complaint, at 1.

<sup>13</sup> Clauses 4.3(a) and 4.8.

<sup>14</sup> The [BANK] Property Plus Term Loan Facility Letter (17 May 2012).

and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) which constituted unsatisfactory conduct.

[16] The issues identified by the Committee were:

- (a) Was Mr RKX, at the relevant time, providing regulated services to the trusts?
- (b) Was Mr RKX authorised to pay his fees for acting as an independent trustee of the trust from the trust funds held in [KPR Legal]'s trust account being the proceeds of the [BANK] loan?
- (c) Was Mr RKX arrogant in his interactions with Mr SDC?

*Provision of regulated services*

[17] The Committee determined that Mr RKX, in his role as an independent trustee, was providing regulated services. The Committee's reasons were:

- (a) Mr RKX forwarded client service and care information to Ms JMC.<sup>15</sup>
- (b) He invoiced his trustee's fees on his firm's invoice paper.
- (c) He receipted payment of his fees into his firm's trust account.
- (d) Mr SDC's perception of the services Mr RKX was providing.

*Authority to pay trustee fees*

[18] In the Committee's view:

- (a) Mr RKX was "not authorised nor permitted to use those funds for his fees".<sup>16</sup>
- (b) The "taking of those fees without authorisation and not refunding them when challenged was not acting competently consistent with the terms of the retainer and the duty to take reasonable care (Rule 3)".<sup>17</sup>

*Was Mr RKX arrogant?*

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<sup>15</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3.4 and 3.5.

<sup>16</sup> Standards Committee determination (17 April 2015) at [17].

<sup>17</sup> At [18].

[19] The Committee noted that Mr RKX, “albeit mistakenly” held the position that “he was entitled to his trustee’s fees from the [trust] funds held and ... that he would not reach agreement with Mr SDC about that”. As such, the Committee “did not accept” that Mr RKX “showed arrogance in not addressing the matter with Mr SDC”.<sup>18</sup>

[20] The Committee concluded that because it considered that Mr RKX was not entitled to have his fees paid from the [BANK] loan money that there was no necessity to consider what those fees “should have been”. The Committee’s orders included the requirement that Mr RKX repay the fees, and pay a fine and a costs order.

### **Application for review**

[21] Mr RKX filed an application for review on 29 May 2015. He seeks a reversal of the Standards Committee’s decision. In support of his application he states that:

#### *Remuneration – authority to pay*

- (a) No trust funds were receipted into his firm’s account with the exception of the payment of his fees as invoiced by him to Mr HWK and Ms JMC.
- (b) To “... the best of his recollection all approved payments had been made and [his] trustee fees had been approved by [Mr SDC and Ms JMC] and [his] ... co-trustee”.
- (c) His co-trustee, Mr HWK, would not have paid the trustee’s fees “if there were any known expenses still to be paid from the [BANK] funds”.
- (d) He was “entitled to trustee remuneration”. Having taken “proper steps of enquiry (with the disclosure of fees to [Mr SDC] at the time of rendering [his] trustee fees) [he] was not on notice that the payment ... was from a trust fund that [he] was not entitled to draw from or that there were insufficient funds to meet the fees” so that the trust funds could not “meet the obligations then due”.
- (e) Following his resignation, his replacement trustee had “no issue” with “either ... the quantum or the payment of [his] trustee fees”.

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<sup>18</sup> At [20].

*Independent trustee role*

- (f) His trustee duties included the proposed sale of the [Trust 1] property, and proposals to engage a property manager in respect of which Bayley's and Mr SDC were contenders.

*Provision of regulated services*

- (g) The trustees obtained independent legal advice throughout. Concerning a tenancy dispute at [Property 2], the trustees sought advice from a barrister, but "[o]n reflection should have instructed STO who are the trust's lawyers".
- (h) Neither he nor his firm acted "in any legal capacity as to the funding agreements, legal process and any other legal services that were required by the trusts ...". He states that STO acted on the [BANK] loan as evidenced from the copy of the facility agreement.
- (i) Had he "invoiced the client on any other letterhead for non-regulated services" he would not have been able to receipt his fees into his firm's trust account.
- (j) Contrary to Mr SDC's perception, his services "involved the making of commercial and not legal decisions".

**Mr SDC's response**

[22] In response, Mr SDC claims that Mr RKX has failed to explain:<sup>19</sup>

- (a) His entitlement "to take [his fees] from WCM [Legal's] trust account from funds clearly reserved for other purposes".
- (b) "Why he signed a trustee resolution designed to mislead the WCM [Legal] trust account administrators". Concerning the mode of payment of the agreed remuneration of \$15,000 plus GST per annum, Mr SDC argues that it was "commonly accepted practice that where an annual remuneration was agreed then there was an apportion[ment] ... or charge of time actually served ...".

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<sup>19</sup> Email SDC to Legal Complaints Review Officer (15 June 2015).

[23] In particular, he contends that:

*Remuneration – authority to pay*

- (a) Mr RKX and his co-trustees did apply for the [BANK] loan.
- (b) Neither he nor Ms JMC “approved of trustee payments in excess of \$1,250 plus GST per month ...” nor did they approve Mr RKX’ invoices. They did not know that “he would pay himself out of the [BANK] loan funds”. Mr SDC assumed that the invoice would be “paid \$1,250 plus GST from the trust’s own bank account by [the trust’s] administrator (as were all other invoices) and the balance by [Ms JMC] directly”.
- (c) The Trust — Mr RKX and Mr HWK as trustees — had to borrow additional funds to cover the shortfall equivalent to the fees paid to Mr RKX and Mr HWK.

*Provision of Regulated Services*

- (d) Mr RKX invoiced his fees on his firm’s invoice paper, and referred to his fees as “legal fees”.<sup>20</sup>
- (e) STO acted “in a functional capacity only”, and did not give “legal advice”. That firm’s “legal work included deed of retirement and appointment of Mr RKX and Mr HWK, drafting a lease, and drafting Mr RKX’ resignation”.

**Mr RKX's submissions**

[24] On behalf of Mr RKX, his counsel, OKJ, provided written submissions to which he spoke at the hearing. In addition to his summary of Mr RKX’s points he submits that:<sup>21</sup>

*Remuneration – authority to pay*

- (a) Clause 20.1 of the Trust Deed authorises trustee remuneration.

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<sup>20</sup> Email from RKX to SDC, SDC, HWK (11 May 2012).

<sup>21</sup> Submissions, OKJ (8 September 2017).



- (b) Mr SDC had a right to challenge in the High Court any payment of trustee fees by claiming either a breach of trust by Mr RKX, or that Mr RKX was acting improperly, but not to stop payment.
- (c) It was for the new trustees appointed as a consequence of Mr RKX's retirement, and who had "no issue" with Mr RKX's fees, to question the reasonableness or otherwise of Mr RKX's trustee fees.
- (d) Mr RKX and Mr HWK authorised the payment of the trustees' fees. Mr RKX "believed" that Mr SDC and Ms JMC similarly approved, but it was "not necessary to obtain their approval, as beneficiaries".

*Provision of regulated services*

- (e) Ms JMC was not Mr RKX's client. The fact that Mr RKX forwarded client care and service information to Ms JMC did not mean that she was a client.
- (f) His reference to his "trustee fees as legal fees" was an error.
- (g) The use of Mr RKX's firm's invoice paper "is not determinative of anything other than trustee's fees".
- (h) Mr RKX "was acting as a trustee not a lawyer".<sup>22</sup> Regardless, Mr RKX "receipted an agreed payment by his fellow trustee for outstanding trustee fees ... which are clearly reasonable and paid in accordance with the provisions in the trust deed and [Mr RKX's] appointment ... as a trustee".

**Mr SDC's submissions**

[25] Mr SDC also filed written submissions before the hearing. In addition to providing a summary of the points made in his earlier response, he submits that:<sup>23</sup>

- (a) Mr RKX's appointment as a trustee was due to his "legal expertise" and as an adjunct to [his] practice". Such trustees are able "to either instruct a separate lawyer or to do all or some of the legal work for their trusts".

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<sup>22</sup> Referring to *TE v Wellington Standards Committee 2* LCRO 100/2010, 92/2011, 153/2012 (1 February 2013).

<sup>23</sup> Email SDC to Legal Complaints Review Officer (14 September 2017).

- (b) [Trust 2] and [Trust 1] are trading trusts which own commercial property. Mr RKX's trustee work included "reviewing leases, reviewing loan documentation, instructing barristers", and "commercial property management work (this is defined as real estate work under the Real Estate Agents Act 2008 and consequently as legal work under the [Act])".
- (c) Mr RKX's description of his trustee work in his invoices shows that "some of his work [comprises] the sort of services that are provided by lawyers while others are trustee work (and are incidental to legal work)".
- (d) Mr RKX had described his fees as "legal fees".<sup>24</sup>
- (e) Whilst Mr RKX's categorisation of his fees in the trustees' memo of 26 June 2012 as, and included among, "settlement claims" was incorrect, this suggested that his trustee work was "legal work".
- (f) Clause 20.1 of the Trust Deed did not authorise payment of Mr RKX's trustee's fees.

## Review

[26] This review was progressed by way of a hearing by teleconference on 18 September 2017 before me and was attended by Mr RKX and his counsel OKJ, and Mr SDC.

## Nature and scope of review

[27] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>25</sup>

... 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

<sup>24</sup> Email RKX to HWK, re SDC (11 May 2012).

<sup>25</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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.

[28] More recently, the High Court has described a review by this Office in the following way:<sup>26</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[29] 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:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

## **Issues**

[30] The issues on this review are:

- (a) What was the purpose of Mr RKX's appointment? Was he appointed as an independent trustee, as a lawyer or both?
- (b) When carrying out his duties as a trustee was Mr RKX providing regulated services?
- (c) If he was providing regulated services, was his authorisation of payment of his trustee's fees by the memorandum which he and his co-trustee Mr HWK signed and which Mr SDC complains about, "connected" to his provision of regulated services?
- (d) Depending on the answer to these issues, by signing that authorisation, did Mr RKX contravene any professional rules or standards?

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<sup>26</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

## Analysis

(a) *Purpose of Mr RKX's appointment? (b) Was he providing regulated services?*

[31] Mr RKX is a lawyer experienced in trust matters. It was for this reason that he was recommended to Ms JMC by Mr NUP as her nominee for appointment as trustee. He says that Ms JMC did not instruct him to act for her or the trusts as a lawyer.

[32] On the other hand, Mr SDC argues that Mr RKX's appointment was due to his "legal expertise" in trust matters which effectively overshadowed his role as an independent trustee.

(i) *Regulated services*

[33] Section 6 of the Act provides that "regulated services" means:

- (a) in relation to a lawyer or an incorporated law firm, —
  - (i) legal services; and
  - (ii) conveyancing services; and
  - (iii) services that a lawyer provides by undertaking the work of a real estate agent; ...

[34] The term "legal services" means "services that a person provides by carrying out legal work for any other person".<sup>27</sup>

[35] In turn, "legal work" includes defined categories of work including:<sup>28</sup>

- (a) the reserved areas of work:
- (b) advice in relation to any legal or equitable rights or obligations:
- (c) the preparation or review of any document that—
  - (i) creates, or provides evidence of, legal or equitable rights or obligations; or
  - (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
- (d) mediation, conciliation, or arbitration services:
- (e) any work that is incidental to any of the work described in paragraphs (a) to (d)

[36] Depending on the seriousness of the conduct, the professional failings or shortcomings of the lawyer concerned are categorised as either "misconduct" (s 7 of the Act), or "unsatisfactory conduct" (s 12).

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<sup>27</sup> Lawyers and Conveyancers Act 2006, s 6.

<sup>28</sup> Section 6.

(ii) *Misconduct whilst providing, or unconnected with the provision of regulated services*

[37] Whereas “professional” misconduct, under s 7(1)(a) of the Act, “means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services ...”, s 7(1)(b)(ii) states “personal” misconduct includes “conduct ... which is unconnected with the provision of regulated services ...”.

[38] The High Court has stated that “... the distinction between professional misconduct and personal misconduct continues under the Act, and that personal misconduct:<sup>29</sup>

... involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner’s job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.

[39] In further reference to the Act being concerned with “a lawyer’s conduct in two aspects, first their professional conduct and second, their personal conduct”, the High Court has stated that “[a]ll conduct must either be in the course of one or the other. There can be no gap or lacuna.”<sup>30</sup>

[40] Illustrations of conduct of the lawyer concerned held to have been “connected” to the provision of regulated services, and thereby subject to the regulatory regime under the Act, include the manner of responding to a Standards Committee enquiry,<sup>31</sup> making allegations about the judiciary,<sup>32</sup> communications to colleagues and to the Legal Complaints Service,<sup>33</sup> and recovery of legal fees.<sup>34</sup>

(iii) *Unsatisfactory conduct – conduct whilst providing regulated services, or rule contravention*

[41] The Act provides four categories of unsatisfactory conduct. The first two categories in s 12 include conduct that occurs at a time that the lawyer concerned is providing regulated services, namely, conduct that:

<sup>29</sup> *Orlov v New Zealand Legal Complaints Disciplinary Tribunal* [2014] NZHC 1987 at [106].

<sup>30</sup> *A v Canterbury Westland Standards Committee No.2 of the New Zealand Law Society* [2015] NZHC 1896 at [57]; see also *Orlov*, above n 29, at [102].

<sup>31</sup> *Auckland Standards Committee No.1 v Hart* [2012] NZLCDT 20 at [44] and [45].

<sup>32</sup> *Orlov*, above n 29, at [109].

<sup>33</sup> *Hong v Legal Complaints Review Officer* [2016] NZHC 184 at [10], [11] and [47]–[53].

<sup>34</sup> *A v Canterbury Westland Standards Committee No.2 of the NZLS*, above n 30, at [26] and [28] and [29] per Venning J.

- (a) ... falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) ... would be regarded by lawyers of good standing as being unacceptable, including –
  - (i) conduct unbecoming a lawyer or an incorporated law firm; or
  - (ii) unprofessional conduct; ...

[42] The third category in s 12 is:

- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7) ...

[43] In a previous decision of this Office, the Legal Complaints Review Officer (LCRO) observed that a finding of unsatisfactory conduct “most often arises in connection with the provision of legal services”.<sup>35</sup> The LCRO has also stated that the qualification in ss 12(a) and (b), namely, that the conduct of the lawyer concerned must be “conduct ... that occurs at a time when [the lawyer] is providing regulated services” is to be “construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs in connection with the practice of law.”<sup>36</sup>

[44] In determining whether a lawyer’s conduct falls within these descriptions, the LCRO has also observed that rather than examine “the niceties of particular business structure through which the service is being provided or the formalities of the role the provider purports to occupy” that “... it is necessary to consider objectively whether a reasonable person in the shoes of the client would consider that he was obtaining legal services.”<sup>37</sup>

[45] Where a lawyer has a dual role, for example, as a lawyer acting in an estate administration of which he or she is a trustee, there is “a heavy onus ... on [the lawyer concerned] to show that the conduct complained of did not have a connection with [his or her] status as a lawyer and the client could not reasonably have thought he was acting as a lawyer.”<sup>38</sup>

(iv) *Mr RKX’s role as a trustee*

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<sup>35</sup> *IJ v QT* LCRO 94/2011 at [32].

<sup>36</sup> *Morpeth v Ramsey* LCRO 110/2009 at [20].

<sup>37</sup> At [27].

<sup>38</sup> At [28].

[46] Mr RKX claims that he was acting as a trustee, not a lawyer. He says that his tasks as a trustee included the proposed sale of the [Trust 1] property, and proposals to engage a property manager in respect of which Mr SDC was a contender. He says that he and Mr HWK sought legal advice as required. He states that neither he nor his firm acted in a legal capacity concerning the [BANK] loan or other requirements for legal services.

[47] In support of this position he explains that:

- (a) All of his work, whether trustee work or legal work was invoiced on his firm's invoice paper. If he had not done so, he would not have been able to receipt his trustee's fees.
- (b) It did not automatically follow that because he sent client service and care information to Ms JMC that his attendances as a trustee were regulated services. He says that he had been a member of a Standards Committee and out of "an abundance of caution" his firm always sent client service and care information when new matters were opened.
- (c) His reference in an email to his trustee's fees as "legal fees" was an error.
- (d) Because he needed a "quick answer" on a commercial lease issue he had instructed a barrister, which he says, on reflection ought to have been referred to STO.

[48] Mr SDC disagrees. He argues that:

- (a) Mr RKX was appointed as a trustee because of his "legal expertise" and as "an adjunct to [his] practice". This, he says, enabled Mr RKX to either have the legal work done by other lawyers, or do "all or some" of it himself.
- (b) Mr RKX's narrations of his attendances in his invoices illustrate a mixture of trustee attendances and legal work.
- (c) STO acted "in a functional capacity only", did not give legal advice, and that all they did was prepare the deed of retirement and appointment of trustees, draft a lease, and draft Mr RKX's resignation letter.

- (d) The fact that Mr Rkx invoiced his fees on his firm's invoice paper, and referred to his fees as legal fees is determinative of Mr Rkx having provided regulated services.

(v) *Categorisation of Mr Rkx's work*

[49] Where a lawyer acts as a trustee it can often be a difficult exercise to differentiate legal work from trustee work. A helpful point of differentiation referred to by the Court of Appeal is that it is for a lawyer to advise whether a proposal is lawful or not, but not to make a decision on the matter.<sup>39</sup> This necessarily requires an examination of the nature of the work carried out in each role.

[50] For example, in the context of an estate administration, this Office has held that:<sup>40</sup>

... 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 in 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 will be regulated services.

[51] The ability of a lawyer acting in that capacity, and as a trustee "to charge fees for performance of his or her trustee duties (which are chiefly concerned with obtaining possession or control of trust property and preserving that property in a secure manner [to] enable the terms of the Trust to be carried out) must be provided for in the terms of the engagement".<sup>41</sup> This is because "[i]n the absence of an agreement authorising the lawyer/trustee to charge fees for purely trustee-related activity, no fee can be charged because 'equity requires a trustee to act gratuitously'".<sup>42</sup>

[52] It is clear from the settlement agreement of the family dispute that Mr SDC and Ms JMC were each to nominate a person for appointment as an independent trustee of the Trusts. It was his expertise in trust matters that led to Mr Rkx being recommended as Ms JMC's nominee for appointment to that role. At the time of his appointment he was not acting, and after his appointment did not act for the Trusts which were at that time separately represented by STO.

<sup>39</sup> *Hansen v Young* [2004] 1 NZLR 37 (CA) at [33]–[36], referring to *Dubai Aluminium Company Limited v Salaam* [2003] 1 All ER 97 (HL) at [134]; the principle in *Hansen* is cited in *AW v ZK* LCRO 230/2012 (28 March 2014) at [39].

<sup>40</sup> *Shrewsbury v Rothesay* LCRO 53/2009 (November 2009) at [30].

<sup>41</sup> *AW v ZK*, above n 39, at [39].

<sup>42</sup> At [39], referring to *Hansen v Young*, above n 39, at [4].



[53] Whilst he may not have drafted documents and provided advice to the beneficiaries, his legal experience undoubtedly equipped him for his role as a trustee. In that capacity, his tasks included dealing with tenants and real estate agents, and reviewing documents, albeit those that required his signature, and others to familiarise himself with the trusts' affairs, as detailed in his invoices. Such tasks can be found in the definition of "legal work" in s 6 of the Act referred to earlier at [35].

[54] The fact that Mr RKX sent client care and service information to Ms JMC, issued his invoices on his firm's invoice paper, undertook most if not all written communications with his firm's "sign off" does not, in my view, assist his argument that he was not providing legal services. If anything, it suggests the opposite.

[55] Mr OKJ submitted that in Mr RKX's capacity as a trustee, he "was the client". Referring to the meaning of misconduct in section 7(1)(a) of the Act, the High Court has stated that the words "providing regulated services" do "... not require there to be a subsisting lawyer/client relationship with a particular client ..." and that it "... will be sufficient if at the material time the lawyer is engaged in the provision of legal services and if the conduct complained of is connected to those services".<sup>43</sup>

[56] Overall, Mr RKX has not persuaded me on the balance of probabilities that the Committee was wrong in reaching its conclusion that when acting as he did as a trustee of the Trust in carrying out the tasks he describes in his invoices that he was providing regulated services to the Trusts.

(c) *Was Mr RKX authorisation of payment of his trustee fees "connected" with his provision of regulated services?*

[57] Having reached the conclusion that Mr RKX, when acting as a trustee was providing regulated services, it would be difficult to argue that his memorandum of 26 June 2012 which authorised payment of his trustee's fees for the regulated services he provided was not connected to his provision of those regulated services.

(d) *By signing the authorisation, did Mr RKX contravene any professional rules or standards?*

(i) *Professional Rules*

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<sup>43</sup> *A v Canterbury Westland Standards Committee No. 2*, above n 30, at [60].

[58] Whilst noting that Mr RXX "... took the view, albeit mistakenly, that he was entitled to his trustees' fees from the funds held ..." <sup>44</sup> the Committee found that he "was not authorised nor permitted to use [the [BANK]] funds for his fees". <sup>45</sup> By doing so the Committee stated that Mr RXX "was not acting competently consistent with the terms of the retainer and the duty to take reasonable care (rule 3)" which constituted unsatisfactory conduct. <sup>46</sup>

[59] The duty in r 3 of the Rules aligns with the professional standard in s 12(a) of the Act which defines unsatisfactory conduct as "conduct of the lawyer ... 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". Illustrations of circumstances in respect of which the rule and standard have been held to apply include acting for a client who lacked capacity on the preparation of a will (pre-1 August 2008); <sup>47</sup> omission of material from submissions; <sup>48</sup> acting for two parties and not properly advising one of them; <sup>49</sup> and not having carried out the agreed legal services. <sup>50</sup>

[60] Mr SDC complains that Mr RXX, as a trustee, and without authority to do so, authorised payment of his trustee's fees. Mr SDC terms this action as "misappropriation". Relatedly, he alleges that Mr RXX, together with his co-trustee, Mr HWK, unilaterally decided on hourly rates of \$350 in respect of their trustees' fees without approval from Mr SDC and Ms JMC. In my view, this conduct does not fit easily into the types of conduct in respect of which r 3 of the Rules and the related professional standard in s 12 of the Act have been held to apply.

[61] The position that Mr RXX and Mr HWK were in as professional trustees charged with acting "independent of any advice received from family members" has to be viewed in the context of the preceding family dispute which resulted in the mediated settlement agreement. The intention of the settlement agreement was to require the opposing parties at that time to take a step back from the management of the affairs of the two trusts by nominating persons of their choice for appointment as independent trustee.

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<sup>44</sup> Standards Committee determination, above n 16, at [20].

<sup>45</sup> At [17].

<sup>46</sup> At [18].

<sup>47</sup> *A v X* LCRO 2/2008 (20 February 2009).

<sup>48</sup> *AL v ZR* LCRO 102/2010 (11 February 2011).

<sup>49</sup> *CA v XU* LCRO 196/2010 (18 May 2011).

<sup>50</sup> *KD v WW* LCRO 83/2011 (30 March 2012).

[62] Whilst this does not mean or imply that the trustees were not bound by the terms of the trust deed and the Trustee Act 1956, it does spell out the “independent” role they were to have as nominees of Ms JMC, and Mr SDC respectively.

[63] The independent role Mr RKX and Mr HWK had, where as lawyers they were the only trustees, is similar to circumstances where a lawyer acts as a sole trustee. In those circumstances, this Office has referred to “obvious pragmatic reasons” why a lawyer acting as a sole trustee, whilst not being obliged to do so, would consult with beneficiaries beforehand particularly concerning costs.<sup>51</sup>

[64] Mr RKX and Mr HWK did not take that course before they signed the memorandum of 26 June 2012 and proceeded to pay their respective trustees’ fees. In my view, whilst a prior discussion with Mr SDC and Ms JMC beforehand would have been the desirable approach to take, it does not necessarily follow that the authority Mr RKX conferred upon himself fell short of any professional rule or standard.

(ii) *Professional standards*

[65] For completeness, it must be asked whether Mr RKX’s authorisation of payment of his trustees’ fees was “conduct ... that would be regarded by lawyers of good standing as being unacceptable”. This includes “conduct unbecoming” or “unprofessional conduct”: see s 12(b) of the Act.

[66] Unlike the professional standard in section 12(a), which “is an articulation of the well-established ‘reasonable consumer test’”,<sup>52</sup> the standard in section 12(b) is “conduct that would be regarded by lawyers of good standing as being unacceptable...”.

*Unacceptable conduct*

[67] An illustration of conduct found to have been unacceptable was where a lawyer failed to either resolve a client’s complaint or communicate the lawyer’s refusal to continue acting before declining to act further on a court matter.<sup>53</sup>

*Conduct unbecoming*

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<sup>51</sup> *Hunstanton v Camborne and Chester* LCRO 167/2009 (10 February 2010) at [8]–[10].

<sup>52</sup> Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [4.3.2].

<sup>53</sup> *Hartlepool v Basildon* LCRO 79/2009 (3 September 2009).

[68] Conduct unbecoming has been described as “actions which can properly be set apart as an unacceptable professional breach”.<sup>54</sup> Namely, conduct where there is “more than a mere error or negligence” in respect of which “there may be considerable overlap” with the standard of “competence and diligence” in s 12(a).<sup>55</sup> Also, “an element of wrongdoing will need to exist” that falls short of misconduct.<sup>56</sup> Illustrations of conduct unbecoming include circumstances where a lawyer, found to have been acting in a dual role, used the lawyer’s knowledge of the client’s affairs and made a disclosure to a third party,<sup>57</sup> a lawyer acting for a purchaser of a property who held funds as a stakeholder for a particular purpose declined to apply them as because the client had not paid the lawyer’s fees,<sup>58</sup> and a lawyer mislaid a client’s contracting out agreement.<sup>59</sup>

#### *Unprofessional conduct*

[69] Unprofessional conduct, which was not included in the previous Law Practitioners Act 1982, has been described as “add[ing] little other than colour to the concept of unsatisfactory conduct as a whole and indicate simply that a failure of professional standards adhered to by lawyers of good standing will be unprofessional and therefore unsatisfactory conduct”.<sup>60</sup>

[70] Mr RXX, whilst acknowledging at the hearing that “certain payments were to be made from the [BANK] funds”, says that “in his mind there was no issue of wrongful payment of funds not for the purpose” by including his and Mr HWK’s trustees’ fees. He states that having sent his invoices to Mr SDC, Ms JMC, and Mr HWK, no objection had been raised by them or, later, by his successor trustee.

[71] In summary, his position is that whilst no such objection was raised, Mr SDC objected to “the mode of payment”, namely, authorising payment from the [BANK] funds held on behalf of the Trust in the trust account of Mr HWK’s firm for purposes stated in the settlement agreement.

[72] Mr OKJ argued that clause 20.1 of the trust deed provided authority for the payment of trustees’ fees. That provision authorises a trustee who is a member of a profession, for example, a lawyer, to “... act in that capacity in connection with the

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<sup>54</sup> Webb, Dalziel and Cook, above n 52, at 105.

<sup>55</sup> At [4.3.2].

<sup>56</sup> At 104.

<sup>57</sup> *Morpeth v Ramsey*, above n 36.

<sup>58</sup> *Workington v Sheffield* LCRO 55/2009 (26 August 2009).

<sup>59</sup> *Wolverhampton v Shaftesbury* LCRO 145/2009.

<sup>60</sup> Webb, Dalziel and Cook, above n 52, at 105.

affairs of the Trust ... and may charge and be paid reasonable and proper charges for all services rendered ... in connection with the affairs of the Trust". Similar "charging clauses" are frequently included in wills when a lawyer is appointed an executor and trustee.

[73] Although such provisions establish an entitlement to charge fees when acting as a lawyer in the administration of an estate or trust, they do not prescribe how the lawyer is to be paid. Whilst not raised by Mr RKX, neither do I consider that the authority to deduct fees included in Mr RKX' terms of engagement forwarded to Ms JMC assist him. That authority refers to the client's funds held in Mr RKX' firm's trust account. Although Mr RKX was Ms JMC's nominee, he was not acting for her. Also, the Trust's funds were held in Mr HWK's firm's trust account not Mr RKX' firm's trust account.<sup>61</sup>

[74] This leads back to the earlier discussion concerning a lawyer(s) who is/are the only trustee(s) and where, to avoid any misunderstanding on any matters of administration, the prudent course would be to consult with those for whom the estate or trust is administered, namely, the beneficiaries.

[75] Having heard from Mr RKX, and Mr OKJ on his behalf, at the hearing, I do not agree, as suggested by Mr SDC that this authorisation amounted to misappropriation. That is a serious allegation which implies intentional dishonesty and, if upheld on a referral to the Disciplinary Tribunal, could lead to a finding of misconduct. Mr RKX had rendered invoices for his fees to which it appears no objection at that time was raised. He, albeit, as found by the Committee, mistakenly considered that his "independent" trustee role permitted him and Mr HWK to pay themselves from the [BANK] loan funds.

[76] It therefore remains for me to decide whether Mr RKX' conduct, the authorisation, was "... conduct that would be regarded by lawyers of good standing as being unacceptable, ..." as provided in s 12(b) of the Act.

[77] I am not persuaded by Mr OKJ's argument that the lack of objection at that time to the amount of Mr RKX' invoices necessarily entitled Mr RKX to authorise payment of his trustee's fees from a fund established by the settlement agreement for particular purposes. The settlement agreement set the annual fee payable to each trustee but did not specify how the trustee's fees would be paid.

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<sup>61</sup> The deduction of fees by a lawyer from a client's funds held in trust is governed by rule 9.3 Lawyers: Conduct and Client Care Rules 2008, regulations 9, 10 Lawyers and Conveyancers Act (Lawyers: Trust Account) Regulations 2008. See also section 110 of the Act, and *Heslop v Cousins* [2007] 3 NZLR 679.

[78] In the circumstances of Mr RKX' appointment, arising out of a contentious family dispute, I consider that it would have been sensible for him to have consulted with Mr SDC and Ms JMC beforehand. This would have brought any concerns about the mode of payment out into the open early on and may have averted a complaint.

[79] However, in my view, his failure to do so falls marginally short of conduct that is "unacceptable" and would therefore constitute unsatisfactory conduct. In arriving at this conclusion, I am persuaded by the context of Mr RKX' appointment referred to earlier, and the level of independence in decision-making from the beneficiaries conferred on him and his co-trustee by the settlement agreement. It is of course open to Mr SDC, as Mr OKJ suggests, to bring a claim against Mr RKX for any considered breach of trust by Mr RKX whilst a trustee.<sup>62</sup>

#### *Mr RKX' fees*

[80] The finding I have reached on this review concerns Mr RKX' conduct in authorising payment of his fees, but not the quantum.

[81] In his complaint, Mr SDC states that by resigning as a trustee on 23 August 2012 Mr RKX' trustee's fees were restricted to four months at \$1,250 plus GST per month, namely, \$5,000 plus GST. He referred to the trustees having "pa[id] themselves (inflated) fees ...".

[82] The Committee decided that Mr RKX was not entitled to his trustee's fees from the [BANK] loan funds held in the trust account of Mr HWK's firm and made orders cancelling the invoices and requiring a refund of the amounts paid. For that reason, the Committee decided it was "not required to determine what Mr RKX's trustee's fees should have been".

[83] As noted earlier, the parties to the mediation agreed, in the settlement agreement, that each trustee's remuneration would be \$15,000 plus GST per annum. However, the settlement agreement did not specify whether that amount would be payable in one lump sum at the end of each year of service as a trustee, by instalments, or on a time and attendance basis.

[84] By contending that the annual trustee's fee would be payable by equal monthly instalments of \$1,250 plus GST, Mr SDC seeks to imply a term into Mr RKX's

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<sup>62</sup> Trustee Act 1956, s 68.

[85] appointment. For his part, Mr RKX disputed that his fees were to be paid monthly. He too sought to imply into his appointment a term not provided for in the settlement agreement by resolving with his co-trustee, Mr HWK, that their trustee's fees would be calculated at an hourly rate of \$350.

[86] Clearly, until these contractual issues are resolved it is not possible for the Committee, or this Office on review, to assess whether the fees invoiced by Mr RKX were fair and reasonable (r 9 and 9.1 of the Rules). In this regard, the complaints process is not an alternative to court proceedings which are better suited to determine matters of evidence by the processes of examination and cross-examination. Once those issues have been resolved, then it is open to Mr SDC to decide whether a complaint as to the fairness and reasonableness of Mr RKX's fees is warranted.

*General observation*

[87] In conclusion, this review serves to highlight the importance of a lawyer who acts in a dual role clearly establishing at the outset the parameters of that role including the work that will be carried out, to whom the lawyer will report, the lawyer's remuneration and how that will be paid, all as set out in the lawyer's terms of engagement.

**Decision**

For the above reasons pursuant to s 211(1)(a) of the Act the decision of the Standards Committee as to the finding of unsatisfactory conduct and consequent orders is reversed.

**DATED** this 28<sup>th</sup> day of September 2017

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**B A Galloway**  
**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 RKX as the Applicant  
Mr SDC as the Respondent

[Area] Standards Committee  
The New Zealand Law Society