NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 20
LCDT 012/18 and 013/18

IN THE MATTER	of the Law Practitioners Act 1982 and the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE NO. 1** Applicant
AND	**JOHN CAMPION** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr S Grieve QC
Mr G McKenzie – 12 March Hearing, replaced by
Ms N McMahon – for 14 May Hearing
Ms C Rowe – 12 March Hearing, replaced by
Mr P Shaw – for 14 May Hearing
Ms S Stuart

HEARING 12 March and 14 May 2019

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 19 July 2019

APPEARANCES
Mr McCaughan for the Standards Committee
Practitioner Self Represented

DECISION OF THE TRIBUNAL ON CHARGES

Introduction

[1] The practitioner faces three sets of charges in two proceedings, which have been heard together.

[2] The first set, arising out of the "S complaint", encompasses alleged conduct which began before 2002 and continued until 2014. Thus, there are two sets of charges filed (with two alternatives), the first set of which is under the Law Practitioners Act 1982 (LPA).

[3] The second set of "S" charges are laid (with two alternatives) under the current legislation, the Lawyers and Conveyancers Act 2006 (LCA). The transitional provisions[1] mean that conduct which occurred before 1 August 2002, that is more than six years before the LCA came into effect, cannot be considered. For that reason, particulars of the charges and the evidence as to historical matters which occurred before 1 August 2002 are included only for background and contextual purposes.

[4] The third set of charges relates to the "R" complaint, which is laid under the LCA.

[5] The charges allege a large number of professional failures relating to the administration of estates, and of trusts. Some of the alleged failures involve an examination of Mr Campion's dual role as a lawyer and a trustee.[2]

[1] Section 351 LCA.
[2] The full charges and supporting particulars are attached to this decision as Appendix I.

Issues

S Complaint

Issue 1

1. Have the Standards Committee proved the five alleged set of failures between 1 August 2002 and 1 August 2008, and if so, were these sufficiently serious to amount to misconduct under the LPA; or should one of the lesser alternatives apply?

Issue 2

2. Have the Standards Committee proved the alleged professional failures after 1 August 2008, and if so, do these constitute misconduct under the LCA, or should one of the lesser alternatives apply?

R Complaint

Issue 1

1. At what date was a proper form of requirement that the practitioner resign as a trustee conveyed to him?

Issue 2

1. Was the practitioner providing "regulated services" to Mrs R or the R Trust, or was he purely acting, as he says, as a trustee?

Issue 3

1. If he was found to be a lawyer and to be in default of a request to resign as a trustee:

    (a) Does this constitute a wilful or reckless breach of r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008? or

(b) Is it conduct which would be regarded as disgraceful or dishonourable, such as to be misconduct?[3]

(c) If not misconduct, is the conduct "unprofessional" such as to fall within the definition of unsatisfactory conduct?[4]

Procedure

[6] Section 252 of the LCA provides the Tribunal with jurisdiction to determine its own procedure.

[7] It has to be recorded that, in these two proceedings, it has been difficult to engage the practitioner's cooperation. Despite a number of directions to do so, at no stage has Mr Campion filed a written response to the charges in either matter. Nor has he filed any affidavit evidence.

[8] Mr Campion was served on 16 October 2018 after difficulties arranging service by post, since he failed to provide a physical address.

[9] Mr Campion did not attend the first telephone conference on 22 November, despite being advised of it on 2 November, and the matter was set down for formal proof on 19 December 2018.

[10] The Standards Committee filed its submissions for the formal proof hearing on 12 December 2018.

[11] Between 17 and 19 December the practitioner sent a number of brief emails requesting an adjournment on medical grounds.

[12] Mr Campion failed to appear on 19 December 2018 but was granted an adjournment on the strict understanding that he would file a formal response to the charges and any affidavit evidence by 18 January 2019. Neither of those directions were complied with. Subsequently the matter was further set down for hearing on 12 March, again on a formal proof basis.

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[3] Section 7(1)(a)(i) or s 7(1)(a)(ii) LCA.
[4] Section 12 LCA.

[13] When the hearing commenced on 12 March 2019, Mr Campion appeared and advised that he was "*defending the charge*". He was requested to specify which witnesses he sought to cross-examine but indicated that he would simply be "providing arguments".

[14] Despite indicating that he would be relying on legal argument only, and not challenging the evidence, the practitioner then went on to give considerable oral evidence (five pages relating to the R complaint and a further four-and-a-half pages relating to the S complaint). None of this had been provided in advance to the Standards Committee, whose counsel was unprepared to cross-examine Mr Campion. The Tribunal was forced to adjourn the matter to a further date because of the practitioner's disregard of its previous directions and ambush of the proceedings.

[15] As pointed out by counsel for the Standards Committee, the practitioner has faced a number of earlier proceedings before the Tribunal and is well aware of its process.

[16] The Tribunal directed that Mr Campion was to provide his files again to the Standards Committee so that they could cross check the matters which had been raised by him in his oral evidence, before the matter resumed.

[17] On adjourning the matter, the Tribunal again directed that Mr Campion was to file a particularised formal response to the charges and each and every particular, and any affidavit in respect of evidence he may wish to give. He was warned that in default of doing so he may be debarred from defending the matter.

[18] Those documents were due on 9 April 2019 but had not been provided by the date of the resumed hearing on 14 May. For that reason, at the commencement of the hearing the Tribunal indicated that the only evidence it would accept from Mr Campion was the oral evidence which had been given by him on 12 March and transcribed, and in respect of which he was to be cross-examined at the 14 May hearing. No further evidence was permitted to be filed by the practitioner because of his flagrant disregard of previous directions.

[19] Because the hearing had to resume with two changes of members, the Tribunal determined that it should start the matter afresh on the basis that the oral evidence that had been given on 12 March was to be taken as read in the transcribed notes of

evidence, together with the affidavit evidence provided by the Standards Committee. The matter then proceeded with relatively lengthy cross-examination of Mr Campion, followed by legal arguments by both counsel.

[20] The Standards Committee later filed submissions on the issue of trustee-solicitor dual role, as requested, but no further submissions were received from the practitioner.

[21] This reserved decision is prepared then on the material outlined above, Mr Campion's oral evidence and the legal arguments made.

Background to the S Complaint

[22] This description is prepared using the particulars relied on in the charge and the factual summary contained in the submissions of the Standards Committee dated 12 December 2018 and evidence accepted.

[23] On 27 April 1955 the S family farm was transferred to Bill S and his sister Jessie S as tenants in common in equal shares.

[24] On 3 March 1969 Bill S established the WRRS Trust, by deed which was drafted by Mr Campion's law firm. The two signatures to the deed were also witnessed by the practitioner. The date of distribution of the Trust was to be "*the 3rd day of March in the year 2004 or such earlier date as may be fixed by the trustees in their sole discretion*".

[25] The deed provided that there would be at least two trustees at all times unless a "*trust company was engaged in that role*". The original trustees were Mr R C M and Mr R H.

[26] On 23 January 1970, Bill S's sister, Jessie S transferred her half-share in the farm to the trust. On the same date, the trust gave Jessie S a mortgage (dated 11 June 1969) over the half-share of the farm. The mortgage was registered over the certificate of title, and at that date the other half of the farm was still owned by Bill S.

[27] R C M (one of the trustees) died on 19 December 1972 and by deed dated 27 September 1973, Bill S appointed the practitioner as trustee in place of R C M.

Title to the half-share of the property was transmitted to R H as survivor and then to R H and the practitioner on 15 March 1977.

[28] By documents dated 5 November 1976 and registered on 15 March 1977, Bill S transferred half of his half-share of the farm (a quarter) to the WRRS Trust. Therefore, the trust owned three-quarters of the farm. The trust then gave Bill S a mortgage over three-quarters of the farm. (Despite there being a mortgage over half the farm already, in favour of Jessie S).

[29] In July 1995 Jessie S passed away. The practitioner was one of the executors of her estate and he carried out the estate administration. The other executor was Bill S.

[30] On 20 June 1996 Mr R H passed away, at which point the practitioner became the sole trustee of the WRRS Trust. From that time down to the time the investigation in these matters began in 2014 Mr Campion took no steps to have a second trustee appointed. The relevant period for this Tribunal is 1 August 2002 to the present time.

[31] In November 1996 Jessie S's interest as mortgagee was transmitted to Bill S and the practitioner as her executors. The practitioner prepared the transmission. In February 1997 the practitioner subsequently arranged for that same mortgage to be transferred from Bill S and himself (as executors) to Sheryl S (Bill S's daughter) and William Peter S.

[32] There is no person called William Peter S in the S family. It should have been transferred to Sheryl S and her brother Robert William S (known as Rocky).

[33] Bill S died in January 1999 and the practitioner carried out the administration of his estate. At the time of his death, Bill S still owned one-quarter of the farm, with the remaining three-quarters held by the WRRS Trust.

[34] In terms of the will, after providing for a life interest in his estate for his surviving wife Noeline S, on her death Bill S's quarter-share in the farm was to go to Rocky S and the balance to be divided equally between Rocky and his sister Sheryl S.

[35] It is convenient from this point to set out the events under the heading of each alleged failure, pursuant to Charge 1, which relates to the practitioner's actions on behalf of the WRRS Trust.

1. Failure Between 1 August 2002 and 27 November 2007 to Update the Title to Reflect Bill S's Death

[36] As recorded Bill S died in January 1999, owning one-quarter interest in the farm. Although the practitioner had responsibility to remove Bill S's name from the title to the farm and transfer it to his executors, he did not do so until 27 November 2007. That is almost nine years later. For our purposes the relevant period is over five years.

2. Failure Since 1 August 2002 to Account for the Fact that Bill S's Death Should Have Resulted in a Mortgage Being Discharged

[37] After Bill S's death in 1999 the practitioner had an obligation to offset debts including discharging the mortgage. At no stage did this occur.

[38] Furthermore, the Committee alleges that the practitioner's failure to account for this or attend to this professional duty was ongoing and therefore forms the basis for the post 1 August 2008 charge also.

3. Failure to Take Account of Rocky S's Death When Updating Title

[39] By the time the practitioner eventually did update the title in November 2007, to account for the death of Bill S, one of Bill S's executors had also died, namely Rocky S, who died on 8 June 2005.

[40] Despite Rocky S's death the practitioner arranged for Bill S's interest in the property to be transferred to Rocky S and the other executors rather than as it should have been, to only the surviving executors.

4. Failure Since 1 August 2002 to Administer the WRRS Trust in Accordance with the Deed

[41] The deed provided that there were to be at least two trustees at all times and that the final date of distribution was to be 3 March 2004.

[42] Not only did the practitioner fail to ensure the replacement of Mr R H who died in June 1996, but he also failed to take steps to distribute the trust by the final date of distribution, being 3 March 2004. Both of these actions were in contravention to the terms of the deed of trust.

5. Failure to Update the Title (mortgage)

[43] In January 1970 the practitioner and Mr R H, the two trustees of the WRRS Trust at that time, granted a mortgage over the farm in favour of Sheryl S and William Peter S. As set out above there was no such person as William Peter S and this would appear to have been an error by the practitioner in registering the mortgage. On 26 March 2008 Sheryl S wrote to the practitioner and drew this error to his attention, asking him to rectify it.

[44] The practitioner took no steps to correct this error which is alleged by the Committee to constitute a further failure to perform his duties professionally and with reasonable care, in a timely manner.

In Relation to Charge 2 the Following Failures are also Alleged

(i) Failure to competently administer the estates of Noeline S and Bill S

[45] Noeline S died on 3 August 2012. The practitioner was responsible for the administration of her estate. In Bill S's will he left a life interest in his estate to his wife. Her passing therefore made it possible and appropriate to wind up both the estates.

[46] That process ought to have involved updating the relevant titles to land. The practitioner did not update the title in that:

(a) Bill S's quarter-share in the farm was not transferred to Rocky S's estate; and

(b) Noeline S's name was not removed as an executor of Bill S's estate on the title.

(ii) Further Failures to Update the Title

[47] On 29 July 2013 Sheryl S wrote to the practitioner and, among other concerns, raised the winding up of Bill S's estate and the updating of the title. The practitioner did not reply substantively until 6 March 2014, nearly nine months later, when he sent a letter and statement purporting to show the wind up of Bill S's estate. However, the statement was incomplete and incorrect in its treatment of GST.

[48] Again, in May 2014, Sheryl S wrote to the practitioner to raise the title updating issue. The practitioner promptly replied saying that he was taking steps to correct the "William Peter S" name on the title.

[49] However, by August 2014 Sheryl S was dissatisfied with progress and engaged another lawyer to correspond with the practitioner about the concerns she had previously raised. Urgency was repeatedly impressed upon the practitioner by the new lawyer, but his response was to the effect that he could not update the title as that was the responsibility of Sheryl S's new lawyer to set up the eDealing. He did not provide any explanation as to, and took no steps in relation to the release of the mortgages. He did not provide a copy of the trust deed when requested and he blamed the lack of client instructions for the situation which existed.

[50] After the Standards Committee appointed an investigator to report concerning the outstanding issues between the complainant and the practitioner she identified, in a lengthy report a very long list of failures but in summary pointed to the fact that:

(a) a number of steps were still needed to be taken to update the title;

(b) when the practitioner had wound up Bill S's estate he failed to realise that Noeline S had incorrectly spent $34,000 of Bill S's capital, leading to one beneficiary receiving more than she should have;

(c) the practitioner had failed to prepare a trust account statement for Bill S's estate, that being a fundamental requirement of trust accounting and estate administration; and

(d) in relation to the WRRS Trust:

(i) the practitioner had not retained a copy of the document appointing him as trustee;

(ii) it appeared that the assets of the Trust had already been effectively distributed for financial purposes although when was not clear; and

(iii) despite this effective distribution the practitioner did not prepare any relevant trustee resolutions or a deed of distribution and not arrange for the farm's title to be updated.

Background to the R Complaint

[51] The evidence filed in respect of this complaint was that the practitioner had acted for a number of years for Mrs R and her late husband J R and their associated family trust, the R Family Trust.

[52] The R Family Trust was set up by the practitioner. The trust was set up as part of an estate planning exercise. Mr and Mrs R had been married before and each of them had children from their prior marriages. They wanted to provide for each other during their respective lifetimes and on the last of them to die, they wanted the assets of the trust to be divided between their respective children.

[53] The original trustees of the trust were Mr R, Mrs R and the practitioner.

[54] Clause 1.1 of the trust deed defines the Appointors as Mr R and Mrs R. They each had a right to appoint one trustee (clause 13.1). Clause 13.1(c) provided that each of the appointors could in their will nominate a person to exercise the power of appointment. Clause 13.1(d) provided that if the appointor did not nominate someone in their will to hold the power of appointment, then the power would be held by the administrator of the estate of the deceased appointor. Clause 13.1(e) provided that each appointor had the power to remove any existing trustee appointed by that appointor.

[55] Mr J R passed away in July 2014 and was not replaced as a trustee.

[56] By 2015 Mrs R was concerned about the practitioner's services, particularly in relation to the estate of her late husband. She decided to remove the practitioner as a trustee and appoint her granddaughter in his stead. She approached another firm to prepare the appropriate documents and these were forwarded to the practitioner on 18 December 2015.

[57] The firm sent the practitioner a deed of retirement and appointment of new trustee and requested that he sign it. The practitioner was followed up a number of times to sign the deed. On 17 March 2016 he was followed up once again and forwarded a further document dated 11 March 2016. This document was signed by the administrator or Mr R's estate and Mrs R. The document was called "Exercise of Power to remove Trustees".

[58] The delay in the practitioner signing the retirement documents was not because of the failure of Mrs R's new lawyers to provide evidence of the proper exercise of the power to remove him. Instead, the practitioner expressed doubts about the wisdom of what Mrs R wished to do with the trust assets. He was concerned that Mrs R did not have a full appreciation of the trust and its purpose. He raised possible issues of elder abuse and Mrs R's mental competency. Although Mrs R's new lawyers advised that his concerns were misplaced, and any subsequent issues associated with trustees exercising their powers were not of concern to the practitioner, the practitioner failed to sign the documents removing him.

[59] Mrs R passed away in May 2016. Mrs R's death meant that delays due to the practitioner's concerns of elder abuse or her not understanding the trust fell away. The trustees and executors of Mrs R's estate made further requests to the practitioner to execute the documents. Finally, the practitioner signed the documents on 18 August 2016.

Discussion of Issues

S Complaint

Issues 1 and 2

[60] The Tribunal considers that Charges 1 and 2, the first relating to the period 1 August 2002 until 1 August 2008 and the second 1 August 2008 down to the present

time, have both been established on the balance of probabilities having regard to the serious nature of the allegations. The professional failures of the practitioner to his client in respect of the administration of the Trust and the estates which he administered for this family are multiple and very serious. In relation to the first period, which is governed by s 112 of the LPA, the High Court had adopted the following standard in the decision of *Complaints Committee 1 of the Auckland District Law Society v APC*.[5] In that decision the full Court found that intentional wrongdoing was not an essential element of a charge under s 112(a) and that such a formulation would be too narrow. They adopted the well-known passage from *Pillai v Messiter*.[6]

[61] The Court in APC stated:[7]

> "[33] … While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner."

[62] We consider that, in the numerous failures which have been established by the Standards Committee, the practitioner did demonstrate such serious negligence as to amount to "*indifference to and an abuse of the privileges*" of a legal practitioner. In relation to the second period of time, which is governed by the definition of misconduct in the LCA (s 7) the above standard has also been applied. It can readily be seen that the conduct complained of could either be viewed as "disgraceful or dishonourable" as pleaded under s 7(1)(a)(i) or at least a reckless contravention of the Rules of Client Conduct and Care,[8] as pleaded in the Charge (s 7(1)(a)(ii) LCA).

[63] The errors of themselves are serious, are multiple and have existed over a number of years without rectification by the practitioner.

[64] Furthermore, the practitioner cannot hide behind his "trustee hat" while also performing legal services for the Trusts and the relevant Estates and not attending to the various breaches of trust involved by his serious negligence.

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[5] CIV 2007-404-4646, 29 April 2008, Judgment of the full Court.
[6] *Pillai v Messiter* [No. 2] (1989) 16 NSWLR 197 (Kirby P).
[7] Above n 5.
[8] Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008.

[65] The consequences for the client are serious and will involve expensive rectification.

[66] Since we have found liability to be at the highest level, we do not need to consider whether the lesser alternatives apply.

R Complaint

Issue 1 – At what date was a proper form of requirement that the practitioner resign as a trustee conveyed to him?

[67] When Mrs R's new lawyers wrote to the practitioner on 18 December 2015, enclosing a deed of retirement and appointment of new trustee, there was no reference as to who was exercising the power to remove the practitioner. It was not until the communication of 17 March 2016 that a document was provided to the practitioner showing the exercise of the power to remove the practitioner. That document was correctly signed by Mrs R and the trustees and executors of Mr R's estate, as they held the power to remove the jointly appointed trustee pursuant to clause 13.2(d) of the trust deed. At this point, the power to remove trustees was legitimately exercised by those entitled to exercise that power.

[68] Paragraph 4 of the particulars provided in relation to the charges say that "*Mrs R was the person with power of appointment and removal of trustees*". This is not correct. Mrs R held the power to appoint and remove her own preferred trustee. She could not exercise her late husband's power as that power was held by the trustees of Mr R's estate.

[69] Although it is open to the Tribunal to take a view that the practitioner failed to respond to requests for this resignation from 18 December 2016, the Tribunal has chosen not to do so. As notice of exercise of the power to remove the practitioner was properly provided to the practitioner on 17 March 2016, the Tribunal considers that is the correct starting point for measurement of the delay in the signing of the retirement documents. The delay therefore was four months and 26 days.

[70] The answer to Issue 1 is therefore 17 March 2016.

Issue 2 – Was the practitioner providing "regulated services" to Mrs R or the R Trust, or was he purely acting, as he says, as a trustee?

[71] The practitioner submitted that at all material times, he was acting as a trustee and not as a lawyer. The practitioner argued that his conduct should not be the subject of disciplinary proceedings because he was acting as a trustee of the trust and was not providing legal services.

[72] The Tribunal has considered *Shrewsbury v Rothesay* and *TE v Wellington Standards Committee 2*.

[73] In the Shrewsbury case the Legal Complaints Review Officer (LCRO) noted (paragraph [27]) that the roles of solicitor and executor/trustee are distinct even if they are held by the same person. However, the LCRO considered that this distinction did not resolve the issue, which the LCRO have framed as follows:

> "The question is whether the work of an executor/trustee of an estate who is also the solicitor of the estate is properly regarded as "work that is incidental" to the other established classes of legal work set out in s 6 of the Act."

[74] The LCRO noted (paragraph [29]) that one of the central purposes of the Act was to protect consumers of legal services and conveyancing services. As a result the LCRO considered that it was appropriate to interpret the Act in a way which was consistent with the protection of consumers of legal services.

[75] The LCRO considered that this intention would be thwarted "*if the legislation were interpreted to exclude from its scope functions which a lawyer routinely undertakes alongside the provision of legal services but these were not considered to be regulated services*".

[76] In the Shrewsbury case LCRO concluded that the work of an executor/trustee who acted as a solicitor for an estate would be regulated services.

[77] Similarly, in *TE v Wellington Standards Committee 2*, TE was a lawyer as well as the executor/trustee of NR's estate. TE had acted as NR's lawyer for at least 15 years. NR's daughter NT subsequently complained about TE's conduct in administering the estate, and in particular actions taken by TE which NT considered were in contravention of NR's Will.

[78] NT sought to rely on Shrewsbury, whereas TE argued that his decisions were made solely in his capacity as a trustee of the estate.

[79] The LCRO stated (paragraph [49] onwards):

> I agree that [TE's] arguments may have some merit where the conduct complained of him can quite clearly be identified as conduct undertaken in the lawyer's capacity as executor/trustee. Conduct that would fall into this category would be conduct undertaken with regard to disposal of the deceased's body, and… distribution of the deceased's person affects.
>
> However much of what a lawyer does in the administration of an estate when acting in the dual capacity of solicitor and executor/trustee can be considered to be conduct in either capacity, or can readily be identified as a conduct in the capacity of a lawyer for the Estate.
>
> A helpful approach when categorising the conduct would be to consider the conduct as being undertaken by two separate persons, and to then determine whether the conduct in question could be considered to be the conduct of a lawyer acting for the Estate. If the conduct in question is conduct that a lawyer acting for the Estate would be responsible for, then it can be considered that the lawyer in that instance is providing regulated services and is therefore subject to the disciplinary regime.

[80] It is therefore necessary to consider each of the matters complained of and determine whether the practitioner's conduct in question was taken in his capacity of a lawyer, or whether he was exercising discretion as a trustee only.

[81] The practitioner had acted as a lawyer for a number of years for both Mr R and Mrs R. Arising out of advice provided to Mr R and Mrs R, the R Family Trust was set up. He was appointed as the independent trustee at inception no doubt because of his knowledge of Mr and Mrs R's affairs and knowledge of their wishes in relation to their assets and how the trust was to manage them for their respective lifetimes.

[82] The reasons provided by the practitioner as to why he did not execute the deed of retirement were due to his concern about Mrs R's mental capacity and possible elder abuse by one of Mr R's children. To satisfy his concerns, the practitioner required Mrs R's new lawyers to provide advice as to Mrs R's capacity.

[83] The practitioner's request to Mrs R's new lawyers for an assurance about Mrs R's capacity is a matter which a lawyer would take if acting for an elderly client where there were genuine concerns about her decision making. Put another way, it would be most unusual for a lay person to place such a requirement on their valid

removal as an independent trustee of a trust. Nor would a lay person be expected to fully understand the effect that a delay in signing the documents would have in the orderly administration of the trust's affairs and the implementation of Mrs R's wishes to release some of the trust's assets to Mr R's son.

[84] The Tribunal has also taken into account the fact that the practitioner's appointment as a trustee from inception of the trust was to facilitate an estate planning exercise as between Mr and Mrs R who each had their own families and wished to structure their affairs in a pre-determined way.

[85] The Tribunal is satisfied the practitioner was acting in a dual role of trustee and lawyer in refusing to sign the documents to give effect to his removal as a trustee of the trust. Accordingly, the practitioner's conduct can be considered to fall within the definition of "regulated services" and subject to the disciplinary regime.

Issue 3

[86] If the practitioner was found to be a lawyer and to be in default of a request to resign as a trustee:

(a) Does this constitute a wilful or reckless breach of r 3? Or

(b) Is it conduct which would be regarded as disgraceful or dishonourable, such as to be misconduct?[9]

(c) If not misconduct, is the conduct "unprofessional" such as to fall within the definition of unsatisfactory conduct?[10]

[87] We find the charges against the practitioner in relation to the R complaint to have been proved.

[88] We do not consider the breach of rr 2.3, 3, 3.1, or 4.3 to be reckless or wilful. We find the breaches of the relevant rules to reach the threshold of unsatisfactory conduct, as the practitioner's conduct was "unprofessional". The practitioner should have signed the documents to give effect to his removal as a trustee of the R Family trust promptly, at least after 17 March 2017. The Tribunal finds the delay of four

[9] Section 7(1)(a)(i) or s 7(1)(a)(ii) LCA.
[10] Section 12 LCA.

months and 26 days to be an unacceptable delay. The reasons put forward by the practitioner for the delay are not accepted given that Mrs R had instructed other lawyers to act for her and they had advised the practitioner that his concerns were not his issue going forward.

[89] Although the delay of over four and a half months is significant, we consider it to be closer to the level of "unprofessional conduct" than "disgraceful or dishonourable".

[90] We therefore find that the conduct falls into the "unsatisfactory conduct" level of culpability.

[91] The Standards Committee are to file any further submissions as to penalty within 14 days of the date of this decision.

[92] Mr Campion may have a further 14 days to file his submissions on penalty. Mr Campion should set out his financial position so that the question of costs may be properly considered.

DATED at AUCKLAND this 19th day of July 2019

Judge D F Clarkson
Chair

Appendix 1

The S Complaint

Charge 1

Waikato Bay of Plenty Standards Committee No.1 (**Standards Committee**) hereby charges John Campion (**Practitioner**), of Hamilton, that he committed a disciplinary offence under s 112 Law Practitioners Act 1982 (**the 1982 Act**), in that he engaged in conduct between 1 August 2002 and 31 July 2008 that constituted:

(a) Misconduct in his professional capacity, pursuant to s 112(1)(a) of the 1982 Act;

In the alternative:

(b) Conduct unbecoming a barrister and solicitor, pursuant to s 112(1)(b) of the 1982 Act;

In the alternative:

(c) Negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute, pursuant to s 112(1)(c) of the 1982 Act.

Charge 2

The Standards Committee further charges that the Practitioner committed a disciplinary offence under s 241 Lawyers and Conveyancers Act 2006 (**the 2006 Act**) in that he engaged in conduct on or after 1 August 2008 that constituted:

(a) Misconduct within the meaning of either s 7(1)(a)(i), s 7(1)(a)(ii) and/or s 7(1)(b)(ii) of the 2006 Act;

In the alternative:

(b) Unsatisfactory conduct within the meaning of s 12(a) and/or (b) and/or (c) of the 2006 Act.

In the alternative:

(c) Negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute, pursuant to s 241(c) of the 2006 Act.

Particulars:

1. At all material times since 1 August 2002 the Practitioner held a practising certificate as a barrister and solicitor issued under either the 1982 Act or the 2006 Act.

Creation of WRRS Trust

2. On 3 March 1969 Mr William Robert Richmond S (**Bill S**) established the WRRS Trust by deed.

3. The deed creating the WRR S Trust was drafted by the Practitioner's law firm, and the Practitioner witnessed two of the signatures to the deed.

4. Clause 3 of the deed stated:

> The date of distribution hereinbefore referred to shall be the 3rd day of March in the year 2004 or such earlier date as may be fixed by the Trustees in their sole discretion.

5. Clause 10 of the deed stated:

The number of Trustees shall at all times be kept up to at least two in number unless the Trustees be a "trust company" within the meaning of the Trustee Act 1956.

6. On 27 September 1973 the Practitioner was appointed a trustee of the WRRS Trust.

7. At that time the only other trustee of the WRRS Trust was Mr R H.

WRRS Trust acquires share of S family farm

8. The WRRS Trust acquired a share of the S family farm located near Morrinsville (**the Farm**).

9. On 23 January 1970 Bill S's sister, Jessie S, transferred her ½ share in the Farm to the WRRS Trust.

10. On that date the WRRS Trust gave Jessie S a mortgage over the ½ share of the Farm.

11. This mortgage was recorded on the certificate of title of the Farm (**the Title**) as Mortgage S461752.

12. As at 23 January 1970 the other ½ share of the Farm was owned by Bill S.

13. On 15 March 1977 Bill S transferred ½ of his ½ share of the Farm (ie a ¼ share of the Farm) to the WRRS Trust.

14. Therefore the WRRS Trust now owned ¾ of the Farm, and Bill S owned the remaining ¼.

15. On 15 March 1977 the WRRS Trust gave Bill S a mortgage over ¾ of the Farm.

16. This mortgage was recorded on the Title as Mortgage H122397.5.

Jessie S passes away

17. On 25 July 1995 Jessie S passed away.

18. The Practitioner was one of the executors of her estate, and carried out the estate administration.

19. The other executor was Bill S.

20. On 20 June 1996 R H passed away.

21. The Practitioner became the sole trustee of the WRRS Trust from that point.

22. On 29 November 1996 Jessie S's interest as mortgagee under Mortgage S461752 was transmitted to Bill S and the Practitioner as her executors.

23. The Practitioner prepared the transmission.

24. On 7 February 1997 the Practitioner subsequently arranged for that interest in Mortgage S461752 to be transferred from Bill S and himself (as executors) to Sheryl S and "William Peter S".

25. Sheryl S is Bill S's daughter.

26. There is no person called "William Peter S" in the S family.

27. The Practitioner should have arranged for the interest in Mortgage S461752 to be transferred to Sheryl S and her brother Robert William S (**Rocky S**).

Bill S passes away

28. On 7 January 1999 Bill S passed away.

29. At the time of his death Bill S still personally owned a ¼ share of the Farm.

30. The remaining ¾ share was held by the WRRS Trust.

31. The Practitioner carried out the administration of Bill S's estate.

32. On 5 February 1999 probate was granted in relation to Bill S's estate.

33. According to Bill S's will, the executors of Bill S's estate were his widow N S (**Noelene S**), and his children Rocky S and Sheryl S.

34. The will provided:

    a. N S was to be given a life interest in Bill S's estate.

    b. On Noelene S's death:

        i. Bill S's ¼ share in the Farm was to go to Rocky S.

        ii. The balance of the estate was to be divided equally between Rocky S and Sheryl S.

35. It is a normal part of estate administration to remove the deceased's name off a certificate of title.

36. At the time of Bill S's death, Bill S's ¼ share in the Farm and his interest as mortgagee under Mortgage H122397.5 should have been transmitted into the name of his executors (ie Noelene S, Sheryl S and Rocky S).

Charge 1

Failure between 1 August 2002 and 27 November 2007 to update Title to reflect Bill S's death

37. Between 1 August 2002 and 27 November 2007 the Practitioner failed to take steps to update the Title to reflect Bill S's death.

38. The Practitioner did not arrange for the Title to be updated to reflect Bill S's death until 27 November 2007.

Failure since 1 August 2002 to account for the fact that Bill S's death should have resulted in Mortgage H122397.5 being discharged

39. At no stage after 1 August 2002 did the Practitioner account for the fact that Bill S's death resulted in offsetting debts, which meant that Mortgage H122397.5 should have been discharged after it was transferred to Bill S's executors.

Failure to take account of Rocky S's death when updating Title

40. On 8 June 2005 Rocky S passed away.

41. Despite Rocky S dying on 8 June 2005, when the Practitioner registered documents on 27 November 2007 transmitting/transferring Bill S's ¼ share in the Farm and Bill S's interest in mortgage H122397.5, the Practitioner arranged for those interests to be transmitted/transferred to Rocky S, Sheryl S and Noelene S, as executors of Bill S's estate.

42. Given Rocky S's death, the Practitioner should have arranged for those interests to be transmitted to Sheryl S and Noelene S as executors of Bill S's estate.

Failure since 1 August 2002 to administer WRRS Trust in accordance with deed

43. Despite the fact that Mr H had died on 20 June 1996, it was not until 6 December 2007 that the Title was updated to remove Mr H's name as one of the owners of the ¾ share.

44. Despite the express wording of clause 10 of the deed, the Practitioner did not take sufficient steps since 1 August 2002 to ensure that a second trustee was appointed to the WRRS Trust at any stage since Mr H's death.

45. Despite being the solicitor acting for, as well as the sole trustee of, the WRRS Trust, the Practitioner failed to take steps to arrange for the trust to be formally distributed by 3 March 2004 (ie the date required by clause 3 of the Trust Deed).

Failure to update Title

46. On 26 March 2008 Sheryl S's lawyer wrote to the Practitioner at Sheryl S's request, highlighting/querying the following issues:

    a. The Title needed to be updated to reflect the fact that Rocky S had passed away.

    b. Whether a second trustee had been appointed for the WRRS Trust, and if so, the Title needed to be updated.

    c. The Title recorded that two mortgages were outstanding on the Farm:

        i. R H and the Practitioner had granted a mortgage over ½ of the Farm to "William Peter S" and Sheryl S.

        ii. R H and the Practitioner had granted another mortgage over ¾ of the Farm to Sheryl S, Rocky S and Noelene S.

47. The letter stated:

> I think there must be something wrong because the [WRRS Trust] appears to own a ¾ share in total, but the two mortgages (which refer to different proportions) are over the same interest in the land. Sheryl also tells me that there is no William Peter S, so I am not sure who that should in fact refer to.
>
> Could you please check the title and tidy up whatever needs to happen there to correct the notations.

48. On 15 May 2008 the Practitioner filed documents as follows:

    a. Mortgage H122397.5 was transmitted to Sheryl S and Noelene S as executors for Bill S (ie Rocky S's name was removed).

    b. The ¼ share of the property was transmitted to Noelene S and Sheryl S as executors for Bill S (ie Rocky S's name was removed).

49. As at 15 May 2008 the Title still recorded that Mortgage S461752 was owed by R H and the Practitioner to "William Peter S" and Sheryl S.

Charge 2

Noelene S passes away

50. On 3 August 2012 Noelene S passed away.

51. The Practitioner carried out the estate administration.

52. Probate was granted on 8 October 2012 to Sheryl S as executor.

53. Noelene S's estate was left to either Sheryl S personally or a trust in Sheryl S's name.

Failure to competently administer estates of Noelene S and Bill S

54. As a result of Noelene S's passing, and her life interest in Bill S's estate lapsing, it was now possible to wind up Bill S's estate.

55. It is a normal part of an estate wind-up on the death of a life interest beneficiary to deal with the assets which have been subject to the life interest.

56. The Practitioner failed to deal with Bill S's ¼ share in the Farm in a timely fashion, by failing to transfer it to Rocky S's estate.

57. The Practitioner also failed to any steps to remove Noelene S's name as an executor of Bill S's estate from the Title.

58. It is normal practice for a lawyer to ensure that Noelene S's name was removed from the title of the Farm after her death.

Correspondence with Sheryl S/Failure to update Title

59. On 29 July 2013 Sheryl S wrote to the Practitioner. The letter noted:

    a. Sheryl S was the only surviving executor of Bill S's estate – "[t]herefore I have obligations myself and would like to complete these in a timely fashion".

    b. Sheryl S had spoken with the Practitioner about the winding up of Bill S's estate on 13 March 2013, 2 July 2013, and some time in the week leading up to 29 July 2013.

    c. She was still waiting to hear from the Practitioner regarding whether the Title was up-to-date.

60. On 6 March 2014 the Practitioner sent Sheryl S a letter enclosing a statement purporting to show the wind-up of Bill S's estate.

61. The statement was defective in the following respects:

    a. The statement was incomplete.

    b. The treatment of GST on invoices was incorrect.

62. However ultimately Sheryl S still received the correct amount of funds.

63. On 28 May 2014 Sheryl S emailed the Practitioner regarding updating the Title.

64. On 29 May 2014 the Practitioner responded by email, stating "Thanks for the detail will prepare the necessary forms for signature and arrange with you when they are ready".

65. On 12 August 2014 Sheryl S's lawyer wrote to the Practitioner at her request.

66. The letter raised the following issues:

    a. Sheryl S was "very concerned about the apparent lack of action (and what looks like neglect) in respect of the administration of her father's estate and trust".

    b. The Practitioner had been recorded as the sole trustee of the WRRS Trust on the Title since 2007. The lawyer queried why a second trustee had not been appointed.

    c. There appeared to be a number of issues with the Title:

        i. Noelene S was still listed as a part owner of a ¼ share, despite passing away on 2 August 2012.

        ii. Mortgage S461752 was still recorded as being owed to "William Peter S" and Sheryl S. The lawyer stated that there was no such person as "William Peter S". The lawyer queried why the mortgage had not been released.

    d. Whether there was any money owing in relation to Mortgage H122397.5.

67. The letter also stated:

> Sheryl instructs us that despite phone calls, correspondence and meetings with you, she remains unconvinced that appropriate actions have been taken and the deficiencies in the management of the various estates continue. She has little confidence that the estates/the trust are being efficiently administered.
>
> …

> These files need your attention. Administration needs to be completed and the properties transferred to their correct ownerships and proper recording statements provided to the executors and beneficiaries.

68. On 29 August 2014 the Practitioner responded to Sheryl S's lawyer, stating:

> The blockage has always been the question of "William Peter S" and who and what he was. We note your advice that he does not exist. On that basis we have looked further into various papers and are satisfied that the reference is to William Robert S [sic]. That being the case we are taking steps to effect a change of name.

69. The Practitioner also advised that he could not arrange the remainder of the transfer of interests, and that it would be necessary for Sheryl S's lawyer to "set up e-dealings".

70. On 2 September 2014 the Practitioner arranged for the Title to be corrected, so that the name of "William Peter S" to be replaced by the name of "Robert William S" in Mortgage S461752.

71. On 12 September 2014 the Practitioner wrote to Sheryl S's lawyer.

72. In that letter the Practitioner referred to Mortgages S461752 and H122397.5. The Practitioner stated "There are not as far as we are aware any funds outstanding under the mortgages".

73. On 22 October 2014 Sheryl S's lawyer wrote to the Practitioner, requesting the following information:

    a. An explanation for why the two mortgages had not been released if there was no money owing on them. The letter stated "you as the solicitor acting would be the person we would expect to have the relevant knowledge in respect of those mortgages".

    b. A copy of the deed for the WRRS Trust.

74. The Practitioner replied by letter dated 28 November 2014.

75. The Practitioner did not provide a copy of the deed for the WRRS Trust as requested.

<u>Complaint and investigation</u>

76. On 20 May 2015 Sheryl S filed a complaint against the Practitioner with the New Zealand Law Society.

77. On 12 October 2016 the Standards Committee appointed Ms Wanda Hendrikse, Partner, McBreens Solicitors (**the Investigator**), as an investigator pursuant to s 144(1) of the 2006 Act.

78. After reviewing various pieces of information (including the Practitioner's files) the Investigator provided her report on 8 June 2017 (**the Report**).

79. The Report concluded:

    a. The Practitioner acted as a lawyer in relation to:

        i. The administration of Bill S's estate.

        ii. The administration of Noelene S's estate.

        iii. The administration of the WRRS Trust.

    b. The Practitioner should have arranged for Mortgage H122397.5 to be discharged following Bill S's death.

    c. A number of steps needed to be taken in order to update the Title, which should have recorded as follows:

        i. Sheryl S holding a 3/8 share.

        ii. Rocky S's estate holding a 5/8 share.

iii. Both mortgages H122397.5 and S461752 discharged.

d. When the Practitioner wound up Bill S's estate following Noelene S's death, he failed to realise that Noelene S had incorrectly spent $34,000 of Bill S's estate capital.

e. The effect of this was that when Bill S's estate was distributed, Sheryl S received $17,000 more than she should have, and Rocky S's estate received $17,000 less than it should have.

f. In relation to Bill S's estate:

i. Apart from an initial draft statement of assets and liabilities sent to Sheryl S on 10 March 1999, there was no other trust account statement on the Practitioner's file.

ii. The existence of a trust account statement is a fundamental requirement of trust accounting and estate administration.

g. In relation to the WRRS Trust:

i. The Practitioner had not retained a copy of the document appointing him as a trustee.

ii. The Practitioner failed to insist on a second trustee to be appointed at any stage after Mr H's death on 20 June 1996, in contravention of the deed.

iii. The Practitioner did not arrange for Mr H's name to be removed from the Farm's title until 2007, whereas this should have been attended to in 1996.

iv. It appeared that the assets of the WRRS Trust have already been effectively distributed for financial purposes, although it was not possible to say when this happened.

v. Despite the assets being effectively distributed for financial purposes:

1. The Practitioner did not prepare any trustee resolutions to distribute the assets;

2. The Practitioner did not prepare a deed of distribution to be signed by the WRRS Trust or the beneficiaries; and

3. The Practitioner did not arrange for the Farm's title to be updated.

Therefore the Practitioner committed Charge 1 as follows:

80. The Standards Committee refers to paragraphs [4], [5], [37] to [49] and paragraphs [77] to [79] above. Between 1 August 2002 and 31 July 2008 the Practitioner acted as a lawyer in relation to:

a. The administration of the estate of Bill S;

b. The administration of the estate of Noelene S; and

c. The WRRS Trust.

81. The above paragraphs, either separately or cumulatively, amount to a breach of any or all of ss 112(1)(a) to (c) of the 1982 Act.

And/or the Practitioner committed Charge 2 as follows:

82. The Standards Committee refers to paragraphs [5], [44], and [50] to [79] above. Since 1 August 2008 the Practitioner acted as a lawyer in relation to:

    a. The administration of the estate of Bill S;

    b. The administration of the estate of Noelene S; and

    c. The WRRS Trust.

83. The above paragraphs, either separately or cumulatively, show that the Practitioner acted contrary to his obligations under Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008).

84. The above paragraphs, either separately or cumulatively, amount to a breach of any or all of ss 7(1)(a)(i), 7(1)(a)(ii), 7(1)(b)(ii), 12(a) to (c) and 241(c) of the 2006 Act.

The R Complaint

Charge

Waikato Bay of Plenty Standards Committee No. 1 (**Standards Committee**) hereby charges John Campion (**Practitioner**), of Hamilton with:

> Misconduct within the meaning of either s 7(1)(a)(i), s 7(1)(a)(ii) and/or s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 (**Act**);
>
> In the alternative:
>
> Unsatisfactory conduct within the meaning of s 12(a) and/or (b) and/or (c) of the Act.

Particulars:

1 At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand.

2 The Practitioner acted for a number of years for P R (**Mrs R**) and the JF and PB R Family Trust (**the Trust**).

3 The Practitioner was also a trustee of the Trust.

4 Mrs R was the person with power of appointment and removal of trustees.

5 In 2015 Mrs R approached another law firm, GHL (**GH**) because she was unhappy with the Practitioner's services in relation to various matters arising both from his representation of her and his role as a trustee.

6 Mrs R decided to exercise her power to remove the Practitioner as a trustee of the Trust.

7 Through her new solicitors the appropriate deeds were prepared and sent to the Practitioner for the purpose of removing him as a trustee and appointing Mrs R's grand-daughter, T W (*Ms W*) to replace him.

8 The Practitioner refused to execute the documents or accept his removal as trustee, as follows:

    (a) On 18 December 2015 the Practitioner was sent a deed of retirement and appointment of new trustee, which it asked the Practitioner to sign and return as soon as possible;

    (b) On 21 January 2016 the Practitioner replied that the matter was "under consideration";

(c) Following multiple further communications from GH, the Practitioner replied by letter on 3 February 2016.

(d) In that letter the Practitioner said:

(i) That it was a complex and not straight forward matter;

(ii) He was not sure that Mrs R had a full appreciation of the position;

(iii) There could be issues of "elder abuse" and "mental competency";

(e) On 18 March 2016 the Practitioner sent GH an email which repeated these matters and added that he was concerned the new trustee might exercise her power "in such a way as it would be regarded as a fraud on the power".

(f) Also on 18 March 2016, GH replied, saying the Practitioner's concerns were misplaced but, in any case, "given you have been removed as a trustee any subsequent issues associated with the trustees exercising their powers are not matters relevant to you".

(g) GH repeated its request for the Practitioner to complete the documents as required.

(h) In April and May 2016 there were further communications between the Practitioner in which GH asked the Practitioner to execute the documents and the Practitioner refused.

(i) In May 2016 Mrs R passed away.

(j) Ms W and JE (**Mr E**) were appointed as the executors of her estate.

(k) In June and July 2016 GH made further requests of the Practitioner to execute the documents, noting that his ongoing refusal to do so was now inhibiting the ability of Ms W and Ms E (sic) to perform their role as executors.

(l) In a letter of 5 July 2016 the urgency of the situation was brought to the Practitioner's attention, as there was an unconditional cash offer for the trust property.

(m) On 1 August 2016 GH again requested the Practitioner sign the documents.

(n) GH also advised that in the interim the prospective buyer had withdrawn their offer.

9 On 17 May 2017 Ms W and Mr E wrote to the New Zealand Law Society, complaining about the Practitioner's conduct. They alleged breaches of Rules 2.3, 3.1 and 4.3.

10 In the following months the Committee corresponded with the complainants and the Practitioner before issuing a Notice of Determination on 16 January 2018.

11 The Committee alleges that the Practitioner is guilty of misconduct (or alternatively unsatisfactory conduct) on the following bases (viewed either individually or collectively):

(a) The Practitioner failed to act in a competent and timely manner in relation to the Trust, in breach of Rule 3;

(b) The Practitioner continued to act in relation to the Trust after the retainer had been terminated and refused to execute a Deed of Retirement and Appointment concerning his retirement as a trustee in breach of Rules 2.3 and/or Rule 4.3;

(c) The Practitioner failed to treat the complainants with respect and courtesy, in breach of Rule 3.1.