LCRO 207 & 208/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [A North Island] Standards Committee
BETWEEN	**MR XB** and **MR XC** Applicants
AND	**[A North Island] Standards Committee** Respondent

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

Decision

Introduction

[1] Mr XB and Mr XC have applied for a review of the determination by [A North Island Standards Committee] that their conduct constituted unsatisfactory conduct as defined in s 12(c) of the Lawyers and Conveyancers Act 2006, by reason of breaches of the Act, and the Lawyers and Conveyancers Act (Trust Accounts) Regulations 2008.

[2] The facts giving rise to the determination by the Standards Committee to conduct an own motion enquiry reveal an unusual mingling of trust account and firm funds as well as an unusual alignment by a lawyer with the interests of his client.

Background

[3] I have taken the liberty of incorporating the facts as recorded by the Standards Committee, and then by Mr BA in submissions on behalf of the Standards Committee, in full into this decision. It is necessary to record these to

enable readers of this decision to have a full understanding of the matters with which this decision is concerned.

[4] The Standards Committee wrote:[1]

> 5. Sums of $61,359 and $20,000 were transferred from a trust ledger that was in the name of the client to the ledger in the name of [Law Firm 1] on 30 October 2009. Although the [Law Firm 1] ledger recorded that the project was in the name of the client, the payment of the client's funds from the client's ledger left an unclear audit trail.
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> 6. The funds were transferred pursuant to a written authority dated 23 October 2009 (the authority) ~ which reads as follows:
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> > To whom it may concern:
> >
> > I (name of client) for myself personally and on behalf of my company (name of company) hereby authorise you to transfer funds to the trust account for [Law Firm 1] to protect my company's funds from possible seizure. The moneys owing to [Law Firm 1] and [Mr XB] personally are to be repaid from the sale proceeds and disbursed according to these instructions.
>
> 7. [Law Firm 1] advised that they acted for Mr XE and his company. They had acted for the client for many years. The business operated by the company was struggling financially. [Law Firm 1] acted for Mr XE in a number of matters and were given a charge over the assets of the company. In addition, Mr XB had advanced $25,000 to the company and took a charge securing that loan. The client and the company obtained independent legal advice, the advance was made and the security was given.
>
> 8. During the latter part of 2008 and all of 2009 the business deteriorated. [Law Firm 1] advised their client that he could not continue in business because his company was insolvent. The client found a buyer for the business for a price which was insufficient to cover the secured creditors. The price was accepted.
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> 9. An agreement was reached with the secured creditors as follows:
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> a. The first secured credit was to receive payment in full;
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> b. [Law Firm 1], as second secured creditor were to receive $70,723.90 plus GST (including disbursements);
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> c. The third charge holder was to receive $54,500 (discounted from $70,000);
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> d. The fourth charge holder was to receive $4,450 (discounted from $7,500);
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> e. The fifth charge holder (Mr XB) was to receive $10,000 (discounted from $25,000);

[1] Standards Committee Decision dated 18 July 2012 at [5-15].

f. The sixth charge holder, the Bank of New Zealand, was to receive no funds but would receive moneys paid to the Bank by eftpos;

g. The landlord was to be paid in full (as consideration for the consent to the assignment of the lease); and

h. A company renting the security cameras was to be paid in full (to avoid the removal of the cameras).

10. As the settlement date approached:

a. A former business associate of the client alleged that he had an interest in the business;

b. There were threats of injunction;

c. The former business associate put undue pressure on the landlord;

d. Approaches were made by the former business associate to the prospective business purchaser and the purchaser's solicitor with a view to have the purchaser resile from the agreement; and

e. The client was unable to pay such basic expenses as the power and telephone, which were liable to be disconnected. The client was concerned that the purchaser would have an opportunity to cancel the purchase agreement. For that reason Mr XB then advanced further moneys and paid for these services to continue. It is not known whether the client received independent advice before these further loans were made.

11. It was decided that for the sake of transparency, it would be better to put what in effect would be [Law Firm 1]'s fee (as negotiated with the other creditors) into a separate matter account. The ledger in the name of [Law Firm 1] re. the client was opened and the sum of $61,359.71 (being all the funds available) was transferred to that account together with the sum of $20,000 being the stock take figure. [Law Firm 1] advised that it was clear that there would be a significant refund when the stock taking was carried out.

12. [Law Firm 1] advised the Inspector that the client was well aware of what [Law Firm 1] were doing and signed the authority. He was also aware that the fees that [Law Firm 1] would recover would be much less than what they were owed and understood that the payments which were to be made would be made out of what in effect would have been [Law Firm 1]'s fees.

13. [Law Firm 1] advised that except for the sum of $4,000, the payments made from the account were in accordance with the arrangements made with the client. By mistake the ledger was debited with the payment of $4,000 to [Trust Account 1] for the purchase of shares in Law Alliance NZ. This payment should have come from [Law Firm 1] office account and [Law Firm 1] advised that the sum of $4,000 was to be journalled back and that $4,000 was to be applied on account of the fees owing to [Law Firm 1].

> 14. There is, however, another unexplained payment of$30,000 to [Trust Account 2] made on 2 November 2009. The narration read "to transfer funds for repayment". A search of that company discloses that the shareholders and directors are [Mr XB] and Mr XF. The reasons for this payment are shown neither in the Inspector reports nor in any response from [Law Firm 1].
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> As at 13 January 2010 the following payments had been made from the account:
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> | | |
> |---|---|
> | a. [Trust Account 2] | $30,000 |
> | b. [Mr XB] | $24,081 |
> | c. Refund stock figure overpaid | $9,364 |
> | d. [Trust Account 2] | $4,000 |
> | e. [Company 1]– payment of guarantee | $6,000 |
> | f. [Law Firm 1] – to pay fees | $7,900 |
> | | $81,345 |

[5] The unusual issues which are revealed from these facts are:

i. The creation of an account in the name of the firm within the firm's trust account to hold funds other than the firm's float or in suspense; and

ii. The degree of involvement with the client's affairs leading to a situation where Mr XB personally funded his client to enable a sale transaction to proceed. Although it did not happen in this instance, such a degree of involvement will inevitably result at some stage in a lawyer who conducts his practice in this way coming into conflict with his client's interests.

The own motion investigation and the Standards Committee determination

[6] The facts of this matter were noted by, [a New Zealand Law Society audit inspector], during a routine inspection of the firm's trust records. Following a consideration of the response by the firm to the issues raised by [the inspector], the Standards Committee determined pursuant to s 130(c) of the Lawyers and Conveyancers Act 2006 to conduct an own motion investigation.

[7] In response to the notice of hearing, Messrs XB and XC provided further submissions together with an affidavit from Mr XE in which Mr XE confirmed Mr XB's responses to the Standards Committee and that all actions were taken on his instructions.

Having considered all of the material the Standards Committee determined that the conduct of both Mr XB and Mr XC constituted unsatisfactory conduct. It recorded its findings this way:[2]

> 21. Having considered the evidence the Committee agrees with the Inspector's allegations and considers it was contrary to the Trust Account Regulations and the Act to transfer client funds (in the total sum of $81,359) from the client's separate trust ledger to the firm's own trust ledger within the trust account.
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> 22. Having inquired into the matter and conducted a hearing the Committee determined that there has been unsatisfactory conduct on the part of the practitioners pursuant to s152(2)(b) of the Act due to breaches of regulations 11(1) and (2) of the Trust Account Regulations, ss110(1)(a) and 110(1)(b) of the Act and ss112(1)(a) and 112(1)(c) of the Act.
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> 23. In particular the Committee notes:
>
> a. The two journals meant that the trust account did not provide a record of the amount of trust money held for each client and the trust account records were not capable of being conveniently and properly reviewed by the Inspectorate, in breach of regulations 11(1) and 11(2) and ss112(1)(a) and 112(1)(c);
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> b. The trust account arrangement breached the fundamental accounting obligation in ss110(1)(a) and 110(1)(b), in which a lawyer who received money for or on behalf of any person "must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs"; and
>
> c. The parties cannot contract out of s110. It is not possible for a client to authorise a lawyer to ignore s110(1)(b).

[8] It then made the following orders:[3]

> 24. In relation to Mr XB:
>
> a. That the practitioner be censured pursuant to s156(1)(b) of the Act;
>
> b. That the practitioner pay to the New Zealand Law Society by 18 August 2012 a fine of $5,000 pursuant to s156(1)(i) of the Act;
>
> c. That the practitioner pay to the New Zealand Law Society 18 August 2012 the sum of $1,500 in respect of the costs and expenses of and incidental to the inquiry and the hearing pursuant to s156(1)(n) of the Act; and
>
> d. That there be no publication as to the practitioner's name or the facts of the matter.
>
> 25. In relation to Mr XC
>
> a. That the practitioner be censured pursuant to s156(1)(b) of the Act;

[2] Above n1 at [21-23].
[3] Above n1 at [24-25].

b. That the practitioner pay to the New Zealand Law Society by 18 August 2012 a fine of $5,000 pursuant to s156(1)(i) of the Act;

c. That the practitioner pay to the New Zealand Law Society 18 August 2012 the sum of $1,500 in respect of the costs and expenses of and incidental to the inquiry and the hearing pursuant to s156(1)(n) of the Act; and

d. That there be no publication as to the practitioner's name or the facts of the matter.

[9] Both Mr XB and Mr XC have applied for a review of that determination and have put forward the following reasons in support of their application:-

1. The funds received by the client ([Company A]) were properly receipted into the trust account of the practitioner, held exclusively for that person and then paid as that person directed.

2. The accounts recorded in such a manner to be conveniently and properly reviewable, were up to date and clearly showed the money held for the client. The Trust Account records clearly disclosed the position of the money and the records were kept in a manner that could be conveniently and properly audited or inspected.

3. There is no authority for the proposition that it is not possible for a client to authorise a lawyer to ignore section 110(1)(b) and in particular there is a clear direction that the money is to be held as that person directs.

4. The issue of the payment of $30,000 to [Trust Account 2] is an issue which had never been raised and consequently never addressed by us and accordingly we were denied any opportunity to respond.

Review

[10] A review hearing took place [on 6 March 2013]. Messrs XB and XC were represented by Mr XD and the Standards Committee by Mr BA. Mr XD advised that he had only had limited time to prepare and proposed that the matter proceed either on the papers or by way of written submissions. The hearing therefore covered the matters which I wished to clarify with the parties and Mr BA made verbal submissions.

[11] Following the hearing both Mr XD and Mr BA have provided written submissions.

The firm's account within the Trust Account

[12] The firm operated a client account in its own name within the firm's trust account. This was used primarily as a suspense account to hold funds for a short time pending identification of the payer and / or the purpose of the payment.

[13] Mr XB opened a project ledger within that client account in the name of [Company A] and transferred funds from [Company B] into that account.[4]

[14] Mr XB says that he transferred the funds in an attempt to assist his client, who was concerned that a former business associate would seek to obtain, ex parte, an injunction to restrain the sale. It is unclear to me how this would have assisted Mr XE and Mr XB acknowledged that. However, he wanted to be seen as doing something to assist his client.

[15] Although the transferred funds were ostensibly to pay fees it would appear to be accepted that the funds would be used to make essential payments to ensure the sale proceeded. Whatever the reasons were for establishing this second account, it seems to me that Mr XB was aligning himself so closely with his client that he was adopting what has been acknowledged to be unusual or unorthodox practices in an attempt to be seen to be taking steps to assist his client.

[16] Mr XB even went so far as to advance personal funds to his client thereby creating the potential for a conflict of interest to arise between the firm and its client. I acknowledge that Mr XE took independent advice with regard to these advances, but they were to be repaid from the proceeds of sale of the business, and Mr XB was acting for the company in that transaction. I hasten to add, that there is no suggestion that the result for [Company B] was compromised in any way, but the potential existed for a conflict of interest to arise.

[17] Overall, there would seem to be a lack of clarity of thought as to the legitimacy, purpose and possible consequences of the steps that Mr XB took.

[18] Mr XD has submitted that the stock payment had been paid into the second ledger to avoid the possibility that an injunction might freeze the funds, which would have placed Mr XB in a position where he would have been unable to fulfil an undertaking to return any overpayment for stock to the purchaser.

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[4] All of the trust accounts produced record the client as [Company B], whereas the authority obtained from Mr XE referred to a payment from [Company A] and the ledger within the [Law Firm 1] client account was designated as [Company A]. In addition, the narration to the journal entry also refers to the funds as having been transferred "from [Company A]" (HAY8311/5) whereas account 8311 was an account for [Company B].

[19] This possibility does not legitimise breaches of the trust account legislation. In the first instance, the basis on which the payment had been made by the purchaser could readily be put before the Court so that the funds were exempted from the effect of any injunction. Secondly, as noted by Duncan Webb in his text Ethics, Professional Responsibility and the Lawyer "a court will not order that an undertaking be enforced unless it is capable of being performed".[5] In support of that statement, Professor Webb cites the case of *re McDougall's application* [1982] 1 NZLR 141. Further, Mr XB was aware of the potential for the sale to be disrupted prior to settlement and even though the purchaser may have been anxious to cancel the contract, it is likely that he would have cooperated to agree to an alternative arrangement for the stock payment if it meant that it secured his funds.

[20] Overall, I do not consider this submission provides a convincing argument for the arrangement put in place by Mr XB.

Has there been a breach of section 110 of the Lawyers and Conveyancers Act 2006?

[21] The purposes of the Lawyers and Conveyancers Act include the protection of consumers of legal services and the maintenance of public confidence in the provision of legal services. These cannot be achieved if questionable arrangements are made with regard to client funds. I do not mean questionable in the sense that funds were necessarily at risk, but the transfer of funds effected by Mr XB departed from the usual and orthodox way of treating client funds. It is to be expected therefore that audit inspectors and Standards Committees will pay close scrutiny to any arrangement which departs from the norm and will enforce strict compliance with the requirements of the Act and the Trust Account regulations. In this regard, there is no room for an argument that a lawyer should not be held to be in breach of the Act because they "complied with the spirit and intent of s 110".[6]

[22] Section 110(1)(a) and (b) provides as follows:

> **110 Obligation to pay money received into trust account at bank**
>
> (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person-

[5] Duncan Webb *Ethics, Professional responsibility and the Lawyer*, 2nd edition at [15.9].
[6] XD submissions of 15 April 2013 at [3].

> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of-
>
> (i) the practitioner; or
>
> (ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[23] The funds were transferred to an account in the name of [Law Firm 1]. [Law Firm 1] was the nominated client. The funds did not belong to [Law Firm 1]. That was a breach of the Act.

[24] Mr XD submits that the transfer of funds within the trust account: [7]

> Was no different from numerous transfers of funds within different ledgers held by a law firm which commonly occurs. Here, the unusual aspect is the structure of the next ledger but which, it is submitted, a client could choose.

[25] Transfers of funds within a Trust Account must be done by way of a journal entry, and the circumstances in which a transfer of funds may be affected are described in paragraph 4.5 of the Lawyers Trust Account guidelines. These are:

- Transfer of funds between two clients
- Transfer of funds between two accounts of one client
- Transfer of fees, disbursements or commissions from the client's account to the practice's float account in the trust ledger.

[26] This was not a transfer of funds to effect a transaction between [Law Firm 1] and [Company B]. It was not therefore a transfer of funds between two clients. Neither was it a transfer of funds between two accounts of one client – the funds were transferred from [Company B] to [Law Firm 1] and the fact that the project ledger indicated it was a matter concerning [Company A] did not alter that.[8] Nor was it a transfer of funds to the firm's float account in payment of fees.

[27] I do not therefore agree with Mr XD's submission in this regard that the transfer of funds was no different from numerous other journal entries by law firms.

[28] It is helpful to note in this regard that where funds are held for a client, they are held in an account in the name of the client. In this case, the funds were held in an account in the name of [Law Firm 1]. That indicates that they were being held on a different basis from funds held for other clients.

[29] That this was so, is evidenced by the payment to [Trust Account 2]. The statement from Mr XF provided by Mr XD with his submissions included the following paragraph:[9]

> [Mr XE], who I know, owed me $30,000. When I learnt from him that he was selling his [business] I asked for my money back. It was me who directed that the money should be paid into [Trust Account 2]. Although half the shares in that company were owned by Mr XB, the company was holding the money for me.

[30] This statement only serves to underscore the fact that the funds were not held exclusively for [Company B] or [Company A] to be paid to that person or as that person directs it.[10] Mr XF says that it was he who directed [Law Firm 1] to make the payment to him.

[31] One of the grounds for seeking a review of the Standards Committee decision is that the payment to [Trust Account 2] had not been raised previously and that Messrs XC and XB had been denied the opportunity to comment on it. That opportunity has now been provided through this review. I observe that in itself it is not a critical issue, but rather as I have noted, has served to reinforce the fact that the funds were not held exclusively for the client.

[32] Mr XE has provided an affidavit in which he states: [11]

> I wish to make it very clear that in transferring the money within the trust ledgers of [Law Firm 1's] Trust Account into the name of [Law Firm 1] with a sub ledger of [Company A] was made with my full knowledge and consent. In fact it was more than that because I told [Law Firm 1] to do that. I remember at the time signing a written direction for that.

[33] In the letter under cover of which that affidavit was sent to the Law Society Messrs XB and XC stated: [12]

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[7] Above n6 at [5].
[8] Note that [Company A] was not the same client as [Company B].
[9] Statement from [Mr XF] to NZLS dated 10 April 2013.
[10] As required by s 110(1)(b) of the Lawyers and Conveyancers Act 2006.
[11] Affidavit of Mr XE dated 11 May 2012 at [37].

> ... At all times we acted in accordance with instructions and pursuant to the directions of our client.

Rule 4.1 of the Conduct and Client Care Rules provides: [13]

> Good cause to refuse to accept instructions includes a lack of available time, the instructions falling outside the lawyer's normal field of practice, **instructions that could require the lawyer to breach any professional obligation**, and the unwillingness or inability of the prospective client to pay the normal fee of the lawyer concerned for that relevant work. (emphasis added)

[34] Mr XB could not be required by his client to act in breach of his professional obligations and instructions, to do so does not legitimise the action. In any event, Mr XE would not have been aware that what was being proposed would place the lawyers in breach of their professional obligations.

[35] Having considered all of the issues in this regard, I concur that Messrs XB and XC have breached the provisions of s 110(1)(a) and (b) of the Lawyers and Conveyancers Act 2006.

Regulations 11(1) and (2) and s 112 of the Act

[36] Regulations 11(1) and (2) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 provide:

> **11 Trust Account Records**
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> (1) It is the duty of every practice required by s 112(1) of the Act to keep records in respect of trust accounts, to do so in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate.
>
> (2) Trust account records must be up to date, clearly show the amount of the trust money held for each client, and as far as practicable be secure against retrospective alteration or deletion.

[37] Sections 112(1)(a) and (c) of the Lawyers and Conveyancers Act 2006 provides:

> **112 Obligation to keep records in respect of trust accounts and valuable property**

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[12] Letter dated 22 June 2012 from [Law Firm 1] and Mr XC to NZLS.
[13] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2006.

> (1) If, in the course of the practice of a practitioner or an incorporated firm, the practitioner, a related person or entity, or the incorporated firm receives or holds money or other valuable property in trust on behalf of any person, the practitioner, related person or entity, or incorporated firm –
>
> (a) must, in relation to the money, keep trust account records that disclose clearly the position of the money in the trust accounts of the practitioner, related person or entity, or incorporated firm; and
>
> ...
>
> (c) must keep the records required by this section in such a manner as to enable those records to be conveniently and properly audited or inspected.

[38] Mr XD argues that the transfer of funds was transparent and readily detected. The client ledgers for [Company B] do not clearly show the amount of trust money held for the company as required by Regulation 11(2). To ascertain that, it was necessary to first note that funds had been transferred out to an account in the name of [Law Firm 1], and then to reach the view that although the funds were in an account for [Law Firm 1], the funds in reality belonged to [Company B].[14]

[39] These deductions could not be made from any information within the records available to [the audit inspector]. On the face of it, the funds in the [Law Firm 1]' account belonged to the firm. Indeed, the narration to the journal transferring the funds is "repayment of charge". That provides an even stronger indication that the funds belonged to [Law Firm 1].

[40] There is a clear breach of Regulation 11(2).

[41] The Standards Committee has also found a breach of Regulation 11(1). There is no complaint that the physical records of the firm were not available for inspection by [the audit inspector]. However, payments out of this account were not able to be "properly reviewed by the inspectorate" as required by the Regulation. By way of example I refer to the following entries and account number OSH 600.47.

2/11/2009	**Che**	**D/C**	[Mr XB] Payment of funds as requested	12,250.00	33,109.71

[14] The trust account ledger in question in fact referred to [Company A] and not to [Company B].

2/11/2009	**Che**	**D/C**	[Mr XB] Visa Card Re Balance of Vodafone payment visa [xxxx xxxx xxxx]	831.00	32,278.71
2/11/2009	**Che**	**D/C**	[Mr XB's] Visa Card Payment of funds to Visa [yyyy yyyy yyyy yyyy]	5,000.00	27,278.71

[42] Each of these entries records a payment to [Mr XB] or his Visa card. What was being paid on that Visa account? Even the payment of the Vodafone account does not necessarily mean it is an account held for the client. The entries in themselves did not enable [the audit inspector] to properly review the payments. This constitutes a breach of Regulation 11(1).

Section 112

[43] The requirements of ss 112(1)(a) and (c) are reflected in Regulations 11(1) and (2) and it follows that the finding of a breach of those Regulations will result in a finding of a breach of section 112.

Conclusion

[44] As a result of the above discussion, I find that there have been breaches of ss 110(1)(a) and (b) and ss 112(1)(a) and (c) of the Lawyers and Conveyancers Act 2006 and Regulations 11(1) and (2) of the Trust Account Regulations. As a result of these breaches the conduct of the lawyers constitutes unsatisfactory conduct by reason of section 12(c) of the Act.

Are both partners equally responsible?

[45] The Standards Committee found that the conduct of both partners constituted unsatisfactory conduct and imposed the same penalties on both. Mr XD has submitted that it was Mr XB who acted for Mr XE and Mr XC had no active role in "and indeed no knowledge of, the second ledger until drawn to his attention by the inspectorate report".[15]

[15] XD submissions 15 April 2013 at [7].

[46] On the other hand, Mr BA submits that "both lawyers were associated with the arrangements or, at least, allowed themselves to be associated with it, notwithstanding Mr XB's status as the client's partner".[16]

[47] In support of this submission, he notes that the account number OSH600.47 recorded Mr XC as the client author, while Mr XB was recorded as the project author. However, of more importance, Mr BA notes that Mr XC was the trust account supervisor required by Regulation 16 of the Trust Account Regulations.

[48] The following provisions of Regulation 16 are relevant to this issue:[17]

> **16 Trust account supervisor**
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> ...
>
> (2) Every partnership must at all times have a trust account supervisor for each office of the partnership having separate trust account records, and that trust account supervisor must be a person appointed in that capacity by the partnership.
>
> ...
>
> (4) Every trust account supervisor –
>
> (a) is responsible for the administration of the trust accounting of the practice:
>
> (b) is responsible for ensuring-
>
> (i) that the provisions of the Act relating to trust accounts, these regulations, and any practice rules made under s 94(k) of the Act are complied with by the practice; and
>
> (ii) if the practitioners in the practice in respect of which the trust account supervisor has been appointed are lawyers, that any practice rules relating to lawyers nominee companies are complied with by the practice:
>
> (c) must take appropriate measures to verify the correctness of, and sign, all reports required by these regulations (unless prevented by temporary absence or incapacity; in which case another partner or director, if any, may take those measures and sign).

[49] It is somewhat surprising that Mr XC had no knowledge of the second ledger until drawn to his attention by the inspectorate given the obligations imposed on the Trust Account supervisor by this Regulation.

[50] In addition, whilst s 110 of the Act refers to obligations imposed on "a practitioner", Regulation 11 imposes obligations on "every practice". A "practice"

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[16] BA' submissions 19 April 2013 at [4.1].
[17] Lawyers and Conveyancers Act (Trust account) Regulations 2008 at [16].

is defined in Regulation 3 as meaning and including "a sole practitioner, a partnership, and an incorporated firm."[18] The obligations in this instance are therefore imposed on the partnership, and both partners have equal obligations in that regard.

[51] Whilst it could be argued therefore that Mr XC was not in breach of s 110 and therefore lesser penalties should be imposed, it is not appropriate to attribute penalties to each individual breach as the facts out of which the adverse findings have been made, apply equally to the breaches of each provision.

Censure

[52] The Standards Committee censured both lawyers.

[53] In *NZLS v B* the Court of Appeal noted: [19]

> A censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the Practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

[54] All levels of the disciplinary process take protection of client funds extremely seriously. There is no room for operating on the basis of the spirit and intent of the legislation. All dealings with client funds must be conducted not only within the spirit of the legislation but must also comply with the strict wording of the respective provisions. Any departure from the usual and accepted dealings with client funds must be carefully considered.

[55] Having considered these factors, I am satisfied that a censure is an appropriate order to be made in these circumstances.

Fine

[56] The Standards Committee also imposed a fine of $5,000 on each Practitioner. That is one third of the amount which can be ordered by a Standards Committee pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act. As such, it indicates that the Standards Committee viewed the conduct with

[18] Above n17 at [3].
[19] *The New Zealand Law Society v B* [2013] NZCA 156 at [39].

some concern. The imposition of a fine involves a consideration of all of the factors and the exercise of a discretion as to the amount of the fine imposed.

[57] Again, I refer to the fact that the conduct in respect of which the adverse finding has been made involves client funds. That must automatically raise the bar somewhat in terms of the level of fine imposed. In the High Court decision of *B v Auckland Standards Committee*[20] the Court recognised that fines can be seen to be "backing up" a censure and the fine imposed by the Committee reflects its degree of concern. I share that concern and in the circumstances have come to the view that the fine imposed by the Committee is appropriate.

Costs

[58] The award of costs of $1,500 for each Practitioner is not remarkable in any way and I do not consider any adjustment to that is necessary.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

LCRO costs

In accordance with the Costs Orders Guidelines issued by this Office, it is usual for costs to be awarded against a practitioner where a finding of unsatisfactory conduct is made or upheld. This review has been conducted in respect of the two determinations and was of average complexity. In the circumstances, pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 both Mr XC and Mr XB are ordered to make payment of the sum of $800 to the New Zealand Law Society by no later 10 July 2013.

DATED this 10th day of June 2013

O W J Vaughan
Legal Complaints Review Officer

[20] *B v Auckland Standards Committee* CIV-2010-404-8451, at [38].

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr XB as the Applicant
Mr XC as the Respondent
Mr XD as representative for the Applicant
Mr BA as representative for the Respondent
Waikato Bay of Plenty Standards Committee 2
The New Zealand Law Society