NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 5

LCDT 010/17 and LCDT 011/17

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY / WESTLAND STANDARDS COMMITTEE 3** Applicant
AND	**RONALD BRUCE JOHNSON** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Ms F Freeman

Mr S Grieve QC

Mr C Lucas

Mr W Smith

HEARING 2 & 3 October and 8 November 2017

HELD AT Auckland

DATE OF DECISION 9 March 2018

COUNSEL

Mr S Waalkens for the Standards Committee

Mr P Napier and Mr L Cooney for the Practitioner

RESERVED DECISION OF TRIBUNAL ON LIABILITY

Introduction

[1] Mr Johnson faces three charges. The first, laid with three alternatives to reflect the three levels of culpability, concerns the extent and quality of advice the practitioner gave lay trustees, in a situation where their own lawyer was conflicted.

[2] Charges 2 and 3 are also laid with three alternative levels of seriousness. Both relate to alleged breaches of trust accounting regulations and the LCA.[1]

[3] While Mr Johnson accepts that his conduct in relation to Charges 2 and 3 amounts to "unsatisfactory conduct", he denies culpability at any higher level.

[4] The circumstances around Charge 1 relate to the advice given (or not) by Mr Johnson, when asked to provide independent advice to a family who had just formed a family trust on their lawyer's advice. That lawyer, Ed Johnston, was a trustee of the trust.[2] The advice was about the purchase of a property by the trust, in circumstances where the vendor also was their "usual" lawyer, Ed Johnston.

[5] The scope of the retainer is in dispute. And there was a conflict of expert opinion about the duties owed to the clients by the practitioner who had been asked to give independent advice in these circumstances.

Issues

[6] We consider the issues which must be resolved by the Tribunal are as follows:

Charge 1

1. What was the scope of the retainer between the H Family Trust and Mr R B Johnson?

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[1] Lawyers and Conveyancers Act 2006.
[2] Through his trustee company.

2. Did the practitioner fulfil his obligations to the client under the retainer?

3. If not, at what level of culpability was his breach or failure?

Charge 2

4. Did Mr Johnson breach in the manner alleged, trust accounting regulations and the LCA?

5. If so, were the breaches wilful or reckless, so as to constitute misconduct?

Charge 3

6. Did Mr Johnson breach trust accounting regulations and the LCA in the manner alleged?

7. Did Mr Johnson make false certifications in his monthly certificates to the New Zealand Law Society?

8. If so, were such breaches wilful or reckless, so as to constitute misconduct?

Background

[7] It is necessary to set out some of the background to the trust coming into existence, in order to contextualise how the clients came to Mr Johnson.

[8] Mrs H,[3] a Samoan woman in her mid-seventies, owned an unencumbered home in Grey Lynn and was, by 2009 when the relevant events took place, in her mid-seventies.

[9] Mrs H and her family knew Edward Johnston, a lawyer practising in West Auckland, who had considerable standing in the Samoan community and had known at least one of Mrs H's sons, M, for many years.

[3] By the time of the hearing, the late Mrs H had died, but has simply been referred to by her name for ease of expression.

[10] The family wished to find a way to utilise the large equity in the Grey Lynn home to allow Mrs H to travel to Australia and Samoa to visit extended family. Mr Ed Johnston advised that this could be achieved by setting up a trust, although it is not clear that the family ever understood why this particular structure was necessary. The trust was established on 1 July 2009 with three trustees: Mrs H, her daughter Ms D and the third trustee, Ed Johnston & Co Trustees Ltd. Ed Johnston was the sole director and shareholder of that trustee company.

[11] Neither Mrs H nor Ms D had business experience, or experience with trusts. Ms D never met Ed Johnston, her co-trustee. Neither she nor her mother ever met with Ed Johnston in relation to the trust formation.

[12] The signing of the trust deed had clearly taken place in unusual circumstances. It is Ms D's unchallenged evidence that she signed only the last page which was presented to her by her brother M, (at her workplace) and not witnessed by any other person. It would seem that Sheryl Tier, Ed Johnston's assistant,[4] witnessed the document at a later time in the absence of the client. It is possible that a similar process may well have occurred in relation to Mrs H's signature, since she had never travelled to Mr Johnston's office to execute the trust deed, according to family members. Mrs H did not drive a car, and she did not have a good command of English and so would never have attended an appointment of that sort without being accompanied by one of her children.

[13] It appears sometime after the formation of the trust Ed Johnston suggested to M that the trust purchase a property at Edwin Freeman Place, Ranui. That property was owned by Ed Johnston.

[14] Although neither of the H family witnesses who appeared before the Tribunal knew of it, it seems the idea behind the purchase was to develop the property, by borrowing extra money and securing the borrowing against not only the Edwin Freeman Place property but also the Grey Lynn home in which Mrs H resided. The loan was for $400,000, the purchase price of the property being $300,000. It seems likely that this was discussed between Ed Johnston and M, because the latter, who was a builder and did work for Ed Johnston, submitted a quote for work to be carried

[4] Ms Tier was subsequently made subject to an order not to be employed by any law firm (the equivalent of a lawyer strike-off) for dishonesty, ie stealing from a client.

out on the property. We are, however, unable to be certain of these matters since neither M nor Ed Johnston gave evidence.

[15] Presumably, the intention was that this might provide funds also for the original purpose, that is to provide the elderly Mrs H with the ability to travel.

[16] Recognising the very obvious conflicts of interest and of duties facing him, Mr Johnston had arranged for Mrs H and Ms D, the two trustees, to be referred to Mr R B Johnson for independent advice on the purchase. Mr Johnson said he had often acted in situations of this sort for Mr Ed Johnston.[5]

[17] To this end, Sheryl Tier, Mr Ed Johnston's assistant, sent an email to the practitioner on 2 September 2009 at 3.59 pm requesting Mr Johnson to "*… act for The H Family Trust in relation to the purchase of Edwin Freeman Place.*" The email attached a copy of the agreement for sale and purchase and a copy of the trust deed and gave a contact number for M (not a trustee). Somewhat oddly, rather than a solicitor's approval clause in the agreement itself, the email also said "*I confirm that the agreement is not binding on your client until you are happy with the content of the agreement*."

[18] Mr Johnson met with the family, comprising, the two family member trustees and the two sons/brothers, that same day. Given that he did not receive the instructions or the documents until 4.00 pm, it would seem reasonable to assume he had not spent a great deal of time examining them. This is particularly so since Mr Johnson confirmed he had a meeting immediately prior to seeing the H family. In evidence, he stated that he would not have needed much time to prepare, because, with his experience, he knew what to look for quickly.

[19] It was the family's expectation that Ed Johnston would also be present at the meeting and that the details about the trust would be explained to them at that time. It has to be remembered that no information about trustee obligations, the nature of a trust and its decision-making processes had been conveyed to the two lay trustees previously.

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[5] Mr Ed Johnston was struck off on 26 July 2013, for dishonest dealings including conflicts of interest and failure to protect clients.

[20] On arrival, the family waited some 10 minutes or so in Mr Johnson's reception area before being seen by him for approximately 20 minutes. When they enquired about where Ed Johnston was, it was Ms D's and Mr P's evidence that they were simply told that he was not available and would not be present at the meeting. The practitioner states that he "would have" told the family that it was inappropriate for Mr Johnston to be there since he had a conflict of interest. This is strongly denied by the two family members who say they were told no such thing.

[21] There is a dispute in the evidence as to whether the agreement of sale and purchase arrived at Mr Johnson's office signed or whether it was signed at this meeting. Family members are convinced that they signed it at the meeting and Mr Johnson is equally firm that it arrived in his office as already executed, but subject to the informal solicitor's approval provision. For some reason the two brothers, not trustees but beneficiaries, also signed the agreement. The practitioner is unable to provide the electronic copy of the agreement, which was sent to him from Ed Johnston's office, so we are unable to finally resolve this dispute. However, in the end we do not consider that it is necessary to do so.

[22] Ms D's evidence is that this meeting was the first time she had heard of the purchase of Edwin Freeman Place, and she was quite uncomfortable about the situation. She says that her discomfort was noted by Mr Johnson, who commented to her brothers that if she was not happy in signing the documents then they ought to *"… go with what she feels, or words to that effect*". She says she felt rushed, confused and did not say anything further and ultimately Mr Johnson seems to have taken her silence as acquiescence. His evidence is that the family members were all happy with the agreement as explained to them by him.

[23] In relation to that meeting Mr Johnson says that he accepts that it would have taken about 20 minutes *"… as this would be the approximate time I would spend going through a straightforward agreement for sale and purchase like this."*

[24] It would appear that by "straightforward", the practitioner meant an agreement to purchase a single property but with a finance condition relating to two properties.

[25] It seems that Mr Johnson did not have any red flags raised by the fact that the vendor was the family's solicitor and a co-trustee of the purchaser; that it was a private

sale unsupported by any valuation evidence or knowledge of how the family came to be buying this property and what other properties they might have considered. None of these topics appear to have been raised by Mr Johnson at the time of this initial meeting or indeed subsequently, even on his own evidence.

[26] Further, there are no file notes kept by the practitioner of this meeting, which is now some years ago. The practitioner's time records do not refer to the meeting, and he has not provided any copy of the terms of engagement letter that might bear on the nature of the retainer.

[27] Finance was arranged through a mortgage broker. In his evidence Mr Johnson states:

> "The scope of my retainer was to advise the trustees on the purchase and to obtain/confirm finance".

[28] He says that:

> "The trustees were made aware of the mechanics of the purchase and the loan from ASB. They were made aware of the security arrangements put in place with ASB …".

[29] Mr Johnson had previously satisfied himself that the trust deed allowed for acquisition of property and borrowing. He subsequently prepared a Minute for the trustees to endorse, which resolved to enter into the purchase and to borrow the funds with security against both the Edwin Freeman Place and the Home Street, Grey Lynn property previously owned by Mrs H. The latter property was not actually transferred to the trust until shortly before the registration of the securities and transfer of the new property to the trust. Mr Johnson says that would have been done by Ed Johnston's office.

[30] In response to expert opinion from Mr Eades, that a broader scope of enquiry ought to have been undertaken by Mr Johnson along with the broader advice that carried with it, Mr Johnson stated that his retainer was limited:

> "In fact, the trustees' primary concern was to derive a capital gain from the purchase of the Property after the renovations had been completed (while the increased rental income covered the mortgage payments). My advice was tailored to their instructions."

[31] Mr Johnson's further evidence is that he then met, on 25 September 2009, with Ms D and Mrs H to sign the security documents and the trust minute. This was the settlement date and thus Mr Johnson was able to certify in the normal manner to the ASB, who were advancing the funds, that he had carried out his obligations on behalf of the purchasers and the security holder.

[32] Ms D recalls no second meeting with Mr Johnson or signing the security documents. We consider this is so unlikely as to suggest she has forgotten the meeting, many years later, although she appears to retain other matters with a reasonably strong memory, particularly her impressions of unease and confusion about the purchase itself at the first meeting with Mr Johnson.

[33] In the years subsequent to the purchase, the trust apparently entered into a range of other transactions, in which M appears to have been involved. The endeavours were not successful and the property in question was sold in 2011 for $300,000, that is the same as it had been purchased for two years before.

[34] In March 2015 Mr P (Ms D's brother), made a complaint to the New Zealand Law Society (NZLS) about Mr Johnson on behalf of the H Family Trust. The complaint concerned the actions of Mr Ed Johnston also, however he had by that time been struck off, and has not been further pursued by the Standards Committee in relation to this matter.[6]

[35] The NZLS appointed Mr G Bentley to investigate the H Trust complaints and a report was prepared which raised some concerns leading to the current prosecution.

[36] In turn, trust account discrepancies were revealed and an own-motion investigation into those matters proceeded, ultimately resulting in Charge 2 being laid.

[37] A general review of the practitioner's trust account was undertaken in early 2016, which once again revealed a number of discrepancies of concern to the Inspector. These discrepancies form the basis of the allegations in Charge 3.

[6] Mr Ed Johnston was subsequently convicted in 2016 on charges brought by the Serious Fraud Office in relation to another matter.

Evidence on Retainer and Expert Evidence

[38] Mr Johnson accepted that the emailed instructions had created a "pretty general retainer".[7] He deposes:

> "On 2 December 2009, I took instructions from the trustees of the Trust as to whether the agreement was in order and that they understood the transaction. The trustees confirmed that they were happy with the agreement."

[39] In fact, the evidence disclosed that the practitioner may not have even spoken in the meeting to the actual trustees, Ms D and Mrs H, except to check with the former whether she was comfortable because he had noted from her body language that she did not appear to be. He was not able to recall whether she actually verbalised her acquiescence, and Ms D's evidence was that she said nothing further.

[40] Mr Johnson's evidence:

> "… the trustees' primary concern was to derive a capital gain from the purchase of the Property after the renovations had been completed … my advice was tailored to their instructions".

[41] Mr Johnson was not able to confirm that either of the trustees, ie: Ms D or Mrs H had advised him of this. In answering criticisms of his actions, contained in the report of the Law Society Inspector Mr Bentley, Mr Johnson said:

> "I have already deposed, above, that I knew little of the Trust's intentions or operations in September 2009 apart from what the trustees disclosed under the retainer with CPL (sic)."[8]

[42] In cross-examination Mr Johnson would not concede that the transaction was unusual.

[43] Mr Johnson said he did not recall that the purpose of obtaining travel funding for Mrs H was one of the purposes of the trust and that he understood the purchase was to fulfil an investment strategy of the trust and that the intention was to borrow extra money in order to complete a second dwelling on the property (despite the fact that it could not be subdivided). He deposed that *"From what I can recall, the rental income was never the primary concern for the trustees and they never sought specific advice on this issue."*

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[7] NOE page 121.
[8] In fact, Mr Johnson did not set up CPL (Central Park Legal) until 2011.

[44] Mr Johnson was not clear who had told him about the additional "granny flat" but recalls advising that subdivision was not possible. He was not provided with a registered valuation and says he was not asked by the trustees to advise on the same.

[45] Mr Johnson conceded he had no recollection of having a specific conversation with Mrs H (who it will be remembered was not particularly competent in English).

[46] Mr Johnson's position was that the agreement was forwarded to him in completed form, conditional on finance and thus saw it as a very standard conveyancing retainer.

[47] In answer to questions about the lack of file notes relating to this transaction Mr Johnson had this to say:

> "I do create file notes when there are telephone conversations that I think may be important. This one wasn't one that sent off any alarm bells for me."[9]

[48] In this, he was referring to the original phone call he would have had from Ed Johnston about the conflict of interest.

[49] It has to be noted that the Tribunal found Mr Johnson under cross-examination to be defensive and at times evasive about the scope of his retainer. He appeared resentful of being questioned and indeed of facing charges, at one point referring to his being pursued as the "last man standing".

[50] Mr Johnson was questioned about whether he had discussed with the trustees the purpose of the first meeting on 2 September. He said he could not say because he could not recall.

[51] When asked about the unusual nature of the transaction he confirmed that although he had a number of referrals from Ed Johnston where conflicts of interest existed, particularly in relation to the part of Mr Johnston's practice that involved lending between clients, that he had never before had a situation where Mr Johnston was selling a property to trustees and he was himself also a trustee. He also confirmed he had never had that type of transaction referred to him by any other lawyer.

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[9] NOE page 123.

[52] When pressed on the unusual nature of the transaction he conceded that:

> "The unusual circumstances is that Ed was the indepen (sic) – or the owner of the property and a trustee. The unusual circumstance was dealt with by him getting me to give independent advice in regards to the terms of the agreement. So when you say to me were the circumstances unusual it's, it's a question that begs an answer, should I have done something more? And my answer to that question is no, I acted within my retainer."[10]

[53] Mr Johnson was then asked:

> "Q. But how did you give independent advice, what did you, what value did you add?
>
> A. I talked about the agreement and the conveyance and its process and how they had to borrow money and satisfy a condition …"
>
> Q. Mr Johnson, you don't really consider that to be independent advice do you?
>
> A. I do.
>
> Q. Why couldn't Ed Johnston have given them that advice in relation to the agreement for sale and purchase?
>
> A. Because he owned it and had a conflict."[11]

[54] When pressed about his considering what benefits there were from the agreement to Ed Johnston, the practitioner accepted that there was a benefit in selling the property but said that there was:

> "… Nothing in terms of the documents that I had been provided, the discussions I had with the H's, that led me to believe that the property wasn't being sold for anything more than a fair price. I mean that's what it comes down to …"[12]

[55] When further questioned in cross-examination about what he had done to ensure that his clients were not being disadvantaged by their lawyer, having been asked to give independent advice, Mr Johnson said that related to his retainer:

> "… I consider my retainer and a lawyer's retainer in respect of a conveyance is not to give advice in regards to the financial viability of the transaction. Having said that, and I didn't give any advice in regards to whether it was financial fair or whatever. But, having said that, there was nothing to suggest to me, there was nothing that alarmed me in regards to the documents that I had been provided, the parties with whom I was dealing, that suggested to me that extra steps should have been taken."[13]

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[10] NOE page 143.
[11] NOE page 143.
[12] NOE page 143.
[13] NOE page 145.

[56] Earlier Mr Johnson had referred to Ed Johnston, back in 2009 being a "trusted person in Henderson". Mr Johnson was pressed further by the Tribunal on this topic:

> "Q. So what did your independence … add to the transaction to the assistance that these people were given? What did you provide them that Mr Johnston didn't? I don't think you answered that question either.
>
> A. I did answer that question, sorry, Ma'am. I said that my role in the transaction was to complete the conveyance.
>
> Q. Is that your understanding of independent advice in the situation of a conflict of interest?
>
> A. Yes."[14]

[57] Mr Johnson later confirmed that he was not aware that neither trustee had even met Ed Johnston before his meeting with them on 2 September, despite him having set up a trust in which they were trustees. They had never received any advice, it would appear, on their obligations as a trustee. That fact was not ascertained by Mr Johnson, because he did not explore the clients' level of understanding of the trust.

[58] Later, in evidence, Mr Johnson confirmed that he did not limit his retainer in writing.[15]

[59] Nor, it would seem, was he concerned to understand what the purpose of the trust was:

> "I don't recall asking the trustees what the purpose of the trust was. It was a trust that was designed to buy property or to own property."[16]

[60] Mr Johnson was asked if he accepted that it would have been prudent to:

> "… Discuss with the trustees whether they had satisfied themselves that the purchase of the property was consistent with the goals of the trust and their roles as trustees."[17]

[61] Mr Johnson repeated that he had no clear recollection of the discussion at the meeting but says that it would have been his practice to have canvassed that.

[62] When asked whether he had inquired from the trustees why they were buying from their own lawyer privately rather than buying a property on the open market

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[14] NOE page 146.
[15] NOE page 152.
[16] NOE page 151.
[17] NOE page 153.

Mr Johnson was again unable to recollect whether that had been canvassed, simply commenting that he recalled them being "keen on the property".

[63] Finally, Mr Johnson made what would seem to be a crucial concession that he did not recall if he asked or even considered whether the clients had "… *been influenced in any way by the relationship that they had with Ed Johnston"*.[18]

Expert evidence

[64] Expert evidence was called by the Standards Committee from Robert Eades, an extremely senior and experienced practitioner.

[65] In summary, Mr Eades gave evidence that it would not be proper for a lawyer giving advice to a client purchasing from a former lawyer to insist on a retainer limited only to basic conveyancing. Moreover, there is no evidence that Mr Johnson sought such a limitation.

[66] It was Mr Eades' view that some inquiry into the "wisdom of the transaction" was necessary to ensure that the purchase was "*… on a considered basis, for a property suitable for the trust's purposes and which was for the benefit of the trust and its beneficiaries*."

[67] Mr Eades evidence was that Mr Johnson's questions should have included why the trustees were buying privately from their lawyer rather than on the open market. Also, that he should have checked whether the relationship with Ed Johnston had influenced their decision.

[68] A number of other matters were listed by Mr Eades as to valuation, financial and tax implications, requiring some inquiry or thought on Mr Johnson's part. While the Standards Committee do not advance the case that every one of the inquiries had to be pursued by Mr Johnson, they submitted that his 20 minute attendance and explanation of the agreement mechanics fell far short of the sort of discussion and advice required to protect the clients' interests in this situation.

[18] NOE page 154.

[69] Mr Eades pointed out that Mrs H was 75 years at the time of the retainer and Mr Johnson needed to understand her knowledge and abilities in business. Also Mr Johnson needed to assess whether she and her daughter understood their responsibilities as trustees. It was seen as important that the trustees understood that the third trustee was in a position of conflict.

[70] Mr Eades disputed the view of Mr Haynes[19], as to the straightforward nature of the transaction and the limited retainer required of Mr Johnson.

[71] In relation to Mr Eades evidence about any limit on the retainer his evidence was:

> "Mr Johnston (sic) was faced with a situation where he was being asked by a fellow practitioner, who was a friend, to act for clients who were buying from the practitioner, who had previously been advised by the practitioner, and without any knowledge of what had passed between Mr Ed Johnston and those clients previously which had led to Ed Johnston preparing the agreement for sale and purchase, having it completed and then asking Bruce Johnston (sic) to act for the trustees who, as the evidence seems to show, were not businesslike, they are described as unsophisticated. I don't believe that in that circumstance a practitioner in Mr Johnston's (sic) position should have limited his retainer or, if he felt himself that it should be limited, he should have declined to act and asked that somebody else be instructed on behalf of the H trustees."[20]

[72] In cross-examination Mr Eades was tested about the evidence he had given in other cases about the inadvisability of lawyers advising beyond their expertise, for example on investment decisions and wisdom of investments. He distinguished the situations from the present, where a lawyer-trustee is selling to his clients.

[73] Mr Eades strongly disagreed with Mr Haynes' statement[21] in which he says:

> "Further, I consider that Bruce Johnson could reasonably assume the trustees had considered the general business value of the transaction in order to fulfil their own obligations to ensure the purchase was in the best interests of the Trust."

[74] Mr Eades considered that Mr Johnson was not entitled to make any such assumption.

> "He was faced with three trustees for the H Trust, two of whom as he found out were unsophisticated people and the third of whom through his company was Ed

[19] The expert engaged by the defence, who characterised the transaction as a "usual" purchase between arm's length parties.
[20] NOE page 169.
[21] In his supplementary affidavit.

> Johnston who of course had an interest in seeing that the transaction proceed. I don't see how it was possible to assume that proper enquiries had been made before and particularly that proper advice had been given to the trustees to that stage when after all Ed Johnston was acting for them."[22]

And later:

> "… It was Bruce Johnson's responsibility to make sure that the trustees had been properly advised and that they entered into the transaction on a considered basis."[23]

[75] Mr Eades was cross-examined about whether, if the agreement was found to have been pre-signed by the trustees, it could be said that the practitioner was:

> "… Faced with clients that had apparently decided that the agreement was in their interests?"[24]

[76] Mr Eades' response was:

> "I don't know that that was necessarily the case when the agreement had been engendered by Ed Johnson (sic), drawn by Ed Johnson (sic) and the trustees had signed through the involvement of Ed Johnson (sic)."[25]

[77] Mr Eades emphasised that the purchase from the lawyer-trustee:

> "… Should have triggered the concerns which I believe a practitioner in Bruce Johnson's position should have explored. Not necessarily to give advice but to guide the trustees to matters which they might not previously have considered."[26]

[78] Later Mr Eades, when asked if Bruce Johnson would be entitled to at least assume they wanted to buy a property, Mr Eades' opinion was:

> "No, I don't think he was entitled to assume that they had been properly advised at that point or they had properly considered what they were doing."[27]

[79] And further in debating further whether it was appropriate to take at face value that the clients appeared to be "uncomfortable" Mr Eades opinion was:

> "I don't think the question was sufficient. Merely to ask, "Are you comfortable," without knowing why they were comfortable, why they had come to that decision

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[22] NOE page 171.
[23] NOE page 172.
[24] NOE page 186.
[25] NOE page 186.
[26] NOE page 186.
[27] NOE page 192.

> and particularly in this case had they come to that decision relying on Ed Johnston's advice."[28]

[80] It was Mr Eades' view that a competent practitioner would have looked behind the transaction because it involved Ed Johnston as vendor, the agreement prepared by him on behalf of unsophisticated clients.

[81] Mr Ian Haynes, also a very experienced and senior practitioner gave expert evidence on behalf of the practitioner.

[82] Mr Haynes' evidence supported the narrower approach to the nature of a retainer in this case that Mr Johnson has relied on. However, it is notable that at least in his first affidavit this narrower approach was in relation to a generalised version of the transaction rather than this particular transaction.

[83] Mr Haynes is also reliant on Mr Johnson's interpretation of the trustees and beneficiaries being "comfortable with the proposed purchase". Mr Haynes is content that explaining the agreement mechanics and the funds to be borrowed was a sufficient exercise of his obligations to the client.

[84] In his evidence Mr Haynes maintained his view that a lawyer's role is not a business or financial adviser, which was not largely in dispute.

[85] When taxed on the issue of whether Mr Johnson had ascertained whether the family members meeting with him had congruent interests, Mr Haynes conceded that there was no evidence that Mr Johnson had so ascertained.[29]

[86] Mr Haynes did not consider it would have been necessary to have done so.[30] It was accepted that Mr Johnson did not meet with the trustees separately from the two brothers. Mr Haynes did not consider that was necessary saying that Ms D, who had been observed as having some disquiet, could have expressed the source of that in the meeting. When it was put to him that showed some naivety about family

[28] NOE page 193.
[29] This is relevant, for example one of the brothers, M, had quoted for work to be carried out on the property.
[30] This would seem to overlook the provisions of Rule 6 of the Client Care Rules.

dynamics, Mr Haynes expressed the view that speaking separately to her to understand her apparent unease would have been "a counsel (of) perfection".[31]

[87] Mr Haynes talked of the retainer being broadened only in extreme and unusual circumstances. Mr Waalkens put to him the hypothetical where:

> "… You've got commercially unsophisticated trustees, you've got a potential clash of interests between siblings and you've got a lawyer who is selling them their property and he's the other trustee, do you accept that first the practitioner should have at least contemplated that his retainer might need to go further?"[32]

[88] After some prevarication, Mr Haynes conceded such a hypothetical, were it to have existed, was an extreme situation:

> "I see it as extreme and in that extreme case I accept that a competent lawyer might have decided that it was desirable to enquire further into the matter. At the outset I've said that in my view some competent lawyers may have decided to act, at least to some extent, in the way which Mr Eades has said."[33]

[89] The hypothetical could have been made even more extreme by emphasising that one of the trustees had English as a second language and the vendor/trustee/ lawyer was a long-time friend of the practitioner providing the independent advice.

[90] Mr Haynes accepted that his opinion was based on his adoption of Mr Johnson's evidence that "the family as a whole were comfortable with the transaction."[34] However Mr Haynes also seemed to misunderstand that Mr Johnson had conceded the trustees were unsophisticated.[35]

[91] With some reluctance Mr Haynes finally conceded the situation of a trustee selling to co-trustees who were also clients was unusual.

[92] He also accepted that it would have been important for the trustees to understand the nature of Ed Johnston's conflict of interest.

[93] The Tribunal, having carefully listened to the evidence of both respected experts, preferred the evidence of Mr Eades. We have noted the concessions made

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[31] NOE page 250.
[32] NOE page 251.
[33] NOE page 251.
[34] NOE page 254, 260.
[35] NOE page 267.

by Mr Haynes which would modify his evidence in the hypothetical put to him. We consider the hypothetical matched the situation of the two trustees in the present case.

[94] We found Mr Haynes' evidence to be more in the nature of advocacy, rather than having the distance and detached nature we would expect from an expert witness.

[95] Furthermore, we consider that if such a limited approach were to be taken to the level of advice and understanding of the situation, as was adopted here[36], the clients would (and did) receive little or no benefit from the referral to an independent lawyer.

Law on Retainers

[96] Counsel were agreed that the leading statement on duty to advise a client is the Privy Counsel decision in *Clark Boyce v Mouat*[37] where it was said:

> "When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors."

[97] Mr Waalkens submits that two further cases have added a gloss to this. In the *Haira*[38] case. The Court of Appeal commented on the *Clark Boyce* dictum as follows:

> "We do not read the judgment as holding that a solicitor will never be under a duty, whether before or after accepting instructions, to offer advice on the wisdom of the transaction. Whether or not there is such a duty must depend on the circumstances as they develop and the terms of the retainer. In *Clark Boyce v Mouat* from the outset the solicitor's intended role and retainer were limited. Clearly that will not always be the case."

[98] And in *Gilbert v Shanahan*[39] where Tipping J held:

> "Solicitors' duties were governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arose in the course of carrying out those instructions had to be regarded as coming within the scope of the retainer."

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[36] And advocated by Mr Haynes.
[37] *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648.
[38] *Haira v Burbery Mortgage Finance & Savings Limited (in receivership)* [1995] 3 NZLR 396, 406.
[39] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA), 537.

[99] More recently the Privy Council has held that it is not helpful to describe the duty owed by the solicitor "in the abstract":

> "The scope of the duty may vary depending on the characteristics of the client, insofar as they are apparent to the solicitor. A youthful client, unversed in business affairs might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertenance, for the solicitor to offer to an obviously experienced businessman."[40]

[100] This view is further supported in *Carradine Properties Limited v D J Freeman & Co:*[41]

> "An inexperienced client will need and be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

[101] We have also been referred to the text *Ethics, Professional Responsibility and The Lawyer* where the following passages are relevant:[42]

> "In the absence of clear indications that the contrary was intended, it is presumed that the parties intended a general retainer under which the lawyer is expected to advise on all legal aspects of the client's affairs with which he or she is dealing. The extent of the duty to advise generally will be determined in part by the client's knowledge and sophistication. Thus, if the client is well versed in business matters the lawyer will not be in breach of the duty to advise generally if the wisdom of a particular transaction is not raised. However if the client is unsophisticated, the obligation to discuss the merits of the transaction, to explain commercial matters (which to business people may seem straightforward), and to point out obvious risks will exist … the fundamental principle is that the extent of the work required of the lawyer is to be determined by the retainer's terms. However, in the absence of express terms limiting the general nature of the retainer the solicitor runs a risk that a Court will presume that the parties intended a broad retainer"

And further:

> "When there is some unusual or unique aspect to the transaction, the parties are unfamiliar with the nature of the transaction, or the instructions are not clear, the lawyer ought to ensure the client's intentions are fully understood and their interests are being protected."

[102] Mr Napier submitted, for Mr Johnson that, effectively the Standards Committee was overstating the risks to these clients. Mr Napier submitted:

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[40] *Pickersgill v Riley* [2004] UK PC 11 at [7].
[41] [1999] Lloyd's Report PN48, UK Court of Appeal.
[42] Duncan Webb, (3rd ed.) Lexus Nexus Wellington 2016 at 5.4.1 and 7.5.

> "Realistically, the only way that Mr Johnston could be preferring his own interests was by selling this property at too high a price. There is absolutely no evidence that this was the case."[43]

[103] Mr Napier submitted that, based on Mr Haynes evidence and the dicta in the *Bartle*[44] case, holding that a solicitor is not required to give advice about the wisdom of transaction, that no fault could be found here with Mr Johnson.

Answer to Issue 1

[104] The retainer in this matter was not initiated by the clients. It was imposed on them because of Ed Johnston's dire conflict of interest. In these circumstances, it would be wrong to view the retainer as narrowly as suggested by Mr Johnson.

[105] The clients did not even understand the nature of the conflict or the risks to them that were posed by it. And Mr Johnson seems not to have considered he was obliged to spell these out. Certainly, there was no file note to support such advice having been given, and his evidence falls well short of satisfying us that the full circumstances of this transaction were canvassed by him or the real reason for his involvement and thus the scope of his retainer.

[106] We adopt the submissions of Mr Waalkens as follows:

> "4.17 The practitioner was not advising an experienced commercial party, or even an experienced trustee, where the scope of the advice sought could reasonably be expected to be restricted to the mechanics of the transaction (that is, how the agreement for sale and purchase and finance will work).
>
> 4.18 Mrs H and Ms D were coming to the practitioner as trustees. They owed duties as trustees. The purchase of the house was a significant financial investment. It also involved taking out a higher mortgage in order to fund development work. Those were factors that had a bearing on the trustees' duties. Advice about the purchase as it related to the trustee's duties was a legal matter, not a financial matter. It is a matter on which the practitioner was well capable of advising and could be expected to advise on.
>
> 4.19 Mrs H and Ms D were unversed in business and financial affairs. In *Clark Boyce v Mouat* the plaintiff (Mrs Mouat) had been in the same position, but there had been an express retainer limiting the advice and a letter that Mrs Mouat had signed expressly recording that she had received advice. The Privy Council held that the solicitor was not

[43] NOE page 112.
[44] *Bartle v G E Custodians Ltd* [2010] 1 NZLR 802.

> required to go beyond a limited duty to carry out the conveyancing and advise on the legal aspects of the transaction.
>
> 4.20 Furthermore, in contrast to *Clark Boyce*, Mrs H and Ms D were not "apparently aware of what they were doing". To the contrary … their confusion about a range of matters would have been evident at the meeting (through their assumptions that Mr (Ed) Johnston would be at the meeting, to their surprise that the Trust was purchasing a property)."

[107] We further accept the submission that:

> "4.23 The context of the referral therefore contemplated that the practitioner would give advice to Mrs H and Ms D that they might ordinarily expect to receive from Mr (Ed) Johnston, but were not able due to the conflict of interest. As Robert Eades states in his affidavit: "a main purpose of independent advice in this case should have been to ensure that indeed Ed Johnston was not preferring his own interests"."

[108] Noting that in this instance the lawyer was provided not just with the agreement for sale and purchase but also a copy of the trust deed, his retainer must have extended to advice concerning trustee duties.

[109] We accept the submission contained in paragraph 4.28 of Mr Waalkens' opening:

> "The practitioner was being asked to give advice to trustees (not persons purchasing on their own behalf) that were considering purchasing a property from a fellow trustee, who was also their lawyer. Clearly, these were unusual circumstances …"

[110] We accept the submission that the practitioner's duties were not simply limited to advising the trust on the mechanics of the transaction and that the retainer was considerably wider including whether the purchase of the property was consistent with the trustee's duties. We accept that the "character and experience of the client increased the lawyer's duties in these unusual circumstances".

Issue 1

[111] Thus, we describe the scope of the retainer (Issue 1) as a general one addressing the matters to which we have referred.

Issue 2

[112] We find that the practitioner did not fulfil his obligations in respect of the retainer. We find that because we consider the manner in which Mr Johnson conducted the meeting on 2 September displayed a disregard for the clients' need to understand the conflicts involving their co-trustee and usual lawyer, none of which was explained to them. Further, we consider that by not speaking at least directly to, and probably in private, to the two actual trustees who were present and ascertaining the nature of Ms D's discomfort and surprise, Mr Johnson failed his clients.

[113] Having accepted that these clients were unsophisticated and limited in English in the case of Mrs H, Mr Johnson failed to ascertain their understanding of their obligations as trustees and in particular their obligations in relation to this transaction in the context of the recent formation of the trust.

[114] Mr Johnson's failure to ascertain if his clients had been influenced in their decision by the relationship with the vendor who was their lawyer, and co-trustee, sets this case apart from the 'wisdom of transaction' cases.

[115] In our view Mr Johnson added absolutely nothing useful to the state of knowledge of the clients that they could not have obtained from the conflicted lawyer, in other words he added no value by being apparently "independent".

[116] That is not to say that Mr Johnson intended to assist Mr Ed Johnston in any dishonest way in relation to these people.

[117] However, we do consider that he has failed in his obligation to the clients under Rule 3 to act "*competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care*".

Issue 3, Charge 2

[118] We consider that the practitioner's breach of Rule 3 and failure to his client approaches, but does not quite reach, a reckless contravention of Rule 3.

[119] However, we do consider that the alternative of "negligence in his professional capacity" has been established. It has been of such a degree as to bring his

profession into disrepute. We regard this as 'high end' negligence. We consider that, were reasonable members of the public informed of these circumstances, that they would consider that Mr Johnson had badly let his clients down and in turn brought his profession into disrepute.

[120] This was considered by a Full Bench of the High Court in *W*[45], when considering the similar provision under the previous Act[46]. It was held relevant to consider whether the conduct falls below what is expected of the legal profession, and whether a client would objectively think less of the profession if the conduct were considered acceptable. Certainly, the failures in the advice provided went well beyond the definition of "unsatisfactory conduct" in s 12.[47]

Issue 4

[121] Mr Johnson is alleged to have breached a number of the Trust Account Regulations[48]. In addition the LCA creates obligations on a practitioner to account for trust money, keep proper records and ensure funds held earn interest.[49] The allegations are set out in particulars 6-27 of Charge 2, with the exception of particular 20 which was withdrawn in Opening. The Charges, are attached as Appendix 1 to this decision and we do not propose to address the particulars in detail.

[122] In summary, Mr Johnson, by the conclusion of his evidence, conceded the following categories of default:

Shortcomings in reporting to client;

Poorly maintained trust account entries for two clients;

Reporting payments which had not been made;

Making payments (two clients) without retaining authority for same;

Providing incorrect monthly certificates to NZLS.

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[45] *Complaints Committee of the Canterbury District Law Society v* W [2009] NZLR 514.
[46] Law Practitioners Act 1982.
[47] "…conduct that fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer."
[48] Lawyers and Conveyancers Act (Trust Account) Regulations 2008, Reg 6, 11,12,14 and 17.
[49] Sections 111, 112 and 114 respectively. Set out in Appendix 2 to this decision.

[123] The number of transactions was significant - 42 for the two clients concerned, tens of thousands of dollars were involved, together with another amount of $324,123.03.

[124] One of the major concerns is that, at times Mr Johnson was not updating his trust account records for up to a fortnight. This meant that there was a risk of entries being placed out of date order, and indeed the inspector found three such entries. This can, in turn lead to the obscuring of an overdrawn trust account, so is regarded seriously. Initially, Mr Johnson denied that he had updated so infrequently, or had admitted so to the inspector, but he also conceded on this matter.

[125] Mr Johnson accepted the errors, but minimised their seriousness, using terms such as “human error”, “honest mistake”, “not a widespread failure”, “accident” and “oversight”. We disagree. When we stand back and assess the overall picture, it falls far short of the standard required of a trust account partner, who had recently completed the “Stepping Up” programme on the very regulations under consideration.

[126] The answer to Issue 4, is that the defaults between late 2011 and 2012 are clearly proven on the balance of probabilities, indeed are conceded. We find this Charge established.

Issue 5

[127] As to the level of liability, we view the number of breaches and repeated failure to adhere to the regulations to demonstrate reckless disregard of them. We also accept Mr Waalkens’ submission that the accurate filing of monthly certificates is vital to maintaining the integrity of trust accounting, and therefore the public’s confidence in the profession. We find that misconduct has been established.

Issue 6 and 7, Charge 3

[128] Mr Koo was the Law Society inspector in relation to this charge and has provided detailed evidence of the breaches alleged. At the time under consideration, Mr Johnson still maintained a handwritten trust account. To his credit, Mr Koo’s report prompted the practitioner to acquire an electronic trust accounting system, and a competent person to assist him.

[129] As with the previous charge, Mr Johnson conceded many of the particulars alleged, before the hearing, and the remaining ones in cross-examination. He accepted that his trust account did not reconcile from February 2015 to January 2016 and that he knew this to be the case at least between August 2015 and January 2016.

[130] Once again, Mr Johnson minimised the errors and emphasised his good intentions. But perhaps most worryingly, Mr Johnson did not accept, until the very end of his cross-examination that he knew his monthly certificates were incorrectly certified, having maintained until then that he had not intended to mislead the NZLS. He asserted that because he had intended to find and rectify the errors, that there was no intention to mislead. That is a distortion of his obligation.

[131] As set out in Mr Waalkens' Closing, the categories of default are as follows:

(a) Client balances were permitted to go into debit;

(b) Large client balances were not put in interest bearing deposit;

(c) The float account was overdrawn;

(d) Journal entries were not maintained from September 2014 and certain other transfers were not recorded in journal entries;

(e) Failure to report to clients for which he held funds for more than a year;

(f) Entered balancing entries into his trust account ledgers.

[132] Some of these are more minor errors, such as a failure to retain authority for a $100 payment from the lawyer's own family trust; and handwriting illegibility. However, the failure to reconcile the trust account over a lengthy period is serious enough by itself, and was compounded by the filing of the monthly certificates that Mr Johnson must have known, as he later conceded, were false.

[133] We find Charge 3 proven on the balance of probabilities, having regard to the serious nature of the allegations. Thus, the answers to Issues 6 and 7 are "Yes".

Level of Culpability - Issue 8

[134] The failure to ensure funds were placed on interest bearing deposit (IBD) were serious, involving sums ranging from $19,999.10 to $191,308.11. And although the five client balances found to be overdrawn in January 2016 were relatively small ($51.98 to $1,205.20), they had been overdrawn for a number of months.

[135] Mr Napier submitted that similar breaches had been found to be "unsatisfactory conduct" by the Standards Committees in other cases. Some of these cases involved one aspect of the defaults demonstrated in this matter, and we are not bound by decisions of the Standards Committees or the LCRO[50]. By contrast, this Tribunal has, in the past, taken very seriously the failure to operate a trust account at the high standard necessary to maintain the confidence of the public, and the integrity of the system referred to in *Bolton*[51].

> "The second purpose (of striking off) is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

[136] In his closing submissions, Mr Napier analyses eleven categories of default found and submits each (bar one) would justify a finding of "unsatisfactory conduct". Further, Mr Napier urges the Tribunal to ignore the cumulative effect of the breaches. We consider the Tribunal would be failing in its duty to protect the public, and the reputation of the profession, if it did not take account of the total picture.

[137] Although we note Mr Napier's submission that no client funds were lost or misappropriated, we consider that to be a more relevant factor at the stage of assessing penalty.

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[50] Legal Complaints Review Officer.
[51] *Bolton v Law Society* [1994] 2 All EF 486, 492.

[138] As with the previous charge, we consider that the number of breaches of the relevant rules and regulations, over a significant period of time, demonstrate a reckless disregard of them by Mr Johnson. Even though we accept some of the errors are minor, and may relate to pressure on the lawyer, who was managing his own manual system (too infrequently), the cumulative effect of the defaults must be taken into account when assessing the overall picture of how this trust account was operated.

[139] False certifications are viewed very seriously by the Tribunal, as they underpin the integrity of a self-reporting system.

[140] For these reasons, we find misconduct to have been established.

Directions

1. The Standards Committee is to file it submissions as to penalty within 14 days of the release of this decision.

2. The practitioner is to file his submissions as to penalty within a further 14 days.

3. Counsel are to consult with the Tribunal Case Manager to allocate a half-day hearing to consider penalty.

DATED at AUCKLAND this 9th day of March 2018

Judge D F Clarkson
Chair

Appendix 1

Charges

Canterbury Westland Standards Committee No. 3 of the New Zealand Law Society (**Committee**) charges **Ronald Bruce Johnson** (**Practitioner**) of Auckland, as follows:

Charge 1

Misconduct within the meaning of s 7(1)(a)(ii) of the Act in that the Practitioner wilfully or recklessly contravened rule 3 the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**) when giving advice to the trustees of the H Family Trust (**Trust**) about the purchase of Edwin Freeman Drive, Ranui, Auckland by the Trust (the purchase being made on 13 October 2009).

Or, alternatively, 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 under s 241(c) of the Lawyers and Conveyancers Act 2006 (**Act**).

Or, alternatively, unsatisfactory conduct within the meaning of ss 12(a) and/or 12(c) of the Act.

The particulars of the charge are as follows:

1 At all relevant times the Practitioner:

(a) Was enrolled as a barrister and solicitor of the High Court of New Zealand; and

(b) Held a practising certificate.

2 At the time of the alleged misconduct the Practitioner was a partner at the law firm Corban Revell.

3 The Practitioner worked closely with Edward Johnston, another lawyer who worked for a different firm, and RF and JN, who were property developers.

4 The Practitioner knew the business dealings of Edward Johnston, RF and JN, and the dealings of entities related to or controlled by them.

5 The Trust was a family trust. The trustees were H, D, and Ed Johnston & Co Trustee Limited (together the **Trustees**). Edward Johnston was the sole director and shareholder of Ed Johnston & Co Trustee Ltd.

6 The Trust's main asset was the H family home at Home Street, Grey Lynn (**Home Street**). The broad goal of the Trust was to generate income to support H.

7 In 2009, Edward Johnston recommended that the Trustees use the equity in Home Street to finance the purchase of another residential property at Edwin Freeman Place, Ranui, a property owned by Edward Johnston (**Edwin Freeman Place**).

8 The Trustees were referred to the Practitioner for independent advice in respect of the proposed purchase of Edwin Freeman Place.

9 The purchase of Edwin Freeman Place was not in the best interests of the trust for reasons including:

(a) Rental income would not cover outgoings; and

(b) The proposed purchase price was higher than the property's registered valuation of Edwin Freeman Place.

10 The Practitioner did not advise the Trustees in relation to purchase price or financial viability of the purchase. The Practitioner did not advise the Trustees to obtain an independent valuation.

11 On 13 October 2009 the Trustees purchased Edwin Freeman Place.

12 The Practitioner failed to give adequate advice to the Trustees and therefore failed to act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care, in breach of rule 3 of the Rules.

13 The Committee further relies upon grounds appearing in the affidavits of Malcolm Ellis and Graham Bentley.

Charge 2

Misconduct within the meaning of s 7(1)(a)(ii) of the Act in that the Practitioner wilfully or recklessly contravened provisions of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (**Regulations**) in his operation of the trust account of Central Park Legal Limited.

Breaches of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (Regulations):

(a) Regulation 11(1);

(b) Regulation 11(2);

(c) Regulation 11(3)(b);

(d) Regulation 12(6)

(e) Regulation 12(7); and

(f) Regulation 17.

Or, alternatively, 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 under s 241(c) of the Lawyers and Conveyancers Act 2006 (**Act**).

Or, alternatively, unsatisfactory conduct within the meaning of s 12(c) of the Act.

The particulars of the charge are as follows:

1 At all relevant times the Practitioner:

(a) Was enrolled as a barrister and solicitor of the High Court of New Zealand; and

(b) Held a practising certificate.

2 The Practitioner maintained a trust bank account with Westpac while operating the law firm Central Park Legal Limited in Henderson, Auckland.

3 The Practitioner's trust account was inspected by Graham Bentley of the New Zealand Law Society Inspectorate as part of an investigation into complaints against the Practitioner.

4 In his report dated 20 January 2016 Mr Bentley identified the following issues:

Trust ledger for MDL

5 MDL (**MDL**) was a client of the Practitioner.

Payments made with no supporting documentation

6 The Practitioner made payments from MDL's trust money when no authority to do so had been provided by MDL and/or retained, in breach of reg 12(6) of the Regulations.

7 These payments included:

(a) A $7000.00 payment dated 8 December 2011 described as "Loan to HDL".

(b) A $2,200.00 payment dated 28 February 2012 described as "Repay Ed Johnston loan".

(c) A $300.00 payment dated 28 February 2012 described as "Repay Central Park Legal loan".

(d) A $5000.00 payment dated 16 March 2012 described as "JLS for HDL".

(e) A $260.00 payment dated 9 March 2012 described as "GLC".

(f) A $812.00 payment dated 10 April 2012 described as "NFH".

(g) A $33,423.54 payment dated 27 April 2012 described as "TC".

(h) A $7,569.85 payment dated 16 May 2012 described as "Loan to RJR".

(i) A $1000.00 payment dated 23 May 2012 described as "Carpet from [indecipherable]".

(j) A $850.00 payment dated 28 May 2012 described as "PVF".

(k) A $299.00 payment dated 24 May 2012 described as "DAW".

(l) A $1,800.00 payment dated 29 June 2012 described as "NCP".

(m) A $2,200.00 payment dated 29 June 2012 described as "NCP [indecipherable] by Director to CPL to repay loan."

(n) A $1,000 payment dated 29 June 2012 described as "NCP Contribution to SF".

Failure to report to client

8 The last time the Practitioner reported to MDL about trust money handled for the client, transactions in the client's account, and the balance of the client's account was on 18 December 2011 (**18 December report**). The 18 December report contained information about transactions up to 16 December 2011.

9 The 18 December report omitted to include three payments made during that time period (being loans to CF, Edward Johnston, and Central Park Legal Limited).

10 Further payments of MDL trust money were made into and out of the Practitioner's trust account up until the end of June 2012. The Practitioner did not report further to the client about any transactions after 16 December 2011.

11 The Practitioner did not report to MDL when he ceased to act for MDL.

12 This conduct was in breach of regulation 12(7).

Failure to maintain trust account ledger

13 The trust account ledger was poorly maintained. There were inadequate narrations, running balances have not been included, and there were addition errors. Examples of errors include:

(a) An entry on 16 March 2012 for payment of $95,971.10 was listed as being made to "Placemakers & other invoices". Each individual invoice should have been listed.

(b) Entries dated 16 December 2012 were entered late and in fact took place on 16 December 2011. These entries were added some time after 28 February 2012.

(c) At the end of May 2012 there is an adding error of $100.00 that has meant the trust account ledger is overdrawn by that sum.

14 Collectively these errors constitute breaches of regulations 11(1), 11(2), and 11(3)(b).

Trust ledger for HDL

15 HDL was a client of the Practitioner.

Failure to maintain trust account ledger

16 The trust account ledger was poorly maintained. There were inadequate narrations, running balances have not been included, and there were addition errors. One error was at the end of March 2012 the balance figure was incorrectly calculated as $4,199.47 when it should have been $2,339.87.

17 This error constitutes a breach of regulation 11(2).

Payments made with no supporting documentation

18 The Practitioner made payments from the trust account with no supporting documentation to prove what the payments were for.

19 These payments included:

(a) A $673.32 payment dated 21 March 2012 described as "CPL Invoice 039".

(b) A $2,300.00 payment dated 21 March 2012 described as "BD".

(c) A $200.00 payment dated 21 March 2012 described as "RF".

(d) A $4,380.00 payment dated 21 March 2012 described as "DAW".

(e) A $200.00 payment dated 22 March 2012 described as "RF".

(f) A $1,087.00 payment dated 22 March 2012 described as "RRS".

(g) A $310.00 payment dated 22 March 2012 described as "PK".

(h) A $150.00 payment dated 23 March 2012 described as "BD".

(i) A $4,380.00 payment dated 29 March 2012 described as "DAW".

(j) A $258.32 payment dated 2 April 2012 described as "BD".

(k) A $2000.00 payment dated 5 April 2012 described as "NCP".

(l) A $325.00 payment dated 5 April 2012 described as "BD".

(m) A $1,500.00 payment dated 2 April 2012 described as "DAW".

(n) A $7,975.00 payment dated 10 April 2012 described as "CMSL".

(o) A $1,400.00 payment dated 4 May 2012 described as "DB".

(p) A $601.00 payment dated 16 May 2012 described as "JNL Loan to RJR".

(q) A $4,934.80 payment dated 23 May 2012 described as "PSIL Loan".

(r) A $5,000.00 payment dated 1 June 2012 described as "SI Loan pmnt".

(s) A $1,800.00 payment dated 29 June 2012 described as "NCP CB Fee JNL – Loan to MDL".

(t) A $5,000.00 payment dated 29 June 2012 described as "HDL".

(u) A $15,000.00 payment dated 29 June 2012 described as "GC".

(v) A $10,000.00 payment dated 29 June 2012 described as "JNL loan to MDL for CPL fees".

(w) A $3,200.00 payment dated 29 June 2012 described as "JNL loan to MDL for NCP fees".

(x) A $324,123.03 payment dated 29 June 2012 described as "JL Repay S".

(y) A $257.81 payment dated 1 June 2012 described as "JNL Loan to MDL".

(z) A $2,417.47 payment dated 2 July 2012 described as "CPL Fees & Disb on HPD".

(aa) A $6,000.00 payment dated 2 July 2012 described as "T for CMSL".

(bb) A $2,000.00 payment dated 23 July 2012 described as "P for MRDL".

20 ~~Further, a payment from DW on 23 March 2012 to HDL was receipted directly to MDL's ledger. There is no supporting documentation for a transfer to MDL~~'s ledger.

21 These payments were in breach of regulation 12(6).

Failure to report and inaccurate reporting

22 On 28 June 2012, the Practitioner provided a trust account statement to HDL. It stated that a payment of $345.00 had been made towards "Strata Titles Body Corp fee". The payment had not in fact been made.

23 This is in breach of regulation 12(7).

Monthly certifications

24 In addition to the matters expressly identified by Graham Bentley, issues also exist with the monthly certificates provided to the New Zealand Law Society.

25 For every month that he operated the trust account, the Practitioner completed monthly certificates. In the certificates the Practitioner stated he was satisfied that for the preceding month the practice complied with all of the trust accounting provisions of the Act and Regulations, and that trust account transactions during the month had been in accordance with client instructions and, where completed, properly accounted for to clients.

26 Those certificates were incorrect for December 2011 and February 2012 to July 2012.

27 The certificates were incorrect because the Practitioner had not been complying with trust account regulations in the manner set out in this charge.

28 The conduct above was in breach of regulation 17 of the Regulations.

Appendix 2

Lawyers and Conveyancers Act 2006
Sections 111, 112, and 114

111 Obligation to account for trust money and valuable property

(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 on behalf of any person, the practitioner, related person or entity, or incorporated firm must account properly for the money or other valuable property to the person on whose behalf the money or other valuable property is held.

(2) A person commits an offence against this Act and is liable on conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1).

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

(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

(b) must, in relation to other valuable property, keep records that—

(i) describe the property received or held; and

(ii) show the date on which the property was received; and

(iii) if the property has been disposed of, give details of the disposition of the property, including the date on which, and the person to whom, the property was disposed of; 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.

(2) Subsection (1) does not apply to a person (being a practitioner, related person or entity, or incorporated firm)—

(a) who does not provide regulated services; or

(b) who, in the course of providing regulated services, does not, on that person's own behalf or in his or her capacity as a director or shareholder of an incorporated firm, do any of the following:

(i) receive or hold money or other valuable property in trust for any other person:

(ii) invest money for any other person:

(iii) have a trust account:

(iv) receive fees or disbursements in advance of an invoice being issued.

(3) A person commits an offence against this Act and is liable on conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1).

114 Duty of practitioners to ensure that funds earn interest

It is the duty of every practitioner and of every related person or entity and of every incorporated firm to ensure that, wherever practicable, all money held on behalf of any person by that practitioner, related person or entity, or incorporated firm earns interest for the benefit of that person, unless—

(a) that person instructs otherwise; or

(b) it is not reasonable or practicable (whether because of the smallness of the amount, the shortness of the period for which the practitioner, related person or entity, or incorporated firm is to hold the money, or for any other reason) for the practitioner, related person or entity, or incorporated firm to invest the money, at the direction of the person for whom the money is held, so that interest is payable on it for the benefit of that person.