

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 33

LCDT 011/19

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**CANTERBURY WESTLAND
STANDARDS COMMITTEE (NO 1)**

Applicant

AND

KERRY NOBLE WILLIAMS

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr W Chapman

Mr H Matthews

Mr S Morris

Ms G Phipps

DATE OF HEARING 14 August 2019

HELD AT Christchurch District Court

DATE OF DECISION 4 November 2019

COUNSEL

Mr JLS Shaw and Mr T McGuigan for the applicant

Mr WJ Hamilton for the respondent

**DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS
DISCIPLINARY TRIBUNAL CONCERNING CHARGE**

[1] The applicant has charged Mr Williams with a disciplinary offence under the Law Practitioners Act 1982 (LPA) and alleges:

Misconduct in his professional capacity pursuant to s 112(1)(a) of the LPA; or in the alternative;

Conduct unbecoming a barrister or solicitor pursuant to s 112(1)(b) of the LPA, or in the further alternative;

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 the profession into disrepute pursuant to s 112(1)(c) of the LPA.

[2] The charge and particulars are annexed as Appendix 1.

[3] Mr Williams has admitted Conduct Unbecoming in respect of Particulars 1 and 2 only but has otherwise denied the charge.

Factual Background

[4] The following facts are not disputed:

- (a) Mr Williams commenced a professional relationship with Mrs Z in the late 1990s when she engaged him to assist her with relationship property issues and preparation of her will.
- (b) In late 2003, Mrs Z's ex-husband agreed to purchase the retail arm of a company ABC. That company was owned by Mr Williams and W J. Mr Z used a company DEF to complete the purchase. Mrs Z was a

director and shareholder of DEF at the relevant time but did not involve herself in the transaction.

- (c) The acquisition of ABC was financed by the vendor, the relevant aspect of which was that DEF owed \$80,000 to GHI which was a company in which Mr Williams held a 50 per cent shareholding.
- (d) Mr Williams remained the owner of the manufacturing arm of ABC which supplied its products to DEF.
- (e) In August 2004, Mrs Z (at the suggestion of Mr Z) engaged Mr Williams to:
 - (i) Establish the JZ Trust of which Mr Williams was the sole trustee.
 - (ii) Transfer her home to the Trust.
 - (iii) Set up a revolving credit facility of \$75,000 with Westpac which was secured against the Trust property.
 - (iv) Draw down funds against the facility and to pay \$71,000 to Mrs Z to meet the cost of renovations to the Trust property.

[5] Mrs Z signed a personal guarantee over that credit facility.

[6] Between 4 August 2004 and 29 April 2008, the Westpac facility was extended four times. The funds were drawn down by Mr Williams and paid to either of two companies DEF or JKL. Those payments were made on the direction of Mr Z who was solely engaged in the financial aspects of the companies. Mrs Z was the majority shareholder in DEF. She was effectively the sole shareholder of JKL by means of another company which she owned. She involved herself in the day to day running of the companies.

[7] It was Mr Z who approached Westpac to arrange the further lending. Mr Williams would receive advice from Westpac that an increase in lending had been

sought and approved independently of him. Westpac provided him with the documents to be executed which, when prepared, he would send to Mr and Mrs Z at a PO Box number in the name of Mr Z for signing.¹ Mr Z then obtained the signature of Mrs Z to the documents. Mrs Z did not have any personal contact with Mr Williams about the documents.

Consideration of the charge

[8] There are six transactions which are relevant to the particulars of the charge and are summarised as follows:

- (a) *Transaction 1* – On 4 August 2004 \$75,000 was drawn down from the credit facility and paid into Mr Williams trust account (STA) under Mrs Z's ledger from which \$71,000 was paid to Mrs Z for house renovations. On 10 August 2004 Mr Williams transferred \$1,367.18 from Mrs Z's ledger to the trust account ledger for R A Limited being noted as "*From Z J A(2834/5) \$1,367.8, (sic) To R A Limited (2981/6) \$1,367.18 balance ledgers*". There are no trustee resolutions or signed authorities held by Mr Williams for these entries.
- (b) *Transaction 2* – On or around 21 April 2005 the Trust's facility was extended by a further \$50,000. The \$50,000 was drawn down and paid into the STA under the Trust's ledger. Between 27 April 2005 and 4 May 2005, five separate payments totalling \$49,886.48 were paid from the Trust's ledger to Mr Z and companies one of which was a company in which Mr Williams held 50 per cent of the shares and was the sole director. There were no trustee resolutions or signed authorities held in relation to this transaction.
- (c) *Transaction 3* – On or around 21 June 2005 the Trust's facility was again extended by \$100,000. Three payments totalling \$73,850.63 were made from the Trust's STA ledger to companies including to the company of which Mr Williams was the sole director and holder of 50

¹ Notes of Evidence pp 76, 87 and 88.

per cent of the shares. There were no trustee resolutions or other signed authorities held in relation to this transaction.

- (d) *Transaction 4* – On 8 July 2005 Mr Williams drew down \$23,000 from the Trust's facility and paid it to the company JKL. He did so on the direction of Mr Z. There is no trustee resolution or signed authority held by Mr Williams in relation to this transaction.
- (e) *Transaction 5* – On or around 2 February 2007 the Trust's facility was again extended by \$60,000. \$59,500 was subsequently paid to JKL by two separate payments. No trustee resolutions or signed authorities are held by Mr Williams in relation to this transaction.
- (f) *Transaction 6* – On or around 24 April 2008 the Trust's facility was again extended by \$60,000.00. At this time Mrs Z declined to advance \$53,034 of those funds to DEF. Mr Williams drew down the amount on 29 April 2008 and transferred it to DEF. No trustee resolutions or signed authority are held by Mr Williams in relation to this transaction.

Particular 1 – Conflict of interest

[9] This particular relates to transactions 2 and 3. Mr Williams paid GHI a total of \$2,080 directly from the Trust's STA ledger. The allegations are that, in doing so, Mr Williams:

- (a) Did not fully disclose his interest in GHI to Mrs Z.
- (b) Did not advise the Trust or Mrs Z to obtain independent legal advice.
- (c) Did not obtain Mrs Z's consent.

[10] Mr Williams has admitted Conduct Unbecoming in respect of this particular and also in respect of Particular 2 which also relates to transactions 2 and 3. He denies that he did not fully disclose his interest in GHI to Mrs Z and denies that he did not obtain her consent.

[11] Mrs Z in her evidence was unshaken in her assertion that she did not know about these arrangements.² There is no evidence of her consenting to this arrangement. We find it established that she did not consent to what occurred or know of the details to any reasonable extent.

[12] The position of Mr Williams was that he was acting purely as a trustee when he took this money not as a lawyer. The same issue arises in respect of Particulars 2 and 3.

Particular 2 – Conflict of interest

[13] This particular arises out of transactions 2 and 3 where Mr Williams made payments from the Trust to DEF totalling \$113,344.63 between 22 June 2005 and 29 April 2008 in circumstances where DEF was indebted to GHI, the company in which Mr Williams was a 50 per cent shareholder and of which he was the sole director. The allegations are that, in doing so, Mr Williams:

- (a) Did not fully disclose DEF's indebtedness to GHI to Mrs Z.
- (b) Did not at any point advise the Trust or Mrs Z to obtain independent legal advice.
- (c) Did not obtain Mrs Z's consent.

[14] Mr Williams denies a failure to fully disclose the indebtedness of DEF to Mrs Z and denies a failure to obtain her consent. From the outset he has admitted Conduct Unbecoming in respect of Particulars 1 and 2. The submission on behalf of Mr Williams was that, despite his admission, this conduct occurred in his capacity as sole trustee of the Trust and should not be reclassified as falling within his role as a lawyer.

[15] This position was maintained by Mr Williams in cross-examination:³

² Notes of Evidence pp 14-16.

³ Notes of Evidence p 74, from line 4.

- Q. And so, she was getting the dual protection of someone who would make sure from a legal perspective that things are kosher, that they were happening as they should, and someone who could be trusted to make the ultimate decisions as the trustee. You heard her give that evidence obviously?
- A. I did, yep.
- Q. You accept that's a reasonable expectation for her to have in a position she was in, that you, as a professional trustee, as a solicitor/trustee would be looking both initially in the solicitor role at the legality and propriety of the transactions as well as making the ultimate decision. Do you accept that's a reasonable expectation for her to have in the circumstances?
- A. Ah, if, ah, I would accept that. If I was asked to make an enquiry of the nature of the borrowing and the purpose for which the borrowing was put to, yep.
- Q. So you're saying, what, because she never said to you, oh hey Mr Williams, or hey Kerry, can you give me some advice about whether this is sensible transaction borrowing –
- A. Borrowing.
- Q. – that obligation never fell upon you?
- A. Correct. ... I was never asked during any of these transactions by J as to whether what was being done by her personally was to her advantage.
- Q. And you would say also that there was no obligation on you arising from the fact that you'd been her lawyer since the late 1990's acting on that original claim, preparing a Will for her, doing whatever other legal work there was and then the establishment of the trust?
- A. I think we've covered that haven't we?
- Q. Well just confirm for us if you would. No obligation to the trust, no obligation to her, notwithstanding the previous relationship, that's your position?
- A. That's my position.

[16] Counsel for Mr Williams relied on the view expressed by Matthew Charles Hay who swore and filed an affidavit in support of Mr Williams. Mr Hay is an expert practitioner in the area of trust law. He expressed the opinion that the payment was a trustee task and that Mr Williams was not acting as a lawyer. The conduct referred to in Particulars 1 and 2 was the decision to make the payment. That decision fell on the 'trustee' side of the distinction in *Hansen v Young*.⁴

[17] Mr Hay's view was challenged by counsel for the Committee who put to him that the obligations of a lawyer/trustee overlap. Mr Hay acknowledged that lawyer/client obligations still exist and extend beyond particular retainers. Mr Hay also

⁴ *Hansen v Young* [2004] 1NZLR 37.

accepted that lawyer/client and trustee obligations can overlap but that the lawyer/client obligations still exist.⁵

[18] Despite refutations in his evidence Mr Williams accepted the overlapping role of his professional role and that of a trustee when he said:⁶

- Q. But you say that conflict is restricted to your role as a trustee and it's got no connection with your professional obligations either to the trust?
- A. No. I think that I've held up my hand as the solicitor and said that shouldn't have happened. I let it happen. The milk was spilt. I couldn't do anything about it".

[19] Mr Williams also accepted that the payments were made without authority and that the payments should not have happened.⁷

[20] We find, having listened carefully to the evidence of Mrs Z and observed her demeanour, that she did not consent to the loan nor have knowledge of the level of indebtedness. In any event Mr Williams admission of Conduct Unbecoming appears to concede in part that the conduct in question was conduct that occurred in his professional capacity as a lawyer. This is discussed further from paragraph [31] of this decision.

Particular 3 – failing to provide appropriate advice for the transactions

[21] This particular relates to the payments that Mr Williams made to JKL, GHI and R A Limited totalling \$143,508.96.

[22] The allegations in support of this particular are that Mr Williams failed to:

- (a) Properly advise the Trust and/or Mrs Z regarding whether the transactions met the objects of the Trust Deed.
- (b) Properly advise the Trust and/or Mrs Z whether the transactions represented proper and prudent investments so as to achieve the objects of the Trust Deed.

⁵ Notes of Evidence, p 104, at line 26, p 106, at lines 1-6, 24-28.

⁶ Notes of Evidence, p 97, at lines 15-16.

⁷ Notes of Evidence, p 83, at lines 17-29.

- (c) Properly advise the Trust and or Mrs Z to document the loan advances to JKL and DEF, to obtain adequate security, and to otherwise ensure that the principal asset was protected.
- (d) Properly protect the interests of the Trust and/or Mrs Z.
- (e) Acted primarily on the instructions of Mr Z and/or was improperly influenced by Mr Z's directions and input.

[23] The Committee submitted that the evidence adduced at the hearing confirmed:

- (a) That the transactions did not meet the objects of the Trust as none of the recipients of the payments were beneficiaries.
- (b) That Mr Williams permitted the Trust's credit facility to be extended several times despite interest payments not being met and no principal repayments having been made.
- (c) That the funds were advanced from the Trust as unsecured loans.

[24] There was the further allegation that Mr Williams appeared to take instructions directly from Mr Z and did not discuss the variations or payments with Mrs Z or give adequate consideration to the prudence of the transactions. No attempt was made to assure himself that Mrs Z understood the transactions even although she was, as Mr Williams was aware, a guarantor of the credit facility. He simply relied on the fact that Mrs Z had signed the variation documents on three occasions.

[25] Counsel for Mr Williams again asserted that Mr Williams was:

- (a) Acting at all relevant times as a trustee and not as lawyer to the Trust.
- (b) Not acting for Mrs Z.
- (c) Not acting on the instructions of Mr Z and was not influenced by him.

Particular 4 – failing to provide appropriate advice regarding lending to Mr Z

[26] This particular relates to Mr Williams' acknowledgment that payments made from the Trust fund were effectively loans to Mr Z to assist him in his business dealings.

[27] The allegations in support of this particular are that Mr Williams failed to:

- (a) Properly advise the Trust and/or Mrs Z regarding whether the transactions met the objects of the Trust Deed.
- (b) Properly advise the Trust and/or Mrs Z regarding whether the transactions represented proper and prudent investments so as to achieve the objects of the Trust Deed.
- (c) Properly advise the Trust and/or Mrs Z to document the loan to Mr Z and to obtain adequate security.
- (d) Properly protect the interests of the Trust and/or Mrs Z.

[28] The Committee's evidence in support of this particular is an email that Mr Williams sent to the New Zealand Insolvency and Trustee Service on 13 September 2017 in which he stated that:

The Trust advanced to Mr Z funds to assist him in some business dealings. These funds were in fact funds that should have been utilised to assist with servicing the trusts(sic) debt to Westpac bank and other requirements. Accordingly, the debt owed by Mr Z to the Trust now needs to be reduced by \$1,000.

[29] Mr Williams has denied this particular on a factual basis saying that the Trust did not lend any funds to Mr Z and that the email to the Insolvency and Trustee Service was to explain that Mr Z did some consultancy work the fees for which were assigned to the Trust.⁸

⁸ Mr Williams affidavit of 13/8/2019 at paragraphs [131]-[136].

[30] There is no evidence of any amounts lent to Mr Z. There are two transfers from the Trust ledger to Mr Z's ledger made on 4 May 2005 totalling \$337.50. The notation is "*meet costs as per authority*".⁹ That notation is unhelpful in establishing that the payment was a loan to Mr Z. Mr Williams denies there were any loans to Mr Z. Mr Z's letter to the Official Assignee is of no help in this determination. There being insufficient evidence to establish a loan, we find this particular is not proved to the required standard.

Discussion

[31] Mr Williams has throughout these proceedings maintained that he was acting as trustee in respect of all the transactions and not as a lawyer. He has accordingly not answered any of the particulars except for Particular 4 and that was on the basis that there was no proof that any loans had been made to Mr Z by the Trust.

[32] The Tribunal must determine whether or not Mr Williams was acting professionally such that his alleged failures (which are not disputed) require determination in the context of his conduct.

[33] The starting point for our consideration is Mr Williams' acceptance that he was acting professionally as a lawyer for Mrs Z in part in respect of Particulars 1 and 2 and that his conduct was unbecoming.¹⁰ This is despite Mr Hamilton's submissions that the conduct occurred "outside his professional capacity".

[34] The question then becomes whether or not there was a continuing client/lawyer relationship between Mr Williams and Mrs Z in respect of the remaining particulars.

Relevant case law

⁹ Affidavit of Philip Strang of 5/8/19, annexure "B".

¹⁰ See paragraph [18] of this decision.

[35] We remind ourselves of the statement by Mummery LJ in *Longstaff v Birtles*¹¹ that:

That duty may endure beyond the termination of the retainer which initially formed the professional relationship of [lawyer] and client. The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency.

[36] That statement was adopted by the LCRO in *Morpeth v Ramsey*¹² The LCRO further stated at paragraph [28] that:

Where a lawyer claims that obligations do not attach to him due to his occupying a different role it is appropriate that a heavy onus be placed on that lawyer to show that the conduct complained of did not have a connection with his status as a lawyer and the client could not reasonably have thought he was acting as a lawyer.

[37] In the case of *Hansen v Young*¹³ the Court of Appeal was tasked with considering whether a solicitor, Mr Young who was Co-executor and Trustee of an estate had been negligent as “solicitor”. The issue before the Court was to determine whether there was a retainer and in particular whether “*the solicitors would assume responsibility, in their capacity as solicitors, for the general management and administration of the estate...*” The Court held that the role of a solicitor is to advise and the role of the trustee to make decisions. That the onus was on the party asserting a retainer as solicitor to prove that retainer and that a solicitor can hold a dual role of both trustee and solicitor. In that case the Court found there was an initial retainer, but it did not extend to the continuing management of the estate which was carried out jointly between the two trustees one of whom was Mr Young. A significant factor in that case was the active part Mr Young took in engaging in and instructing on the management of the estate.

[38] In 2006 the Lawyers and Conveyancers Act (Act) was enacted. The purposes are very clear which begin with and include “*to maintain public confidence in the provision of legal services and conveyancing services*” and “*to protect the consumers of legal services and conveyancing services*”.

¹¹ *Longstaff v Birtles* [2002] 1 WLR 470, 471.

¹² *Morpeth v Ramsey* LCRO 110/2009 (12 November 2009) at [27].

¹³ *Hansen v Young* [2004] 1NZLR 37.

[39] That Act replaced the Law Practitioners Act 1982 which had as its first purpose “*promote the interests of the legal profession*”. It is clear that in approaching this matter it is proper to approach it from a client centric lens.

[40] We find that Mr Williams was not acting purely as a trustee but also as a lawyer at all relevant times for the following reasons:

- (a) A lawyer/client relationship had commenced between Mr Williams and Mrs Z in the late 1990s when he acted for her regarding her relationship property issues and prepared her will.
- (b) He acted for her in 2004 upon the establishment of the Trust Deed and the execution by her of a guarantee of the credit facility.
- (c) She understood that as her adviser he established the Trust as he did to protect her assets and she relied on his advice that the Trust would achieve this. She felt she was “doubly protected”.¹⁴ Or as she said:¹⁵

Q And so, what did you think Mr Z’s role was and Mr Williams’ role was when you were signing those docs?

A. With Mr Williams being the solicitor, if he didn't think it was kosher, if it was right, it would be rejected, or he wouldn't agree to it.

- (d) He acted for her in respect of the gifting that occurred during the transactions period and acknowledged that she was his client for that purpose.¹⁶
- (e) Mrs Z considered that Mr Williams was her lawyer throughout the transaction period.¹⁷ As she said in evidence “*I trusted Mr Williams as a solicitor that he would do the right thing by me*”.¹⁸ It was in the view of the Tribunal reasonable that she held this view given how their relationship began and the ongoing nature of their relationship being

¹⁴ Notes of Evidence p 29.

¹⁵ Notes of Evidence p 49.

¹⁶ Notes of Evidence p 100, at lines 21-27.

¹⁷ Notes of Evidence pp 49, 52, 53 and earlier at pp 27 and 29.

¹⁸ Notes of Evidence p 27, at line 31.

one of trust and confidence. The members of the Tribunal carefully assessed her demeanour. She gave an honest account without exaggeration.

- (f) Counsel for Mr Williams in his closing submissions pointed out that Mrs Z did not ask for advice and trusted Mr Z's advice.¹⁹ In the view of the Tribunal it was reasonable that Mrs Z expected that when a person she regarded as her lawyer sent her documents to sign that he was as her lawyer advising her this was a proper course to take.
- (g) Mr Williams sent the letters to Mr and Mrs Z, not to Mrs Z alone as the beneficiary of the Trust receiving a capital payment. This was inconsistent with him acting purely as a trustee.²⁰
- (h) It was not reasonable for Mr Williams to consider that he was applying the Trust funds for Mrs Z benefit and that this was what she as a settlor wanted. Mr Williams knew that, as her lawyer, Mrs Z had instructed him to establish the Trust to protect her assets. The repeated drawing down of funds was inconsistent with that core purpose of the Trust.
- (i) She received correspondence on his letterhead and signed documents as prepared by him reasonably believing he had not ceased being her lawyer.
- (j) Mr Williams acknowledged treating Mrs Z as a client.²¹ When asked, he said that he treated her as a client in any action he took as a trustee because she was the settlor and beneficiary.
- (k) Furthermore, the submission²² that Mr Williams always acted on Mrs Z's and or Mr and Mrs Z's instructions is not consistent with the evidence that she was passive in the dealings nor that Mr Williams saw

¹⁹ Paragraph [5.8].

²⁰ Notes of Evidence p 101.

²¹ Notes of Evidence pp 71 and 72.

²² Paragraph [16] submissions in response.

his role solely as a “decision making trustee” not solicitor acting on instructions.

- (l) The clear distinction in roles that existed in the *Hansen* case was not apparent in the relationship between Mr Williams and Mrs Z.
- (m) While we give respect and weight to the opinion of the expert called on behalf of Mr Williams, Mr Hay, it is for the specialist body of the Tribunal to reach its own view on the evidence. We do not accept, that just because Mr Williams was carrying out a role that is a trustee’s role, that he was not also acting as a lawyer with consequent duties. In any event it was accepted, by Mr Hay that the roles of trustees and lawyer could overlap.²³
- (n) To find that he was purely a trustee would be to find that the relationship was artificially one where he was only a lawyer when this relationship was expressly activated – a turn on turn off relationship. This is very different from his client’s perspective that he always had a dual role which was giving her double protection as trustee and lawyer. To say to members of the public that the lawyer is a lawyer for you when completing the deed of trust, but, when sending documents for you to sign drawing down funds from a trust, the lawyer established to protect you is not a lawyer but solely a trustee, would in our view be contrary to the expectations and beliefs of members of the public. This would create a standard that was very different from the reasonable expectations of the public.
- (o) To delineate the roles in this way would be create a standard that fails to deliver on the purposes of the Act to protect the public. In our view there has to be clear explanation and termination of the lawyer/client relationship in order for a lawyer to be able to claim that professional duties do not apply.

²³ Notes of Evidence p 106.

[41] Mr Hamilton has filed further written submissions in which he has continued his focus on whether Mr Williams was acting as a lawyer or only as a trustee. He repeats his original submission that Mr William's conduct complained of was in his capacity as a trustee. He submitted that the test in *TE v Wellington Standards Committee 2*²⁴ applies. His submission was that an examination of each of the matters complained of was required followed by a determination as to whether the conduct in question was taken by the practitioner in his capacity as a lawyer, or merely as executor trustee.

[42] We find that Mr Hamilton's submissions on this point are a repetition of his opening submissions and are insufficient to persuade us that Mr Williams was acting only as a trustee and not as a lawyer. Mr Williams has conceded that he was Mrs Z's lawyer. Mrs Z unequivocally asserted that she regarded Mr Williams as her lawyer. She referred more than once to her "double protection" because Mr Williams was not only her lawyer but also the trustee of the Trust. She did not separate those roles.

[43] Having found that Mr Williams was not acting purely as a trustee but also lawyer, we conclude that the charge has been proved. We must next consider whether his conduct constitutes professional misconduct under s 112(1)(a) of the LPA the test for which is whether the conduct could be regarded as disgraceful or dishonourable by lawyers of good repute and competence.²⁵

[44] Counsel for the Committee has submitted that such a finding should be made for the following reasons:

- (a) Mr Williams received instructions from Mr Z to successively extend a credit facility registered against the Trust's sole asset and personally guaranteed by Mrs Z. Mr Z was not a settlor, trustee or beneficiary of the Trust.
- (b) Mr Williams never discussed the variations to the credit facility or the payments from the Trust with Mrs Z (with the exception of the final draw

²⁴ *TE v Wellington Standards Committee 2* LCRO 100/2010 at [49].

²⁵ *Auckland Standards Committee 3 v W* [2011] 3 NZLR 117.

down which Mrs Z overtly objected to). While Mrs Z signed three of four variation documents, there was no evidence to suggest Mr Williams assured himself that Mrs Z understood the nature of the transactions. His correspondence was sent to Mrs Z care of Mr Z. He relied on the fact that Mrs Z had signed the bank documents.

- (c) Once the variation to the Trust's credit facility had been established, Mr Williams advanced large sums of money to companies in which Mr Z was a director. Both JKL and DEF were not beneficiaries of the Trust and the funds were advanced as unsecured loans.
- (d) Shortly after the initial draw down, the Trust was unable to meet interest payments and there was no pattern of principal repayments to reduce the Trust's indebtedness to Westpac.
- (e) In relation to the payments made to DEF and GHI, a direct conflict of interest existed. At the time of making those payments:
 - (i) Mr Williams was a 50 per cent shareholder of GHI.
 - (ii) DEF owed Mr Williams money (via GHI) in relation to vendor financing associated with the purchase of the retail arm of ABC.
 - (iii) Mr Williams remained the owner of the manufacturing arm of ABC. Its principal supply line was the retail arm of that same company, which as outlined above, was owned by DEF, a company in which Mrs Z was a shareholder.

[45] Counsel for the Committee made the further submission that Mr Williams' conduct demonstrated an indifference to his obligations as a lawyer. In respect of the undisclosed and unaddressed conflicts of interest, Mr Williams conduct can properly be described as self-dealing on a reasonably significant scale.

[46] The submissions are compelling. We adopt them in making our reasons for our finding that Mr Williams' conduct meets the high threshold for constituting professional misconduct under the LPA.

[47] It follows that we reject the submission made on behalf of Mr Williams that Mrs Z was responsible for her position in the transactions because she knew the drawdowns would go to the company, did not seek advice and/or acted on the advice of Mr Z. In circumstances where her lawyer, who had advised her on setting up a trust to protect her assets sent her documents to sign it is understandable that she did not second guess her trusted advisor and lawyer. We accept her evidence that she signed the documents at the behest of Mr Z in a hurry and without explanation. That does not excuse Mr Williams' lack of regard for Mrs Z.

[48] Having found the charge proved to the level of professional misconduct, a date for consideration of penalty is to be set. Counsel for the applicant is to file submissions in respect of penalty 10 working days before the set date. Counsel for Mr Williams is to file submissions in reply five working days before the hearing date.

[49] Mr Williams seeks an order for the non-publication of his name. That matter will be considered at the hearing to be set for consideration of penalty. Mr Williams is to file an affidavit in support of the application. In the meantime, we make an interim order of non-publication of his name.

DATED at AUCKLAND this 4th day of November 2019

BJ Kendall
Chairperson

CHARGES

The Canterbury Westland Standards Committee (No 1) charges Kerry Williams of Christchurch with a disciplinary offence under the Law Practitioners Act 1982 (LPA 1982) and in respect of that charge alleges:

Misconduct in his professional capacity pursuant to section 112(1)(a) of the LPA 1982;

or in the alternative

Conduct unbecoming a barrister or a solicitor pursuant to section 112(1)(b) of the LPA 1982;

or in the alternative

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 the profession into disrepute pursuant to section 112(1)(c) of the LPA 1982.

The particulars of the charges are that:

Background

- 1 Kerry Williams (Mr Williams) was, at all relevant times, a barrister and solicitor practising on his own account.

Establishment of the Trust

- 2 In June 2004 Mr Williams was instructed by J Z (Mrs Z) to establish the J Z Trust (the Trust). The Deed of Trust provided that, *inter alia*:
 - (a) Mr Williams was the sole trustee of the Trust.
 - (b) The discretionary beneficiaries of the Trust are Mrs Z, Mrs Z's children and Mrs Z's grandchildren (clause 1.2(B)).
 - (c) Every discretion vested in the trustee shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion (clause 12).
 - (d) The trustee shall manage the Trust fund for the benefit of the beneficiaries in such manner as they to the best of their knowledge and judgment believe the settlor would have done had the settlor been the absolute owner thereof (clause 12.1).
 - (e) Any trustee may participate in the exercise by the trustee of the powers conferred upon the trustee notwithstanding that such trustee is associated as director, trustee or otherwise, or is in any other way interested in any company or other entity with which the trustees deal (clause 15).
 - (f) The trustee shall have full power and authority to buy, sell, lease, invest, borrow, mortgage, deal and carry on business with and generally manage and order the Trust fund in all respects as if the trustee were the absolute beneficial owner of it (clause 20).
- 3 At all relevant times, Mr Williams was the sole trustee of the Trust.

W Z

- 4 Mrs Z was married to W Z (**Mr Z**) until their divorce in 1988.
- 5 Notwithstanding the divorce, Mr Z continued to have involvement with Mrs Z's financial affairs, as is detailed further below.

- 6 Mr Z was adjudicated bankrupt on 18 March 1987 and discharged from bankruptcy on 18 March 1990.
- 7 Mr Z was not a settlor, trustee or beneficiary of the Trust.

Property at X Main Road

- 8 In July 2004 Mr Williams was instructed by Mrs Z to transfer X Main Road, H, N (**the Property**) from Mrs Z to the Trust.
- 9 On 29 July 2004 Mr Williams wrote to Mrs Z with information regarding the lending to be secured against the Property and the guarantee to be provided by Mrs Z over the lending.
- 10 In or around August 2004 the Trust opened a facility of \$98,000 with Westpac Bank (**Westpac**). The facility was in the name of the Trust with Mr Williams as the sole trustee. Mrs Z signed a guarantee to Westpac over the facility.
- 11 From 4 August 2004 to 29 April 2008 there were a number of relevant transactions in relation to the Trust's bank account. These transactions are detailed below.

Transaction 1

- 12 On 22 July 2004 Mr Z faxed Mr Williams and noted that the Trust should procure a revolving credit facility of \$75,000 that "*Mrs Z can draw down on as she requires*".
- 13 The agreement for this credit facility is dated 2 August 2004 and is signed by Mr Williams alone.
- 14 On 4 August 2004 the Trust drew down \$75,000 and the funds were transferred into Mr Williams' solicitor trust account (**STA**) under Mrs Z's ledger with the narration "*Westpac – loan advance*".
- 15 This draw down was approved by Mrs Z for renovations to the Property.
- 16 On 4 August 2004 Mr Williams paid \$71,000 from Mrs Z's STA ledger to Mrs Z by cheque. The narration for this payment was "*Self*".
- 17 On 10 August 2004 Mr Williams transferred \$1,367.18 from Mrs Z's STA ledger to the STA ledger for R A Limited. The narration for this payment was "*From Z J A(2834/5) \$1,367.8, To R A Limited(2981/6) \$1,367.18 balance ledgers*".
- 18 The remainder of the \$75,000 advance met disbursements involved in the transaction.
- 19 Together this drawdown and the subsequent payments are referred to as **Transaction 1**.
- 20 No trustee resolutions or other signed authorities are held on Mr Williams' file in relation to Transaction 1.

Transaction 2

- 21 On or around 21 April 2005 the Trust's facility limit was extended by \$50,000.
- 22 The agreement for this extension of the credit facility is signed by Mr Williams alone.
- 23 On 27 April 2005 the Trust drew down \$50,000 and the funds were transferred into the STA under the Trust's ledger with the narration "*Westpac – funds advance*".
- 24 On 27 April 2005 Mr Williams paid \$40,000 from the Trust's STA ledger to J K L Limited (**JKL**) by cheque. The narration for this payment is "*J K L Ltd*".
- 25 At all relevant times:
 - (a) WZ Enterprises Limited was the sole shareholder of JKL;
 - (b) Mrs Z was the sole shareholder of WZ Enterprises Limited;
 - (c) Mr Z was the sole director of WZ Enterprises Limited;

- (d) Mr Z was the sole director of JKL; and
- (e) Mrs Z was not involved in the management of either JKL or WZ Enterprises Limited.
- 26 On 3 May 2005 Mr Williams transferred \$1,040.00 from the Trust's STA ledger to the STA ledger for G H I Limited (GHI). The narration for this payment is "*From Z Trust(8563/2) \$1,040, To G H I Ltd (1111/1) \$1,040.00 two months interest owing*".
- 27 At all relevant times:
- (a) Mr Williams owned 50% of the shares of GHI; and
- (b) Mr Williams was the sole director of GHI.
- 28 There is no documentation recording that the Trust borrowed money from GHI.
- 29 On 3 May 2005 Mr Williams paid \$8,508.98 from the Trust's STA ledger to JKL by cheque. The narration for this payment is "*J K L Ltd – balance ledger*".
- 30 On 4 May 2005 Mr Williams transferred \$112.50 from the Trust's STA ledger to Mr Z's STA ledger. The narration for this payment is "*From Z Trust(8563/2) \$112.50, To Z W Mr(3489/2) \$112.50 meet costs as per authority*".
- 31 On 4 May 2005 Mr Williams transferred \$225.00 from the Trust's STA ledger to Mr Z's STA ledger. The narration for this payment is "*From Z Trust(8563/2) \$225.00, To Z W Mr(3489/2) \$225.00 meet costs as per authority*".
- 32 Together this drawdown and the subsequent payments are referred to as **Transaction 2**.
- 33 No trustee resolutions or other signed authorities are held on Mr Williams' file in relation to Transaction 2.

Transaction 3

- 34 On or around 21 June 2005 the Trust's facility limit was extended by \$100,000.
- 35 The agreement for this extension of the credit facility is signed by Mr Williams and Mrs Z.
- 36 On 22 June 2005 Mr Williams paid \$60,310.63 from the Trust's STA ledger to MNO Company (N.Z.) Limited (MNO) by cheque. The narration for this payment is "*MNO Company (NZ) Ltd*". This transaction related to the Investment Group Limited (DEF) purchasing stock from MNO in connection with a Y business.
- 37 At all relevant times:
- (a) Mrs Z was the majority shareholder of DEF.
- (b) Mr Z was the sole director of DEF.
- 38 On 23 June 2005 Mr Williams drew down a total of \$75,000 on the Trust's facility (comprising separate amounts of \$61,000 and \$14,000) and transferred those amounts to the Trust's STA ledger. The narrations for the two transfers were "*Westpac – drawdown*" and "*Westpac – further funds as requested – transfer to J K L & G H I*".
- 39 On 23 June 2005 Mr Williams paid \$12,500 from the Trust's STA ledger to JKL by cheque. The narration for this payment is "*J K L Ltd*".
- 40 On 8 July 2005 Mr Williams transferred \$1,040 from the Trust's STA ledger to GHI's STA ledger. The narration for this payment is "*From Z Trust(8563/1) \$1,040, To G H I Ltd (1111/1) \$1,040.00 two months interest owing*".
- 41 Together these drawdowns and the subsequent payments are referred to as **Transaction 3**.

42 No trustee resolutions or other signed authorities are held on Mr Williams' file in relation to Transaction 3.

Payments to GHI

43 The two payments of \$1,040 made from the Trust to GHI referred to in Transactions 2 and 3 were interest payments owed by DEF to GHI.

44 GHI and DEF were in a debtor / creditor relationship as a result of DEF purchasing Mr Williams' share in ABC Ltd (**ABC**). Mr Williams' share capital remained in ABC through GHI by way of vendor finance.

45 DEF was indebted to GHI throughout the relevant period covered by these charges.

Transaction 4

46 On 8 July 2005 Mr Z faxed Mr Williams the following:

Kerry,

Could you fax Westpac and arrange for \$23,000 to be transferred to J K L Ltd

...

If possible to be transferred today and I will pay A – F stock on receipt his \$23,400. Thought it was best to do from here as I wasn't sure you want F to know any connection between us.

Security

DEF

G H I

\$50,000

JA Z Trust

\$100,000

Interest at 12% p.a. payable monthly"

47 On or about 8 July 2005 Mr Williams drew down \$23,000 on the Trust's facility and had that draw down transferred directly to JKL.

48 Together this drawdown and the subsequent transfer are referred to as **Transaction 4**.

49 No trustee resolutions or other signed authorities are held on Mr Williams' file in relation to Transaction 4.

Transaction 5

50 On or around 2 February 2007 the Trust's facility limit was extended by \$60,000.

51 The agreement for this extension of the credit facility is signed by Mr Williams and Mrs Z.

52 On 7 February 2007 the Trust drew down \$60,000 and the funds were transferred into the STA under the Trust's ledger with the narration "*Westpac – loan advance*".

53 On 8 February 2007 Mr Williams paid \$58,000 from the Trust's STA ledger to JKL by direct credit. The narration for this payment is "*J K L – balance ledger*".

54 On 15 March 2007 Mr Williams paid \$1,500 from the Trust's STA ledger to JKL by direct credit. The narration for this payment was "*J K L – balance ledger*".

55 Together this drawdown and the subsequent payments are referred to as **Transaction 5**.

56 No trustee resolutions or other signed authorities are held on Mr Williams' file in relation to Transaction 5.

Transaction 6

- 57 On or around 24 April 2008 the Trust's facility limit was extended by \$60,000.
- 58 The agreement for this extension of the credit facility is signed by Mr Williams and Mrs Z.
- 59 On or about 29 April 2008 Mr Williams telephoned Mrs Z to obtain her agreement to draw down \$53,034 on the Trust's facility and advance those funds to DEF.
- 60 Mrs Z did not agree to this transaction, advising Mr Williams that if he went ahead with the transaction it would be his responsibility.
- 61 On or about 29 April 2008 Mr Williams drew down \$53,034 on the Trust's facility and transferred it to DEF.
- 62 Together this drawdown and the subsequent payment are referred to as **Transaction 6**.
- 63 No trustee resolutions or other signed authorities are held on Mr Williams' file in relation to Transaction 6.

Summary of the Transactions

- 64 Transactions 1-6 (collectively referred to as the **Transactions**) involved the following payments from the Trust fund to third parties:
- (a) \$143,508.98 to JKL between 27 April 2005 and 15 March 2007.
 - (b) \$113,344.63 to DEF between 22 June 2005 and 29 April 2008.
 - (c) \$2,080 to GHI on 3 May 2005 and 8 July 2005.
- 65 None of the payments to JKL or DEF were the subject of any formal security.
- 66 From April 2005 onward there were various instances where interest charges on the Trust's Westpac facility were not met by instalment deposits and where the facility limit was exceeded.
- 67 There was no trend of principal repayment in respect of the amounts owed to the Trust by JKL or DEF over the relevant period.

Payment of \$25,000 by Mrs Z

- 68 On 6 March 2009 Mrs Z faxed Mr Williams and advised him that she would like to pay \$25,000 off the facility of the Trust to reduce the credit line. She also noted "(a)ny chance of Mr Z not knowing I'm trying to reduce the debt, i.e. I don't want him to increase it again".
- 69 On 24 March 2009 Mrs Z transferred \$25,000 to the Trust's STA ledger. The same day Mr Williams made a repayment of \$25,000 to the Westpac facility of the Trust.
- 70 On 21 April 2009 Mrs Z faxed Mr Williams stating as follows:

Thanks for forwarding the bank statement. Also banking the \$25,000.

I don't want Mr Z to use that credit that I have created. He is still way over "his" limit by \$16,183. Can you get the limit reduced from \$345,000 shown?

Ideally I would like to see him not receiving statements and each month you advise him of the interest to be paid plus a payment towards reducing the debt which he says has been used to "prop up" Last.

...

I'll contact you by phone I don't want him seeing a fax in case I'm out of the shop.

I think I am over trying to back him getting Last back on track. Be OK if I could see some progress.

Further correspondence between Mr Williams and Mrs Z

71 On 28 October 2009 Mrs Z wrote to Mr Williams and asked:

Have you got records of who received monies when mortgage drawn up... in stages?

This loan is only attached to property – no other ties??

Trying to get my head around a few things!!

Please fax back:

...

Only my eyes to see!

...

72 On 28 October 2009 Mr Williams wrote to Mrs Z and stated:

I have no idea for what purpose the funds were drawn down. What I can do is go back to the Bank and ask them for an activity sheet in relation to the account and then we can identify when the moneys were drawn down and you might then have a better idea for what purpose. The mortgage is only attached to your property it has no other ties with any other property.

Mr Z's bankruptcy

73 Mr Z was adjudicated bankrupt in 2011. He had previously been adjudicated bankrupt in 1987.

74 On 13 September 2013 Mr Williams emailed Ms Deborah Coles of the New Zealand Insolvency and Trustee service and stated that:

The trust advanced to Mr Z funds to assist him in some business dealings... These funds were in fact funds that should have been utilised to assist with servicing the trusts debt to Westpac bank and other requirements... Accordingly, the debt owed by Mr Z to the Trust now needs to be reduced by \$1,000".

Liquidation of JKL and DEF

75 JKL was in receivership and liquidation from 3 November 2012 and was liquidated on 3 August 2012.

76 DEF was in receivership and liquidation from 4 March 2011 to 10 March 2014 and was liquidated on 19 May 2015.

77 The Trust was not able to recover any of the monies advanced to either JKL or DEF.

Demand of Repayment and Sale of Property

78 On 2 Jun 2011 Westpac wrote to Mr Williams and stated:

I refer to my letter dated 14 December 2010 regarding arrears... under the name of the JZ Trust and our subsequent dealings with Mr W Z, who you gave authority to act on behalf of the Trustees.

I advise that Mr Z has been unable to arrange for sufficient funds to be deposited to remedy the default or present a proposal for repayment acceptable to the bank.

We are therefore continuing with recovery action and attached is a formal demand for repayment of the outstanding defaults.

...

Should the Demand expire unremedied, the Bank may refer this matter to its solicitors for further recovery action in terms of its securities held.

...

79 On or around 8 October 2014 the Property was sold and \$954,954.32, (being the settlement funds) were paid into the Trust's STA ledger.

80 On 8 October 2014 Mr Williams paid \$366,913.37 from the Trust's STA ledger to Westpac. The narration for this payment is "Westpac – Loan repayment".

Particular 1 – Conflict of interest – payments to GHI

81 As is detailed above:

- (a) As part of Transaction 2 Mr Williams paid GHI \$1,040 from the Trust's STA ledger.
- (b) As part of Transaction 4 Mr Williams paid GHI \$1,040 from the Trust's STA ledger.
- (c) At the time of Transaction 2 and Transaction 3, Mr Williams had an interest in GHI.

82 In making payments from the Trust to GHI, Mr Williams:

- (a) Did not fully disclose his interest in GHI to Mrs Z.
- (b) Did not at any point advise the Trust or Mrs Z to obtain independent legal advice.
- (c) Did not obtain Mrs Z's consent.

83 In making payments from the Trust to GHI, Mr Williams acted in breach of:

- (a) Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors (7th edition, 2004) (RPCBS) which provides that the relationship between practitioner and client is one of confidence and trust, which must never be abused.
- (b) Rule 1.03 of the RPCBS which prohibits a lawyer from acting or continuing to act for any person where there is a conflict of interest between the practitioner on the one hand and an existing client on the other hand.
- (c) Rule 1.06 of the RPCBS which provides that a practitioner who advises a client on borrowing or investing must act as an independent adviser in the client's best interest.

Particular 2 – Conflict of interest – payments to DEF

84 As is detailed above, Mr Williams made payments from the Trust to DEF totalling \$113,344.63 between 22 June 2005 and 29 April 2008.

85 Throughout this period, DEF was indebted to GHI, a company Mr Williams had an interest in (as sole director and 50% shareholder).

86 In advancing funds from the Trust to DEF, Mr Williams:

- (a) Did not fully disclose DEF's indebtedness to GHI to Mrs Z.
- (b) Did not at any point advise the Trust or Mrs Z to obtain independent legal advice.
- (c) Did not obtain Mrs Z's consent.

87 In making the payments to DEF, Mr Williams acted in breach of:

- (a) Rule 1.01 of the RPCBS which provides that the relationship between practitioner and client is one of confidence and trust, which must never be abused.
- (b) Rule 1.03 of the RPCBS which prohibits a lawyer from acting or continuing to act for any person where there is a conflict of interest between the practitioner on the one hand and an existing client on the other hand.
- (c) Rule 1.06 of the RPCBS which provides that a practitioner who advises a client on borrowing or investing must act as an independent adviser in the client's best interest.

Particular 3 – Failing to provide appropriate advice regarding the Transactions

88 As is noted above, the Deed of Trust required, inter alia, that the Trust fund be managed for the benefit of the beneficiaries in such manner as the trustees to the best of their knowledge and judgment believe the settlor would have done had the settlor been the absolute owner thereof (clause 12.1).

89 In his capacity as a lawyer, and in actioning the Transactions, Mr Williams:

- (a) Failed to properly advise the Trust and/or Mrs Z regarding whether the Transactions met the objects of the Trust and were consistent with the terms of the Deed of Trust.
- (b) Failed to properly advise the Trust and/or Mrs Z regarding whether the Transactions represented proper and prudent investments so as to achieve the objects of the Trust.
- (c) Failed to properly advise the Trust and/or Mrs Z to document the loan advances to JKL and DEF, to obtain adequate security, and to otherwise ensure that the principal Trust asset was protected.
- (d) Failed to properly protect the interests of the Trust and/or Mrs Z.
- (e) Acted primarily on the instructions of Mr Z and/or was improperly influenced by Mr Z's directions and input.

90 These failures represent, inter alia, a breach of Rule 1.06 of the RPCBS which provides that a practitioner who advises a client on borrowing or investing must act as an independent adviser in the client's best interest.

Particular 4 – Failing to provide appropriate advice – lending to Mr Z

91 As is noted above, Mr Williams acknowledged in email correspondence with the New Zealand Insolvency and Trustee service and stated that funds had been advanced to Mr Z by the Trust to assist him in business dealings and that Mr Z was indebted to the Trust.

92 In his capacity as a lawyer, and in actioning lending to Mr Z in the name of the Trust, Mr Williams:

- (a) Failed to properly advise the Trust and/or Mrs Z regarding whether the lending met the objects of the Trust and was consistent with the terms of the Deed of Trust.
- (b) Failed to properly advise the Trust and/or Mrs Z regarding whether the lending represented a proper and prudent investments so as to achieve the objects of the Trust.
- (c) Failed to properly advise the Trust and/or Mrs Z to document the loan to Mr Z and to obtain adequate security.
- (d) Failed to properly protect the interests of the Trust and/or Mrs Z.

93 These failures represent, inter alia, a breach of Rule 1.06 of the RPCBS which provides that a practitioner who advises a client on borrowing or investing must act as an independent adviser in the client's best interest.