SOME NAMES NOT TO BE PUBLISHED AS PER THE ORDER RECORDED AT PARAGRAPH [71], PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 240.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 9

LCDT 001/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**HELEN HOLLAND** Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms A Callinan

Ms M Noble

Ms G Phipps

Ms S Stuart

HEARING 14 and 15 February 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 3 March 2022

COUNSEL

Mr T Simmonds and Ms O Cann for the Standards Committee

Mr R Pidgeon for the Respondent Practitioner

DECISION OF THE TRIBUNAL REGARDING LIABILITY

[1] Ms Holland is charged with misconduct under s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 ("the Act"). This provision expressly targets conduct unconnected with the provision of regulated services. The rationale for the extension to such conduct is found in its statutory threshold: the conduct "would justify a finding that the lawyer … is not a fit and proper person or is unsuited to engage in practice as a lawyer ….". Misconduct under s 7(1)(b)(ii) is not designed to penalise a lawyer who, while acting outside the realm of regulated services, merely makes poor decisions or ordinary mistakes; it targets conduct that goes to the heart of fitness to practise.

[2] For the reasons set out in this judgment, we find Ms Holland's conduct to be at the level of misconduct. Accordingly, we do not need to consider the alternative lesser charge of unsatisfactory conduct under s 12(c).

[3] The Standards Committee alleges that Ms Holland's conduct, in managing her parents' estates and affairs fell gravely short in three areas that we adopt as the organising headings for this judgment, namely:

- breaches of fiduciary duties (including profiting while in a fiduciary capacity);
- failure to maintain adequate records; and
- failure to account.

[4] Ms Holland filed documents suggesting a variety of defences. They included a denial that a lawyer could be liable for conduct outside the provision of regulated services; that this was a family issue, inappropriate for Law Society intervention; and that she owed no fiduciary duties to her siblings. At the hearing, those defences were abandoned, and her defence retreated to the propositions that her brother had told her he did not expect to receive any share in his father's estate; that her brother had stolen a significant part of her records; and that her conduct fell short of the threshold for s 7(1)(b)(ii).

[5] The underlying concern of the charge is whether Ms Holland's conduct (unconnected with the provision of regulated services) is consonant with her being a fit and proper person or suited to practice as a lawyer. With that in mind, we are concerned about stances she has taken with regard to the charge that reflect fundamental shortcomings. We shall comment on these as they arise in this judgment. They include:

- failure to recognise her fiduciary relationships;
- failure to appreciate her fiduciary obligations;
- avoidance of lawful obligations;
- recklessness in managing funds;
- irrationality.

Did Ms Holland breach fiduciary duties?

The fiduciary relationships

[6] Ms Holland is the youngest of three siblings. Her brother and sister are not lawyers. Her brother, the complainant, is a medical specialist residing overseas.

[7] In family affairs Ms Holland held or undertook the following roles:

(a) Ms Holland's father died in November 2001. She was a co-trustee of his estate. She and her mother were granted Probate of his will. Under that will, her mother had a life interest, and the three children were equal residuary beneficiaries.

(b) After her father's death, Ms Holland was the nominated attorney under her mother's Enduring Power of Attorney for property, and for personal care and welfare. Her mother was in indifferent health from 2003 and, over time, her competence diminished.

(c) Ms Holland's mother died in September 2013. Ms Holland was aware that she and her two siblings were the executors, trustees and equal beneficiaries under her mother's will. Probate was not obtained, and Ms Holland took control of estate matters. Her mother's will has not been produced in evidence. Ms Holland's brother says he has never seen it although he accepts that all three siblings were to share equally. Ms Holland seems to have suppressed her mother's last will because she did not agree with aspects of it[1] but she says that, like her previous will, it shared her estate equally among all three children.

Key facts

[8] At first, a law firm acted in her father's estate but, in January 2002, Ms Holland instructed that firm to transfer the estate funds then available, $301,443.83, to the law firm who then employed Ms Holland (and where she later became a partner). From January 2002, those funds were effectively under Ms Holland's sole control.

[9] In 2005, a Napier property in the names of both parents was sold. Ms Holland estimated her father's net estate was worth approximately $500,000 at that point. No documents verify this, but the proposition squares with the sum of the cash funds of approximately $300,000 and her father's estate's share (about $200,000[2]) of the Napier sale.

[10] Her mother's share of the Napier sale was applied to purchase a retirement apartment interest for her mother.[3]

[11] During her mother's lifetime, Ms Holland arranged for the sale of two properties in her mother's sole name - a Taupo property (in 2010) and the apartment (in 2013). Ms Holland's husband, then a practising lawyer, acted on the sales free of charge. The net balances are said to have been divided equally between the siblings. In these transactions, Ms Holland was acting on her mother's behalf.

[1] NoE pp 56 – 58.
[2] NoE p 109, lines 15 – 22.
[3] NoE p 109, line 33.

[12] Ms Holland advanced loans from her father's estate to her sister and to herself. In these transactions she was acting as co-trustee of her father's estate. She said those to her sister were advanced between 2004 and two or three years thereafter,[4] and amounted to $215,000 or $225,000.[5] She said she advanced $200,000 to herself. On her evidence the first lending to herself began in 2002 "because I had a use for it."[6] When it was put to her that her personal borrowings from her father's estate may have been around $285,000, she disputed the proposition[7] but she has not produced any documents to evidence or record the loans. The only evidence we have about the loans is her own words without more. Under cross-examination she was unable to be precise about the number of loans to her sister, eventually retreating to the proposition "I'm pretty certain it would be around that number [12]."[8]

[13] Ms Holland's mother died in September 2013. Only hours before her mother died, Ms Holland prematurely closed two term deposits (totalling $300,000 at face value), attracting a bank penalty of $36,000 (reclaiming interest that had been paid in the expectation the deposits would continue to their terms). Of the $264.000 recovered, she retained one-third, namely $88,000. She paid the remaining $176,000 to her brother (on the day of her mother's death), instructing him to pay half of that sum (namely $88,000) to their sister.

[14] Ms Holland did not argue that the term deposit funds were anything other than her mother's own funds. She accepted that her brother received no share of his father's estate which, in 2005, was said (credibly) to have been worth about $500,000.

[15] No application was made for Probate of her mother's will. Ms Holland treated her mother's estate as if it were one with net assets under $15,000. That notional position was achieved by distributing the proceeds of term deposits proximate to her mother's death, and by ignoring a debt of $53,000 owed by Ms Holland to her mother's estate.

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[4] Ms Holland's affidavit 27 May 2021, Ex A at [20].
[5] Ms Holland's affidavit 27 May 2021, Ex A at [21].
[6] NoE p 86, lines 10 – 18.
[7] "That's not what I recall" NoE 90, line14.
[8] NoE p 94, line 16.

[16] Ms Holland was adjudicated bankrupt in 2017. We infer that she and her husband were experiencing financial pressure in 2009 when she "had a need to use some money" and borrowed $53,000 from her mother's bank account.[9] She deposed that "I was very exposed at this time … as I had lost my job (on 31st March 2007), I lost almost $400,000 from this."[10]

[17] We find it is probable that Ms Holland and her husband experienced financial pressure from at least 2007 when she lost her job. It is possible she was in need of funds earlier when she made advances to herself. Her family home was sold by mortgagee's sale in 2011.[11] In 2012, she learned that her husband was accused of fraud. He was struck off as a lawyer in February 2014. He was sentenced to two and a half years imprisonment on 5 September 2014.[12] He was bankrupted at the same time as Ms Holland. The relevant High Court judgment states: "In 2006 the Bank lent funds to the debtors to enable them to freehold their … property and to pay debt and tax due. That debt totalled about $2M. By 2010, $300,000 - $400,000 had matured but had not been repaid."[13] The judgment says: "The fact remains that the debtors are impecunious. The Bank's debt remains unpaid. It seems the debtors may owe in the region of $800,000."[14]

What were her fiduciary duties?

[18] Ms Holland's brother complained to the Law Society in April 2016 following repeated requests to Ms Holland, some of which she ignored and some of which she fobbed off. The principal reason it has taken almost six years to come to hearing is because of her oppositional stances including failure to comply with an order to produce documents. Ignoring the express statutory provision in s 7(1)(b)(ii), she has, throughout, argued that the matters at issue are not proper matters for professional discipline because she never provided regulated services in these matters. At the hearing, this screen collapsed in face of the clear statutory provision.

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[9] Ms Holland's affidavit 27 May 2021, Ex A at [36]; NoE 101, line 5; as to character as a loan see Bundle p 79 at [38] and NoE 102.
[10] Ms Holland's affidavit 11 December 2017, at [38](a)(iii), Bundle p 78.
[11] Bundle p 191, line 18.
[12] Mr Woodcock's affidavit 26 April 2018.
[13] [2017] NZHC 663, at [30].
[14] [2017] NZHC 663, at [35].

[19] Until Mr Pidgeon opened the defence case at the hearing and accepted otherwise, she explicitly argued that she never owed any fiduciary duty to her siblings in these matters.

[20] Although it is now conceded, we find that the fiduciary duties, in relation to her father's estate, flow from the fact that Ms Holland held Probate, jointly with her mother. In fact, at all material times, Ms Holland had control of estate assets. She owed a fiduciary duty to all the beneficiaries, both the life tenant (her mother) and the residuary beneficiaries (her siblings). This is settled law.

[21] Ms Holland's father's will[15] gave his widow a life interest in "the residence used by my wife and I as our principal place of residence".[16] There was power to sell and purchase a substitute residence. The balance of the estate was to "be held UPON TRUST to pay the net income"[17] to his widow with the gift of the residue to the three children equally (with substitution of grandchildren if a gift to a child failed)[18]. If the "Trustee considers that the income of my residuary estate is insufficient for the proper maintenance of my wife" there was power "to resort to capital".[19]

[22] Ms Holland's father's will granted the following powers:

> "9. o) LEND – May lend money to any person with or without interest and or security …. and whether to a beneficiary who is a Trustee or otherwise as my Trustee thinks proper.
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> p) MAINTENANCE AND ADVANCEMENT – May apply the whole or any part of the capital and income of the expectant contingent or vested share of any person taking under the trusts of this my Will in or towards the maintenance education advancement or otherwise for the benefit in life for such person …."

[23] Ms Holland's father's will specifically directed[20] "that my Trustee … shall not be liable for any loss not attributable to his own dishonesty, or the wilful commission by him of an act known by him to be a breach of trust AND in particular he shall not be bound to take any proceedings against a co-trustee for any breach or alleged breach of trust committed by that trustee."

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[15] Bundle pp 30 – 36.
[16] Bundle p 30, at [4].
[17] Bundle p 31, at [5].
[18] Bundle p 31, at [5].
[19] Bundle p 31, at [6].
[20] Bundle pp 31–32, at [8](d).

[24] Although the testator may have been mistaken about the title-holding of the principal residence (or circumstances may have changed since the 1999 will was made), the scheme of the will is clear. The entire estate was to be applied to house and maintain his widow by way of a life interest but with power to resort to capital payments to her (or for her) at the trustee's discretion. Subject to that intention, there were liberal powers to lend and to advance funds to expectant beneficiaries. After the life interest, the children were to share equally.

[25] In relation to her mother's affairs, we find that Ms Holland, as attorney, owed a fiduciary duty to her mother during her mother's lifetime. She had at some time, possession of her mother's will but she did not produce a copy. In the circumstances of this matter, where she knew of her mother's solemn wish to benefit her children equally upon her death, we find that her duty to her mother extended to managing her mother's property to achieve as far as practicable her mother's testamentary plans. To this extent, we find she owed a level of fiduciary duty to her siblings. The fact that she knew her siblings were (with her) co-executors and co-trustees under her mother's will reinforces this duty.

[26] That Probate was not obtained did not elevate her to the position of sole trustee of her mother's estate. We were astonished that Ms Holland argued that, because Probate had not been obtained, her brother never attained position as co-trustee of her mother's will.[21] Her argument does not explain how she could act whereas he could not. The validity of the will as a testamentary instrument does not depend on whether Probate is obtained.

[27] Similarly, we were astonished at Ms Holland's proposition that she need not heed the provisions of the will simply because she took issue with its choice of trustees, its drafting, or its provisions. We are concerned that she thought it appropriate to not provide copies to her siblings, this upon the basis she believed her mother may not have had capacity when she made her last will. She owed a duty to her siblings as co-executors, to provide them with a copy whether she approved of its terms or not.

[21] NoE p 42, lines 17 – 26; p 46, line 30 – p 47, line 2.

[28] We have not been provided with a copy of that will. In oral evidence, Ms Holland dated it at 2002 (having also mentioned 2007).[22] She objected to it because she thought it was irrational of her mother to appoint all three siblings as co-trustees.[23] She preferred the provisions of her mother's earlier will where Ms Holland and a solicitor were co-trustees. Her concerns that it appeared to have been "cut and pasted" with some special provision relating to her sister's interest in the Taupo property is vague.[24] Absent the document,[25] we cannot comment. If it provided for all three children to be co-trustees and divided all property equally, we cannot understand her objection.

[29] We are conscious that we must assess Ms Holland's actions in the light of the circumstances at the time.

[30] In general terms, Ms Holland's brother was aware that some loans had been made to his sisters. Although Ms Holland's sister swore no affidavit, it seems some of the advances to her were made urgently. On some occasions, Ms Holland thought her sister's children might have been refused return to their schools if fees remained unpaid. We do not know how much was advanced to Ms Holland's sister. Conversely, we do not know, and are quite uncertain, how much was applied by Ms Holland for her own personal purposes. We find ourselves unable to trust Ms Holland's evidence, where uncorroborated. We find that the advances to herself amounted to at least $200,000 and may have been as much as $285,000.

[31] In oral evidence in March 2018, Ms Holland was asked why she had not obtained copies of bank statements to expose her estate dealings. She said "I haven't but I could do that."[26] Almost four years have elapsed and she has not provided any such documentation. We do not know, for example, whether her father's estate funds were kept separate or were merged into her own accounts.

[32] Trustee resolutions signed by Ms Holland and her mother, relating to the years 2002 to 2006[27] suggest a semblance of organisation at that period. Those resolutions record annual allocations of interest payments from Ms Holland to the

[22] NoE p 55, lines 5 and 20 – 25.
[23] NoE p 44, lines 5 – 6.
[24] NoE p 44, lines 1 – 2.
[25] NoE p 56, lines 20 – 24.
[26] Bundle p 196, lines 10 – 18.
[27] Bundle pp 155 – 159.

estate being allocated to her mother as life tenant. But thereafter, there is no such documentation available to us. We infer that formality yielded to laxity as Ms Holland's mother's acuity deteriorated. We are not certain that the appearance of propriety conveyed by those records was uniformly observed in practice because we have no banking records upon which to ground them.

[33] We accept that at least $415,000 was taken from Ms Holland's father's estate and advanced to Ms Holland and her sister. She regarded the fact that her brother was in comfortable circumstances was a relevant factor in this exercise.[28] The advances to her sister were interest-free. Ms Holland said that she paid above-market rates for her own borrowing, at times up to 12 per cent per annum. In response to questioning from Tribunal member Phipps, she acknowledged[29] that she was comparing what she paid against bank deposit rates which were then four per cent. She was obliged to concede that the advances to her were unsecured. Given the risks of the loans to herself, we do not find she paid interest at a generous rate. We have no way of checking what rate she paid from time to time except to the extent that a few annual tax returns for her mother disclosed about $20,000 net per annum having been paid as interest, inferentially by Ms Holland. Ms Holland characterised the situation as one where she ensured her mother was properly provided for.

[34] Having largely stripped her father's estate of its assets, she came to regard her interest payments as a virtuous act rather than the ordinary commercial consequence of borrowing. When she was in particular financial need in 2009, noticing a sum of $53,000 had accumulated in her mother's account, she took those funds. We accept that she probably advised her brother and that he probably acquiesced at the time in her taking that sum as an additional advance to her.

[35] She gave different accounts as to how she regarded that $53,000 sum but her repeated comments at early stages of the Law Society enquiry (which we find are more reliable on this point than her later version) indicate that she regarded it as a loan to herself from her mother's property. It was represented in that character in documents sent to IRD. In this hearing, she attempted to characterise it as her having recovered her own money. She treated her payments of interest as if they

[28] NoE p 97, lines 15 – 28.
[29] NoE p 87, line 10 to p 88, line 5.

were made for the purpose of topping up her mother's needs and, on that basis, she felt entitled to treat the $53,000 that had built up as if it were an overpayment. This is distinctly at odds with the character of interest owing to her father's estate on sums she had advanced to herself. Adding to her confusion, she seems to have become muddled as to whether she was paying the interest payments to her father's estate or to her mother.[30]

[36] The extent to which Ms Holland lost her way with regard to her father's estate is disclosed by a passage of cross-examination[31] where she attempted to distinguish the residuary provisions for the two estates. She said: "Mummy's obviously was to be divided equally. In terms of Dad's, it was for use for her, Mummy's benefit, primarily, and I don't really think – he certainly never discussed with me what was to happen to the balance." We find that she disregarded her duty to give effect to her father's gift to the residuary beneficiaries.

[37] We infer that Ms Holland paid no interest to her father's estate after her mother died.

[38] We accept that Ms Holland placed importance on ensuring her mother was comfortable. We accept that she took a greater share of caring for her mother than either of her siblings, especially her brother who was resident overseas. We accept, too, that a welfare guardian can charge for expenses reasonably incurred. She said there were expenses that she could have claimed but did not. This cannot be verified because she has not provided any sufficient documentation. That said, the expenses reasonably incurred to ensure the comfort of an elderly mother, in declining health, would not amount to a sum of significance in the scale of this matter. Unanswerably, Ms Holland helped herself to much more than she was entitled, even if such matters were taken into account.

[39] Ms Holland has never made demand of her sister to repay any part of the advances. Her own bankruptcy seems to close the door on recovery of what she herself borrowed.

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[30] For example NoE p 100, lines 16 – 20.
[31] NoE p 98, lines 3 – 10.

[40] Although Ms Holland continued to claim that her brother said he did not expect anything from their father's estate,[32] this is completely at odds with his own statements. He was not cross-examined about this proposition. There is no document by her brother to corroborate her assertion. His behaviour is consistent with his having expected his father's estate would be applied to ensure the comfort of their mother, and that there would be an adjustment, then division of the balance of both estates on her death. We found her brother to be an impressive, measured and truthful witness. We cannot say the same of Ms Holland. We reject this defensive claim by Ms Holland.

[41] Ms Holland's brother appears to have waited, patiently and respectfully, trusting his sister to conduct herself appropriately in her management of their parents' respective affairs. He had, of course, received interim payments from his mother's property upon realisation of his mother's two pieces of real estate.

Assessment of Ms Holland's fiduciary performance

[42] In our judgment, Ms Holland was reckless in handling her father's estate. Firstly, lending such a large proportion of the estate funds placed the life tenant at risk of insufficient funds for her maintenance. Secondly, she paid those large sums to her sister and herself, when they were poor financial risks for loan recoveries. This is more readily apparent in respect of her sister, who seems to have been in financial difficulty throughout. Ms Holland's situation has been described above. Even if she was in apparently sound circumstances at the times she took advances, by making unsecured loans, she left her father's estate exposed to risks to both life tenant and at least one of the residuary beneficiaries.

[43] In our view, the powers in the will to lend money or to advance funds to contingent beneficiaries do not save Ms Holland in this case. The question is whether her conduct would justify an adverse finding about her character as a fit and proper person to practise as a lawyer.

[44] Ms Holland's legal practice was mostly in commercial litigation, not in estate work. Nevertheless, we would expect any lawyer to comprehend the basics of

[32] NoE p 39, lines 17 – 20.

fiduciary duties. Lawyers need to be trusted to handle other people's money. The public needs to be assured that lawyers can be trusted to observe the boundaries between the client's interests and the lawyer's personal interests. Against that standard, even in circumstances where she was not providing regulated services, Ms Holland displayed reckless disregard to the estate in which she was co-trustee with her mother, treating the funds as if they were hers to allocate, disregarding the interim needs to secure the position of the life tenant, and the ultimate need to reckon up with her brother's interests. She elevated her interests, and perhaps those of her sister, above the interests of her mother and her brother.

[45] Only after almost six years of process, has she reluctantly and belatedly accepted that she did owe fiduciary duties to her siblings in her father's estate. As to her mother's estate, her precipitate haste to realise the term deposits cost the estate $36,000. We can see no reason for that unless she had an urgent need for funds and was willing to cost her siblings the loss, or if she saw a reason to avoid obtaining Probate.

[46] Failures to maintain adequate records, to share information with beneficiaries or co-trustees, or to account, aspects we are yet to address, add to our grave concern about Ms Holland's failure to recognise or observe her fiduciary duties.

Did Ms Holland fail to maintain adequate records?

[47] In 2018, Ms Holland was found guilty of misconduct by wilfully or recklessly disregarding her obligations to comply with a formal s 147 notice in relation to investigation of this matter. On that charge she was censured and suspended from practising for four months. We are satisfied and have been careful to ensure that the current charge does not duplicate the previous charge and findings. We note though, that Ms Holland expressly sought that the Tribunal have before it and consider her evidence in the earlier proceedings. On that previous charge, her misconduct related strictly to failing to comply with the s 147 notice. In the context of the current charge, her alleged failure is tied to the need to account to beneficiaries and co-trustees and, in her father's estate, the need, if required, to account to the High Court about her execution of her fiduciary duties under the grant of Probate.

[48] Ms Holland alleges that her brother stole a large part of her relevant records when he was staying with her and her husband around the time of their mother's death in 2013. She said her file relating to her father's estate was then in a cupboard in her bedroom. At some time during her brother's visit, she picked the file up and noticed it was thinner than before.[33] She overheard her brother saying to his wife "Don't worry, I've got it all under control."[34] Her evidence about that remark and the significance she attached to it were not put to her brother in cross-examination. She believes the detail provided by him in his complaint is congruent with his having taken material from her files.[35]

[49] She never put the allegation to him at the time, nor in the years thereafter when he or, later, the Law Society, asked for information. She said it was awkward to challenge him around the time of their mothers' funeral.[36] It emerged first in her affidavit evidence for the earlier charge. Under cross-examination at that hearing,[37] she spoke extensively of her ongoing attempts to locate her file for her father's estate.[38] That is incongruent with her allegation, even though she did not allege he took the entire file. In this current hearing, Mr Pidgeon was obliged to put the proposition to her brother. We believed Ms Holland's brother when he roundly denied it. His demeanour, correspondence and stance have, throughout, been measured, respectful of Ms Holland, and sensitive to her personal stresses.

[50] Ms Holland has had several stresses in the course of this enquiry and the hearings. In 2018, she was described as suffering from Post-Traumatic Stress Disorder from the shock of discovering her husband's wrong-doing. In 2018, she was diagnosed with bowel cancer for which she had an operation followed by chemotherapy. The earlier hearing occurred in 2018. Family relationships, particularly with her siblings, have suffered in the wake of the matters at issue in this case. These are not relevant to the issue of liability, but we take them into account in assessing her responses to the complaint.

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[33] NoE for earlier charge, 27 March 2018, Bundle p 193, lines 19 – 28.
[34] NoE p 50, lines 1 – 15.
[35] NoE p 78, lines 16 – 20.
[36] NoE p 49, lines 30 to 52, line 27.
[37] 27 March 2018, Bundle pp 184 – 238.
[38] For example at Bundle pp 198 – 201.

[51] In our estimation, Ms Holland's brother has been sensitive to her unhappy circumstances. In this context, (although irrelevant to the central question) we note he lent her $50,000 of his own money to help her when she was in need, a sum presumably lost by reason of her subsequent bankruptcy. Although Ms Holland characterised his correspondence as "vitriolic," we cannot find any such character in it. He has courteously sought information to which he was properly entitled. His attitude is not that of someone "out for blood." We cannot find any basis in information he supplied, for the proposition it must have come from her allegedly missing records. We are unimpressed by Ms Holland's construction of an overheard statement as attaching to her allegation. We find this to be fanciful and irrational.

[52] We find that the allegation of theft is a convenient construction on Ms Holland's part. The allegation was belatedly made. It is so desperate as to seem unhinged. It strengthens our sense that Ms Holland is unreliable and perhaps has something to hide in the non-provision of records. Emerging through her evidence is a sense that she is aggrieved by the fact that her brother is comfortably situated whereas she has had an increasingly hard time. She was strong in her belief that his need (or lack of need) was relevant to whether he could expect a distribution from their father's estate.

[53] Ms Holland has not produced anything like adequate records that would enable a concerned person to discover what distributions had been made, or needed to be made, to give effect to the wills. We can see the deposit of just over $300,000 into her then employer's trust account in January 2002 but the trail ends there. The fact that we are unable to cobble together any sort of reliable record thereafter tells the story. We accept that some funds have been advanced to her sister, but we do not know, and are unprepared to accept her word, as to how much. We find she has taken advances herself, but we can only speculate as between $200,000 and $285,000, and that range is uncertain if we note that we are unsure what total amount actually passed beneficially to her sister.

[54] Once again, this area of shortcoming on her part is concerning when measured against the standard of fitness to practise. She ought to have known the importance of being able to offer a fair account to those (her siblings) who have been entitled to receive an account. Such knowledge is a fundamental quality we expect

in members of the legal profession. Absent records such as bank statements or her own records of the transactions, we (and she) are unable to construct a record of what has happened to the funds, particularly those from her father's estate.

Did Ms Holland fail to account?

[55] We find that Ms Holland was under a duty to account to her siblings as residuary beneficiaries in her father's estate. Her brother was willing to receive a broad accounting, not requiring an audit. At least, she ought to have been able to show bank records of the capital coming in, the dates and amounts of advances to herself, their sister, and any capital sums applied for her mother (if any). A record of the terms of individual advances and interest payments should have been provided. None of these have been provided.

[56] As to her mother's estate, Ms Holland ought to have provided her siblings with a narrative of her mother's financial affairs sufficient to establish what capital she owned at the date of her death. As co-executors, she should have provided them with a copy of her mother's will,[39] whether or not she disputed it.

[57] When asked by her brother, Ms Holland ignored or fobbed off his requests. We find his requests were proper requests. She adopted the view that he was not entitled to the information, suggesting her sister's privacy precluded his being told.[40] We are unaware what sensitivity she alludes to, and how this would apply to co-executors.

[58] It appears as if Ms Holland took the approach that she would undertake the care of her mother in place of her father's estate and that, in consequence, she could dispose of the capital of the estate as she saw fit. She acted as if her brother had no right to his residuary gift in her father's estate and no right to receive any account of her dealings.

[59] In dealing with her mother's affairs as attorney, Ms Holland cashed up and distributed her mother's major assets. Her closing of the term deposits, attracting an immediate loss of $36,000 seems needless. We infer that she had urgent need of

[39] NoE p 61, lines 5 – 20; p 62, lines 22 – 25.
[40] NoE p 59, lines 30 – 33; Ms Holland's affidavit 27 May 2021, Ex A, at [69].

cash herself at that time, but the arrangement was reckless to the financial consequences to her siblings. She seems to have discussed breaking the term deposits, at least with her brother but it seems he was unaware it would result in an immediate loss of $36,000. Lawfully, she was entitled to act as her mother's attorney until her mother died, but the precipitate closure of the term deposits is hard to justify against her mother's needs at the time. She failed to have proper regard to the interests of her siblings.

Does that conduct justify a finding that she is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer?

[60] in the end, this case turns on whether Ms Holland's conduct "would justify a finding that [she]…is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer…".[41]

[61] The following passages are taken from the helpful submissions of the Standards Committee:

> 3.5 The distinction between professional and personal misconduct, as well as the scope of s 7(1)(b)(ii), were considered by a Full Bench of the High Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*:
>
> > [106] We consider the Act's definitions continue to maintain the distinction between professional and personal misconduct. The latter involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.
> >
> > [107] The test of "fit and proper" person remains the touchstone for whether a lawyer is to be struck off. It is the assessment that is to be undertaken following a finding of professional misconduct under s 7(1)(a)(i). In other words it is recognised that misconduct in the performance of professional duties may lead to a conclusion of unfitness, but not necessarily. By contrast, with personal misconduct, the fit and proper person inquiry is an element of the actual offence. This in effect recognises that personal conduct unrelated to work must be of a nature which in itself justifies a conclusion that the practitioner is not a fit and proper person. We think this structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment.

[41] Section 7(1)(b)(ii) of the Act.

> [108] In a Disciplinary Tribunal decision determined under the previous Act, the Disciplinary Tribunal quoted from the previous edition of the *Laws of New Zealand* chapter on Law Practitioners. We consider the examples cited therein generally illustrate the traditional scope of the personal misconduct option and the current scope of s 7(1)(b)(ii):
>
> > The following instances have been held to constitute conduct unbecoming a barrister or solicitor and as such jurisdiction existed for the Tribunal to enquire into the disciplinary charges: misconduct of a sexual nature with a babysitter; insulting behaviour where there have been previous convictions for indecent assault; association with the business of bookmaking; importuning for immoral purposes; corruption in public office; issue of valueless cheques; obscene and threatening language in a public place and fraudulent conversion of small amounts of clients' monies; consorting with criminals; and allowing the house rented by a tenant to be used as a brothel.

3.6 More recently, the concept of a "fit and proper person" was considered by the Supreme Court in *New Zealand Law Society v Stanley*. That case involved a candidate for admission to the bar who had been refused a certificate of character by the NZLS because of concerns about his character emanating from a history of criminal offending. The Supreme Court defined "fit and proper" as follows:

> [35] The first point to note is the obvious one. That is, the fit and proper person standard has to be interpreted in light of the purposes of the Act. Those purposes broadly reflect two aspects. The first aspect is the need to protect the public, in particular by ensuring that those whose admission is approved can be entrusted with their clients' business and fulfil the fundamental obligations in. s 4 of the Act. The second aspect is a reputational aspect reflecting the need to maintain the public confidence in the profession at the present time and in the future. This second aspect also encompasses relationships between practising lawyers and between lawyers and the court.
>
> [36] While some of the language is outdated, the essence of the first aspect is reflected in the judgment of Skerrett CJ in *Re Lundon*:
>
> > The relations between a solicitor and his client are so close and confidential, and the influence acquired over the client is so great, and so open to abuse, that the Court ought to be satisfied that the person applying for admission is possessed of such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with their business and private affairs.
>
> …
>
> [38] The second point is that the fit and proper person evaluation is a forward looking exercise. That is because the Court or the Law Society, as the decision maker, is required to make a judgement at the time of undertaking the evaluation as to the risks either to the public or of damage to the reputation of the profession if the applicant is admitted. Those risks have to be construed in light of the fundamental obligations on lawyers discussed above. Of particular relevance here are the obligations to uphold the rule of law and to protect the interests of the client subject to duties as an officer of the Court or under any other enactment.

3.7 The Court reiterated that the test is objective in that it is necessary to focus on the relevance of a person's past conduct vis-à-vis the

professional standards, rather than being influenced by sympathy for their position.

3.8 Importantly, the Court confirmed the approach to determining whether someone was "fit and proper" was not punitive; it involved a "protective exercise focused on either the need for public protection or the maintenance of public confidence in the profession". The Court went on to say:

> The High Court in *Re M* adopted the words used in *Incorporated Law Institute of New South Wales v Meagher* and said that the question is as to the applicant's "worthiness and reliability for the future". Further, as Lady Arden observed in *Layne*, what comprises fitness to practise must be referable to the good character appropriate to the particular profession. For an applicant for admission to the legal profession, as the authorities state, the appropriate aspects of the fit and proper person standard are whether the applicant is **honest, trustworthy and a person of integrity**.
>
> (emphasis added).

Unsatisfactory conduct under s 12(c) of the Act

3.9 "Unsatisfactory conduct" is defined in s 12. It includes, pursuant to s 12(c), conduct consisting of a contravention of the Act, or of any regulations or practice rules made under the Act that apply to the lawyer, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under s 7 (s 12(c)).

[62] As to the fiduciary duties to residuary beneficiaries, we quote from the Standards Committee submissions, paragraphs 3.14 to 3.16, and 3.20:

3.14 The office of executor begins at a will-maker's death and is not contingent on probate being granted; probate merely authenticates the appointment.

3.15 In *Re Stewart*, Laurenson J explained the relationship between an executor and beneficiary as follows:

> [24] An executor is the person appointed by a Testator to administer his property and carry out the provisions of the will. To this end the executor has certain specific statutory and commonlaw duties and powers, namely to:
>
> - Bury the deceased;
> - Make an inventory of assets;
> - Pay all duties, testamentary expenses and debts;
> - Pay legacies;
> - Distribute the residue to the persons entitled;
> - Keep accounts.
>
> …

> [25] The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property. The most obvious element of that relationship is the requirement imposed in equity that the trustee will deal with those assets with the utmost probity which, in turn, requires that the trustee will not on any account allow him or her to have or acquire any personal interest in those assets without the express and informed consent of the beneficiary. There is, in addition, a further aspect to an executor's fiduciary responsibilities, namely a duty to act even-handedly between the beneficiaries. It is within this area of responsibility that the obligation not to unwarrantedly thwart claims arises.

3.16 In *Rauch v McGuire*, Asher J cited *Re Stewart* with approval and further explained the role of an executor vis-à-vis a residuary beneficiary (that is, one whose interest in trust property arises once an estate's debts are paid, or as in the estate of [father], upon the death of [mother]). After considering various authorities, Asher J concluded:

> [20] As this analysis shows, residuary legatees such as the Rauchs, have no interest in the nature of a property interest, whether legal or equitable, in the unadministered estate. The corpus of the estate and any income from it was the property of the executors until their administration role was complete. Until the will maker's debts are paid and the specific legacies met, it is not possible to identify the assets to which beneficiaries are entitled. And until that point, there is no need to distinguish between the legal and equitable estate. That is not to say that the residuary legatees are without rights in relation to the administration of the estate. The executors owed the residuary legatees a fiduciary duty to carry out their administration tasks honestly and diligently, and the residuary beneficiaries would have remedies against the executors should they fail to carry out those duties. Thus, in New Zealand it has been recognised that there is a duty of even handedness owed by executors to beneficiaries: *Irvine v Public Trustee.*
>
> [21] However, the remedies arise from causes of action for breach of fiduciary duty, and not because the residuary beneficiaries have a proprietary interest in the unadministered estate…

3.20 Further, in *Erceg v Erceg*, the Supreme Court emphasised a beneficiary's rights to receive information:

> [51] We see the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries. A beneficiary who seeks such an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed. That can be expected to be the basis on which the beneficiary will seek disclosure of trust documentation.

[63] Examples of the application of s 7(1)(b)(ii) are found in former Tribunal cases of *Clarkson*[42] and *Duff.*[43] The former dealt with misappropriation and failing to account; the latter to assisting a person to avoid paying tax.

[64] It is not fair to judge Ms Holland's earlier actions against the full force of her subsequent financial collapse. When she became co-trustee of her father's estate, she had a promising career. She was attached to her mother and seems to have been solicitous of her sister's wellbeing.

[65] We find that her dealings with her father's estate were imprudent and reckless. She placed most of the capital where it was unlikely to be recovered. She placed her mother at risk by distributing her major assets when she had made her mother financially dependent on her. Had Ms Holland died, or had she been bankrupted during her mother's lifetime, her mother would have been severely exposed financially. She used the funds without regard to the need to keep adequate records. This was always going to create problems when she had to account to her brother (for one) as residuary beneficiary. By taking money for her own beneficial use, and doing so without security, even if she seemed to be in promising circumstances, was structurally risky.

[66] Although she was not providing regulated services, we find that it is a reasonable minimum to expect certain attributes in a lawyer in Ms Holland's shoes. Firstly, that she should recognise the existence of fiduciary duties to her father's estate (that is, the scheme of the will), her mother as life tenant, and her siblings as residuary beneficiaries (along with her). Secondly, that she should conduct herself better than recklessly in management of the estate funds. Thirdly, that she should maintain and keep safe, adequate records so the conduct of the estate could be demonstrated to those who had the right to know – in this case, her siblings. Fourthly, that she should give a proper account when called upon to do so. In this case she has done that neither for her brother nor for the Standards Committee, let alone for the Tribunal. Fifthly, a lawyer in Ms Holland's shoes should not profit from her position of privilege in managing money where she had a fiduciary obligation.

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[42] *Hawkes Bay Standards Committee v Clarkson* [2014] NZLCDT 2.
[43] *Otago Standards Committee v Duff* [2021] NZLCDT 25.

[67] We accept that our assessment of Ms Holland's actions should be balanced, taking account of the circumstances, including family relationships and the broad intentions of parental desires. It may well have been suitable to sell her mother's real estate and divide it in other circumstances but where she had more or less alienated the capital of her father's estate, these transactions left her mother quite exposed. In these matters, Ms Holland was the prime mover of sale and interim distribution. We infer she had personal financial needs which ought not to sway a fiduciary. She was in a position of trust. That, even when giving evidence before the Tribunal, she failed to recognise the extent to which she had imperilled her mother's position and hampered her brother's ability to obtain his residuary share, falls short of the care one would expect in a lawyer, even though not acting as a lawyer providing regulated services.

[68] Mr Pidgeon took no issue with the test as contended for by Mr Simmonds. Nevertheless, Mr Pidgeon urged us to consider the situation his client was in at the various times the conduct occurred. A finding of misconduct is a grave matter because it brings cherished career and employment prospects into question, let alone the disgrace of losing the privileged status, the underpinnings of which these disciplinary proceedings guard by our findings. Among the cases referred to in LexisNexis Laws of New Zealand, to which he referred, is a 1932 Court of Appeal decision[44] which is cited for the proposition that an honest muddler may still be guilty of professional misconduct. In that case, the practitioner mixed his own funds with trust funds. In the present case, we could not characterise Ms Holland's conduct so favourably. Over a period of many years, she ignored clear fiduciary duties, promoted her own interests and, when called to account, she has been avoidant, obstructive, and plainly irrational. This is our firm, unanimous view.

[69] In the present case, we find Ms Holland's conduct fell so short of basic standards and the qualities of integrity expected of those who are fit to be members of the profession that the public could have no confidence in her ability to perform reliably as a lawyer should. We find the charge of misconduct is amply proven.

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[44] *Re F* [1932] NZLR 315 (CA).

Directions

[70] A half-day hearing shall be allocated to deal with penalty. Submissions are to be filed in accordance with the following timetable:

1. The Standards Committee is to file and serve its submissions on penalty within 14 days of the receipt of this decision.

2. The practitioner may have a further 14 days to file submissions in reply concerning penalty.

3. Counsel are to confer with the case manager to arrange a suitable half-day penalty hearing. The Tribunal may determine to hold this remotely if required.

Non-publication order

[71] There is an order under s 240 of the Act, that the family members' names and law firm names are not published (although relationships will be identifiable).

DATED at AUCKLAND this 3rd day of March 2022

Judge JG Adams
Deputy Chairperson