

**LEGAL COMPLAINTS REVIEW OFFICER  
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2023] NZLCRO 022

Ref: LCRO 32/2022

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of [Area] Standards Committee

**BETWEEN**

**QP**

Applicant

**AND**

**ZH**

Respondent

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

**Introduction**

[1] Mr QP has applied for a review of the determination by [Area] Standards Committee to take no further action on his complaints about Mr ZH.

**Background**

[2] In June 2004, Mr QP and his former wife, now known as Ms WO, established a Trust known as the [ABC] Trust ([ABC]/the Trust). At the time the events giving rise to Mr QP's complaints occurred, the trustees of the Trust were Mr QP, Ms WO and [ABC] Family Trustee Company Limited. The directors of that company were Mr QP and Ms WO.

[3] The Trust owned and operated a farm in [town].

[4] Mr QP and Ms WO separated in 2015 and Mr QP left the farm soon thereafter. Ms WO remained on the farm.

[5] [Law firm K] Limited (Law firm K) had acted for Mr QP and Ms WO for some time. Following their separation, Mr QP and Ms WO engaged separate legal representation for relationship property matters, but [Law firm K] continued to act for the Trust.

[6] At some point in time, the farm had been subdivided, and in April 2017, the trustees agreed to sell one of the lots that had been created by the subdivision. [Law firm K] was instructed to act on the sale.

[7] Pursuant to the terms of the agreement for sale, the purchaser was required to make payment on account of the purchase price as certain events occurred. Pursuant to these terms, the purchaser made two payments of \$30,000 each.

[8] On 13 April and 7 July 2017, payments of \$26,868.54 and \$28,370.19 respectively, were made by [Law firm K] into the Trust bank account at [Bank Q] without Mr QP's knowledge or consent.

[9] Ms WO held an operating authority on the bank account and immediately transferred these funds out of the Trust bank account to another bank account within the control of Ms WO only.

[10] Mr QP's complaints arise from these events.

### **Mr QP's complaints**

[11] Mr QP's primary complaint is that [Law firm K] made the payments out of funds held for the [ABC] at the direction of Ms WO alone, notwithstanding that there were two other trustees of the Trust.

[12] In the course of investigating the payments, Mr QP became aware of other matters which form the basis of other complaints:

- Costs incurred for placing funds on term deposit and for preparing statements. Mr QP speculates that the funds may not have been placed on deposit.

- Potential breach of r 10.2 of the Conduct and Client Care Rules.<sup>1</sup>
- [Law firm K] was conflicted when it continued to act for Ms WO on her personal matters, including the purchase of another property.

### **[Law firm K] response**

[13] [Law firm K] responded under the hand of two of its directors – BM and ZH. They provide a comprehensive background to the events which occurred.

[14] Mr BM had earlier responded<sup>2</sup> to matters raised by Ms XE, who had previously acted for Mr QP, and these responses were incorporated into the reply to the Lawyers Complaints Service.

### *Complaint 1*

[15] [Law firm K] contend that there was no breach of the provisions of s 110(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) which requires funds to be “held exclusively for that person, to be paid to that person or as that person directs”. They submit:

- “Direction (specific instruction) is only required if money is being paid *not* to the client”.
- “The term “person” is used in the singular but means “client” in a joint context if appropriate. So, a person can be a person, a company or a Trust (trustees). As trustees will have a Trust bank account, a payment to the Trust bank account is a payment to the client/person”.

[16] [Law firm K] also refers to the Lawyers Trust Account Guidelines which state that authority to pay money out of a firm’s Trust account may be contained in a client’s acceptance of a letter of engagement and that the letter of engagement issued by the firm referred to paying out surplus settlement monies. [Law firm K] submits that specific client instruction is required only if payment is to be made to a third person.

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<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 – Rule 10.2 provides: “A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.”

<sup>2</sup> Letter BM to XE (19 September 2019).

[17] [Law firm K] consider there is a conflict between reg 12(6)(b) of the Trust Account Regulations<sup>3</sup> and s 110 of the Act, but as the regulations are subordinate to the Act, the provisions of the Act apply.

[18] They say that any interpretation other than that “would mean that every lawyer settling the sale of a property would need specific written authority to pay their clients”.

[19] [Law firm K] contend that there are no grounds to sustain this complaint.

#### *Interest on Trust funds*

[20] [Law firm K] refer to the fact that the client ledger for the sale of the farm records interest accruing. They also provide the resident withholding tax certificate.

[21] They reiterate that all funds from the subdivision and sale to [Company D] were paid out to the client, and consequently the firm did not hold any net proceeds.

[22] [Law firm K] do not accept this complaint.

#### *Communication with another lawyer's clients*

[23] [Law firm K] interprets r 10.2 as dealing “with a situation where a lawyer engaged in a matter, communicates directly with a client of another lawyer [in respect of the] same [transaction or] matter”. They say that the advice from Mr QP’s solicitor that she had been instructed by Mr QP “as trustee of the [ABC] [could] only have been in his personal capacity, in terms of his role as trustee”.

[24] [Law firm K] acted for the Trust at all times and therefore contact with Mr QP was contact with their client. They say that copying [Law firm S] (who were then acting for Mr QP) into correspondence was a means of ensuring Mr QP received communication as he was difficult to communicate with. [Law firm K] conclude:

We have not communicated directly with Mr QP in respect of any of the allegations or questions raised in correspondence with his solicitor or barrister. If we have inadvertently breached the rules due to reporting to *our clients* then we apologise. However, as noted above our interpretation of the rules is that there has been no breach.

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<sup>3</sup> Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

*Additional complaint*

[25] [Law firm K] also responded to what they considered to be a complaint by Mr QP in addition to those identified by the Committee which related to the firm providing an annual statement for the Trust and its charges in relation thereto.

**The Standards Committee determination**

[26] The Committee summarised Mr QP's complaints as being:<sup>4</sup>

- (i) Trust monies were paid to the trust's bank account without the unanimous authority of all trustees;
- (ii) Trust monies were not placed on Interest Bearing Deposit (IBD) and the trustees charged a fee for providing an annual statement to trustees; and
- (iii) Mr ZH and/or his firm were conflicted when they acted for one of the trustees in their personal capacity to purchase another property.

*Payment of Trust funds*

[27] The Committee considered that the payments made by [Law firm K] were made in accordance with the firm's terms of engagement which include "paying out any surplus settlement monies". It said:<sup>5</sup>

- 14. [Law firm K]'s authority to make payments to their client trust was contained in the client's acceptance of the letter of engagement. The Committee finds that where money is being paid to the client, an express client authority is not required. An email was sent to the client confirming the payments.
- 16. Mr QP had the means both through his own Solicitors, and by virtue of being one of the trustees, to know what was happening with control of the trust's bank account and to exercise control over it.
- 18. The Committee finds no merit in the suggestion made on Mr QP's behalf that the terms of agreement by referring to "surplus settlement money" does not envisage the payment of surplus deposit monies to the client trust.

[28] The Committee took note of the fact that the firm's terms of engagement recorded the Trust email address provided and that Mr QP had not advised the firm of any changes.

[29] The Committee determined to take no further action on this issue.

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<sup>4</sup> Standards Committee determination (10 February 2022) at [9].

<sup>5</sup> At [14], [16] and [18].

*Interest on funds held?*

[30] The Committee referred to the evidence provided by [Law firm K] which included the firm's Trust account ledgers and the RWT certificate, both of which indicated that funds held did earn interest. The Committee also determined that [Law firm K] was able to charge an administration fee for placing funds on deposit and determined to take no further action on this issue.

*Conflict of interests*

[31] Mr QP speculated that Ms WO had used the funds paid into the Trust's bank account to purchase another property. [Law firm K] acted for Ms WO on the purchase and Mr QP says that the firm would have been aware that Ms WO was using Trust funds for her own benefit.

[32] The Committee treated this assertion by Mr QP as a complaint that the firm was conflicted in acting for the Trust and Ms WO in her personal capacity.

[33] However, it determined to take no further action as [Law firm K] had provided evidence that the Trust funds had not been applied towards the purchase.

**Mr QP's application for review**

[34] Mr QP disagrees that the letter of engagement contemplated that the deposit would be paid out when received and expected that the payments would be held until the end of the transaction when a decision would be made by the trustees at that time about payment.

[35] He disputes that he was difficult to contact and asserts that he was not advised when the payments were received or that the funds were paid out at Ms WO's request.

[36] Mr QP makes the point that the firm's "client" was the three trustees, and that payments should not have been made at the direction of only one trustee.

[37] Mr QP also advises that he was about to commence proceedings in the High Court to remove two of the trustees and to have the accounts of the Trust audited.<sup>6</sup>

*Outcome sought*

[38] The outcome sought by Mr QP is:<sup>7</sup>

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<sup>6</sup> No further information has been received from Mr QP about these proceedings or audit.

<sup>7</sup> Application for review (28 February 2022), Part 7.

The outcome I am seeking is for ZH of [Law firm K] Ltd to acknowledge their negligence/discrimination and actions have not been in accordance with their own Deed and Client Services. To return the deposit monies back into ABCTrust A/C held at [Law firm K] so that at final distribution those monies are accounted for by all Trustees and not one trustee by unanimous decision.

## **Process**

[39] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

## **Nature and scope of review**

[40] The High Court has described a review by this Office in the following way:<sup>8</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[41] This review has been conducted in accordance with those comments.

## **Review**

### *The respondent*

[42] The Standards Committee processed the complaint as being against Mr ZH. Mr ZH has not taken issue with this, and this Review proceeds on the basis that Mr ZH is the respondent.

### *Who was the client?*

[43] The trust account ledger established by [Law firm K] recorded the name of the client as the [ABC] Trust, as recommended by the Lawyers Trust Account Guidelines.<sup>9</sup> However, a Trust is not a separate legal entity. In the text Garrow and Kelly *Law of*

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<sup>8</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

<sup>9</sup> At [16.2].

*Trusts and Trustees* 8<sup>th</sup> Edition, Mr Greg Kelly cites<sup>10</sup> from the judgment of the Privy Council in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd*:<sup>11</sup>

A trust is not a legal person. Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently.

[44] [Law firm K], and the Standards Committee, proceeded on the basis that the firm's client was [ABC], and that the payment into a bank account held by the Trust was permitted by s 110(2)(b) of the Act.

[45] Section 110(2)(b) provides:

An incorporated firm that, in the course of its practice, receives money for, or on behalf of, any person—

(b) must hold the money, or ensure the money is held, exclusively for that person, to be paid to that person or as that person directs.

[46] Mr ZH says that he paid the funds to his client which he regarded as being the [ABC] and that he has therefore complied with the requirements of s 110(1)(b)<sup>12</sup> of the Act.

[47] I do not agree. A trust is not a separate legal entity. Payment could only be made on instructions from all three trustees. [Law firm K] did not have those instructions.

#### *Acting without instructions*

[48] The timesheets provided by [Law firm K] indicate that the instructions to pay out the funds and the details of the account into which payments were to be made, were received from Ms WO.<sup>13</sup> Mr ZH was well aware of the fact that Mr QP and Ms WO were estranged but it is apparent that Mr ZH did not confirm with Mr QP that the funds were to be paid as instructed by Ms WO.

[49] It is not enough for Mr ZH to argue that Mr QP had not instructed him that he was not to make any payments – it is a lawyer's duty to act on positive instructions from the client and to clarify instructions if they are unclear.

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<sup>10</sup> Chris Kelly and others, *Garrow and Kelly: Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at [1.26].

<sup>11</sup> *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 at [59].

<sup>12</sup> Section 110(1)(b) provides: "A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person— ... (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

<sup>13</sup> Timesheet entry (12 April 2017).



[50] The duty to obtain informed instructions is discussed in *Ethics, Professional Responsibility and the Lawyer* at chapter 10.3:

- Citing from *Groom v Crocker*.<sup>14</sup>

It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left by him and shall keep the client informed to such an extent as may be reasonably necessary.

- Citing from *Ismail bin Ibrahim v Lim*.<sup>15</sup>

If the client's instructions are unclear, it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action.

#### *The letter of engagement*

[51] [Law firm K] submit that the letter of engagement issued by the firm included paying out surplus funds, and that this in itself provided authority for the payments to be made.

[52] This submission is founded on guideline 6.2 of the Lawyers Trust Account Guidelines. However, the Guideline goes on to say:

Preferably, you should obtain and hold on file written authority from the client for any payment or series of payments.

In the circumstances which are present here, I consider that it would have been more than preferable to obtain written authority.

[53] Mr ZH submits that to hold that he was not able to rely on the terms of engagement, would mean that every solicitor who acts for a vendor would need to obtain specific written authority to pay out proceeds of a sale.

[54] There were too many uncertainties in this instance to enable Mr ZH to rely on the terms of engagement to make the payments:

- were the deposits 'surplus'?
- had Mr QP seen the terms of engagement?

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<sup>14</sup> [1939] 1 KB 194.

<sup>15</sup> [1998] 1 AMR 339.

- had Mr QP 'accepted' the terms of engagement?<sup>16</sup>
- the terms of engagement had been provided 5 months prior to the payments being made.
- the parties were estranged and Mr ZH was aware that Mr QP and Ms WO were engaged in relationship property negotiations.

[55] In all circumstances, where funds are held for more than one person, I do not consider that a lawyer can rely on terms of engagement to make payment out of the firm's trust account to clients without confirmation from the clients. The terms of engagement may have been delivered some time before the payment was made, and the clients may well not remember what was provided in the terms. The clients may also have separated unbeknown to the lawyer, and entitlement to the funds may be in dispute.

[56] [Law firm K]'s submission is, effectively, that a lawyer can act unilaterally and pay funds held for a client in trust to that client, in this case, into a bank account held by a client.

[57] There are any number of reasons why that can not be so, and I hesitate to put forward an example as it may be seized upon to discount the general principle. However, a client may have several bank accounts and it would be somewhat presumptuous of a lawyer to make payment into one account and then rely upon this section to avoid the fact that he or she has acted without instructions.

#### *Protection of client funds*

[58] The courts, and the disciplinary process, require a lawyer to account scrupulously for monies held in a firm's trust account. That requirement was reinforced in a decision of the Lawyers and Conveyancers Disciplinary Tribunal:<sup>17</sup>

[7] ... The duty imposed on a solicitor to account scrupulously for money in a trust account is a fundamental obligation, one that the public are entitled to rely upon as a guarantee of security and fidelity. ... Where those standards are not adhered to, penalties must generally be imposed to encourage other practitioners to comply with the trust account requirements and to demonstrate fidelity to the public. ...

[59] The Court of Appeal has also emphasised the strict approach taken by the courts when addressing the obligations and responsibilities of lawyers when dealing with client funds. The Court's judgment was referred to in a decision of this Office, *BA v SC*,<sup>18</sup>

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<sup>16</sup> The copy provided by [Law firm K] is not signed by Mr QP or Ms WO.

<sup>17</sup> *ASC 2 v Mason* [2020] NZLCDT 38 at [7].

<sup>18</sup> LCRO 83/2020 at [62]–[63].

[62] The key requirements of s 110(1) are that the lawyer (a) must pay the money “promptly” into the lawyer’s “separate trust account”, and (b) must hold the money “as that person directs”. The lawyer is also “deemed” by s 110(3) to have received a person’s money if that person “deposits funds by means of a ... electronic transfer” into the lawyer’s trust a bank account.

[63] In *Fletcher v Eden Refuge Trust* the Court of Appeal explained that these requirements are “strict and reinforced” by (a) s 110(4) which makes contravention of s 110 a criminal offence, (b) the Trust Account Regs referred to below, and (c) the Court [of Appeal’s] decisions, in a professional disciplinary context, which “emphasise the inviolate nature of funds held in trust and the paramount need for solicitors to avoid overdrawing their trust accounts”.<sup>33</sup>

<sup>33</sup> *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227 at [74] which considered s 89(1) of the Law Practitioners Act 1982, and reg 8 of the previous Solicitor’s Trust Account Regulations, which are the predecessors to s 110(1), and reg 12 of the Trust Account Regs. See also concerning the deduction of fees from money held in trust: *Heslop v Cousins* [2007] 3 NZLR 679 at [195] for the interrelationship of s 89 of the Law Practitioners Act 1982, and reg 8 of the Solicitor’s Trust Account Regulations 1998, the predecessors to s 110 and reg 9 of the Trust Account Regs.

[60] Failure to obtain informed instructions is a breach of one of a lawyer’s fundamental obligations. By making the payment at the direction of Ms WO only, [Law firm K] enabled a breach of the Trust to occur. Although Ms WO was a beneficiary of the Trust, any distributions needed to be approved by all trustees. That did not occur and it should have been within contemplation that this was a possibility that needed to be protected against.

[61] [Law firm K] acknowledges that Ms WO may not have been complying with the terms of the Trust Deed and obtaining proper authorisation from all trustees to make payments. They argue that Mr QP’s remedy was to take action against Ms WO, but once the funds had been paid out, extra cost and difficulty would no doubt occur in endeavouring to remedy the situation.

[62] The failure by Mr ZH to obtain authority from all trustees amounts to unsatisfactory conduct, pursuant to s 12(a) of the Act.

#### *Trustee decisions*

[63] Clause 8.3 of the Trust Deed confirmed the rule of law that all decisions of trustees must be unanimous. If it is not accepted that [Law firm K]’s client were the three trustees, the firm was nevertheless still in error by proceeding without confirming that the payment had been properly authorised.

[64] [Law firm K] did not have unanimous instructions from the three trustees to make the payment.

*A conflict of interest?*

[65] Mr QP asserted that Ms WO had used the deposits to (part) fund her own purchase. [Law firm K] acted for her on the purchase. The committee posed the question as to whether [Law firm K] was conflicted, but determined to take no further action on this issue as [Law firm K] had provided evidence as to how the purchase was funded.

[66] Mr QP had not included this information in support of an allegation that [Law firm K] was conflicted in acting for Ms WO personally and also the Trust.

[67] I have not examined the question as to whether [Law firm K] was conflicted any further, on the basis that it was not part of Mr QP's complaints. If Mr QP wishes to make a complaint that the firm had a conflict of interest, then he may make a further complaint to the Complaints Service specifically in this regard.

*Interest on funds held*

[68] Mr ZH has provided evidence that the firm ensures that funds held accrued interest. I confirm the Committee's determination to take no further action on this issue, and that it was in order to charge for this.

**Decision**

- [69] (a) For the reasons discussed above, and pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the committee to take no further action on Mr QP's complaints is reversed, but confirmed as noted in [69] above.
- (b) Mr ZH's conduct constitutes unsatisfactory conduct as that term is defined in ss 12(a) of the Act.

**Orders**

[70] The outcome sought by Mr QP is for "[Law firm K] to acknowledge their negligence/discrimination and actions have not been in accordance with their own deed and client services." Neither a Standards Committee or this Office have jurisdiction to make any pronouncement about negligence. That is a matter for the Court.

[71] Mr QP also requests that the deposit moneys are refunded back into the firm's trust account and held for the [ABC]. Any such payment, could only be by way of compensation pursuant to s 156(1)(d) of the Act. There are limitations on orders that

can be made by way of compensation, and an order such as that sought by Mr QP, is, again, a matter best sought before the Court.

[72] Mr QP has advised (at the time of his application for review) that matters were before the Court, and that is the correct forum for any benefits that Ms WO may have received by reason of Mr ZH's conduct to be addressed.

[73] Accordingly, the appropriate consequence to follow from the finding of unsatisfactory conduct, is by way of a fine.

[74] Pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006, Mr ZH is ordered to pay to the New Zealand Law Society, the sum of \$3,000.

### **Costs**

[75] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006, and the Costs Orders Guidelines issued by this Office, Mr ZH is ordered to pay the sum of \$1,200 to the New Zealand Law Society.

### **Publication**

[76] This decision covers some important issues that lawyers acting for trusts and estates may need to be aware of. Pursuant to s 206(4) of the Act, I direct that this decision be published in an anonymised format.

### *Enforcement of Orders*

[77] Pursuant to s 215 of the Act, the Orders made above may be enforceable in the civil jurisdiction of the District Court.

**DATED** this 28<sup>TH</sup> day of MARCH 2023

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**O Vaughan**  
**Legal Complaints Review Officer**

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

Mr QP as the Applicant  
Mr ZH as the Respondent  
Ms RN, Mr LF, and Mr BM as Related Persons  
[Area] Standards Committee  
New Zealand Law Society