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

[2024] NZLCRO 162

Ref: LCRO 40/2023

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|---|---|
| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | an application for review of a prosecutorial decision of the [Area] Standards Committee [X] |
| **BETWEEN** | **DG**<br>Applicant |
| **AND** | **[AREA] STANDARDS COMMITTEE [X]**<br>Respondent |

## REISSUED DECISION

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

### Introduction

[1] The applicant has applied for review of a decision by the [Area] Standards Committee [X] (the Committee) that all issues involved in the matter of a complaint made against him by Ms YS (the complainant) should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

### Background

[2] The applicant's firm acted for the complainant and numerous related entities controlled by her for many years up to 2018. The complainant's primary legal adviser was a principal of the firm, Mr LM. The applicant was one of the lawyers at the firm who provided legal services for the complainant between 2011 and 2017.

[3] The firm's services included the preparation of a trust deed establishing the complainant's trust (Trust A), which was settled in December 2011. Mr LM was one of the three trustees of Trust A. The applicant drafted the trust deed.

[4] The complainant was in a domestic relationship with Ms PW (the Partner). The Partner settled her own trust in March 2014 (Trust B). The two trustees were the Partner and her father.

[5] Later in 2014, the trustees of Trust A and the trustees of Trust B bought a property together (the Property). They also entered into a Property Sharing Agreement (the PSA) setting out the terms on which they agreed to own the Property, finance its purchase, pay for its upkeep, agree on and pay for renovations, adjust any disproportionate financial contributions and, if appropriate, sell the Property and apply its proceeds of sale.

[6] The applicant prepared the PSA for Trust A. The trustees of Trust B were independently advised on it.

[7] The complainant was a successful businessperson with numerous business interests and assets. The Partner appears to have worked at various times as the Operations Manager of one of the complainant's businesses and/or the complainant's personal assistant.

[8] The financial position of the complainant and of Trust A was significantly different from the financial position of the Partner and Trust B.

[9] At some point between 2014 and 2016, the complainant introduced the applicant to the Partner. In 2016, the Partner's father and co-trustee of Trust B died. At the Partner's request, the applicant accepted appointment as independent trustee in his place.

[10] There is disagreement between the complainant and the applicant as to the complainant's role in that appointment. The firm said initially that:

> … [the complainant] was aware of [the Partner's] request that [the applicant] accept this appointment and [the complainant] positively encouraged [the applicant] to accept it as she advised [the applicant] that she wanted [the Partner's] best interests to be looked after, particularly at what was a difficult time in [the Partner's] life.

[11] In a later submission for the applicant, it was stated that:

> After [the Partner's] father passed away in 2016, [the complainant] recommended to [the Partner] that she appoint [the applicant] as her independent trustee. [The

> Partner] was amenable to that, and with [the complainant's] endorsement and encouragement, [the applicant] agreed to that appointment.

[12] The complainant's recollection is different. She stated simply that she "… was advised that [the applicant] had agreed to be the independent trustee on [Trust B]" and later that:

> At the time I did not think to question his decision [to accept appointment as trustee of [Trust B]] but with hindsight I am not sure on what basis he made his decision as he had not just written the [PSA] for me but was still acting for me on all of my affairs. I don't recall being asked to sign anything approving him becoming the Trustee, nor did anyone suggest I take independent legal advice.

[13] In 2017, the complainant embarked upon a process for the sale of a substantial part of her business interests. She was represented by another law firm in that process. The applicant's firm continued to represent the complainant in her personal capacity.

[14] The overall transaction involved a guarantee. The complainant had this to say about the guarantee:

> At the time of the sale, I needed to have drawn up a guarantee …. The basis of the guarantee was to secure my Trust the sum of $500,000 to come from the sale proceeds … Following the sale of [the business], the wording of a clause within the guarantee was contested by [another party] and [the other party] initiated legal proceedings for the release of the monies held by [the firm] on my behalf. At that time I took further legal advice and was advised that the wording of the guarantee was erroneous and did not protect my position and to request the funds not to be released. This in turn led to [the firm] being taken to the High Court …, where they lost the case and the funds had to be released to [the other party] and I lost $500,000.
>
> This caused the end of the relationship [2018] with [the applicant], Mr LM and [the firm].

[15] The complainant uplifted her files from the firm in July 2020. I have no information as to when Mr LM ceased to be a trustee of Trust A.

[16] The complainant and the Partner subsequently separated.

[17] The financial contributions of Trust A and Trust B (and/or the complainant and the Partner), respectively to the mortgage repayments and to the costs of renovation and improvement of the Property, were substantially disproportionate.

[18] A dispute arose between the two trusts principally regarding the application to the circumstances of the provisions of the PSA regulating the adjustment of disproportionate financial contributions between the parties and also regarding the sale of the Property.

[19] In November 2020, the solicitor for Trust A wrote to Mr LM advising him of the

dispute and of the fact that proceedings were being prepared and indicated that he might be asked to give evidence for Trust A.

[20] There were also Family Court proceedings between the complainant and the Partner personally.

[21] In the context of Trusts A and B being in dispute and the complainant and the Partner personally also being in dispute, the complainant considered it inappropriate for the applicant to continue in his role as a trustee of Trust B.

[22] The matter was raised with Mr LM by the complainant's counsel in December 2020. She raised two issues in that regard. These were expressed as follows:

> … the potential conflict of interest which arises as a result of a partner in your firm now acting against [the complainant's] interests as a trustee of [Trust B].
>
> … [the complainant] is concerned that you have been privy to personal and business information during the lengthy period you acted for her and as such there is a clear conflict now with a partner in your firm acting as [the Partner's] trustee in circumstances where Court proceedings are now pending.

[23] In relation to the first issue, counsel wrote that:

> As you are aware the Lawyers & Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides (sic) that a lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.

[24] Counsel requested that Mr LM:

> … please confirm by return that [the Partner] will appoint an independent trustee who is not a member of your firm and that there will be no information provided to that trustee which in any way breaches [the complainant's] client confidentiality with you".

[25] The firm responded by letter the following day, through a principal other than the applicant or Mr LM. Relevantly, the firm wrote:

> … as you will appreciate Mr LM is no longer a trustee for [the complainant], nor does he act for her. [The] correspondence did not appear to raise any potential conflict of interest issue with regard to a partner in our firm, as you put it, '… acting against [the complainant's] interest as a trustee in [Trust B]'.
>
> That reference is apparently to our partner, [the applicant], who is a trustee of [Trust B]. …
>
> We are all aware of the relevant provisions of the [Rules], however, the rule you refer to has no application to [the applicant's] position here. He is not acting for [Trust B] in relation to the issues in respect of which you have been instructed. We understand that [Lawyer X] is presently acting for that trust. [The applicant] is merely discharging his obligations as trustee on a day to day basis. That does not involve taking any 'active part' in the matters in issue between your client and

> [the Partner]/[Trust B].[1]
>
> There is, with respect, no inherent conflict of interest in [the applicant] continuing in his role as a trustee of [Trust B]. However, he will discuss the matter with [the Partner] during the Christmas break and, if it is [the Partner's] wish that he resign, or otherwise, his resignation is considered to be the best way forward, then [the applicant] will retire from that role (sic).[2]
>
> This said, it appears to us that the principal concern here is that [the complainant] is assured that there will be no breach of her confidentiality.
>
> I am instructed to relay to [the complainant], [Mr LM'] and [the applicant's] absolute assurance that no personal or business information relating to her, which they may have acquired from acting for her, has been or will be disclosed to [the Partner] or to [Trust B].

[26] Counsel for the complainant responded in due course, relevantly, that:

> … It is not accepted that your firm is not conflicted. Your firm drafted the relevant Property Sharing Agreement. [The applicant] is acting as the independent solicitor trustee of [Trust B] which is now in breach of its obligations under the Agreement and about to be named as a defendant in proceedings being issued (the mediation having been rejected by your client trust).
>
> Your firm is in receipt of client information about my client and is therefore wholly conflicted.
>
> I advise that unless [the applicant] resigns as a trustee within the next 48 hours and your firm cease its involvement (sic), my client will lodge a complaint with the NZ Law Society without further notice.

[27] The above initial exchange of correspondence encapsulates the dispute that arose originally between the complainant and the applicant's firm about the professional conduct of the applicant and/or Mr LM that pertained until the laying of charges against the applicant by the Committee in March 2023.

[28] I refer to Mr LM because the original assertion about being privy to personal and business information relating to the complainant was made against Mr LM, not the applicant. The stated link with the applicant was that he worked in the same firm.

[29] As explained later in this decision, the Committee has taken a more expansive view of the scope of the provisions of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 (the Rules) it considers the applicant to have breached in the circumstances.

[30] The firm advised that the applicant duly raised with the Partner the possibility of his resigning as trustee of Trust B and that the Partner made it clear she wished him to

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[1] The reference to "active part" does not appear to be a quote from the letter to which the firm was responding.

[2] The comma after "otherwise" appears to be a typographical error.

remain as a trustee

[31] The dispute between Trusts A and B remained unresolved. In November 2021, the trustees of Trust A issued proceedings in the High Court against the trustees of Trust B seeking an order for specific performance of the PSA, an order for sale of the Property and a sum for a fair occupation rental.

[32] At some point, the parties engaged unsuccessfully in mediation. It is unclear whether this was before or after proceedings were issued. The applicant attended the mediation in his capacity as trustee.

[33] The trustees of Trust B defended the High Court claim on disputed facts and raised affirmative defences of "unconscionable bargain", estoppel and constructive or resulting trust.

[34] The parties had by that time agreed to the Property being sold. The residual dispute related to the financial adjustments to be made between the parties under the terms of the PSA.

[35] There is no suggestion in the materials that the applicant or his firm had any legal advisory relationship with either Trust B or the Partner personally at any time.

**The complaint**

[36] The complaint was made in June 2022, at which point the High Court proceedings had been under way for some eight months.

[37] As is conventional practice, the Committee's determination to lay charges before the Tribunal does not include reasons. It is a reasonable inference, from the particulars of the charges, that they are premised on the factual allegations by the complainant and the legal position advanced by the complainant through counsel. I will therefore traverse the salient points made in the complaint.

[38] The complainant's allegations included that:

> [The applicant] has been actively involved with [Trust B] in the dispute against me and this is causing me great distress and concern as [the applicant] has an in depth knowledge of my personal affairs, financial position and the structure of my businesses and trusts.
>
> …
>
> … In 2016, [the Partner's] father passed away and I was advised that [the applicant] had agreed to be the Independent Trustee on her trust. At the time I did not think to question his decision [to accept appointment as trustee of [Trust B]] but with hindsight I am not sure on what basis he made his decision as he had

> not just written the [PSA] for me but was still acting for me on all of my affairs. I don't recall being asked to sign anything approving him becoming the Trustee, nor did anyone suggest I take independent legal advice.
>
> I am not assured by the comments expressed by [the firm] in respect of disclosure of information or that there is no inherent conflict of interest.
>
> [The applicant] wrote the [PSA] for my trust. The same [PSA] that I am now having to fight to retain the integrity of, as it was intended – with [the applicant] on the opposing side.
>
> [The applicant] is fully aware of why I wanted the [PSA] and now I am going to Court because of the failure of the [PSA] to protect my trust's interests and financial investments into the property which was jointly owned.
>
> [The applicant] knows everything there is to know about my personal and business affairs … my concern is that information known only to him is influencing the responses to current legal proceedings of which he is on the opposing side of the trustee.

[39] The sole outcome the complainant initially sought from the complaint was for "[the applicant] to retire as the independent trustee of [Trust B] with immediate effect". In later correspondence through counsel, this was extended to seeking public censure of the applicant and compensation for legal fees incurred in advancing the complaint.

[40] The firm's response on behalf of the applicant to the complaint was consistent with its response in December 2020 to the correspondence from the complainant's counsel when the complainant's concern was first raised. Its letter stated, relevantly, that:

> … It was originally asserted that [the applicant] was 'acting' for the Trust. However, this complaint does not assert that [the applicant] is 'acting', so appears to recognise the distinction between him remaining a trustee and acting as a lawyer.
>
> [The applicant] does not act as lawyer for the trust. [Another law firm] acts for the trust …
>
> We understand that the Trust's solicitor has recently written to [counsel for the complainant], advising that he has received no information other than the relevant copy documents (such as the Trust Deed) from [the applicant]. [The applicant] confirms this to be the position also. We further attach a letter from [the other law firm] confirming this.
>
> Although [the applicant] has no wish at all to become a target in the litigation, or to cause any concern to [the complainant], he nevertheless remains a duly appointed trustee of the Trust and therefore has a duty to deal with the Trust's affairs on a day-to-day basis and in the interests of the beneficiaries of the Trust. Ms PW, who holds the power of appointment and removal of trustees of the Trust, has made it clear to him that she wishes him to remain as her trustee.
>
> Because the Trust is engaged in proceedings with [the complainant's] trust, it is necessary for [the applicant] to provide instructions to the Trust's solicitor. However, this does not involve [the applicant] acting as a solicitor, nor does it or will it necessitate him providing any confidential information to the Trust's solicitor. He stands by his assurances to [the complainant] in his regard.

> [The applicant] maintains that the discharge of his trustee duties does not offend Rule 8.7 or indeed any other rule set out in the [Rules].

[41] That letter was accompanied by a letter from Trust B's solicitors confirming relevantly as follows:

> I can confirm I have not uplifted any files held by [the firm] nor have I had access to them. I confirm I have not received any information (written or otherwise) or documents which would be confidential to [the complainant] or related entities or arising from the former solicitor client relationship existing between [the complainant] and related entities and [the firm].
>
> Any information I have received is either from the file of my client's former lawyer…, or from [the Partner] directly. I have also obtained a copy of my clients trust deed and a copy of a property sharing agreement (which is the subject of the High Court proceedings), directly from [the applicant] but those are documents held on behalf of my client trustees and available to them.
>
> I confirm I have not received any information from [the applicant] that would have been available to him acting as lawyer to any third party and subject to solicitor client privilege.

[42] The complainant's perception of the situation is well illustrated by pertinent comments she made in a subsequent letter to the NZLS. These included the following:

> (a) I paid that firm a considerable amount of money in legal fees over the course of eight years and I am incredulous that they now take this stand against me.
>
> (b) I don't understand that they seem to have completely abandoned the duties I believe they owed to me as a client and certainly didn't think these ended when the retainer ended.
>
> (c) My concern is not only that [the applicant's] detailed knowledge of my personal and business affairs may influence his response to the current legal proceedings, it is also because he and [Mr LM] … drafted the PSA which is the subject of the proceeding and which [the applicant] is now trying to defend as a trustee.
>
> (d) I wonder that [the applicant] was ever allowed to become a trustee of [Trust B] at all, but that was never an issue he or [the firm] raised with me at the time.
>
> (e) I reiterate that one of the key issues in the litigation relates to the drafting of and interpretation of the PSA ….
>
> (f) As a party to the proceeding [the applicant] will … be in the position of defending the [PSA] he himself wrote when the process moves to the High Courts and my understanding of the role of a lawyer, especially in Court proceedings, is to be independent and objective. I fail to see how [the applicant] can do this.
>
> (g) The [firm's] letter seems to hide behind a 'technicality' that he is not acting as a lawyer but as a trustee. I simply don't understand how this can excuse him. He was my lawyer and now he is acting against my interests in the most painful way possible. I just don't see how he (and his firm) can do this and keep confidential all the information I gave to them. This is extremely distressing to me.

[43] The applicant's position was then well summarised in a letter from the firm on his behalf to the New Zealand Law Society (NZLS) setting out the view the firm had taken when the perceived issue was first raised with it in December 2020:

> (a) [The firm] did not act for [the complainant] or any of her related entities at the time."
>
> (b) [The applicant] was acting in his capacity as a trustee, and not as lawyer providing advice to [Trust B] such that the [Rules] had no application."
>
> (c) [The firm] was not acting for nor intending to act for [Trust B] at any time in respect of the relevant dispute (whether directly or as instructing solicitor)."
>
> (d) [The applicant] owed duties of confidentiality to [the complainant] as a former client, which he assured he would observe …".
>
> (e) The strong likelihood that [the Partner] would be unable to find another party willing to replace [the applicant] as the independent trustee of [Trust B] when proceedings were already afoot (as it was likely that any new trustee would become a party to that litigation) and that would leave [Trust B] effectively incapable of making any decisions in respect of its assets or the dispute at hand.

**The charges**

[44] There are three charges. On the basis of the charge particulars, the Committee alleges, in the alternative:

(a) misconduct pursuant to ss 7(1)(a)(i) and 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (the Act); or

(b) negligence or incompetence in the applicant's professional capacity of such a degree as to reflect on his fitness to practise or to bring his profession into disrepute, pursuant to s 241(c); or

(c) unsatisfactory conduct pursuant to ss 12(a), (b) or (c) and s 241(b), i.e. unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct.

[45] On the information available to the Committee, the statements about the factual background made in the charge particulars appear to be uncontentious apart from paragraph 8, which states as follows:

> In defending the proceedings, the practitioner has disclosed information acquired in the course of his professional relationship with [the complainant] to the solicitor who acts for him and [the Partner] in the proceedings. In particular, the practitioner has disclosed:
>
> (a) the Property Sharing Agreement; and

> (b) his views on the operation and effect of the Property Sharing Agreement necessary to allow the filing of a Statement of Defence in the proceedings by the trustees of [Trust B].

[46] Charge 1, in summary, is that by accepting appointment as a trustee of Trust B, the applicant breached any or all of Rules 5, 5.1, 5.4.3 and/or 5.4.4 of the Rules. The Committee considers these alleged breaches of the above Rules arguably constitute misconduct pursuant to s 7(1)(a)(ii); that is, that they were willful or reckless.

[47] Charge 2 is that the applicant "… should not have remained as a trustee of [Trust B] once the dispute arose between [the complainant] and [the Partner] in relation to the property." The charge is brought under s 7(1)(a)(i). This means that the Committee considers that the applicant's conduct in remaining as trustee after the dispute arose "would reasonably be regarded by lawyers of good standing as being disgraceful or dishonourable", rather than it being a wilful or reckless breach of any rule.

[48] Charge 3 is that:

> The information referred to in paragraph 8 above is confidential information to which Chapter 8 of the [Rules] applies. [The applicant's] disclosure of that information, as set out in paragraph 8 above, was in contravention of Rules 8, 8.1 and 8.7 of the [Rules].

[49] The Committee considers the alleged conduct arguably to constitute misconduct as a wilful or reckless breach of those Rules.

[50] I note that in the Committee's notice of hearing, the applicant was asked to answer particulars of potential breaches of rr 5, 5.1, 5.2, 5.3, 6.1 and 8.8 of the Rules. I infer that:

(a) the Committee was satisfied that the facts did not support any charge of breach of any of rr 5.2, 5.3, 6.1 or 8.8; and

(b) the laying of the charges is the first time the applicant has been asked to answer potential breach of rr 5.4.3, 5.4.4, 8, 8.1 and 8.7 of the Rules.

**Application for review**

[51] The applicant filed an application for review on 3 April 2023 accompanied by brief submissions principally relying on the submissions made in response to the complaint in August 2022. The applicant's position was that no conflict of interest arose for him in accepting appointment as trustee and that referral to the Tribunal for any breach of duty that might be found was disproportionate and unjustified.

[52] The outcome sought was a reversal of the Committee's referral to the Tribunal and that the complaint be dismissed.

[53] I note at this point that counsel's letter included reference to r 8.8 of the Rules. The notice of hearing before the Committee included reference to possible breach of r 8.8 but the charges laid before the Tribunal do not include any such allegation.

**Review on the papers**

[54] 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. In this instance, the parties are the applicant and the Committee.

[55] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of the application for review, there are no additional issues or questions in my mind that necessitate any further submission from the applicant. On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

**Nature and scope of review generally**

[56] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

[57] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

**Approach to prosecution review applications**

[58] In considering applications to review a prosecution determination, Review Officers in a number of earlier decisions observed "that the general position in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute, observing that the prosecutor's function is merely to do the preliminary screening and to present the case".[5]

[59] Those cases identified principles, discerned from various judgments, which might justify reversal of a prosecution determination. These include cases in which the decision to prosecute was:

(a) significantly influenced by irrelevant considerations;

(b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);

(c) exercised in a discriminatory manner;

(d) exercised capriciously, in bad faith, or with malice.

[60] However, in *Orlov v New Zealand Law Society* the Court of Appeal commented:[6]

> [25] … The existence of a right [to review a Committee's decision to prosecute] is now settled.
>
> …
>
> [50] … [T]he prosecutorial analogy is not entirely apt. Unlike a prosecutor, the Standards Committee can only reach its determination after first conducting an inquiry and holding a hearing (albeit usually on the papers). Further, while the Standards Committee has the power to regulate its own procedure, the Act also expressly requires that in exercising and performing its duties, powers and functions, a Standards Committee must do so in a way that is consistent with the rules of natural justice. … A further important consideration is the existence of

[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[5] See *Rugby v Auckland Standards Committee* LCRO 67/2010 (12 July 2010) at [3], and *FF v Wellington Standards Committee 2* LCRO 23/2011 (27 September 2011) at [48].
[6] *Orlov v New Zealand Law Society* [2013] NZCA 230.

> the statutory right of review to [a Review Officer].

[61] Subsequently, the High Court emphasised, when considering a Review Officer's decision to dismiss an application to review a prosecution determination, that a Review Officer must bring to the assessment of such a determination a robust and independent judgement as to the appropriateness of the decision.[7]

[62] In that decision, Fogarty J held the following:

> [21] … I agree that the summary in FF v Wellington Standards Committee No 2 is too narrow. (citation omitted)
>
> …
>
> [23] The purpose of the review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is as simple as that. ... I agree ... that "a review by the LCRO (should be) 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. I agree also there is room in that review for the LCRO to identify errors of fact.
>
> …
>
> [25] [T]he dictum of FF v Wellington Standards Committee No 2 … is out of date. … [A] critical question for [a Review Officer] is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer it to the Tribunal.

[63] It is clear from the above that the review by a Review Officer of a prosecution determination should not be approached any differently from other types of review applications dealt with by Review Officers.

[64] Cases that describe the extent of a Review Officer's jurisdiction, such as *Deliu v Hong,*[8] *Deliu v Connell,*[9] and *Zhao v Legal Complaints Review Officer,*[10] do not make any distinction between review applications which challenge a prosecution determination and other types of review applications.

[65] Given all of this, my approach on this review has been to:

(a) independently and objectively consider all of the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's decision;

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[7] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2623.
[8] *Deliu v Hong*, above n 4.
[9] *Deliu v Connell*, above n 5.
[10] *Zhao v Legal Complaints Review Officer*, above n 8

(c) form my own opinion about all of those matters and do so robustly.

(d) Given all of this, my approach on this review has been to:

[66] The outcome of the review of a prosecution determination can include agreement with the Committee that the possibility of misconduct has been raised, disagreement with the Committee about that issue, reversal of a prosecution referral and substitution with a finding of unsatisfactory conduct, or reversal of the prosecution decision and a direction that no further action be taken. A review outcome can also include referring issues raised back to the Committee for it to reconsider.

**Issues**

[67] The issues for consideration in this review are:

(a) Can the applicant be directed to retire as a trustee of Trust B?

(b) Did the applicant's actions as a trustee constitute the provision of legal services?

(c) Could the applicant's acceptance of the role as trustee of Trust B mean that he was no longer independent and free from comprising influences when providing legal services to the complainant?[11]

(d) Could the applicant's acceptance of the role of trustee of Trust B constitute an act incompatible with his relationship of confidence and trust with the complainant as her lawyer?[12]

(e) Did the applicant's acceptance of the role of trustee of Trust B constitute entry into a property transaction or relationship with the complainant by reason of the existence of the PSA?[13]

(f) If so, could the entry into that transaction or relationship create the possibility of the relationship of confidence and trust between the applicant and the complainant being compromised?

(g) Did r 5.4.4 apply in the circumstances?

(h) If r 5.4.4 did apply in the circumstances, did the applicant comply with the requirements of that Rule?

[11] Rule 5 of the Rules.
[12] Rule 5.1 of the Rules.
[13] Rule 5.4.3 of the Rules.

(i) Did the fact of the dispute arising between Trust A and Trust B:

(i) change the nature or scope of any existing professional obligations the applicant owed to the complainant under the Rules; or

(ii) give rise to any new professional obligation owed by the applicant to the complainant under the Rules?

(j) If so, is there evidence that the applicant breached any such obligation?

(k) Did the applicant's conduct in remaining as a trustee once the dispute arose occur at a time when the applicant was providing regulated services, in terms of s 7?

(l) Could the fact that the applicant remained as trustee of Trust B after the dispute arose nevertheless be capable of constituting conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable?

(m) If so, was the applicant required to retire as trustee of Trust B, if that could be achieved?

(n) Did the PSA constitute information confidential to the complainant or Trust A?[14]

(o) If so, could the applicant's disclosure of that information to Trust B's lawyers constitute a contravention of any of rr 8, 8.1 or 8.7 of the Rules?

(p) Did the applicant's views on the operation and effect of the PSA constitute information confidential to the complainant or to Trust A?

(q) If so, is there evidence that the applicant disclosed to Trust B's lawyers his views on the operation and effect of the PSA?

(r) If so, could the applicant's disclosure of that information to Trust B's lawyers constitute a contravention of any rr 8, 8.1 or 8.7 of the Rules?

(s) If the answer to any of the above questions relating to breach or contravention is "yes", is the applicant's conduct reasonably capable of constituting misconduct within the meaning of the definition specified by the Committee in relation to the relevant change?

[14] Rule 8 of the Rules.

(t) If the answer to question (r) is "no", is the applicant's conduct nevertheless capable of constituting negligence or incompetence reaching the threshold specified in s 241(c) of the Act?

(u) If the answer to question (s) is "no", is the applicant's conduct nevertheless unsatisfactory conduct within the meaning of the definitions specified by the Committee in relation to the relevant charge?

(v) Does the complainant have a legitimate claim for compensation for legal fees incurred in advancing her complaint?

**Discussion**

*(a) Can the applicant be directed to retire as a trustee of Trust B?*

[68] I have raised this issue first because the sole outcome originally sought by the complainant was that "[the applicant] … retire as the independent trustee of [Trust B] with immediate effect*".* The complainant receives a copy of this decision.

[69] The short answer is "no". There is no jurisdiction under the Act for a direction to be given to any person to retire as a trustee of a trust. Only the High Court has that power. Such a direction could never have been an outcome of the complaint and cannot be an outcome of the Committee's charges or of this review.

[70] I make some additional observations about the position the applicant found himself in. The firm was clearly sensitive to, and wished to allay, the concern expressed by the complainant through counsel in December 2020. At that time, the concern related solely to the duty of confidence of the firm as a whole.

[71] The firm responded immediately in the terms set out in paragraph [25] of this decision. In addition to providing assurance that there would be no breach of the complainant's confidentiality, the firm advised that the applicant would raise with the Partner his retirement from the trustee role.

[72] The matter was clearly expressed in that way because the applicant could not unilaterally retire. The retirement of trustees is governed by s 101 of the Trusts Act 2019. Trust B had two trustees (the Partner and the applicant) and the trust deed did not give any person the power to remove trustees.

[73] In those circumstances, the applicant could retire only if the Partner, as the other

trustee, discharged him and appointed a trustee in his place[15] or if the applicant himself found someone willing to replace him as trustee.[16]

[74] The Partner did not discharge the applicant from his trustee role. The firm advised the complainant's lawyer that the applicant himself was unlikely to find a volunteer to replace him in the role. This is unsurprising, on both counts.

[75] The applicant was liable as trustee for the indicative claim to be advanced by Trust A. As matters developed, he became a defendant in the High Court proceedings. The claims against him as trustee, jointly with the Partner, were for a sum exceeding $1.9 million. According to Trust A's pleadings, Trust B's half interest in the Property was worth up to $1.5 million.

[76] The PSA contained a clause limiting the liability of the named independent trustees and any substitute independent trustee to a "…liability out of and to the extent of the assets of the said trust…". So, there was contractual protection from personal liability on which the applicant could presume to rely, subject to any legal challenge that might be mounted to the application of that clause.

[77] I have no information as to any other assets or liabilities of Trust B at the relevant time but, at the least, the latter would have included the costs of the High Court proceedings, for which the applicant would have been jointly liable absent a similar contractual limitation of liability arrangement.

[78] It seems possible if not likely that the trustees, in that capacity, were contingently insolvent, the contingency being the plaintiffs succeeding in their claims.

[79] In those circumstances, and unless Trust B had other assets from which a meaningful trustee indemnity could be given, I consider it highly unlikely that any independently advised individual who did not suffer from foolhardiness would have agreed to assume the trusteeship in place of the applicant, at either the Partner's or the applicant's request, at least until the proceedings had been concluded.

[80] I mention these matters because of the complainant's assertion that the applicant "refused to retire" and the clear perception on her part that this was in some way a hostile act towards her. Although I certainly understand that she could have that perception, it is not necessarily well-founded. Objectively, it is much more likely that the applicant had no real choice in the circumstances but to remain as trustee.

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[15] Section 101(b) Trusts Act 2019.
[16] Section 101(c) Trusts Act 2019.

[81] The firm's succinct assessment of his situation that had been expressed in the fourth paragraph of its December 2020 letter quoted at paragraph [40] above seems likely to have remained accurate from that point onwards and through to the making of the complaint in July 2022.

[82] The complainant has a legal remedy under the Trusts Act 2019, and only under that Act, should she be determined to attempt to force the removal of the applicant as trustee of Trust B and be advised that she has legal grounds to do so.

*(b) Did the applicant's actions as trustee constitute the provision of legal services?*

The distinction between lawyer and trustee

[83] There is a very clear and uncontentious legal distinction between acting as a lawyer and acting as a trustee. The distinction was articulated by the Court of Appeal in *Hansen v Young*[17] The case was about a lawyer who was also the executor and trustee of an estate. He was found to have been negligent in the sale of some company shares.

[84] For present purposes, the Court of Appeal relevantly held that:

(a) Trustees and executors could assign selected tasks to their lawyers but only to the extent that the task fell within a proved retainer.

(b) It was not the case that, unless a co-executor and trustee was told of the distinction between the capacities in which the lawyer was acting, the lawyer would be taken, in his capacity as a lawyer, to have agreed to carry out work entrusted to named executors and trustees.

(c) Evidence of the public's perception in New Zealand of the role of lawyers where a lawyer was one of two or more co-executors and co-trustees was not relevant. What was at issue was what was actually agreed between the parties.

(d) The roles of executor or trustee and lawyer are distinct, even if they are held by the same person.

[85] The *Hansen* case was decided before the current professional disciplinary regime was introduced but has been consistently cited and applied under the current

[17] [2004] 1 NZLR 37.

regime.

[86] The distinction is far more than "a technicality", as suggested by the complainant in her correspondence to the NZLS. The legal rights and obligations of trustees are governed by the Trusts Act 2019. Their exercise and performance are subject to the jurisdiction of the High Court. Neither the Committee nor the LCRO has any jurisdiction to inquire into or determine any legal issue arising as to the conduct of a person (whether or not a lawyer) acting in his or her capacity as a trustee.

[87] Much more recently, the High Court addressed similar issues in *Burcher v Auckland Standards Committee 5 of the New Zealand Law Society*.[18] Mr Burcher had a significant trust law practice and was independent trustee of many trusts. He had been suspended from legal practice. It was common ground between Mr Burcher and the NZLS that he could continue to fulfil trustee roles, provided he did not give legal advice.

[88] The question was whether or not he had, in fact, provided legal services to trusts of which he was trustee. Mr Burcher argued unsuccessfully that if he was undertaking tasks for a trust of which he was trustee, even if he was bringing his legal skills and knowledge to bear on the matter, he was thereby acting as a trustee and not as a lawyer.

[89] For present purposes, I consider the *Burcher* decision to be significant for the following reasons:

(a) It confirms that determining whether services have been provided as a lawyer or as a trustee is a question of fact;[19]

(b) It rejects the argument that legal services provided by a lawyer who was a trustee could be argued to be trustee services;[20]

(c) It states that a "bright line separation" needs to be "clearly drawn" between things done in the role of trustee and any legal work undertaken;[21]

(d) This is so despite the expert evidence that was given of the "very real difficulties in differentiating the roles and obligations of trustees to act and use their legal experience for the benefit of the trust";[22]

(e) It cites with approval expert evidence that "where a solicitor is a trustee and is intimately involved in the affairs of his trust/clients…the solicitor will

[18] [2020] NZHC 43.
[19] At [49].
[20] At [49], [57] and [87].
[21] At [96].
[22] At [88].

> generally be operating in two capacities; as a trustee and as a professional adviser … a solicitor who is also a trustee may be both the client, and the legal adviser to the client".[23]

The allegation of professional misconduct

[90] Charge 1 is made under section 7(1)(a)(ii) of the Act. Charge 2 is made under section 7(1)(a)(i) of the Act. In each case, the charge is one of professional misconduct rather than personal misconduct.

[91] Those charges appear to adopt the position advanced by the complainant through counsel as to why the respondent's conduct as trustee could be regarded as being within his professional capacity as a lawyer. Counsel's submission regarding the nature of the necessary connection with regulated services was as follows:

> [The applicant's] trusteeship of [Trust B] was a direct consequence of the firm and [the applicant] providing those legal services to [the complainant]. The introduction to [the Partner] and her trust came through [the complainant's] business with the firm. In the words of the cases referenced above, the trusteeship was "not unconnected with" and was "incidental to" such legal work.

[92] Counsel's reference to the case about a service being "not unconnected with" legal work is a reference to *Orlov v New Zealand Lawyers & Conveyancers Disciplinary Tribunal*,[24] in which the High Court established (relevantly to this review) that:

(a) all conduct by a lawyer is either professional conduct or personal conduct, with there being no gap between those two categories of conduct;[25] and

(b) conduct will be personal conduct only if it is not the provision of regulated services and if it is unconnected with the provision of legal services.

[93] Counsel's reference to a case concerning the phrase "incidental to legal work" is made because "legal services" are defined as "services that a person provides by carrying out legal work for any other person" and "legal work" is defined to include any work that is "incidental to" any of the specific kinds of legal work described in paragraphs (a) to (d) of the definition of legal work in s 6 of the Act.

[94] In the particular case,[26] the lawyer wrote letters making serious misconduct

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[23] At [103].
[24] [2015] 2 NZLR 606 at [112].
[25] At [102] and [112], noting that my summary is of the concepts the Court expressed and not of the wording of those two paragraphs, both which contain incorrect cross-references. Paragraph [102] refers to [98]–[99] and therefore to s 7(1)(a) and s 7(1)(b)(ii) (rather than to s 7(1)(b)). Paragraph [112] refers specifically to s 7(1)(a)(i) and s 7(1)(b)(i) (rather than to s 7(1)(a) and s 7(1)(b)(ii)).
[26] *Deliu v The National Standards Committee and the Auckland Standards Committee No 1 of*

allegations against two High Court judges. The Court found that his actions were either "'legal work' in the generally understood sense i.e. work carried out as a lawyer for the benefit of clients" or "'legal work' in the sense of work incidental to reserved areas of work i.e. incidental to giving legal advice to his clients generally regarding appearing as an advocate for them", and therefore regulated services.[27]

[95] Consequently, Charges 1 and 2 are premised on the applicant's acceptance of the role of trustee and continuation in that role after the dispute arose being either the provision of regulated services, or not unconnected with the provision of legal services, or incidental to any of the categories of legal work specified in s 6 of the Act.

Lawyers as trustees

[96] Lawyers are frequently appointed as independent trustees of family and other trusts. There are numerous reasons for this.

[97] The first and foremost reason is that by virtue of their services to their clients and habituation to demanding ethical standards, lawyers command a high level of trust in the community.

[98] The second reason is that many lawyers, by reason of their knowledge, training and professional work, have a much better understanding of trust law principles and of the practices and procedures required for the proper governance and administration of the trusts than the average citizen.

[99] The third reason is often that a lawyer acting for a private individual as a client has existing knowledge of the client's assets and liabilities and of the family members and the dynamics of their relationships with each other. The lawyer does not come to the trustee role as a stranger to the potential issues that might arise in the due administration of the trust and the exercise of the discretions available to trustees.

[100] Other reasons may be applicable in particular circumstances. These include the simple convenience of the lawyer's firm being readily available to undertake legal work arising from trustee instructions. Consequently, it is not unusual for the trustees of a trust of whom one is lawyer to instruct that lawyer's firm to provide legal services to the trust.

[101] The cases recognize that a lawyer acting as a trustee is entitled, and indeed

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*the New Zealand Law Society* [2023] NZHC 1184*; Deliu v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal, The National Standards Committee and the Auckland Standards Committee No 1 of the New Zealand Law Society* [2017] NZHC 2318.

[27] At [60].

expected, to bring his or her legal skills, knowledge and training to the performance of the trustee role.

[102] This does not necessarily mean that the fulfilment of a trustee role by a trustee who happens to be a lawyer or whose firm happens to be providing legal services to the trust is, for the purposes of the Act, an activity that is either itself regulated services, or "incidental to" or "connected with" legal services.

[103] I express the matter in that way ("happens to be") because there have been some instances where, on the particular facts, there was a sufficient lack of differentiation or demarcation between the two roles of either executor and lawyer or trustee and lawyer to leave room for a finding that acts or omissions occurring in the course of the performance of executor or trustee services nevertheless fell within the disciplinary regime as "professional" conduct.[28]

[104] For the reasons set out in this decision, this is not one of those instances.

Trustee services are not regulated services

[105] The first and most basic point is that acting as a trustee cannot of itself be a "legal service" and therefore a "regulated service". If it were otherwise, it would be illegal for anyone who was not a lawyer to be a trustee.

[106] The main problem that would result from the potential application of the lawyers' professional disciplinary regime to executors or trustees is the jurisdictional conflict that would then arise between the Lawyers and Conveyancers Act 2006 (in the case of lawyers) and either the Administration Act 1969 (in the case of executors) or the Trusts Act 2019 (in the case of trustees).

[107] The conduct of trustees is governed by the particular trust deed, the Trusts Act 2019 and a vast body of jurisprudence developed over centuries of Court decisions. A consequence of treating a trustee service as a "legal service" is that an additional regulatory layer would then be applied, solely to trustees who are also lawyers, under the Act and Rules that are premised on principles that in almost all respects are inapplicable to or inconsistent with trust law principles.

[108] To give an obvious example, lawyers are entitled to charge clients for their legal services and their charges are regulated by rr 9 to 9.3 of the Rules. The primary regulatory principle involves a balancing of the commercial interests of the client and the

[28] For example, *EL v SV* [2021] NZLCRO 43, where the bulk of the services provided were in reality legal services.

lawyer. Fees must be fair and reasonable to both.

[109] Trustees are prohibited by law from receiving any reward for acting as trustees[29] unless the trust deed expressly empowers them to do so[30] or unless the High Court orders that reasonable remuneration be paid, either under s 139 of the Trusts Act 2019 or under its inherent jurisdiction.[31] The criteria for determining reasonable remuneration under s 139 of the Trusts Act 2019 are materially different from rr 9 – 9.3 of the Rules.

[110] Similarly, the client care and service information prescribed in the preface to the Rules is of no application to a trustee, as a trustee does not have a client, and it is difficult to see how at least chapters 2–4, 5.10–5.12 and 6–14 of the Rules can have any arguable application to trustees.

[111] A lawyer does have duties under rr 5 to 5.9 that are analogous to the similar duties of a trustee. The connection in my view is simply that both lawyers and trustees are fiduciaries. The fact that both trustees and lawyers have fiduciary duties does not mean that acting as a trustee is a legal service.

Trustee services are unlikely to be "incidental to" legal work

[112] The next question is whether one service can nevertheless be "incidental to" the other.

[113] My view is that for work of one kind to be "incidental to" work of another kind, it must in most circumstances flow from or be a consequence of that other work.

[114] Where a lawyer undertakes legal work for an executor or trustee, it will normally be the legal work that is incidental to the acts, decisions and instructions of the executor or trustee, not vice versa.

[115] In neither case does work in the originating role come within the scope of s 6(e) of the statutory definition of "legal work". I observe that this view is consistent, albeit in reverse, with the "bright line separation" principle stated by High Court in in *Burcher.* A bright line between trustee services and legal services must also be a bright line between legal services and trustee services.

[116] There may be unusual circumstances where the trustee function might in some way be argued to flow from the legal service function. For the reasons I will explore

[29] Section 37 Trusts Act 2019.
[30] Section 5(4) Trusts Act 2019.
[31] Section 8 Trusts Act 2019; *Re Spedding (deceased)* [1966] NZLR 447; *Ngai Tai Ki Tamaki Tribal Trust v Karaka* [2012] NZCA 668.

further below, this is not the case in this instance.

Can trustee services be "connected with" legal services

[117] The last and more difficult question is whether work undertaken as a trustee can be not "unconnected with" the provision of regulated services within the formulation in *Orlov*. That formulation was devised by the Court to circumvent the apparent restrictiveness of the phrase "…at a time when [the lawyer] is providing regulated services" in the definitions of "misconduct" and "unsatisfactory conduct" in the Act.

[118] I interpret "not unconnected with" and "connected with" as having the same meaning.

[119] For there to be a connection, there is no requirement that there be a subsisting lawyer/client relationship with a particular client.[32] There must still be a sufficient connection with the provision of regulated services, however.

[120] The mere fact of being a lawyer[33] cannot be a sufficient "connection" between trustee services and the provision of legal services. In short, mere status as a lawyer must be irrelevant. If it were otherwise, the phrase "… at a time when [the lawyer] is providing regulated services" would be redundant. It would mean "when the lawyer is a lawyer".

[121] Where the same individual is both trustee and lawyer, there is plainly a connection in the sense that both roles are being performed by the same person. I do not consider that to mean that the different work performed in the two roles is therefore "connected" in the sense intended in *Orlov*.

[122] There is still an essential legal distinction (or "bright line separation") between acting as a trustee and acting as a lawyer and the governing principle is that distinguishing between the two is a question of fact to be determined objectively.

[123] A helpful approach is to consider the overall services as being undertaken by two different people and then determine whether the conduct in question can readily be identified as conduct of the lawyer to the trust or conduct of the trustee.

[124] The fact that the same person performs both roles does not render the separation between the two roles obsolete or the factual inquiry fundamentally any different.

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[32] *A v Canterbury Westland Standards Committee No 2* [2015] NZHC 1896 at [60].
[33] i.e. holding a current practising certificate. See s 6 of the Act.

[125] Counsel for the complainant submitted as follows:

> [The firm's] claim … that the rules have no application because [the applicant] was acting as a trustee not as a lawyer is misconceived. It is also incongruous in light of [the firm's] comment … that [the applicant] was not, nor has ever been, a trustee of any of [the complainant's] trusts. The latter comment implicitly acknowledges that acting as a trustee has professional significance.

[126] I understand that by "professional", counsel meant concordant with all aspects of professionalism expected of a provider of legal services. One would of course expect an independent trustee to fulfil his or her duties as a trustee in a professional manner, in accordance with the trust deed, the law and applicable fiduciary obligations and with prudence and good judgement. Professionalism in that context does not connote the provision of a legal service, in my view.

[127] Where the trustee is a lawyer, he or she is entitled and expected to bring a lawyer's additional skills to the performance of the role. This does not make it a legal role.

[128] Where a trustee instructs himself or herself in his or her separate capacity as a lawyer to provide legal services to the trust, the better view is that the fulfilment of the trustee role is "unconnected with" the provision of legal services in the terms contemplated by the Court in the *Orlov* decision. The roles of trustee and legal adviser to the trustees are separate and distinct.

Applying those principles to this review

[129] In any event, those circumstances did not arise in this case. Here, the applicant's firm did not act for the Partner or Trust B, at any time. It acted, or formerly acted, for the complainant and Trust A. In my view, it is not tenable to suggest that acting as a trustee for one person (not a client) could reasonably be regarded as "connected with" the provision, or former provision, of legal services to another person (a client).

[130] I identify no reason in principle why either:

(a) the fact that the trustee's firm provides legal services to the trust (which is not the case here); or

(b) the fact that, as here, the prospective trustee was introduced to the non-client by a client of the prospective trustee's firm,

should change the character of the non-legal service such that it becomes "incidental to" or "connected with" a legal service.

[131] Further, the fact that the applicant was introduced to the Partner at a time when the applicant was providing regulated services to the complainant is conceptually and as a matter of principle not a sufficient connection, in my view.

Professional conduct vs personal conduct

[132] This does not mean that the conduct of a lawyer in the lawyer's capacity as a trustee is outside the scope of the disciplinary regime under the Act. It just means that conduct in that capacity is properly regarded as conduct unconnected with the provision of legal services in terms of the *Orlov* formulation and consequently personal conduct rather than professional conduct.

[133] A lawyer found, for example, to have breached fiduciary duties owed solely as a trustee could be charged with either misconduct under s 7(1)(b)(ii) or unsatisfactory conduct under s 12(c) of the Act. There have been LCRO decisions in which this course of action has been contemplated.[34]

[134] For such a breach of fiduciary duty to constitute misconduct, the trustee would need to be sufficiently morally culpable to support a conclusion that he or she was no longer a fit and proper person or otherwise no longer suited to engage in practice as a lawyer. For it to constitute unsatisfactory conduct, the breach would need to constitute the breach of a Rule or other applicable legislative or regulatory provision that was not premised on acting in a professional capacity.[35]

[135] This approach leaves the necessary assessment of the standard of conduct of the trustee under the trust deed, the Trusts Act 2019 and applicable case law in the hands of the High Court, where it properly lies. As a matter of principle, the Act and Rules should not be interpreted in a manner that purports to circumvent the jurisdiction of the High Court.

[136] For completeness, I have considered whether Charges 1 and 2 could potentially be replaced by identical charges under s 7(1)(b)(ii) of the Act. For the reasons set out in the rest of this decision, I do not consider that this would be appropriate.

*(c) Could the applicant's acceptance of the role as trustee of Trust B mean that he was no longer independent and free from compromising influences when providing legal services to the complainant?*

[137] Rule 5 of the Rules provides as follows:

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[34] *K v E* LCRO 37/2009*; RKX v SDC* LCRO 109/2015; *MB v RP and ND* [2022] NZLCRO 112.
[35] See *EA v BO* LCRO 237/2010 at [28] to [34], *AB v AC* CRO 001/2017 at [36].

> A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

[138] There are four elements to the rule. The first is that its application is tested when the lawyer is providing services to his or her client; in this instance, to the complainant or to Trust A. When doing so, the lawyer must be:

(a) independent; and

(b) free from compromising influences; and

(c) free from compromising loyalties.

[139] The first point to be made about this question is that the answer to it does not depend on the proposition that acting as a trustee (if that is the alleged compromising conduct) is incidental to or connected with the provision of regulated services.

[140] The Rule is engaged most frequently, if not solely, where the lawyer's independence or loyalty are compromised where either:

(a) the lawyer is acting in a legal advisory capacity for someone else; or

(b) the lawyer's personal interests are potentially affected by the client's interests or potentially affect the client's interests.

[141] The only circumstances that have been identified as potentially giving rise to either a lack of independence or a compromising influence or a compromising loyalty on the applicant's part under Charge 1 are:

(a) the fact of being an independent trustee of Trust B; and

(b) the fact that, by reason of that role, the applicant became responsible as trustee for any liabilities that might arise under the PSA.

[142] The appointment occurred on an unspecified date in 2016. The applicant ceased being involved in the provision by the firm of the services to the complainant by an unspecified date in 2017.

[143] As a lawyer, the applicant owed fiduciary, contractual and regulatory obligations to the complainant and/or Trust A, as the firm's client, in relation to the provision of any legal services that might have been provided by the firm to either of them during that period in relation to their affairs. As a trustee of Trust B, the applicant owed fiduciary and statutory obligations to his co-trustee and to the beneficiaries in relation to the affairs of Trust B.

[144] The fact that an individual owes legal obligations (of any description) to different people in different capacities cannot, of itself, give rise to a loss of independence, a compromising influence or a compromising loyalty for that individual as legal adviser. There must be a factual circumstance that can be argued to have that effect. The question that arises is therefore what, on the basis of the information available to the Committee, could constitute such a circumstance.

[145] There are potentially three such circumstances identifiable, by inference, from the materials available to the Committee.

[146] The first relates to the fact that the applicant had drafted the PSA. He did so up to two years or so before being introduced to the Partner and then becoming a trustee of Trust B.

[147] The materials do not indicate whether the applicant actually became a party to the PSA, as distinct from becoming responsible for any liabilities of Trust B arising under the PSA by operation of law. For present purposes, the distinction is not relevant. By becoming a trustee of Trust B, he became responsible for any liabilities of Trust B that might arise under the document that he had drafted.

[148] The fact of becoming responsible for any liabilities that might arise under the PSA cannot, of itself, give rise to any loss of independence or compromising influence or loyalty for the applicant in providing legal services (presumptively) to Trust A in 2016-2017. The question is whether the fact that the applicant had drafted the PSA makes any difference.

[149] I do not identify any difference that it could make. Any question that might arise as to whether or not the applicant competently drafted the PSA is a different matter and one that can arise only in the context of the obligations owed by the applicant to Trust A in a legal advisory relationship. Those obligations are principally the obligation to draft the document in accordance with the client's instructions and the obligations to do so competently and with reasonable care.

[150] The consequence if any such professional obligation is breached is that Trust A can sue the applicant's firm for any resulting loss.

[151] There is no connection between the duties giving rise to those professional obligations and the duty subsequently assumed by the applicant to Trust B on becoming a trustee.

[152] The second potential circumstance relates to the only legal work undertaken by

the firm between the 2016–2017 period expressly referred to by the complainant in her complaint.[36] The legal work appears to have been undertaken for the complainant personally, rather than for Trust A, but ultimately for the benefit of Trust A.

[153] The pertinent point about the narration of these events is that they had nothing to do with Trust B. Consequently, there was no evidence before the Committee from any circumstance arising from that course of events that could be argued to have given rise to a loss of independence or a compromising influence or loyalty on the applicant's part by reason of his role as trustee of Trust B.

[154] Again, any issue of competence on the part of the firm in relation to the preparation of the guarantee in question is a matter arising between the complainant and the firm in the context of their legal advisory relationship and has no connection with the applicant's role as trustee of Trust B.

[155] The third potential circumstance is that a dispute subsequently arose between Trust A and Trust B regarding the performance of the PSA. That dispute did not arise until sometime between March and December 2020.

[156] According to the complainant, the legal advisory relationship between the firm and the complainant had ceased in 2018. Consequently, no loss of independence or compromising influence or loyalty could arise for the applicant in terms of Rule 5 because he was not then providing services to the complainant or to Trust A.

[157] In summary, on the basis of the information available to the Committee, I find there is no reasonable basis on which an allegation of breach of Rule 5 can be advanced, in relation to either Charge 1 or Charge 2.

(d) *Could the applicant's acceptance of the role of trustee of Trust B constitute an act incompatible with his relationship of confidence and trust with the complainant as her lawyer?*

[158] Rule 5.1 of the Rules provides as follows:

> The relationship between lawyer and client is one of confidence and trust that must never be abused.

[159] The premise of Charge 1 in this respect, as expressed in paragraph 10(b) of the Charges, is that the applicant's acceptance of the role as trustee was incompatible with his relationship of confidence and trust with the complainant as her solicitor.

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[36] See [14] of this decision.

[160] I find it challenging to identify an arguable basis for the allegation for largely the same reasons as are discussed above in relation to the alleged breach of Rule 5.

[161] There is no suggestion in the materials of either any actual loss of confidence or trust by the complainant in the applicant as legal adviser by reason of his acceptance of the appointment, or of any reason for concern about matters of confidence or trust, arising at the time.

[162] Regardless of the apparent difference of recollection between the complainant and the applicant regarding the circumstances in 2016 leading to the applicant's appointment as trustee,[37] one is left trying to identify an alleged incompatibility that was, at best, hypothetical or latent in 2016. It is difficult to do so, no actual alleged incompatibility having been identified in the materials.

[163] I have the firm perception that it was the breakdown of the domestic relationship between the complainant and the Partner in 2020, and the complainant's consequent perception that the applicant was, in bald terms, "on the Partner's side" from that point by reason of his trustee responsibilities, that has triggered the retrospective suggestion of inherent incompatibility regarding the relationship of confidence and trust in 2016.

[164] I do not for a moment downplay the genuineness of the complainant's sense of anxiety from 2020 onwards that her former legal adviser was by then a trustee owing fiduciary obligations to her former domestic partner as co-trustee and beneficiary of Trust B, and that this might in some not necessarily identifiable way prejudice her interests (the only identified way being potential breach of confidence).

[165] I also have no doubt that had the applicant been asked to become a trustee of Trust B after the relationship between the complainant and the Partner hit rocky ground, he would likely have declined; not because of any breach of duty but simply out of respect for the complainant's sensitivities.

[166] The fundamental question is nevertheless whether the circumstances are capable of giving rise to an actual breach of duty owed by the applicant to the complainant or Trust A.

[167] The complainant's argument, and the basis of Charge 1, is that the applicant's acceptance of appointment as trustee abused the relationship of confidence and trust between the complainant as client and the applicant as lawyer. This begs the question as to the way in which that relationship was thereby abused. There is no answer in the

[37] See [10]–[12] of this decision.

complainant's submissions to the Committee.

[168] I consider the proposition of alleged breach of Rule 5.1 at that time to be far too nebulous to constitute a sound basis for a disciplinary charge of professional misconduct.

[169] Nor do I consider that the circumstances could give rise to an alternative charge of personal misconduct under s (7)(1)(b) of the Act.

*(e) Did the applicant's acceptance of the role of trustee of Trust B constitute entry into a property transaction or relationship with the complainant by reason of the existence of the PSA?*

[170] Rule 5.4.3 of the Rules provides as follows:

> A lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.

[171] The applicant became trustee of Trust B in 2016. At the time, the complainant was a client of the firm. Although there is no information in the materials about any legal services provided to Trust A after 2014, Mr LM was a co-trustee and it can be assumed that Trust A remained a client of the firm as well.

[172] As noted earlier, I have no information to the effect that the applicant actually became a party to the PSA. By becoming a trustee, however, the applicant became liable for the due performance of the existing obligations of Trust B under the PSA.

[173] The circumstances do not sit easily with the formulation in Rule 5.4.3, despite its flexibility. The PSA does not constitute a business transaction or a business relationship.

[174] The PSA does give rise to contractual obligations to contribute funds for agreed renovations and to make financial adjustments between the parties. This does not constitute a "financial transaction". In my view, that phrase connotes something direct such as a loan or investment. It could constitute a "financial relationship", however.

[175] Similarly, the PSA does not constitute a "property transaction" but, because it creates obligations relating to property owned by the parties, could constitute a "property relationship".

[176] The difficulty with the alleged application of Rule 5.4.3 is that it potentially proscribes the entry into such a relationship by "a lawyer". In my view, this can only mean, or is certainly intended to mean, the lawyer acting in his or her professional or

personal capacity.

[177] In this context, the distinction between a lawyer acting as a lawyer, acting in a personal capacity or acting as a trustee is critical. The sorts of transactions typically engaging r 5.4.3 include a lawyer lending money to or borrowing money from a client, purchasing property with a client or investing money in a client's business or with a client in a business or property.

[178] The consumer protection purpose of the rule is to dissuade a lawyer from entering into a transaction or relationship with a client that engages the lawyer's own interests and thereby compromises the lawyer's independence and objectivity in advising the client.

[179] All such transactions or relationships give rise to a potential tension for the lawyer between safeguarding the client's interests and safeguarding the lawyer's own interests. This is not the case where the lawyer enters into a transaction or relationship solely as an independent trustee. The lawyer has no personal interest to safeguard in that scenario.

[180] The situation is different if the lawyer trustee has a beneficial interest in the trust of which he or she is trustee; that is, where the lawyer is an interested trustee rather than an independent trustee. In that scenario, the lawyer has a personal interest that might give rise to a conflict with the interests of the client.

[181] I have found no cases or commentary in which a finding has been made of r 5.4.3 being engaged where a lawyer's involvement in a transaction or relationship is solely as an independent trustee. This is unsurprising, as there is no apparent mischief in that circumstance for the Rules to guard against.

*(f) If so, could the entry into that transaction or relationship create the possibility of the relationship of confidence and trust between the applicant and the complainant being compromised?*

[182] The alternative way of looking at the matter is to assume (contrary to my view) that the reference to "lawyer" in the rule can mean a trustee who happens to be a lawyer and then consider the second part of the test in r 5.4.3, namely whether the transaction or relationship creates the possibility of the relationship of confidence and trust between the lawyer and the client being compromised.

[183] The capacity in which the applicant is acting is again potentially critical to the application of this test. The lawyer's personal interests are not engaged where the

lawyer's role is solely one of being an independent trustee for another person.

[184] The complainant's express concern in this regard relates to the fact that the applicant became responsible as trustee for the performance of Trust B's contractual obligations under the PSA.

[185] The hypothetical question this seems to raise is whether, if the applicant had been required to give legal advice to Trust A during 2016–2017 regarding the due performance of the PSA, that advice might have been influenced by the fact that the applicant was liable as trustee for its performance.

[186] The questions are hypothetical because the applicant was not in fact required to give Trust A or the complainant any such legal advice.

[187] The test is merely one of "possibility". It must be possible for a trustee to be influenced by his or her own potential liability as trustee in such hypothetical circumstances.

[188] The major difficulty with adopting that interpretation is that it would logically preclude any lawyer ever becoming an independent trustee for the lawyer's own client's trust. If simply being a trustee might influence a lawyer's hypothetical advice if such advice were to be required, it would make no difference whether the lawyer was a trustee of Trust B or of Trust A. This defies common sense.

[189] Further, such an interpretation would preclude a lawyer ever becoming an independent trustee in the trusts of each member of a domestic couple in the relatively common "mirror trust" situation. This cannot be the case.

[190] The same individual is capable of having different fiduciary obligations to different people in different capacities without there being any necessary conflict between one set of obligations and the other.

[191] The common analogy of the lawyer "wearing two hats" is useful. The Rules apply where both hats are legal adviser's hats; thus, a lawyer cannot act for two clients on the same matter where the risk of being unable to discharge his or her duties to both clients is more than negligible.[38]

[192] The Rules also apply where the two hats are a legal adviser's hat and the lawyer's own hat; this is the situation regulated by r 5.4.3.

[193] The Rules do not apply where the two hats are a legal adviser's hat and an

[38] Rule 6.1 of the Rules.

independent trustee's hat, regardless of whether the client is or is not a beneficiary of the relevant trust but particularly where the client is not a beneficiary.

[194] The view I come to is that the rule was simply not intended to have, and should not be interpreted as having, the consequence of precluding lawyers from acting as independent trustees, either for their own client entities or for a third party that has an existing contractual relationship with a client entity.

[195] In my view, there are two possible interpretations of the correct application of the rule. The first is the view I have expressed earlier; namely that the offending circumstance must involve the personal interests of the lawyer. This is not the case in this instance.

[196] The second is that there must be a situation of legal advice actually being given by the lawyer which is potentially influenced by the lawyer's potential liability as independent trustee for the other party. This is also not the case in this instance; there is no suggestion that any issue arose for Trust A involving the PSA on which the applicant (or the firm) gave Trust A legal advice.

[197] On the actual circumstances here (namely the applicant becoming liable for Trust B's obligations under the PSA), my view is that any compromise of the relationship of confidence and trust with Trust A was hypothetical and any arguable breach of r 5.4.3 arising for that reason should not have any disciplinary consequences.

*(g) Did Rule 5.4.4 apply in the circumstances?*

[198] Rule 5.4.4 covers the circumstance where the transaction or relationship does not, when entered into, raise a possibility of the relationship of confidence and trust between lawyer and client being compromised. It relevantly provides as follows:

> A lawyer who enters into any financial, business, or property transaction or relationship with a client must advise the client of the right to receive independent advice in respect of the matter and explain to the client that should a conflict of interest arise the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters.[39]

[199] Rules 5.4.3 and 5.4.4 together, cover the field of entry into such transactions or relationships with clients.

[200] I consider that the same conceptual objections apply to the application of this rule to the circumstances as apply to r 5.4.3. It is not intended to, and in my view does not, capture a contractual relationship arising by operation of law between the client and

[39] The rule then sets out three exceptions that are not relevant to the current circumstances.

a trustee for another person who happens to be a lawyer, who has no personal interest in the performance of the obligations arising under the contractual relationship and who does not give advice to the client about the contractual relationship.

[201] Again, I can find no decision or commentary suggesting that a "conflict of interest" in terms of the rule can arise between a lawyer acting as a lawyer for party A and the lawyer acting solely as an independent trustee for party B.

[202] As with r 5.4.3, this does not mean that the interpretation advocated for the complainant is not linguistically arguable. The rule must be interpreted in light of its purpose, however. In my view, the purpose is to safeguard the client where the lawyer's personal interests are potentially engaged.

[203] Accordingly, I find that the facts are not capable of supporting charge of breach of r 5.4.4.

*(h) If Rule 5.4.4 did apply in the circumstances, did the applicant comply with the requirements of that Rule?*

[204] For the above reasons, this question does not arise to be answered.

*(i) Did the fact of the dispute arising between Trust A and Trust B:*

*(i) change the nature or scope of any existing professional obligations the applicant owed to the complainant; or*

*(ii) give rise to any new professional obligation owed by the applicant to the complainant?*

[205] I have included the above as issues to address because it seems to me that, by reason of Charge 2 cross-referencing the particulars of Charge 1 in paragraphs 8 and 9 of the charges, the Committee might have contemplated advancing the charge under s 7(1)(a)(ii) rather than s 7(1)(a)(i). I consider it useful to clarify why such a charge would not lie.

[206] The dispute between Trust A and Trust B arose some two years or so after the complainant terminated the lawyer-client relationship with the firm. Rules 5 and 5.1 are premised on there being a lawyer-client relationship at the time the rule is breached. There was no ongoing lawyer-client relationship in 2020. Accordingly, neither rule could have been breached when the dispute arose.

[207] Rule 5.4.3 was either breached or not at the time the applicant became a trustee

and thereby responsible as trustee for the liabilities of Trust B under the PSA. Such liabilities would include both actual and contingent liabilities.

[208] The fact that the dispute arose in 2020 and the fact that proceedings were issued in 2021 changed the scope of the contractual liabilities the applicant potentially faced as trustee (depending on the outcome of the dispute and the proceedings respectively) but did not change their subsisting contractual origin.

[209] Expressed another way, no fresh financial relationship or property relationship arose in 2020 or 2021. The dispute and the proceedings were consequences of changing factual circumstances arising under the existing financial relationship or property relationship.

[210] In any event, there was no lawyer-client relationship between the applicant's firm and either the complainant or Trust A in either 2020 or 2021, so there could not have been breach of either r 5.4.3 or r 5.4.4 at either time.

[211] Accordingly, the Committee was correct to consider (if it did) that Charge 2 could not be advanced as an alleged wilful or reckless breach of any of rr 5, 5.1, 5.4.3 or r 5.4.4.

*(j) If so, is there evidence that the applicant breached any such obligation?*

[212] This question does not arise to be answered.

[213] Any existing, unchanged professional obligation owed by the applicant to Trust A of course continued to apply. In this context, the obvious continuing obligation was the duty of confidence in relation to Trust A's information. This is covered by Charge 3.

*(k) Did the applicant's conduct in remaining as a trustee once the dispute arose occur at a time when the applicant was providing regulated services, in terms of s 7?*

[214] There is a further difficulty with Charge 2. For there to be a sufficient connection with the provision of regulated services, the alleged conduct (remaining as a trustee) must have occurred at a time when the applicant was providing regulated services, in terms of s 7 of the Act.

[215] The fact that there was a dispute between Trust A and Trust B was first drawn to the attention of the firm in late November 2020. There is no evidence that the applicant was aware of the matter before then. The fact that the complainant objected to the applicant acting as trustee of Trust B was first made known in late December 2020.

[216] This was some two years after the complainant had ended her relationship with the firm and some three years after the applicant had been involved in any legal work undertaken for her or her entities.

[217] Neither the applicant or the firm had ever provided legal services to either the Partner or Trust B.

[218] In summary, the applicant was not (at any time from December 2020 onwards) providing regulated services to any person or entity involved in or connected with either the dispute between Trust A and Trust B or the dispute between the complainant and the Partner.

[219] For Charge 2 to proceed, the phrase "at a time when [the applicant] was providing regulated services" has to be interpreted as being synonymous with the phrase "at a time when [the applicant] was a practising lawyer".

[220] The recent Court decisions extending the ordinary meaning of the phrase for regulatory purposes have all involved either an employment context involving lawyers in law firms or an identifiable connection with regulated services provided by the lawyer to the lawyer's clients generally (as in *Deliu*). The circumstance of the applicant acting as trustee of Trust B involves no such context or connection and is not analogous to any such context or connection.

[221] Although the courts may well further extend the scope of the definition to other circumstances not yet contemplated, I am not aware of any judicial comment to the effect that the phrase can mean simply being a practising lawyer.[40] As I have already noted, this would make the phrase itself redundant, as it would then mean "at a time when the lawyer is a lawyer".[41]

[222] I therefore consider that Charge 2 is misconceived for this reason also.

*(l) Could the fact that the applicant remained as trustee of Trust B after the dispute arose nevertheless be capable of constituting conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable?*

[223] I pose this question in case I am wrong about the applicability to the circumstances of the phrase "at a time when [the applicant] was providing regulated services".

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[40] Noting specifically that [62] of the *Deliu* decision is not such a comment.
[41] "lawyer" being defined in s 6 of the Act as a person who holds a practising certificate.

[224] The learned authors of *Ethics, Professional Responsibility and the Lawyer* said the following about "disgraceful or dishonourable conduct":[42]

> This is the traditional articulation of the standard of misconduct and can be noted for its reliance on the view of other right-thinking people who also practise in the profession. While it is an objective standard, it is informed by proper knowledge of professional practice and an appropriate approach to professional standards. It is similar to previous articulations by the Courts and Tribunal, including the oft-cited statement in *Atkinson v Auckland District Law Society* that misconduct is conduct:
>
> > of sufficient gravity to be termed "reprehensible" (or "inexcusable", "disgraceful" or "deplorable" or "dishonourable") or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree and so frequent as to reflect on … fitness to practice.
>
> In fact, the words "disgraceful" and "dishonourable" add little (other than colour) to the term "misconduct". They do, perhaps, signal a degree of seriousness that the word itself, on a dictionary definition, would not convey. However, it is clear that misconduct is a very serious professional wrongdoing.
>
> [Citation omitted]

[225] And further:[43]

> In *Dentice v Valuers Registration Board*, Eichelbaum CJ reviewed the concept of professional misconduct generally and noted that across all professions the key element is whether the practitioner's conduct has shown some degree of unfitness to practise. Where that degree of unfitness is so great as to pose a threat to the public, the profession is entitled to remove the practitioner from practice.[44]

[226] The distinction between acting as a trustee and acting as a lawyer again necessarily comes to the fore. The applicant's decision to remain as trustee (if he was able to make one, as discussed earlier) was honourable and professional from an independent trustee perspective. A claim had been either signalled or made against Trust B that had the potential to deprive it of its assets. The applicant owed a duty to act prudently to help preserve them.

[227] I consider that lawyers of good standing with a view on the obligations of independent trustees would consider it dishonourable for a trustee in that circumstance to attempt to "cut and run".

[228] Be that as it may, it is not the conduct of the applicant as an independent trustee but his conduct as a lawyer that is in question. What then is the nature of the applicant's honourable conduct as a trustee that could be considered potentially disgraceful or

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[42] Duncan Webb, Kathryn Dalziel and Kerry Cook, *Ethics, Professional Responsibility and the Lawyer*, (3rd ed, LexisNexis, Wellington, 2016) at 107. See also *Auckland District Law Society v Ford* [2001] NZAR 598

[43] At [4.3.5].

[44] [1992] 1 NZLR 720, 724–725.

dishonourable as a lawyer?

[229] The applicant had no obligation to support or assist Trust A in the pursuit of its claim beyond giving evidence for Trust A, if required, regarding any relevant issue arising in his former legal advisory capacity.

[230] The only thing the complainant herself has been able to point to is the subjectively perceived risk that the applicant might disclose to the Partner information confidential to the complainant. She was categorically assured that this would not occur. There is no evidence to suggest that her genuinely held concern had objective substance. Any actual breach of confidence is governed by r 8 and consequently Charge 3.

[231] The worst that can be said, in layperson's terms, is that the applicant's ongoing role as trustee for Trust B was "not a good look" from the subjective viewpoint of a former client in conflict with the trust and her former domestic partner. This does not mean that the applicant had actually done anything that could be regarded as disgraceful dishonourable, or otherwise objectionable.

*(m) If so, was the applicant required to retire as trustee of Trust B, if that could be achieved?*

[232] This question does not arise to be answered.

*(n) Did the PSA constitute information confidential to the complainant or Trust A?*

[233] The PSA itself constituted information known to both the trustees of Trust A and the trustees of Trust B. As between the trustees of Trust A and the trustees of Trust B, it was not confidential. Vis-à-vis third parties, it was confidential to each of them.

[234] The complainant's reasons for entering into the PSA and any objectives she sought to achieve by the drafting of its provisions, as communicated to the applicant as her lawyer, would constitute information confidential to her. The charges do not extend to any such information and there is no suggestion in the material before the Committee that the applicant disclosed any such information.

[235] The complainant's concern recorded at paragraph [43(f)] above appears to encompass the possibility of the applicant giving evidence in the proceedings. Trust A's position in that regard is protected by the provisions of the Evidence

Act 2006 relating to privileged solicitor-client communications.

[236] If the applicant were to face any difficulty in in that respect, his difficulty would be in his trustee capacity. If any argument were to arise in the proceedings regarding the proper construction of the PSA and the resolution of that argument required evidence about the surrounding circumstances at the time of entry into the PSA, the applicant would be a compellable witness for Trust A (but not for Trust B, in respect of privileged communications with Trust A).

*(o) If so, could the applicant's disclosure of that information to Trust B's lawyers constitute contravention any of Rules 8, 8.1 or 8.7 of the Rules?*

[237] Rule 8 provides as follows:

> A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

[238] Rule 8.1 relevantly provides as follows:

> … The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.

[239] Charge 3 is, in part, that the PSA itself was information concerning a client of the firm, namely Trust A, and the applicant disclosed it to the lawyers acting for Trust B in breach of r 8.

[240] Rule 8.1 helps define the duration of the duty under r 8. It cannot be separately contravened.

[241] The evidence in support of this charge in this respect appears to be the extract from the letter from the lawyers acting for Trust B in the High Court proceedings quoted at paragraph [41] above.

[242] The focus of the rule is on holding information "in strict confidence". The decisions on the rule invariably deal with information that is confidential to a client in a real sense. The PSA was confidential information that was equally confidential to both Trust A and Trust B. As between Trust A and Trust B, it was not confidential to either of them.

[243] The document was the primary focus of the dispute that led to the High Court proceedings between the two trusts and the proceedings themselves once they were commenced. Both parties sought to rely on it.

[244] The complainant had terminated her relationship with the firm between two and three years earlier and had uplifted her (and presumably Trust A's) files and records.

[245] It is correct that the applicant would have first become privy to the PSA six years earlier in his capacity as an employed lawyer at the firm. His duty of confidence in his capacity as a lawyer continued after the complainant terminated the retainer.

[246] It can be assumed from the fact that he was also in possession of a copy of the PSA in 2021, however, that the applicant subsequently became privy to it for a second time in his capacity as trustee either on being appointed to that role in 2016 or when the PSA became subject of a dispute in late 2020.

[247] The footnote to r 8 states that:

> Information acquired in the course of the professional relationship that may be widely known or a matter of public record (such as the address of the client, criminal convictions, or discharged bankruptcy) will nevertheless be confidential information.

[248] The broader principle the footnote partly expresses is that a lawyer's obligation of confidence continues even if the same information is available to the lawyer (or former lawyer) from another source (public or private) and, in this instance, in a separate capacity.

[249] I therefore consider the Committee's interpretation of the rule to be correct and that the applicant breached r 8 by providing a copy of the PSA to Trust B's lawyers. The more important question is whether the breach of that rule should have disciplinary consequences in the circumstances. I will address that issue later in this decision.

[250] Rule 8.7 provides as follows:

> A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.

[251] As between Trust A and Trust B, the PSA was not confidential to either of them, in a real sense rather than the extended technical sense that applies under r 8. Alternatively, it could be regarded as confidential to both Trust A and Trust B.

[252] Be that as it may, it was what it was. Trust A was pursuing a claim against Trust B in reliance on its terms. When Trust B did not accede to that claim, Trust A sought an order for specific performance of the PSA. The document disclosed to Trust B's lawyers was the document that Trust A sought to enforce against Trust B.

[253] In determining the applicability of the rule, it is necessary to consider the legal and procedural reality of the course of events. In the actual circumstances, I do not

consider that the applicant's disclosure of a copy of the PSA to Trust B's lawyers can constitute the use of information confidential to Trust A for the benefit of Trust B.

[254] Regardless of whether the concept of benefit to one party necessarily implies detriment to the other party, as suggested by counsel for the applicant in submissions to the Committee (arguing that its disclosure involved no detriment to Trust A), the document again was what it was. There was no dispute that it existed, that the parties were party to it or what its terms were. I can identify no arguable "benefit" to any person from its disclosure by the applicant to Trust B's Lawyers.

[255] If I am wrong in that view, the more important question again becomes whether the consequent breach of r 8.7 warrants a disciplinary response in the circumstances. In that regard, as identified in the materials before the Committee, Trust B's lawyers could have obtained the PSA from the Partner or from Trust B's former lawyers in which case the alleged issue would never have been raised.

*(p) Did the applicant's views on the operation and effect of the PSA constitute information confidential to the complainant or to Trust A?*

[256] I turn now to the matter of the alleged disclosure by the applicant of "his views on the operation and effect of the [PSA] necessary to allow the filing of a statement of defence in the proceedings by the Trustees of [Trust B]".

[257] The first difficulty with a charge based on this element is the absence of evidence available to the Committee potentially supporting the charge. The second difficulty is the necessary distinction between:

(a) the complainant's instructions to the applicant as Trust A's lawyer in relation to the preparation of the PSA in 2014;

(b) any legal advice the applicant may have given the complainant in relation to the preparation of the PSA in 2014;

(c) any views the applicant might have held in his trustee capacity about the operation and effect of the PSA in 2020 or 2021, taking into account the nature of any factual disputes at that time;

(d) any views the applicant might have communicated to Trust B's lawyers about the operation or effect of the PSA in 2020 or 2021.

[258] Self-evidently, the first two categories of information are confidential to Trust A. Disclosure by the applicant to Trust B's lawyers of either any part of the instructions from

the complainant in 2014 or any part of any advice given by the applicant regarding Trust A's affairs at any time would constitute a breach of r 8.

[259] Similarly, any use by the applicant of any of that information in any instruction process he might have been involved in with Trust B's lawyers would constitute a breach of rule 8.7.

[260] Conversely, any views the applicant might have held in his trustee capacity about the operation and effect of the PSA in 2020 or 2021, taking into account the nature of any factual disputes between the complainant and the Partner at that time, do not constitute information confidential to Trust A.

[261] Nor do any views the applicant might have communicated to Trust B's lawyers about the operation or effect of the PSA in 2020 or 2021 constitute information confidential to Trust A, provided they did not incorporate any instructions or other information received from Trust A or any legal advice he provided to Trust A.

[262] The necessary premise on which Charge 3 is based is that the applicant's views on the operation and effect of the PSA in 2020 or 2021 constitute information acquired by the applicant during and as a consequence of his legal advisory relationship with the complainant or Trust A. This is not necessarily so and is unlikely to be so.

[263] I have read the pleadings in the High Court proceedings that were included with the charges. There is no dispute between the parties about the terms of the PSA. Both parties rely on it as if pleaded in full. The matters in dispute are a mixture of factual and legal matters. They include:

(a) factual disputes as to the sums expended on the financing and the renovations, whether or not both parties approved the renovation expenditure, whether or not the parties entered into a separate oral agreement about loan repayments and whether or not oral representations were made about expenditure not falling within the scope of the PSA's provisions; and

(b) legal disputes as to whether funds contributed were derived from relationship income and constitute relationship property and as to the effect, in law or equity, of alleged unpaid work contributions by the Partner and alleged representations by the complainant.

[264] It is very difficult to see how such matters could constitute information acquired by the applicant while he was a legal adviser to the complainant.

*(q) If so, is there evidence that the applicant disclosed to Trust B's lawyers his views on the operation and effect of the PSA?*

[265] There is no suggestion that the applicant was involved in any of the events giving rise to the factual disputes. It is highly likely that, by their very nature, these disputes arose from communications between the complainant and the Partner.

[266] Nor was the applicant a legal adviser to Trust B, at any time. There is nothing in the materials to suggest that the position adopted by Trust B in the proceedings was influenced or informed by any views held by the applicant about legal issues in dispute.

[267] The proposition the Committee put to the applicant in its notice of hearing was that "[the complainant alleges] that [the applicant's] knowledge of [the complainant's] business affairs is influencing the responses to the current legal proceedings of which he is on the opposite side as a Trustee".

[268] That proposition was put in the context of potential breach of r 8.8 rather than r 8.7 but the premise of use of confidential information is common to both rules.

[269] The response for the applicant in submissions to the Committee was that:

> As noted in our earlier correspondence, [the applicant] provided assurance to [the complainant] that no information would be disclosed, but in any event, the application of any such information could not assist [Trust B] and/or disadvantage [Trust A] in relation to the factual disputes before the court.
>
> It is noted that [the Partner] was employed as [the complainant's] personal assistant throughout relevant period, so was herself closely familiar with [the complainant's] personal and business matters.

[270] The first difficulty with a charge premised on this allegation is that only relevant evidence before the Committee was the evidence from Trust B's lawyer, who stated that "any information I have received is either from the file of my client's former lawyer…, or from [the Partner] directly".[45]

[271] The second difficulty is the assumption that approval by an independent trustee to file a pleading necessarily implies a personal view on the part of the trustee that the case being advanced is factually well-founded or legally robust. Neither assumption can safely be made. The trustee may well have no personal knowledge of the facts and/or, if a lawyer, no relevant expertise in the legal issues.

[272] Here, there is no evidence that the applicant had any personal knowledge of the disputed facts or any relevant expertise. On the latter aspect, the evidence is that he

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[45] See [41] above.

undertook commercial legal work for the complainant's entities. The legal issues in the proceedings are ones of relationship property law and its developing tendrils in equity.

[273] All that can be reasonably safely assumed from the fact of approving a pleading is that the trustee, acting as prudent trustee, considers it in the interests of the beneficiaries for the case to be advanced. In the normal course of events, this will be on the basis of independent legal advice.

*(r) If so, could the applicant's disclosure of that information to Trust B's lawyers contravene any of Rules 8, 8.1 or 8.7 of the Rules?*

[274] I agree with the Committee that, on a strict interpretation of r 8, there was a breach of that rule by reason of the fact that the applicant first became privy to the PSA as lawyer for Trust A, despite subsequently being in possession of a copy of it in his trustee capacity.

[275] As stated earlier, r 8.1 is an interpretative extension of r 8 and not a rule that can itself be contravened.

[276] For the reasons set out above, I do not consider that, on the information available to the Committee, there is either a factual or legal basis for a charge of breach of r 8.7 to be advanced.

[277] In summary of my analysis to this point, I find:

(a) no arguable basis for Charge 1 or Charge 2 based on alleged breach of r 5;

(b) no arguable basis for Charge 1 or Charge 2 based on alleged breach of r 5.1;

(c) no case for any disciplinary consequence to flow from any assumed breach of either r 5.4.3 or r 5.4.4 and consequently no basis for Charge 1 or Charge 2 on those grounds;

(d) a breach, or at least arguable breach, of r 8;

(e) that r 8.1 is not a rule that can be breached;

(f) no arguable basis for the alleged breach of r 8.7.

*(s) If the answer to any of the above questions relating to breach or contravention is*

*"yes", could the applicant's alleged conduct be reasonably capable of constituting misconduct within the meaning of the definition specified by the Committee in relation to the relevant charge?*

[278] The next question is therefore whether a breach of r 8 in these circumstances is reasonably capable of constituting misconduct within the meaning s 7(1(a)(ii) of the Act. That section relevantly requires the breach of r 8 to have been "wilful or reckless".

[279] For present purposes, I adopt the comments in *Hong v Auckland Standards Committee No. 5*[46] regarding the meaning of "wilful or reckless" in this context: "wilful" requires some actual knowledge that the act is a contravention and "reckless" connotes wilful blindness.

[280] It is useful at this point to summarise the relevant circumstances which, in my view, were as follows:

(a) The PSA was the primary focus of the dispute and consequent proceedings;

(b) Both parties sought to rely on it, including Trust A suing for its specific performance;

(c) The document was not, as between the parties, confidential;

(d) The applicant first became privy to it as lawyer for Trust A;

(e) He subsequently became privy to it again as trustee for Trust B;

(f) Trust B's lawyer could have obtained a copy of it from the Partner or from Trust B's former lawyers without objection;

(g) Instead, Trust B's lawyer obtained a copy of it from the applicant.

(h) It cannot reasonably be suggested that there was any "benefit" to Trust B (in terms of r 8.7) in the applicant providing a copy of it to Trust B's lawyers.

[281] In terms of the test for misconduct in s 7(1)(a)(ii), I doubt that the applicant gave the matter a first thought, let alone a second thought after becoming alert to any potential ethical issue.

[282] In terms of the lesser alternatives proposed by the Committee, I struggle to identify anything objectionable in substance from an ethical viewpoint in the applicant, in his capacity as trustee, providing to Trust B's lawyers a copy of the document that was

[46] [2020] NZHC 1599 at [159].

the basis of a dispute between the two trusts and on which he was being sued as trustee. An interpretation of the rule that prevented him from doing so would defy common sense.

[283] There is no professional mischief to be guarded against. The document itself was completely material to the process of resolution of the dispute between the parties and equally completely immaterial in terms of the applicant's ongoing duty of confidence as a former legal adviser to Trust A.

[284] For all the above reasons, I do not consider that the applicant's act in providing a copy of the PSA to Trust B's lawyers should have any disciplinary consequence.

*(t) If the answer to question (s) is "no", is the applicant's conduct nevertheless capable of constituting negligence or incompetence reaching the threshold specified in section 241(c) of the Act?*

[285] For the above reasons, the answer to this question is "no". The only error the applicant made was procedural one. If he had thought to tell Trust B's lawyers to get the PSA from the Partner or from Trust B's previous lawyers, there would have been no issue.

*(u) If the answer to question (t) is "no", is the applicant's conduct nevertheless unsatisfactory conduct within the meaning of the definitions specified by the Committee in relation to the relevant charge?*

[286] Not every breach of the Rules by a lawyer reaches the threshold for a finding of unsatisfactory conduct. This is one of those instances. The answer to this question is also "no".

*(v) Does the complainant have a legitimate claim for compensation for legal fees incurred in advancing her complaint?*

[287] The normal position in accordance with the LCRO Costs Guidelines is that a complainant is expected to bear his or her own costs of pursuing a complaint. I see no reason to depart from that practice in this instance.

**Summary**

[288] I have little doubt that, in the circumstances that have evolved, the applicant fervently wishes – probably more fervently than the complainant – that he had never accepted appointment as trustee of Trust B.

[289] This is particularly so given his own understanding, disputed by the complainant, that the complainant supported and encouraged the appointment, if not recommending it in the first place. The conflict of recollection about that matter is not determinative of any issue in this review. It is always the lawyer's responsibility to understand and meet his or her ethical obligations regardless of his or her understanding of a client's wishes.

[290] A lack of foresight, in the "crystal ball" sense, does not equate to an ethical lapse, however.

[291] Despite the numerous issues of legal interpretation posed by the circumstances and the consequent inordinate length of this decision, an assessment of professional conduct can often be reduced to a reasonably simple question: Has the lawyer actually done anything ethically wrong – as distinct from someone being worried that the lawyer might hypothetically do something ethically wrong.

[292] The original, core concern expressed by the complainant was that the firm might disclose information confidential to her to the Partner. She received an immediate categorical assurance that this would not occur. There is no evidence that it has occurred or that there is real risk of it occurring.

[293] It may well be that, through unobjectionable intent, the applicant has found himself in a position that both he and the respondent find awkward at a personal level, for different reasons.

[294] My clear view, however, is that neither in accepting the appointment, nor in anything the applicant has (on the available evidence) done or not done since then, has the applicant done anything ethically wrong.

**Decision**

[295] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee to refer the complaint, and any and all issues involved in the matter, to the Tribunal is reversed.

[296] Pursuant to ss 211(1)(b), 138(1)(f) and 138(2) of the Lawyers and Conveyancers Act 2006, I direct that no further action be taken on the complaint because:

(a) in relation to the primary outcome sought by the complainant, she has an adequate remedy that it would be reasonable for her to exercise; and

(b) in relation to the alleged breaches of the Rules particularised by the Committee in its charges and the conduct giving rise to them, having regard to all the circumstances, further action is inappropriate.

**Costs**

[297] Paragraphs 8 and 9 of the LCRO Costs Orders Guidelines state as follows:

> 8. The Act provides that a costs order in favour of the practitioner complained against (the "person to whom the proceedings relate") may be made and that the professional body pay those costs.
>
> 9. Such an order would be made only where the conduct of the Society can be criticised. In particular, such an order might be made where the application for review is made by the practitioner in response to an adverse finding by a Standards Committee and the application is upheld. However, the mere fact that the Standards Committee's decision is modified or reversed will not necessarily be grounds for a costs award.

[298] In short, costs do not "follow the event" in this jurisdiction.

[299] It must be emphasised that a standards committee decision to refer a matter to the Tribunal does not necessarily imply that the Committee has formed the view that the alleged conduct does constitute misconduct but only that it is capable of constituting misconduct. The view I have come to is that the applicant's alleged conduct was ethically unobjectionable.

[300] I have no doubt that the Committee undertook its task with diligence, in good faith and in accordance with due process. Differing views on the relationship for disciplinary purposes between legal services and trustee services are legitimately held. In addition, the relevant definitions in the Act are notoriously problematical and the Court decisions interpreting them have been known to raise unforeseen issues.

[301] In accordance with customary practice in such circumstances, there will be no order for costs.

**Publication**

[302] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made to each of the persons listed at the foot of this decision.

[303] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of

his or her decision as the Review Officer considers necessary or desirable in the public interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[304] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines

[305] This decision is the re-issue of a decision orignally dated 22 December 2023 that was recalled for error.

**DATED** this 13th day of MARCH 2024

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**FR Goldsmith**

**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 DG as the Applicant
[Area] Standards Committee [X] as the Respondent
Law firm A as the Applicant representative
Mr BR as the Respondent representative
Ms YS as an Interested Party New Zealand Law Society