LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 112

Ref: LCRO 18/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee X
BETWEEN	**MB** Applicant
AND	**RP and ND** Respondent

DECISION

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

Introduction

[1] Mr MB has applied for a review of a decision by the [Area] Standards Committee X (the Committee) to take no further action in respect of his complaint concerning the conduct of Mr RP and Mr ND, trustees of a family trust established pursuant to the will of his late father, Mr GB.

[2] Mr GB died in 2012. Probate of Mr GB's will was granted by the High Court in 2013 to his wife Mrs HB, and to their children, Mr MB, Mr IB, Ms JH, Ms WP, and to Mr GB's lawyer, Mr KV (the executors).[1]

[1] Will dated 10 December 1998; Codicil dated 21 February 2007.

[3] Mr GB's will conferred on Mrs HB a life interest in the residue of his estate, which included his one half share in two commercial properties, with the trustees empowered, if considered necessary for Mrs HB's "adequate maintenance", to have recourse to the capital. Upon Mrs HB's death the will required Mr GB's trustees to hold the one half share in those properties on trust "until the date of death of the last of [Mr GB's] children", and to "pay the net income" to them "in equal shares".[2]

[4] Disagreement among the executors on the approach towards administration of Mr GB's estate led to High Court proceedings. In 2016 a mediation of those proceedings resulted in the executors resigning and Mr RP and Mr ND being appointed in their place as trustees.

[5] On 10 August 2017, in response to Mr RP and Mr ND's request for "an independent review and expert opinion" on management of the estate's assets, financial advisors recommended "alternative types of investment" to retention of one of the two commercial properties which comprised three shops and produced rental income (the property).[3]

[6] In their December 2019 written report to "the beneficiaries" Mr RP and Mr ND acknowledged the possible sale of the property had been "contentious" for the family. However, they said having obtained professional advice, and the views of family members they recommended "the proper approach" was to (a) sell the property, and (b) invest the sale proceeds "in a balanced fund" guided by a professional fund manager. They asked for the family's views on the appointment of a fund manager.

[7] On 21 August 2020, soon after the end of the first Covid 19 lockdown in New Zealand, Mr RP and Mr ND recommended to the family it was "an appropriate time" to sell the property. They said they and Mrs HB, after discussions, had "agreed to list" the property for sale.

[8] In his reply that day Mr MB contended the sale of the property would not be "in the best interests of all 17 beneficiaries" because (a) the alternative investments put forward by the financial advisor "failed to demonstrate" an improved income return, and (b) "fell woefully short of being a better investment".

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[2] Will, clauses 5, 6 - also, upon the death of any child the income otherwise payable to that child be paid to any grandchildren.
[3] Letter and accompanying advice, [Company A] to Mr RP (10 August 2017).

[9] On 27 August, in his response for the trustees, Mr RP explained the property "fail[ed] to achieve the appropriate balance" for an investment, and as required by the Trustee Act 1956 and Trusts Act 2019 they had "consider[ed] (among other things) diversifying trust investments [to] avoid the risk of capital loss or depreciation".

[10] In his 30 August reply, Mr MB acknowledged trustees must act in the best interests of the beneficiaries but contended the Trusts Act 2019 did not prescribe particular types of investment. He restated his view that the "projected income returns and asset appreciation (actually depreciation) options" in the financial advisor's August 2017 review were "poor compared [with]" the corresponding returns from the property".

[11] In response on 10 September, Mr Mr RP said he "understood", and had given "full consideration" to Mr MB's position, and the other family members' points of view. He explained he and Mr Mr ND were required "to make their decision based on the factors set out" in the Trusts Act, which they had done.

[12] The property was sold in November 2020.

Complaint

[13] Mr MB lodged a complaint with the Lawyers Complaints Service on 15 September 2020 in which he alleged when Mr RP and Mr ND, as the trustees of Mr GB's estate, decided to sell the estate's one half share in the property they (a) were conflicted, and (b) did not act in the best interests of the estate.

(1) Conflict of duties

[14] Mr MB said Mr RP and Mr ND "should not be spending time or estate funds advising" Mrs HB about a proposed sale but claimed if they were, then they were conflicted.

[15] He asked that Mr RP and Mr ND be required to "represent the interests" of the estate only or resign as trustees and act for Mrs HB.

(2) Best interests – conflict of interest

[16] Mr MB claimed Mr RP and Mr ND's decision to sell the property was in conflict with "the intent" of Mr GB's will, and "the best interests of the estate and the 17 beneficiaries".

[17] He claimed the sale of the property "without a better alternative investment" was not in the best interests of the beneficiaries and therefore did not comply with trustee law. He asked that Mr RP and Mr ND "prove" a proposed alternative investment that "is better" than the property for the estate "in both income and asset value appreciation".

Response

[18] Following an initial assessment by the Lawyers Complaints Service (LCS), Mr MB's complaint was dealt with through its Early Resolution Process which I refer to later in this decision.

Standards Committee decision

[19] The Committee delivered its decision on 18 December 2020 and determined that no further action on the complaint was necessary or appropriate.

(1) Conflict of interest

[20] In deciding, pursuant to s 138(2) of the Act, to take no further action on this aspect of Mr MB's complaint the Committee said Mr RP and Mr ND had "a duty to consult" Mrs HB, who (a) had a life interest in the estate's one half share in the property, and (b) owned the other half share outright, concerning the management of the trust's assets which included the property.

[21] The Committee said it was satisfied that in carrying out that duty Mr RP and Mr ND did not have a conflict of interest.

(2) Management of trust assets - jurisdiction

[22] Pursuant to s138(1)(f) of the Act, the Committee declined jurisdiction to consider this issue stating matters which concern the role and duties of trustees, including any objections a beneficiary may have to a trustees' decision, are for the High Court to determine even in cases such as this where the trustee(s) happen to be lawyer(s).

[23] In reaching that conclusion the Committee noted Mr RP and Mr ND had (a) sought advice from an investment adviser, and (b) consulted with the beneficiaries, including Mrs HB, before they decided "it was appropriate for the trust" to sell its share of the property and invest the proceeds in an alternative investment.

Application for review

[24] Mr MB filed an application for review on 25 January 2021.

(1) Conflict of duties

[25] He says there is no evidence to support the Committee's conclusion that (a) Mrs HB's interest as the owner of a one half share in the property, and her life tenancy of the other half share held by Mr RP and Mr ND as trustees, and (b) Mr RP and Mr ND's duty as trustees, were "aligned".

(2) Best interests – conflict of interest

[26] In his submission, if it is found that Mr RP and Mr ND's decision, as trustees, to sell the estate's one half share in the property was not in the estate's best interest then their conflict of interest "is established".

[27] He asks that determination of his complaint be "held open" until evidence is produced that shows whether or not Mr RP and Mr ND's decision to sell the property was in the best interests of the estate.

Response

(1) Conflict of interest

[28] In their response to Mr Mr MB's review application Mr RP and Mr ND deny they were conflicted. They say (a) they did not and had never acted for Mrs HB who was independently represented, and (b) they and Mrs HB instructed the law firm which had previously acted for Mr GB and Mrs HB's matters concerning the property, including leasing the shops, to act on the sale of the property.

(2) Best interests

[29] They explain that as trustees of Mr GB's will it was their duty to act "in the best interests" of all the beneficiaries whose views they took into account in reaching their decision to sell the property and invest the proceeds in the manner required by the Trustee Act.

Review on the papers

[30] 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.

[31] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. 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

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[4]

> … 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.

[33] More recently, the High Court has described a review by this Office in the following way:[5]

> 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.

[34] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

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[4] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[5] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Preliminary

[35] The LCS dealt with Mr Mr MB's complaint through its Early Resolution Process (ERP). This involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[36] If the Committee's preliminary view is that the complaint lacks substance, a Professional Standards Officer (PSO) will inform the lawyer concerned of the Committee's preliminary view, inviting response. Any response is noted in a file note and provided to the Committee, which then completes its inquiry into the complaint.

[37] On 15 December 2020 a PSO telephoned Mr RP and Mr ND and informed them the Committee had reached a preliminary view that it would take no further action on Mr MB's complaint and asked them whether they wished to respond to the complaint.[6]

[38] Mr RP and Mr ND replied that they were willing to provide any further information the Committee required to which the PSO stated the Committee "found no additional issues or questions" that "needed a response" and would send a copy of the complaint to them.

Issues

[39] The issues I have identified for consideration on this review are:

(a) As well as acting as trustees of the estate's assets, including the property, did Mr RP and Mr ND also act for Mrs HB in their capacity as lawyers?

(b) If so, was there a conflict between any professional duties Mr RP and Mr ND as lawyers owed to the estate on the one hand, and to Mrs HB on the other?

(c) In arriving at and making their decision to sell the estate's share of the property and invest the sale proceeds in an alternative investment, did Mr RP and Mr ND breach any professional standards or obligations, or contravene any professional rules or regulations?

(d) In arriving at and making that decision, did Mr RP and Mr ND (i) act in the best interests of the estate, and (ii) have a conflict of interest?

[6] Central SC 2, Early Resolution Process - Call Log (15 December 2020).

Analysis

(1) Retainer – issue (a)

(a) Overview

[40] Mr MB claims when, as trustees of the estate, Mr RP and Mr ND decided to sell and replace the property with an alternative investment, they also provided legal advice to Mrs HB about that proposal.

[41] Mr RP and Mr ND deny they acted for and provided legal advice to Mrs HB who they say was advised by her own lawyer on that matter.

(b) Professional standards, rules

[42] The term "retainer", contained in a number of the Rules, is described as "an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not".

[43] The term "client" is not defined in the Lawyers and Conveyancers Act 2006 (the Act) or the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), but in the context used in r 1.2, and in a number of other rules, is the recipient of legal services.

[44] By "identi[ying] the client and prescrib[ing] the services expected of the lawyer", and "determ[ining]" the "scope of the lawyers' duties", a retainer is regarded as being "central to various aspects of the lawyer-client relationship".[7]

[45] Although possibly not referred to in the retainer agreement, attendances or matters which "fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer".[8]

[46] For evidentiary purposes it is preferable a retainer be documented, but it does not need to be in writing to be enforceable.[9] The Rules do however require a lawyer to

[7] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Pyrmont, NSW, 2017) at [3.20] – also "upon whose instructions the lawyer acts, the scope of the lawyer's authority in carrying out those instructions".
[8] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at p 537.
[9] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer*, (3rd ed, LexisNexis, Wellington, 2016) at [5.4].

provide a client with information on the principal aspects of client care and service, including the basis of charging, in advance of commencing legal work on a retainer.[10]

(c) Discussion

[47] The first issue for consideration is whether as Mr MB claims, in the lead up to their decision as trustees to sell the estate's one half share in the property, Mr RP and Mr ND also provided legal advice to Mrs HB. In other words, whether Mr RP and Mr ND, in their capacity as lawyers, acted for or represented Mrs HB at that time concerning the possible sale of the property.

Parties' positions

- Mr MB

[48] Mr MB says since their appointment as trustees Mr RP and Mr ND had "spent considerable time over the last few years" discussing with Mrs HB, who owned the other one half share of the property, "options to force" the estate to sell the property, and if they had, then they were conflicted.

[49] He says as with Mrs HB's "previous three approaches" to Mr RP and Mr ND about selling the property, on her latest approach to them about that matter they "should … refer" her to her own lawyer for advice.

- Mr RP and Mr ND

[50] Mr RP and Mr ND say they did not and had never acted for Mrs HB who was independently represented, and did not act on the sale of the property.

[51] They explain, following completion of their executor duties pursuant to Mr GB's will, the executors could not agree among themselves how to administer and manage Mr GB's estate which led to [the executors] resigning and appointing [Mr RP and Mr ND] as trustees in [the executors'] place.

[52] They say Mrs HB's lawyer "made it very clear" Mrs HB wanted to sell the property otherwise she "would consider applying" to the Court under the Property Law Act for a sale order.

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[10] Rules 3.4, 3.5, 3.6 in respect of lawyers other than barristers sole; rules 3.4A, 3.6A, 3.6A in respect of barristers sole.

Consideration

[53] Mr RP and Mr ND say their role was as trustees – appointed by and in place of the executors who resigned – of the trusts pursuant to Mr GB's will. They explain Mrs HB had her own lawyer and they and Mrs HB jointly instructed the law firm, which had previously acted for her and Mr GB on matters including leasing of the shops on the property, to act on the sale of the property.

[54] Whether a lawyer has been retained by a person is to be "determined objectively", the question being "whether a reasonable person observing the conduct of both [the lawyer] and [the client] would conclude that the parties intended [a] lawyer-client relationship to subsist between them". The fact that the lawyer concerned "had personal reservations as to whether he [or she] was going to take the case are relevant only in so far as they were objectively ascertainable".[11]

[55] Because "some responsibility" on whether a retainer exists or not "lies properly with the lawyer", it is important that the lawyer identifies who his or her client is, particularly when instructed by a number of persons among whom there may be differences or even conflicts.[12]

[56] Where an alleged client claims the lawyer concerned contravened a professional obligation or duty, then the alleged client bears the burden of proof "of facts and circumstances sufficient to establish a tacit agreement to provide legal services". In those circumstances "objective facts, not merely from the lawyer's belief as to which clients he or she was acting for" will be determinative. [13]

[57] The observation has been made that the "reasonable expectations of the alleged client carry significant weight here, as the lawyer may always take steps to dissuade a belief that the lawyer acts for a person".

[58] Considerations to ascertain that person's "reasonable expectations" of a retainer include (a) "how" the lawyer "referred to and dealt with" the alleged client; (b) the lawyer's file material; (c) "who instructed the lawyer"; (d) who is liable for the lawyer's fees; and (e) whether the alleged client had previously retained the lawyer.[14]

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[11] *Hartlepool v Basildon* LCRO 79/2009 (September 2009) at [23]*;* see also *Lawyers' Professional Responsibility*, above n 7 at [3.20].
[12] At [23] referring to *Day v Mead* [1987] 2 NZLR 443, 458; *Blyth v Fladgate* [1891] 1 Ch 337; *Giffith v Evans* [1953] 1 WLR 1424, 1428. See also *T v G LCRO 29/2009 (April 2009)* at [26].
[13] *Lawyers' Professional Responsibility*, above n 7 at [3.50].
[14] *Lawyers' Professional Responsibility*, above n 7 at [3.50].

[59] It could reasonably be expected that if as Mr MB claims Mr RP and Mr ND in addition to their trustee role for the estate, were also providing legal advice to Mrs HB about a possible sale of the property, evidence of such attendances would be readily available and have been produced to both the Committee and for consideration on this review. For example, a letter of engagement from Mr RP and Mr ND to Mrs HB.

[60] In that regard, I observe although Mr MB claims Mr RP and Mr ND provided legal advice to Mrs HB concerning the sale of the property, he acknowledges that on three occasions Mrs HB, having "approached" them about selling the property, was referred by them to her own lawyer for advice. Moreover, no evidence has been produced that Mrs HB regarded Mr RP and Mr ND as acting for her on this matter.

[61] For their part Mr RP and Mr ND have provided the names of (a) the lawyer consulted by Mrs HB on the sale, and (b) the law firm they and Mrs HB instructed to act on the sale of the property.

[62] They also explain, as mentioned earlier, Mrs HB's lawyer informed them that if they did not cooperate with Mrs HB who wanted to sell the property, then Mrs HB would consider applying to the Court for a sale order.

[63] The standard of proof to be applied in disciplinary hearings, is the "civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them".[15]

[64] From the information produced, I do not consider Mr MB has proved his claim Mr RP and Mr ND provided legal advice to Mrs HB concerning a possible sale of the property.

(2) Conflict of duties – issue (b)

(a) Overview

[65] As noted above, Mr MB claims Mr RP and Mr ND should not have advised Mrs HB about a proposed sale of the property, but if they had then they were conflicted.

[66] Mr RP and Mr ND say their role was confined to being trustees of Mr GB's estate and they did not provide legal advice to Mrs HB, who was independently advised, about the sale of the property.

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[15] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [112].

(b) Professional standards, rules – acting for more than one client

[67] Consistent with the consumer purposes the Act, lawyers' fundamental obligations include the requirement lawyers must protect their clients' interests. Rule 6 similarly requires that "[i]n acting for a client, a lawyer must, within the bounds of the law and [the rules], protect and promote the interests of the client to the exclusion of the interests of third parties".[16]

[68] For that reason, it behoves lawyers to "avoid any situation" in which their professional duties "owed to different clients conflict". To that end, r 6.1 prohibits a lawyer from "act[ing] for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients".[17]

[69] The threshold "a negligible risk", above which there is "a real risk of an actual conflict of interest" and the prohibition in r 6.1 applies, has been described as "no meaningful risk that the obligations owed to the parties would not be able to be discharged".[18]

[70] In determining whether or not a conflict of duty exists or is likely to arise for a lawyer in a particular situation, the distinction between contentious and non-contentious matters can provide a useful approach.[19]

[71] If in particular circumstances the lawyer concerned considers the prohibition in r 6.1 does not apply, r 6.1.1 permits the lawyer to "act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained". Informed consent must be given without influence, and independent from the other clients.[20]

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[16] The Act, ss 3(1) and 4(d).
[17] *Moody v Cox & Hyatt* [1917] 2 Ch 71 (EWCA) at 81.
[18] *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [27] and [36]. In this context, the word "negligible", which is not defined in either the Act or the Rules means, "unworthy of notice or regard; so small or insignificant as to be ignorable": *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003) Vol 2.
[19] *Ethics, Professional Responsibility and the Lawyer,* above n 9, at [7.2]. See *Sandy v Kahn*, and more recently *ZAA v YBC* LCRO 243/2013 (June 2017); generally, *Lawyers' Professional Responsibility*, above n 7, at [7.35], [7.95] and [7.115].
[20] Rule 1.2 – "informed consent means consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved"; *Sandy v Kahn*, above n 18, at [41] and [42].

[72] These rules still apply where different lawyers in a firm act for different parties in a matter or a transaction.[21] An "information barrier within a practice does not affect the application of, nor the obligation to comply with, r r 6.1 or 6.2".[22]

(c) Discussion/conclusion

[73] Because, as I have found, Mr RP and Mr ND did not act for Mrs HB concerning the possible sale of the property, the professional rules I have referred to that apply when a lawyer acts for more than one client on a matter were not brought into play.

[74] It is therefore not necessary concerning this issue that I consider whether Mr RP and Mr ND were providing legal services to the estate, but I do so with the next issue.

(3) Trustee-lawyer – issue (c)

[75] This issue concerns whether in reaching their decision to sell the property and invest the sale proceeds in a professionally managed fund, Mr RP and Mr ND, lawyers by profession, breached any professional standards or obligations, or contravened any professional rules or regulation.

(a) Lawyer-trustee

[76] Where a trustee, who by profession is a lawyer, makes a decision or acts in his or her capacity as a trustee, the question may arise whether the trustee was also acting for the trust in his or her professional capacity as a lawyer.

[77] The context for such enquiry could be, as in these circumstances, where a beneficiary such as Mr MB seeks to challenge the trustee's decision or complains about the trustee's conduct.

[78] Whether or not the trustee was also acting as a lawyer will determine whether the trustee is subject to the regulatory regime under the Act in respect of the trustee's conduct complained about.

(b) Unsatisfactory conduct, misconduct

[79] If a lawyer is found to have breached any professional standards or obligations, or contravened any professional rules, one of two findings can be made:

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[21] Rule 6.2 of the Rules.

[22] Rule 6.3 of the Rules; r 6.1.2 - a lawyer must cease acting for all clients if a conflict arises; r 6.1.3 - independent advice/informed consent is a precondition to a lawyer resuming to act for one of the clients.

(a) unsatisfactory conduct; or (b) misconduct for the more serious professional failings or shortcomings. [23]

[80] The High Court has drawn the distinction between "professional misconduct (not the statutory term)" on the one hand, and "personal misconduct" on the other. "All conduct must either be in the course of one or the other. There can be no gap or lacuna."[24]

[81] Whereas "professional" misconduct, "means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services …" (s 7(1)(a)), "personal" misconduct "includes conduct which is unconnected with regulated services …" (s 7(1)(b)(ii)).[25]

(c) Services connected/unconnected

[82] Lawyers' conduct held by the Courts to have been "connected" with the provision of regulated services include responding to a Standards Committee enquiry;[26] making allegations about the judiciary;[27] communications to colleagues and to the Legal Complaints Service;[28] and recovery of legal fees.[29]

[83] Nevertheless, a lawyer who is not providing regulated services may still be subject to a misconduct finding where the conduct although "unconnected" with the provision of regulated services "would justify a finding that the lawyer … is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer …".[30]

[84] While unsatisfactory conduct largely concerns conduct which occurs at a time when a lawyer is providing regulated services, unsatisfactory conduct may also arise

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[23] Section 12 of the Act defines unsatisfactory conduct); s 7 defines misconduct. Per ss 241 and 253 of the Act, a finding of misconduct can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, or by the High Court on appeal.
[24] Section 7(1)(a)(i) to (iv); s 7(1)(b)(ii); s 7(1)(b)(ii); *A v Canterbury Westland Standards Committee No.2 of the NZLS* [2015] NZHC 1896 at [57]; and *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [102].
[25] Section 6 of the Act provides the definition of "regulated services", which refers to "legal services" being legal work carried out by one person for another. "Legal work" includes (a) "reserved areas of work" - in connection with proceedings or anticipated proceedings, giving legal advice in other matters; (b) "advice in relation to any legal or equitable rights or obligations"; (c) preparing legal documents; (d) "mediation, conciliation, or arbitration services"; (e) "work incidental…" to the above.
[26] *Auckland Standards Committee No.1 v Hart* [2012] NZLCDT 20 at [44]–[45].
[27] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [109].
[28] *Hong v Legal Complaints Review Officer* [2016] NZHC 184 at [10]–[11].
[29] *A v Canterbury Westland Standards Committee No.2 of the NZLS* [2015] NZHC 1896 at [28]-[29].
[30] Section 7(1)(b)(ii).

where a lawyer is not providing regulated services but contravenes the Act, or any regulations or practice rules made under the Act.[31]

[85] A common thread to the related definitions of "regulated services" is the provision of legal advice to a client which "most often arises in connection with the provision of legal services."[32]

[86] It follows that the qualification in the definitions of unsatisfactory conduct in s 12(a), and s 12(b) that the lawyer's conduct must occur at a time when the lawyer is providing regulated services "must be construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs in connection with the practice of law". [33]

[87] In a practical sense, this means "it is necessary to consider objectively whether a reasonable person in the shoes of the client would consider that he [or she] was obtaining legal services."[34]

[88] Where a lawyer has a dual role, for example, acting in an estate administration where he or she is an executor/trustee, there is "a heavy onus … on [the lawyer concerned] to show that the conduct complained of did not have a connection with [his or her] status as a lawyer and the client could not reasonably have thought he was acting as a lawyer."[35]

[89] It can often be difficult to differentiate legal work from trustee work. A helpful point of differentiation referred to by the Court of Appeal is that it is for a lawyer to advise whether a proposal is lawful or not, but not to make a decision on the matter. In a particular case this necessarily requires an examination of the nature of the work carried out by the lawyer/trustee in each role.[36]

[90] In the context of an estate administration, the observation has been made that where the lawyer's services are (a) "of a type that it is usual" for a lawyer to provide, and (b) "provided in conjunction with legal work", then such services "are properly considered

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[31] Section 12(a), (b) and (d) - conduct which occurs at a time when a lawyer is providing regulated services; section 12(c) – contravention of the Act, or any regulations or practice rules made under the Act which may arise when the lawyer concerned is not providing regulated services.
[32] *IJ v QT* LCRO 94/2011 (January 2012) at [32].
[33] *Morpeth v Ramsey* LCRO 110/2009 (November 2009) at [20].
[34] At [27] citing *Longstaff v Birtles* [2002] 1 WLR 470 (EWCA) at 471.
[35] At [28].
[36] *Hansen v Young* [2004] 1 NZLR 37 (CA) at [33]–[36], referring to *Dubai Aluminium Company Limited v Salaam* [2003] 1 All ER 97 (HL) at [134]; the principle in *Hansen* is cited in *AW v ZK* LCRO 230/2012 (28 March 2014) at [39].

to be incidental to that work and also legal work". If so, the work of such lawyer/trustee will be regulated services and the lawyer/trustee subject to regulation under the Act.[37]

[91] Another approach to differentiating legal work from trustee work is "to consider the conduct as being undertaken by two separate persons, and to then determine whether the conduct in question could be considered to be conduct of a lawyer acting for the estate. If so, "then it can be considered that the lawyer in that instance is providing regulated services and therefore subject to the disciplinary regime".[38]

(d) Discussion

[92] From the information produced Mr RP and Mr ND were appointed by the retiring executors, who could not agree concerning the direction they wanted management of the estate to take, as trustees of the trusts pursuant to Mr GB's will.

[93] In his written communications to the beneficiaries, Mr RP referred to the steps Mr RP and Mr ND were taking and proposing to take in their role as trustees.

[94] In particular, Mr RP and Mr ND (a) made enquiries about engaging a property manager to manage the estate's two commercial properties; (b) managed the property's tenancies; and (c) reported to, met with, and considered the beneficiaries' views about estate management matters.

[95] They reviewed the estate's asset portfolio which included an assessment of whether retention of the property met the trustees' financial objectives for a professionally managed balanced investment portfolio. That assessment included the condition of the property and whether the estate had sufficient capital and income to cover the cost of necessary maintenance.

[96] In arriving at their decision to sell the property Mr RP and Mr ND first obtained the advice of a financial adviser. They recommended to the beneficiaries that should the property be sold then the sale proceeds be placed in a professionally management fund in respect of which they put forward the names of two fund managers for consideration.[39]

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[37] *Shrewsbury v Rothesay* LCRO 99/2009 (November 2009) at [31].
[38] *TE v Wellington Standards Committee 2* LCRO 100/2010, 92/2011, 153/2012 at [51].
[39] Email, Mr Mr RP to Mr MB and others (21 August 2020); emails Mr Mr RP to Mr MB (a) 27 August 2020, (b) 10 September 2020; Report, Mr RP and Mr ND, as trustees of the estate, to the estate beneficiaries (2019).

[97] They also liaised with Mrs HB, as co-owner of the property and her lawyer about a possible sale, and, having resolved to sell, together with Mrs HB instructed the law firm which had previously acted for her and Mr GB to act on the sale of the property.

[98] Those tasks, including in my view the exchange of views on the investment requirements of the trusts legislation, did not involve or concern the carrying out of legal work, and could have been performed by another professional experienced in dealing with such matters such as an accountant, a professional property manager, or a business person.[40]

[99] Although it might be contended the fact Mr RP's written communications with the beneficiaries were on his and Mr ND's legal firm's letterhead suggests Mr RP and Mr ND's singular role as trustees was less clear, the substance of those communications concerned management of the property and its place in the estate's investment portfolio.

Conclusion

[100] From my analysis of the information produced and applying the approach to differentiating legal work from trustee work referred to above, overall I consider Mr RP and Mr ND's role was confined to acting as trustees of the estate, not in the dual role of trustees and lawyer for the estate. No evidence has been produced, such as a letter of engagement, that they had been retained by the estate to provide legal services to the estate.

[101] It follows that in reaching and making their decision it was in best interests of the estate to sell the estate's interest in the property and invest the sale proceeds in a professionally managed fund, Mr RP and Mr ND were not providing legal services to, and therefore were not in a lawyer-client relationship with the estate.

[102] Mr MB has not identified any conduct by Mr RP and Mr ND, as trustees, unconnected to the provision of regulated services that breached or contravened any professional obligations or rules when as trustees they reached and made that decision.

[40] Section 6 of the Act: "legal work" defined, above n 26, in summary: (a) dispute resolution for a client; (b) legal advice; (c) preparation of documents that created legal or equitable rights or obligations, or the transfer of, or creation of a charge over property; or (d) any mediation, conciliation, or arbitration services.

(4) Trustees' "best interests" decision – issue (d)

(a) Overview

[103] Mr MB claims (a) Mr RP and Mr ND's decision to sell the property "without a better alternative investment" was not in the estate's best interests of the beneficiaries as required by trustee law, and (b) in making that decision they were conflicted. He asks Mr RP and Mr ND "prove" a proposed alternative investment "is better" than the property for the estate "in both income and asset value appreciation".

[104] In their response, Mr RP and Mr ND say contrary to Mr MB's view, Mrs HB and the other beneficiaries wanted to sell the property, and Mr GB's will did not constrain [Mr RP and Mr ND] from doing so if they as trustees considered that "was the right thing to do".

(b) Sale, and investment decision - best interests

[105] The first limb of this aspect of Mr MB's complaint concerns whether Mr RP and Mr ND's decision to sell the property and invest the sale proceeds in a professionally managed balanced fund was in the best interests of the estate.

(i) Parties' positions

- Mr MB

[106] Mr MB takes issue with the Committee's reasons for its decision Mr RP and Mr ND were not conflicted, namely, Mrs HB' interests (a) as an owner of a half share in the property, and (b) as the life tenant and a beneficiary of the other half share held by Mr RP and Mr ND on trust, were aligned.

[107] He regards with "grave concern" the recommendation in Mr RP's 30 October 2020 letter to Mrs HB of "bringing this trust to an end" if there was "a realistic possibility" of doing so which in his view shows Mr RP and Mr ND "ha[d] no interest" in abiding by the trusts created by Mr GB's will, and "lack[ed]…integrity".[41]

[108] He says Mr RP and Mr ND had "yet to demonstrate or provide any evidence" that the sale of the property was in the best interests of the beneficiaries, and it was "apparent" to him the decision conflicted with their duties as trustees.

[41] Mr MB has not produced this letter.

[109] In his view that position is supported by the financial adviser's 10 August 2017 "independent review and expert opinion" obtained by Mr RP and Mr ND which he says "demonstrated" the alternative investment options "fell woefully short in both income and capital appreciation" compared with "the profitable, unencumbered" property held by Mr GB and Mrs HB for many years.

[110] Mr MB says no evidence has been produced (a) that the "alternative investment" proposed by Mr RP and Mr ND is "better in income and/or capital appreciation or is a more robust investment than [City] commercial property over the long term of the [estate]", or (b) "demonstrating the alternative investment benefits" for "either of the income and/or the capital beneficiaries".

[111] In Mr MB's view, with the property "a major asset" of the estate at that time, Mr RP and Mr ND ought to have consulted "all 17 beneficiaries, particularly the younger generation who will be most prejudiced by the capital loss" of the financial adviser's recommendations.

[112] He explains because Mrs HB could have sold her half share in the property "without consulting" the estate, Mr RP and Mr ND, who had no interest in Mrs HB's half share, should "not have stated" that the sale of the whole property would "obtain the best price" for Mrs HB's half share.

[113] He says Mrs HB had not obtained a sale order, and her lawyer's advice, known to Mr RP and Mr ND, was that taking into account Mrs HB's "other income and assets" an application on the grounds of hardship "would likely fail".

[114] He explains because the property complied with the building code including earthquake standards, and Mr GB's will provided for a retention fund there was "no compelling reason" to sell the property on the grounds of insufficient funds for "repairs and maintenance" in respect of which he says Mr RP and Mr ND were neglectful.

[115] He asks what enquiries they made to engage a property manager. He says he knows of "many similar properties in the area" which are managed but Mr RP and Mr ND did not contact the manager he recommended.

[116] He says "over a number of years" he had "raised in writing" with Mr RP and Mr ND his concerns about selling the property. He said in (a) their 21 August 2020 letter to the beneficiaries they put forward "the same proposal", and (b) their 10 September 2020 to him they "agree[d] to disagree", but did not address his concerns he had again raised.

[117] He acknowledges (a) the Trustee Act 1956 required an investment "must be in the best interests" of the trust, but says that Act was "not prescriptive" as to the type of investment; (b) the Trusts Act 2019 refers to the "desirability of diversity" yet requires the "need to maintain the real value of capital or income of the trust", and "potential for capital appreciation"; and (c) the estate has "other property", and "an investment account".[42]

[118] He explains, in addition to the financial adviser's review, Mr RP and Mr ND's December 2019 report and 21 August 2020 letter to the family members, there was "a significant number of other correspondence" in support of the view that the legislative requirement of "diversified investment" does not mean the trustees must sell a "good investment", such as the property, to be replaced by a "pure investment option".[43]

[119] He said he had also "identified in some financial detail", since "proven correct", the "risks, poor returns and capital value destruction" of the investment options in the financial adviser's review.

[120] Referring to Mr RP and Mr ND's "earlier 2017 attempt to force" the sale of the property he said "the advice" at that time was (a) the property "was validated as the best investment" for the estate; (b) Mrs HB who owned the other half share of the property, "could not force" the sale; (c) any argument by Mrs HB the sale was required on "hardship grounds" would "likely fail due to the [estate's] significant other assets"; and (d) "the value" of the property is "determined by the market", not the owners, or either of them, who wish to sell the property.[44]

- Mr RP and Mr ND

[121] Mr RP and Mr ND explain that as trustees of Mr GB's will they had a duty to act "in the best interests" of all the beneficiaries whose views they took into account in reaching the decision "the property should be sold and the proceeds invested in a [manner] more in keeping with the prudent person requirements" of the Trustee Act.

[122] As noted above, Mr RP and Mr ND explain Mrs HB and the other beneficiaries wanted to sell the property, and Mr GB's will did not constrain [Mr RP and Mr ND] from doing so if they, as trustees, considered that was the right decision.

[123] They explain factors that persuaded them to sell the estate's interest in the property included the cost of maintenance, a number of unsuccessful attempts to engage

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[42] Section 13E of the Trustee Act 1956; from 30 January 2021, s 59 of the Trusts Act 2019.
[43] In their 21 August 2020 to the family members, Mr RP and Mr ND said they and Mrs HB had requested appraisals of the property from two real estate agents.
[44] Mr MB does not say who provided "the advice".

a property manager, the family's views, and Mrs HB's stated intention to apply to the Court for a sale order if the family did not agree with her desire to sell the property.

[124] Concerning their trustee duties, they explain they were particularly mindful of the duties (a) "to diversify" the estate's investments which was not possible if they retained the property which comprised the "entire trust fund invested in commercial real estate in one particular suburb", and (b) "to be even-handed in their treatment of beneficiaries".[45]

[125] They say due to the "uncertainty" of the global financial scene at that time and therefore the "performance of any one investment class", including "commercial property, it could not be said "with certainty" that the property's value would increase whereas a balanced portfolio "reduces the risk of capital loss due to a downturn in one particular asset class".

[126] Mr RP and Mr ND explain the lawyer acting for Mrs HB, who owned the other half share in the property, "made it very clear" Mrs HB wanted the property sold, and if necessary "would consider" applying to the Court for sale order for which, in their view, she could have made "a very strong claim".

[127] They also explain the estate "did not have surplus funds", the rental income "was not sufficient" to pay for the "considerable work" required on the property, and the "banks were unlikely to lend" to pay for work to comply with the property's earthquake rating if they "were minded to incur the risk" of borrowing.

[128] Finally, they say they were "unable to find" a property manager needed for "regular supervision" of, and "work" required on the property, but even so because those costs could not be charged to capital the income from the property would have been reduced.

(ii) Discussion/conclusion

[129] This issue lies at the heart of Mr MB's complaint, namely, his dissatisfaction with Mr RP and Mr ND's decision after obtaining advice from financial advisers, and consulting with Mrs HB and the other beneficiaries it was in the best interests of the

[45] Mr RP and Mr ND say (a) "to consider both the interests of the income beneficiary or beneficiaries from time to time, and the interest of the ultimate capital beneficiaries", and retaining the property which "produced quite low income" solely for the purpose of "capital gain" for the "future benefit" of the capital beneficiaries was "not in keeping" with their trustees' obligations; and (b) not to "sacrifice income" required for Mrs HB, the life tenant, in order to achieve maximum capital growth" for the eventual capital beneficiaries".

estate to sell the property and invest the sale proceeds in a professionally managed balanced fund.

[130] As I have concluded, that decision was reached and made by Mr RP and Mr ND in their capacity solely as trustees of the estate, and not as lawyers acting for the estate. For that reason, I agree with the Committee, the remedy available to any beneficiary such as Mr MB dissatisfied with the trustees' decision, is to apply to the Court for a review of that decision.

(c) Conflict of interest

[131] Mr MB says Mr RP and Mr ND's decision to sell the property conflicted with "the intent" of Mr GB's will, and "the best interests of the estate and the 17 beneficiaries".

[132] As I understand Mr MB's concern, he says Mr RP and Mr ND's decision, as trustees, to sell the property and invest the sale proceeds was in conflict with the legislative requirements of them as trustees at that time.

[133] That being the case, Mr MB's claim Mr RP and Mr ND were conflicted when they made their decision would equally form part of any enquiry made by the Court acting on an application made by a beneficiary to review that decision.

[134] For completeness, because I have concluded Mr RP and Mr ND, when they made their decision, were acting solely as trustees and not as lawyers for the estate, no issue arises that Mr RP and Mr ND did not act independently as required by lawyers' fundamental obligations, and the Rules.[46]

Decision

[135] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee to take no further action on Mr MB's complaint is:

(a) Confirmed as to the finding, pursuant to s 138(2) of the Act, to take no further action concerning Mr MB's allegation that Mr RP and Mr ND, as trustees, were conflicted when they resolved to sell the estate's one half share in the property, but modified by my finding that Mr RP and Mr ND did not, in their capacity as lawyers, act for Mrs HB or the estate and therefore those of the Rules which concern a lawyer acting for more than

[46] Section 4(c) of the Act, rr 5 to 5.4 of the Rules.

one client, and require a lawyer when acting for a client to be independent, did not apply; and

(b) Confirmed as to the finding, pursuant to s 138(1)(f) of the Act, to take no further action concerning Mr MB's allegation Mr RP and Mr ND, as trustees, when they resolved to sell the property did not do so in the best interests of the estate, on the grounds there is in all the circumstances an adequate remedy for Mr MB to pursue in the High Court.

[136] [Directions regarding publication redacted]

DATED this 14th day of October 2022

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B A Galloway
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 MB as the Applicant
Mr RP and Mr ND as the Respondents
Ms AC as a Related Person
[Area] Standards Committee X
New Zealand Law Society