	LCRO 98/2013
CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [XX] Standards Committee [X]
BETWEEN	**CD AND EF** Applicants
AND	**GH** Respondent

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

DECISION

Introduction

[1] Ms [CD] and Mr [EF] have applied for a review of a decision by the [XX] Standards Committee [X] dated 22 March 2013 in which the Committee made a series of determinations of unsatisfactory conduct in relation to Mr [GH]'s conduct, and ordered him to pay a fine of $250 and costs to the New Zealand Law Society (NZLS). The Committee did not publish Mr [GH]'s identity, and did not order him to pay compensation to Ms [CD] or Mr [EF]'s firm, [EF YX].

[2] The review application centres on the orders made, and says the outcome is unfair to Ms [CD] and [EF YX]. An apology is sought to Ms [CD] and [EF YX], and compensation is sought to offset the legal fees Mr [EF] charged to Ms [CD], and for stress and anguish she says Mr [GH]'s conduct caused her.

Background

[3] Mr [GH] was an associate of [JK] Limited (the firm), which acted for Ms and Mr [CD] jointly (the [CDs]) when they sold their house in late 2011. Mr [GH]'s obligation was to act impartially for both Ms and Mr [CD].

[4] Before the house was sold, Ms and Mr [CD] had been involved in fairly long-running and seemingly divisive disputes over their respective claims to relationship and separate property. As a consequence, the [CDs] also each had separate representation. Mr [EF] acted for Ms [CD] and counsel was instructed. Another firm instructed Ms [MN] as counsel for Mr [CD].

[5] Mr [GH]'s instructions from the [CDs] were to receive the deposit, settle the sale of the house, receive settlement funds into the firm's trust account and hold those to the [CD]'s joint direction.

[6] Ms [CD], through Mr [EF], instructed the firm early on, and again on several occasions, not to make payments from the trust account without her express authority. Mr [EF]'s email of 2 December 2011 is addressed to [QR], whose firm had recently been taken over by the firm, saying:

> Dear [QR],
>
> We understand that you have instructions to act for Mr and Ms [CD] in this transaction and that they were referred to you by [TT] of [ABC] Real Estate.
>
> Please note that we act for Ms [CD] and that she separated from Mr [CD] several months ago.
>
> Please note and confirm to us that the proceeds of sale, including deposit money will not be disbursed except with Ms [CD]'s written consent.
>
> You should communicate with us on behalf of our client.
>
> In the meantime may we have a copy of the signed agreement …

[7] The firm's trust account ledger for the [CDs] records receipts of $50,118.75 in December 2011 and $1,314,005.93 on 30 March 2012. Several payments were made from money held for the [CDs]. Ms [CD] protests that she did not authorise three in particular of those payments. Mr [EF] says the unauthorised payments were significant in the context of the relationship property proceedings between Ms and Mr [CD]. The three payments at issue were:

(a) January 2012 $6,800 to Mr [CD];

(b) 30 March 2012:

(1) $3,054.09 to Mr [CD]; and

(2) $1,409.53 to Telecom.

(the payments)

[8] Mr [GH] acknowledges he made payments knowing he did not have instructions from Ms [CD] to do so.

[9] The Committee made determinations that Mr [GH] had contravened s 110 of the Lawyers and Conveyancers Act 2006 (the Act), Lawyers and Conveyancers Act (Trust Account) Regulations 2008 reg12(6) and rules 3, 10, 10.3 and 10.3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which say:

Section 110

110 Obligation to pay money received into trust account at bank

(1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—

(a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—

(i) the practitioner; or

(ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and

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

(2) …

(3) For the purposes of this section, a practitioner or an incorporated firm is deemed to have received money belonging to another person if—

(a) that person, or a bank or other agency acting for, or on behalf of, that person, deposits funds by means of a telegraphic or electronic transfer of funds into the bank account of—

(i) the practitioner or incorporated firm; or

(ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; or

(b) the practitioner or incorporated firm takes control of money belonging to that person.

(4) A person commits an offence against this Act and is liable on conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1) or subsection (2).

Regulation 12(6)

> **12 Receipt and payment of trust money**
>
> …
>
> (6) A practice may make transfers or payments from a client's trust money only if—
>
> (a) the client's ledger account has sufficient funds and they are available for that purpose; and
>
> (b) the practice obtains the client's instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it; and
>
> (c) payments to a third party are made in a form that permits the crediting of the money only to the account of the intended payee; and
>
> (d) transfers to another client are by way of trust journal entry.

Rule 3

> 3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

Rule 10

> 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

Rule 10.3

> 10.3 A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.

Rule 10.3.2

> 10.3.2 A lawyer who receives funds on terms requiring the lawyer to hold the funds in a trust account as a stakeholder must adhere strictly to those terms and disburse the funds only in accordance with them.

Review Issue

[10] As mentioned above, the review application centres on the orders made, seeks an apology to Ms [CD] and [EF XY], and compensation to offset Mr [EF]'s legal costs, and for stress and anguish caused to Ms [CD] by Mr [GH]'s conduct.

Nature and Scope of Review

[11] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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

[12] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[13] 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:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Discussion

[14] Orders requiring Mr [GH] to apologise and pay compensation are available under s 156(1)(c) and (d) of the Act. This Office has the power to order a lawyer to pay compensation of up to $25,000.[3] Orders have been made for conduct causing anxiety

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[3] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

and stress.[4] One such case was where a lawyer did not pay money in accordance with a written authority he had prepared for his clients to sign, which resulted in a significant amount of the clients' money being lost to them somewhere in the international banking system for a period of days.[5] The lawyer was ordered to pay compensation of $2,000 for anxiety and distress in that matter.

Undertaking and conflict of interest

[15] Mr [EF] initially said Mr [GH] undertook to him to retain the funds, and breached that undertaking. The emphasis shifted after Mr [EF] received Mr [GH]'s response to an assertion that regardless of whether or not Mr [GH] had given and breached an undertaking to him, he had received money on behalf of Ms [CD] and not held it to her direction.

[16] Mr [GH] says he did not provide an undertaking. He says he had worked mostly in the property law field for over 11 years, had given undertakings on a daily and weekly basis and knows their importance. He accepts, however, that he paid money out without a joint instruction from the [CDs].

[17] The Committee considered Mr [GH]'s correspondence with Mr [EF], and in particular his emails to Mr [EF] of 7, 14 and 30 March 2012 and concluded Mr [GH] had given an undertaking to retain settlement proceeds pending receipt of joint instructions. On that basis the Committee concluded Mr [GH] had contravened rule 10.3.2 by receiving funds on terms that required him to hold them in a trust account as stakeholder then failing to adhere strictly to the terms and disburse the funds only in accordance with them, having given a written or oral undertaking to Mr [EF] in the course of practice. The Committee mentioned that if it was wrong about the undertaking, Mr [GH] had at "least made a strong commitment" to the same effect.

[18] An undertaking has the following features:[6]

(a) The undertaking must contain a promise.

(b) The promise's content must be clear.

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[4] *RI v Hart* LCRO 158/2011; *TC & TD v NV* LCRO 255/2011.
[5] *EB v NI* LCRO 269/2013.
[6] *Gill v Wainui Timber Co Limited* [1992] 1 NZLR (CA) 1, 4; *Commissioner of Inland Revenue v Bhanabhai* [2006] 1 NZLR 797 (HC) at [66].

(c) The undertaking must have an express or implied time for performance.

(d) A solicitor must give the undertaking personally in his or her capacity as a solicitor.

[19] Referring to cases relating to undertakings that meet the relevant criteria, the authors of *Ethics, Professional Responsibility and the Lawyer* say:[7]

> Such undertakings should be honoured according to their spirit and should not be construed or drafted in a technical manner with a view to avoiding their intent. The undertaking is enforceable whether given orally or in writing, although for obvious reasons, it is advisable to record such things in writing. Firms will be held liable for the undertakings of any of its partners or staff.
>
> The reasons for [rule 10.3], which requires the strict adherence to undertakings, are pragmatic. Undertakings are common throughout legal practice, and the continued efficient working of legal practice requires that such undertakings be honoured, regardless of other supervening circumstances. The additional reason for the strict application of the rule is to maintain the legal profession's integrity. Members of the profession must be seen as wholly trustworthy in that, once they have undertaken a particular course of action, they can be depended on to act accordingly. That the duty to honour undertakings is strict means even when a lawyer has erred or made an oversight, circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promises made.

And:[8]

> … duties to honour undertakings and promises, … make the practice of law workable for practitioners.

And under the heading "fiduciary breaches":[9]

> Some fiduciary breaches will amount to dishonest conduct (such as misappropriation or misuse of client funds) and are clear instances of misconduct of the most serious kind, for which striking from the roll is the inevitable sanction. Arguments which seek to mitigate the misconduct by pointing out that no client money was actually lost, all the circumstances in which the conduct occurred were exceptional, are rarely entertained. That client funds were meddled with without authority shows the practitioner is not a fit person to practise law and should be struck off …
>
> However, numerous less serious breaches of the fiduciary duty owed to the client may amount to misconduct. Some fiduciary breaches in relation to the handling of money may be due to oversight or poor financial management, such as failing to deposit money or overdrawing a trust account by drawing on uncleared funds. Such unintentional breaches may amount to misconduct, especially if they are repeated or serious. If they are intentional or reckless, they will be misconduct by virtue of the statutory definition. However, it might

[7] Duncan Webb, Kathryn Dalziel and Kerry Cook, *Ethics, Professional Responsibility and the Lawyer* (3rd ed, Lexis Nexis, Wellington, 2016) at [15.9.1].
[8] At [5.1].
[9] At [4.3.6].

> be noted that where the breach is minor or unintentional, it is more likely to be unsatisfactory conduct.
>
> Other obvious fiduciary breaches which would amount to misconduct are continuing to act in the face of a conflict of interest …

Conflict of Interest

[20] As to conflict of interest, there was, and continued to be no conflict between Ms and Mr [CD] with regard to the sale of the property. They had both entered into the agreement for sale, and, regardless of who acted for them, they were obliged to settle pursuant to that agreement.

[21] The firm's letter of engagement was sent out to the [CDs] on 5 December 2011. A file was created, and a client ledger opened in the trust account in the joint names of Ms and Mr [CD].

[22] The New Zealand Law Society Inspectorate is responsible for ensuring that legal firms comply with the Trust Account Regulations. The question of whether Mr [GH] should have opened separate ledgers for each client has been answered in the negative elsewhere in the course of a review by this Office.[10] Provision is made in the regulations for joint instructions to be given, and joint client ledgers to be treated as a single client's ledger.[11] There is good reason to take the view that Mr [GH] opening a single trust account ledger in the joint names of the [CD]'s was a practice that is correct and acceptable to the Inspectorate even though the [CDs] were at odds over their separate entitlements.

Undertaking

[23] The deposit was paid into the trust account on 20 December. Before that occurred, Ms [CD]'s reservations about doing anything jointly with Mr [CD], including instructing Mr [GH]'s firm, translated into a series of specific requirements, and a request by Mr [EF] for a full copy of Mr [GH]'s letter of engagement with a schedule of the firm's fees, before Ms [CD] would formally confirm her instructions.

[24] Mr [GH]'s letter of engagement included reference to payments that the firm could make by deduction from the trust account, including Mr [GH]'s fees and any disbursements/expenses payable to third parties, and administration fees.

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[10] *AJ v ZQ* LCRO 134 /2010, at [39] to [42].
[11] Lawyers and Conveyancers Act (Trust Account) Regulations 2008, regs 12(1) and (2).

[25] Ms [CD]'s instructions included a direction that no funds from the sale were to be disbursed unless and until Ms [CD] specifically agreed, in writing, via Mr [EF]'s firm. The instruction to seek specific directions extended to the real estate agent's invoice, and Mr [GH]'s costs. Mr [EF] explained on 2 December that none of the proceeds of sale, including the deposit, were to be disbursed "except with Ms [CD]'s written consent".

[26] The agent had deducted his commission before the money was received into the firm's trust account, so that was never an issue for Mr [GH].

[27] Of the balance of the deposit he held in the firm's trust account, Mr [GH] paid $6,800 to Mr [CD] in January. That payment was made before Mr [GH] sent any of the emails in March 2012 referred to by the Committee as constituting an undertaking, but after Mr [EF] had sent his emails, beginning on 2 December 2011 to Mr [GH]'s firm setting out Ms [CD]'s instructions and the conditions she sought to impose on the joint retainer with the firm. Although some of those emails send mixed messages, it is completely clear that if the firm was jointly instructed, Mr [GH] was to receive money in, and he was not authorised or directed by Ms [CD] to pay any of that money out unless he had a signed authority to do so from her via Mr [EF]'s firm.

[28] The evidence indicates that despite Ms [CD]'s initial reservations, the [CDs] jointly instructed Mr [GH]'s firm. Mr [GH] says his firm's terms of engagement were not subject to the modifications proposed unilaterally by Mr [EF] in his email of 16 December. While that may be so, it is equally clear that Mr [GH] needed joint authority before he could pay any money out.

[29] As he was jointly instructed, the payment of $6,800 Mr [GH] made in January 2012 to Mr [CD] cannot have been a disbursement/expense payable to a third party. It was not an administration fee, nor Mr [GH]'s firm's fees either, so it does not appear to be a deduction of the type envisaged by the terms of engagement.

[30] Mr [GH] told Mr [EF] in advance of making the payment that Mr [CD] had asked him for the money, and had been greeted with silence. He says he took silence to be acquiescence to him making the payment. That cannot be correct, given Ms [CD]'s clear instructions, via Mr [EF], not to make payments from the deposit without her express direction.

[31] Later Mr [EF] told Mr [GH] that Ms [CD] disputed her liability to pay half of the loan secured by the ASB's mortgage over the house. That meant when settlement time came around, Mr [GH] would need her specific instructions before he could repay debt to ANZ to obtain the bank's consent to discharge the mortgage. He would otherwise be unable to settle the transaction. It was apparent from that email that Ms [CD] intended to withhold consent to repayment of the ASB loan, which in turn would create an impasse as between the parties to the agreement for sale and purchase.

[32] It is not clear that the second or third payments Mr [GH] made from the joint funds at about the time of settlement, the payments of $3,054.09 to Mr [CD] for advertising costs, and $1,409.53 to Telecom, were payments that fell within the category of disbursements/expenses Mr [GH] would be authorised to pay from funds held for the [CD]'s jointly pursuant to the terms set out in the letter of engagement. However, Mr [GH] says he genuinely believed the parties had agreed that the Telecom account and real estate marketing payments should be made from joint funds.

[33] It appears that Ms [CD] may have conceded in negotiations, presumably without prejudice, that those two payments might come to be made from joint funds. However, there is no evidence of any interim or final agreement being reached. I therefore take it that if that concession had been made, it was withdrawn. Certainly when Ms [CD] found out that Mr [GH] had paid the Telecom bill, she adopted the position that she had not authorised him to do so because she contended she disputed liability for it.

[34] Mr [EF]'s comment that any funds paid into Mr [GH]'s firm's trust account were to be held there intact, on interest-bearing deposit, until approved for disbursement, should have been largely superfluous. Mr [GH] was professionally obliged by the Trust Account Regulations to take those steps in relation to the deposit until he received the [CD]s' joint instructions. The only question for Mr [GH] was when joint instructions might arrive. In the meantime it was not open to Mr [GH] to assume that he was authorised to make any payments from the [CD]s' funds. Whether or not he had given an undertaking, he should have appreciated the extent of the constraints upon him particularly given Mr [EF]'s early correspondence. The evidence supports the conclusion that Mr [GH] was not jointly directed to make the payments.

[35] It appears the [CDs] resolved the impasse over liability under the mortgage to some extent, because when settlement came around on 30 March 2012, Mr [GH] sent an email to Mr [EF] and Ms [MN] on 30 March 2012 in the following terms:

> The settlement of [123 TUV] Road has happened without fuss today. The funds will be kept here on interest bearing terms until agreement is reached for disbursement (interim or final), or until a Court orders otherwise.

[36] Mr [GH] does not say in that email what "the funds" are. His statement of 7 May 2012 refers to a commission statement which he had sent to Ms [CD] on 23 December 2011, and a settlement statement on the sale being enclosed. I take it the latter was prepared around the time of settlement on 30 March 2012.

[37] On 24 April 2012 Mr [EF] requested a "statement of account with the ASB repayment statement and the [ABC] commission statement", which Mr [GH] sent to him on 30 April (in the case of the commission statement, for the second time). Mr [EF] then requested a "statement of account" showing "funds in and out and still held in interest-bearing deposit". Mr [GH] said he would "drag it out and forward it". It is not clear whether he had previously sent copies to Mr and Ms [CD].

[38] However, if Ms [CD] had received a copy, it appears she had not passed it on to Mr [EF], because on 3 May he followed up on his request of 24 April. Mr [GH] then provided a "trust statement" dated 7 May. That statement records the three payments Mr [EF] says were unauthorised. Mr [GH] sent that to Mr [EF] on 8 May. On 18 May Mr [EF] requested a copy of Mr [GH]'s trust account ledger printout. Mr [GH] provided that on 21 May.

[39] Correspondence between Mr [EF] and Ms [MN] in mid-May 2012 records skirmishes between the [CDs] over the money held in Mr [GH]'s firm's trust account. In his letter to Ms [MN] on 21 December 2011, Mr [EF] had referred to Mr [CD]'s behaviour and how that did little to "assist his prospects of an agreement for an early release of any money from the sale of the house". It is apparent from that email, and others sent by Mr [EF], that the deposit held by Mr [GH] in his firm's trust account was being relied upon by both parties as leverage in the relationship property negotiations. That is common enough in the circumstances.

[40] However, it was not part of Mr [GH]'s role to subvert either party's position in those negotiations. He says he did not intend to prejudice the position of either party. However, having received the joint funds, his job was to preserve the status quo, comply with his reporting obligations under the Trust Account Regulations, and await developments.

[41] While there is no rule, in similar circumstances joint instructions often arrive in the form of an interim or final relationship property agreement signed by both parties. If

Mr [GH] was at all uncertain, before paying money out, he could have requested a written joint instruction without having to approach Mr or Ms [CD] directly. The alternative for Mr [GH] was to await orders of the Court before making any payment out from the [CD]s' joint account.

[42] Pending receipt of joint instructions or court orders, Mr [GH] could not act on either of the [CD]s' entreaties for money. He could, quite justifiably, have told Ms and Mr [CD] he simply could not help,[12] and directed them to address their concerns to their independent lawyers. Paying money out without joint instructions, for whatever reason, upset the status quo and ran the risk s 110 of the Act and Trust Account Regulation 12(6) would be contravened.

[43] Section 110(1)(b) of the Act applies to any money held in a trust account. The money held in the firm's trust account was held to the [CD]s' joint direction. None of that could be paid out without both of the [CDs] having directed payment. Whether or not Mr [GH] gave an undertaking, he could not do what he did without contravening the Act, regulations and rules, and preferring one party's interests over the other's.

[44] Although Mr [GH] denied having given an undertaking, breaching the Act, regulations or rules, he does not challenge the Committee's findings of unsatisfactory conduct that arise from his operation of the firm's trust account. Given the facts he admits, it would be difficult for him to argue he had not been partisan or had exercised his professional judgement solely for the benefit of the [CDs] jointly (rather than individually, at all times). As a result, the relationship of confidence and trust between him and the [CDs] jointly was abused, albeit (understandably) Ms [CD] appears to be the only one of the two who has laid a complaint against Mr [GH].

[45] Mr [GH] mentions having discussed the situation with his employer. However, his conduct speaks for itself. Given the apparent contraventions of s 110 of the Act and reg 12(6), his conduct could fall within the definitions of unsatisfactory conduct or misconduct under the Act. It is similar in a number of respects to the conduct considered by the Tribunal in the recent decision of *Auckland Standards Committee 4 v Thomas*,[13] although that decision was not available to the Committee that made the decision under review in March 2013.

Auckland Standards Committee 4 v Thomas

[12] Particularly given the obligations imposed by rule 10.2.

[13] *Auckland Standards Committee 4 v Thomas* [2016] NZLCDT 5.

[46] Mr Thomas admitted a single charge of misconduct for paying funds out of his firm's trust account without instructions from both trustees of a family trust, knowing that one of the trustees did not consent. Mr Thomas acknowledged his wrongdoing, and accepted responsibility for it. Mr Thomas considered the non-consenting trustee was in flagrant breach of his duties as a trustee, and acted for personal gain in respect of relationship property claims between the parties. However, the proper course for the trust in that case was to seek orders for the trustees' removal from the High Court. Instead Mr Thomas took matters into his own hands and completed the trust's purchase of a house by paying the trust's funds out of his trust account without the co-trustee's direction.

[47] In considering penalty, the starting point for the Tribunal was a period of suspension for six to eight weeks. However, by a fine margin, suspension was not ordered for a number of reasons. The event was one of a kind, and the conduct was not dishonest or for personal gain. There was no detriment to the parties (although the non-consenting party argued loss of bargaining power, the Tribunal did not deal with that because it was a contentious and speculative claim). Mr Thomas accepted and acknowledged his guilt and that publication was appropriate. Mr Thomas' long and otherwise unblemished career (a single unrelated adverse conduct finding was not relevant) meant there was no need for public protection, public confidence could be maintained and deterrence achieved to the extent required without the imposition of a suspension.

[48] The Tribunal formally censured Mr Thomas, ordered him to pay costs to NZLS and the Tribunal and to pay compensation to the non-consenting party. The compensation order was not for the loss of bargaining power, but for the non-consenting party's legal fees of $2,898.20 after becoming aware the funds had been released without authority.

Unsatisfactory Conduct or Misconduct

[49] This Office has no jurisdiction over misconduct, and Mr [EF] does not press for a determination of misconduct: it is the consequential orders that are the focus of the review application. Given the finding of misconduct in *Thomas*, and that the role of this Office on review involves the formation of a second opinion, I have considered whether Mr [GH]'s conduct should be considered by the Tribunal.

[50] The most unsettling aspect of Mr [GH]'s response to being confronted with his conduct by his employer is his response:[14]

> Mr [GH] feels he had a duty to Mr [CD] as a client to see his son could be fed; other bills paid; and his financial position not jeopardised particularly over the Christmas/New Year period. He tells [his principal] he would have done the same thing for Mrs [CD], had it been necessary.

[51] That early response is telling. It shows that while misconceived, Mr [GH]'s conduct was driven by a desire to deal fairly with both parties, each of whom had made separate requests for payments from the money held in Mr [GH]'s trust account. However, without a joint instruction, fair or not, he could not make a payment. He made a conscious choice to make the payments, which, according to the authors of *Ethics, Professional Responsibility and the Lawyer*, puts him at risk of his conduct falling within the statutory definition of misconduct.

[52] Although professional obligations were owed to the [CDs] jointly, on the basis of *Thomas*, Mr [GH]'s conduct is not conduct that is likely to give rise to an order for suspension. There is no evidence of this being part of a pattern of conduct by Mr [GH]. He has acknowledged his wrongdoing, accepted responsibility for it, and was motivated by a sense that it was for him to decide what was right between the [CDs], rather than by personal gain or dishonesty. However, there really is no excuse for it.

[53] While Mr [GH] persuaded himself he owed moral obligations to Mr [CD] and his children, moral obligations should not to be conflated with role differentiated professional obligations. The following extract from *Ethics, Professional Responsibility and the Lawyer* helps to explain why:[15]

> Lawyers are part of the system of justice, not only as advocates before the Courts, but more widely as expert intermediaries between the incredibly complex body of law and citizens. As intermediaries their role is not to act as private citizens promoting their own views of the proper ordering of society or distribution of rights across citizens; rather it is to act as the client's agent in his or her legal dealings.
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> Because of this institutional function, rules which bind lawyers and make their actions predictable are necessary. By such rules the uncertainty that would flow if a lawyer were to approach each problem from his or her own view of the appropriate approach is circumvented … The client does not need to know the lawyer's personal attitudes and beliefs but can rely on a public code of behaviour that is consistent across all lawyers.
>
> … Lawyers … are frequently permitted, and occasionally required, to act in a manner that contradicts the normal expectations of ethical conduct ... The

[14] Letter [JK] to [EF] (17 May 2012), at [15].
[15] At [2.4].

> professional rules of lawyers demand they act in a way which in normal life would be considered wrong … The role of a lawyer then is strongly differentiated in the sense that there is a strong divide between the conduct expected of them as lawyers and the conduct expected of them as ordinary citizens.

[54] That said, there is no evidence that suggests the public needs to be protected against Mr [GH]. Public confidence can be maintained and deterrence achieved to the extent required without the imposition of a suspension, and although Mr [GH] did not oppose publication of his name,[16] publication is not necessary or desirable to protect the public interest.

[55] The evidence indicates it was an honest but misplaced error, and on balance, not conduct that must be addressed by the Tribunal. This review relates to matters this Office can properly determine. In the sense that it involves other peoples' money, I would characterise Mr [GH]'s conduct as reasonably serious unsatisfactory conduct.

Compensation

[56] Mr [GH] was professionally obliged to the [CDs] jointly to hold their joint funds to their joint instruction until they had resolved who should get what. That obligation was part of the duty of care he owed to them as their lawyer. He breached that duty. The most difficult question is whether that breach caused loss. Mr [EF] says it did, but acknowledges that quantifying that loss is problematic largely because those attendances are entangled with other attendances on Ms [CD]. Mr [GH] resists the suggestion that Ms [CD] has sustained losses attributable to his conduct. He says she came out ahead of Mr [CD] overall.

[57] As to actual detriment to Ms [CD], the assertion is made that her negotiating position was substantially prejudiced, and her legal costs were substantially increased, by the unauthorised release of funds to Mr [CD]. Mr [EF]'s letter of 5 November says he considers:

> … that Ms [CD] has incurred legal costs directly relating to her complaint in the sum of at least $5,451 plus GST ($6,268.65) for time and attendances of this firm. These costs are incorporated in this firm's fee invoices relating to her separation from her husband and the division of their property and associated matters. However, I think this is a reasonable allocation of her legal costs to the complaint as identified form this firm's time and attendance records.

[58] Mr [EF] also says that counsel's fees of $12,420 and his firm's fees of $5,632.70 (including GST) in relation to the Court proceedings are Mr [GH]'s

[16] Letter [GH] to NZLS (12 November 2012).

responsibility. Mr [EF] seeks a total of $24,321.35 from Mr [GH] to compensate Ms [CD] for her costs.

Causation

[59] The most obvious way to address the question of causation is whether, but for Mr [GH]'s conduct in making payments in January and March, Ms [CD] would have had to pay Mr [EF] as much for the legal services he provided to her.

[60] Mr [EF]'s argument is based on the fact that Ms [MN] commenced proceedings on Mr [CD]'s instructions shortly after Mr [GH] made payments from his firm's trust account to Mr [CD]. Ms [CD] had to defend those proceedings with assistance from counsel instructed by Mr [EF]'s firm. Up to the time Mr [CD] commenced proceedings, Mr [EF] says Ms [CD]'s instructions had been to negotiate resolution and avoid the Family Court.

[61] Mr [EF]'s argument in relation to the costs of litigation relies heavily on information that is not available, in particular Mr [CD]'s perspectives. The evidence available on review suggests a level of antagonism between the [CDs] that might never have been resolved without Court orders. Mr [CD] may have had his own reasons for the timing and commencement of proceedings that had nothing to do with the payments Mr [GH] made to him. There is no evidence on review of how Mr [CD] arranged his finances before or after Mr [GH] made payments from his trust account. He may have had alternate sources of funding unbeknown to Ms [CD]. While there is a risk that Mr [GH] gave Mr [CD] a fighting fund, the causative link is too tenuous to found an award of compensation in this jurisdiction.

[62] That costs in the Family Court proceeding are a matter for the Family Court is a further factor that indicates against an order for compensation on the basis sought.

[63] It is fair to say that Mr [EF] put a fair amount of effort into attempting to negotiate concessions in Mr [GH]'s retainer in advance to suit Ms [CD]. At that stage there had been no contravention by Mr [GH]. There is no evidence from Mr [EF] about whether his assessment of the costs to Ms [CD] include his attempts to advance her position before any money was paid out of Mr [GH]'s trust account. As Mr [EF] accepts, it is not a straight forward exercise to unravel what costs may be directly attributable to Mr [GH]'s conduct.

[64] While I can accept Mr [GH]'s conduct may have contributed to an increase in costs to Ms [CD], there is too little certainty about that, and the evidence is not such as to be able to reliably quantify any loss she may in fact have sustained. In the circumstances no order is made pursuant to s 156(1)(d).

Apology

[65] Mr [GH] expressed a willingness reasonably early on to offer an apology to Ms [CD] and Mr [EF] if an adverse finding was made.[17] No apology was ordered and it is not clear whether one has been provided. The conduct occurred over four years before this decision. Realistically, I doubt that an apology would serve any useful purpose after such a lengthy delay.

[66] In the meantime, Mr [GH] has given no indication that he recognises the philosophical difficulty that underlay his conduct, namely the conflation of personal morality with professional obligations. Having read the extract from *Ethics, Professional Responsibility and the Lawyer* set out above, and with the passage of time, Mr [GH] may come to a clearer understanding of that. In the circumstances, Mr [GH] is encouraged, but not ordered, to consider delivering apologies to Mr [EF] and Ms [CD].

Fine

[67] Whether to impose a penalty, if so whether that penalty is a fine, and if so at what level, are all elements of the discretion exercised by Committees. There is no formula by which to calculate the appropriate level of a fine. As such, this Office would have to have good reason to interfere with the exercise of that discretion. That said, the expectation of this Office is that it will form its own independent second opinion.

[68] The maximum fine a Committee or this Office can order a practitioner to pay pursuant to s 156(1)(n) of the Act is $15,000. A fine at that level is reserved for the most serious of cases of unsatisfactory conduct.

[69] The Committee ordered Mr [GH] to pay a fine of $250. A fine at that level reflects a view that the contraventions were very minor. That view is not consistent with the view formed on review, with the benefit of the Tribunal's decision in *Thomas*,

[17] Letter [GH] to NZLS (12 November 2012) at [4].

that Mr [GH]'s conduct was reasonably serious. Mr [GH] made two payments to Mr [CD] without a joint instruction, and if payment of the Telecom account had no proper basis, a third payment. The payments were made within the space of only three months.

[70] Although there is a range, a fine of $250 is out of line with fines imposed by Committees and confirmed by this Office for contraventions of s 110 of the Act,[18] where there has been no contravention of regulation 12(6) or several of the Conduct and Client Care rules. The fact that a contravention is of the Act, rather than regulations and rules subordinate to it, tends to suggest a contravention is to be treated more seriously.

[71] In addressing Mr [GH]'s conduct, a fine of $250 is unlikely to meet the objectives of penalty in a disciplinary context which include acting as a deterrent and reflecting the public's and the profession's disapproval of the unsatisfactory conduct.[19] A fine of $250 has little deterrent effect, and is unlikely to adequately reflect the disapproval a member of the public or of the profession is likely to feel at a lawyer taking matters into his own hands as Mr [GH] did.

[72] It is a fairly basic tenet of the legal profession that lawyers act in general accordance with instructions given by clients. There is also no real uncertainty about how s 110 of the Act or reg 12 operate. However, there is always a degree of flexibility in how contraventions are addressed.

[73] The Committee settled on a modest fine as the appropriate penalty, however, the view taken by the Tribunal of Mr Thomas' conduct, which bears a number of similarities to Mr [GH]'s, was that a censure, rather than a fine, was the appropriate response to the finding of misconduct.

[74] A finding of misconduct will be viewed as intrinsically more serious than a finding of unsatisfactory conduct. Although Mr [GH]'s conduct is not to be considered by the Tribunal, on balance a fine is appropriate but at a more meaningful level than $250. In the circumstances, a fine of $3,000 is an appropriate response, given what follows.

Censure

[18] See for example *VX v [North Island] Standards Committee* LCRO 126/2012 - $1,000 and censure; *WB v [North Island] Standards Committee*, LCRO 127/2012 - $1,000; *XB v A North Island Standards Committee* LCRO 207 & 208/2012 – Fine of $5,000 and censure.
[19] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

[75] In *New Zealand Law Society v B*, the Court of Appeal stated that "censure" and "reprimand" are largely synonymous (although that was in the context of publication and s 131(1)). It stated that it did not see any distinction between a harsh or soft rebuke: a rebuke of a professional person will inevitably be rated seriously. Either is available pursuant to s 156(1)(b). Looking at the conduct under consideration in *Thomas*, and comparing it with Mr [GH]'s, I consider that following the direction taken by the Tribunal in *Thomas*, a censure is an appropriate regulatory response to Mr [GH]'s conduct.

[76] In the circumstances, Mr [GH] is censured pursuant to s 156(1)(b) of the Act for taking matters into his own hands and making payments from funds held for or on behalf of the [CDs] jointly, without having obtained the [CD]s' joint instruction or authority for the payment, as reg 12(6)(b) requires.

Committee's Costs to NZLS

[77] The Committee also ordered Mr [GH] to pay costs to the New Zealand Law Society. There is no reason to interfere with that order.

Costs on Review

[78] The LCRO has a discretion over costs on review. Mr [GH] did not apply for the review. Although the penalty has been altered, there is nothing about Mr [GH]'s conduct in the course of the review, in which he has barely participated, that makes an order for costs against him appropriate. No costs order is made.

Decision

[79] Pursuant to ss 211(1)(a) and 156(1)(b) of the Lawyers and Conveyancers Act, the decision is modified to record a fine of $3,000 and record that Mr [GH] is censured.

[80] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act, the decision is otherwise confirmed.

DATED this 3rd day of August 2016

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D Thresher
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:

Ms [CD] as the Applicant
Mr [EF] as the Applicant
Mr [GH] as the Respondent
Ms [RR] as a related person as per s 213
Mr [BB] as a related person as per s 213
[XX] Committee [X]
The New Zealand Law Society