NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 39
LCDT 017/12, 018/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **MURRAY IAN WITHERS** Lawyer, of Christchurch

CHAIR
Mr D Mackenzie

MEMBERS OF TRIBUNAL
Mr W Chapman
Mr M Gough
Mr A Lamont
Mr S Walker

HEARING at Christchurch on 8 and 9 July 2013

APPEARANCES
Dr D Webb and Mr R Kay for the Standards Committee
Mr A Hughes-Johnson QC, and Ms C Bibbey for Mr Withers
Mr G Brodie for Mr Withers in respect of the application for further evidence after decision reserved (dealt with on the papers)

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] Mr Withers faced three professional disciplinary charges laid against him by Standards Committee 3 of the Canterbury/Westland branch of the New Zealand Law Society ("Standards Committee"). One of those charges related to conduct alleged to have occurred at a time when the Law Practitioners Act 1982 ("LPA") was in force, prior to 1 August 2008, and was heard under the transitional provisions of the Lawyers and Conveyancers Act 2006 ("LCA").[1]

[2] The first charge ("Undertaking Charge") related to an allegation that Mr Withers failed to perform an undertaking he had given to the Christchurch City Council, and was thereby guilty of misconduct. In the alternative Mr Withers was charged with unsatisfactory conduct, or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to bring the profession into disrepute.

[3] The second charge ("LPA Conflict Charge") related to an allegation that Mr Withers, prior to 1 August 2008, acted for more than one party in the same transaction without the prior informed consent of all parties, and that he did not disclose an interest he had in the transaction concerned. This charge alleged misconduct. In the alternative, Mr Withers was charged with conduct unbecoming a barrister or solicitor, or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to tend to bring the profession into disrepute.

[4] The third charge ("LCA Conflict Charge") related to an allegation that Mr Withers, from 1 August 2008, remained engaged as further matters arising from the transaction referred to in the LPA Conflict Charge developed, notwithstanding he was conflicted and lacked independence. This charge also alleged misconduct. In the

[1] Section 351 Lawyers and Conveyancers Act 2006.

alternative it alleged unsatisfactory conduct, or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to bring the profession into disrepute.

[5] The various allegations and their supporting particulars are more precisely set out in the charges as laid and filed with the Tribunal. Each of the charges alleged misconduct in the first instance.

[6] Misconduct has been given statutory definition under s 7(1)(a)(i) LCA, which defines misconduct as meaning conduct in the context of the provision of legal services which:

> "…would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable"

[7] This definition reflects the judicial definition of misconduct set out by Viscount Maugham in *Myers v Elman*[2], which required that the conduct be of a serious nature to constitute misconduct.

[8] Misconduct has been described more recently as a deliberate departure from accepted standards, or such serious negligence as, although not deliberate, to portray indifference to and an abuse of professional privileges.[3]

[9] Whether misconduct is under LCA or LPA, its essential elements are that it be conduct of a sufficiently serious nature to be viewed as disgraceful or dishonourable, such as where there is a deliberate departure from accepted standards, or negligence portraying indifference.

[10] Misconduct is further defined in LCA in relation to the provision of legal services by s 7(1)(a)(ii) as:

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[2] *Myers v Elman* [1940] AC 282, at 288.
[3] *Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452, approving *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197. See also *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

> "… a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act…"

[11] Mr Withers denied the charges, and a defended hearing took place in Christchurch on 8 and 9 July, 2013. At the conclusion of that hearing the Tribunal reserved its decision.

Application for leave to allow further evidence after decision reserved

[12] While the Tribunal was deliberating on the decision it had reserved, Mr Withers sought directions regarding an intended application to admit further evidence. The Tribunal, by Minute of 22 July 2013, directed that if such an application was to be made it should be filed and served together with supporting affidavits, in accordance with a timetable it established for those steps and any response by the Standards Committee. The Tribunal indicated that the application would be dealt with on the papers.

[13] An application and response were subsequently received by the Tribunal. The application was opposed by the Standards Committee.

[14] The application related to evidence to be given by Wieslaw Jan Adamowski. The evidence proposed to be led and the subject of the application was set out in an affidavit by Mr Adamowski dated 24 July 2013.

[15] The law is quite clear in respect of such matters. Generally, once a party has closed its case (or as in this case, after judgment has been reserved), no further evidence will be permitted. While the Tribunal has the power to admit further evidence arising from its ability to regulate its own procedures in the interests of justice, there are some principles to be observed. It is a power which has been held to be a power which should be exercised only in exceptional cases.[4]

[4] *Montego Motors Ltd v Horn* [1974] 2 NZLR 21, at p 25; *Easton v Cramp Developments Ltd* [1975] 1 NZLR 641.

[16] In *Equiticorp Industries Group Ltd (in Statutory Management) v Hawkins*[5] the Court summarised the principles to apply. Applicable in the instance of Mr Withers' application are:

(a) The discretion is to be exercised sparingly, and in exceptional circumstances only;

(b) The failure to call the evidence at the proper time should be adequately explained;

(c) The justice of the case must require the admission of the additional evidence; and,

(d) Leave should be refused if the evidence would have been available had due diligence been exercised;

[17] For Mr Withers it was submitted that the reason Mr Withers did not call evidence from Mr Adamowski was that at the time he was preparing his defence in response to the case being set down for substantive hearing, Mr Adamowski was unavailable overseas.

[18] It was submitted for Mr Withers that he did not approach counsel until late March 2013 (at that time the Tribunal had intimated in its Minute of 20 March 2013 that the matter was to be set down for hearing in May 2013). Formal instructions were given by Mr Withers to his counsel in early May 2013, in response to a fixture notice issued on 22 April 2013 for the substantive hearing of the charges on 7 May 2013. As it turned out, that fixture was vacated, and Mr Withers was given further time to prepare and file his defence affidavits[6].

[19] It was submitted that this late involvement of counsel, and the short period that remained available to complete defence affidavits arising from the timetabling for the substantive hearing, meant that Mr Adamowski's evidence could not be obtained for the hearing. He was overseas at the time counsel came to consider his evidence.

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[5] *Equiticorp Industries Group Ltd (in Statutory Management) v Hawkins* [1966] 2 NZLR 82, at 85.
[6] See Tribunal Minutes of 6 May 2013 and 24 May 2013 regarding this matter.

[20] The matter was compounded it was submitted, by adverse personal circumstances affecting both Mr Withers and his counsel, relating to family bereavements. These factors were said to have influenced trial preparations, including the timely filing of evidence.

[21] For Mr Withers it was also noted that the charges were serious, and that the interests of justice demanded that he be given every opportunity to defend himself against the charges. It was submitted that there could be no prejudice in allowing the evidence and that it dealt with an important issue arising from the charges.

[22] For the Standards Committee it was submitted that the application should be declined. The Committee's opposition was based on a procedural point (that the application had not been lodged within the period required by the Tribunal in its Minute of 22 July 2013), and also: there were no exceptional circumstances; no adequate explanation for the failure to call Mr Adamowski's evidence; the justice of the case did not require it; and there had been a failure of due diligence.

[23] There were some other matters raised in support, but given our decision we do not need to analyse those further matters said to support us declining the application. We should also say at this point that we do not see any substantive merit in the claim that the application should be declined because it was out of time. If it was out of time (and that is not necessarily correct) then it is a minor issue which we do not consider is a matter of any weight in our consideration of the application, and certainly would not operate, itself, to deny jurisdiction or to require dismissal.

Discussion and determination on Application to allow further evidence

[24] We do not consider that Mr Withers has been able to show that he has an adequate reason for his failure to have Mr Adamowski's evidence available.

[25] The charges were laid and served in August 2012. The Tribunal indicated to Mr Withers in November 2012 that a substantive hearing might occur in late February 2013, and disclosure, defence filings, and any interlocutory filings were timetabled.

Mr Withers advised at that time that he was seeking further information to assist his defence and that he was actively considering steps he might take[7].

[26] After Mr Withers had failed to comply with the Tribunal's directions of 13 November 2012, a further judicial conference was convened on 20 March 2013. At that conference Mr Withers advised that he had completed drafts of evidence for four witnesses who were reviewing the drafts before they were sworn. Mr Withers was advised by the Tribunal that his defence was in his hands and that it was up to him to be ready for a defended hearing which was then proposed for some time in May 2013[8].

[27] As it turned out, the substantive hearing was subsequently set down for 7 May 2013, but was adjourned to a later date in July 2013, to give Mr Withers more time to prepare his defence with his newly instructed counsel.

[28] At the defended hearing on 8 and 9 July, 2013, Mr Withers proceeded with his own evidence only, and that of a Mr Hickey. In his affidavit in support of his application to bring further evidence Mr Withers says that he "*had originally prepared an outline brief of evidence and discussed this with Mr Adamowski."* Mr Withers also said that he knew from late 2012 that Mr Adamowski would be overseas for part of 2013. He suggested that because he did not know on what dates Mr Adamowski would be away, and that he did not know when the charges would be heard against him, he was caught by surprise when the date of hearing was established, and by then Mr Adamowski was out of New Zealand.

[29] We do not think this situation supports Mr Withers' application. At the 13 November judicial conference Mr Withers was advised that the hearing would be set down for a date after 15 February 2013, the revised date by which filings were to be completed.[9] Following his failure to complete and file his defence affidavits in accordance with directions given, at the conference of 20 March 2013 Mr Withers

[7] See Tribunal Minute of 13 November 2012.
[8] See Tribunal Minute of 20 March 2013.
[9] Above, n 7.

was again reminded of his obligation to get his defence affidavits filed, with a substantive hearing indicated as likely to be set down for May 2013[10].

[30] At each of these conferences, 13 November 2012 and 20 March 2013, Mr Withers was warned of the need to finalise and file his defence affidavits, but he did not do that, including regarding Mr Adamowski's evidence which he had already briefed. He knew a substantive hearing date was approaching, he had already briefed Mr Adamowski's evidence, and he knew that Mr Adamowski was going to be away overseas during part of 2013.

[31] Mr Withers had taken none of the steps he should have regarding Mr Adamowski's evidence until his counsel raised the issue of his evidence in May 2013, and by then it was too late as Mr Adamowski had left New Zealand about 24 April 2013. The failure to have Mr Adamowski's evidence available at the hearing of the charges is a direct consequence of Mr Withers' own failure in ensuring due diligence in his case preparation. That preparation is not limited to the few months during which counsel was active in preparing his defence. Mr Withers' evidence in support of the application was that Mr Adamowski's evidence had been briefed and discussed some time earlier, but not progressed in a timely way despite the possibility of the hearing of the charges occurring much earlier than it actually did, and when Mr Adamowski was in New Zealand.

[32] We do not consider that there is any issue of justice that indicates that Mr Adamowski's further evidence should be admitted. The circumstances of the unavailability of his evidence, and the nature of the evidence itself, do not indicate any issue that requires that it be admitted at this stage. The discretion we have in this regard should be exercised sparingly, and only in exceptional circumstances.[11]

[33] In this case we consider the application should be declined. There are no exceptional circumstances and Mr Withers is the author of the position that has arisen regarding this evidence. He has no proper basis to explain his failure to arrange for the evidence to be available for the hearing. There has been a failure of

[10] Above, n 8.
[11] Above, n 5.

due diligence by Mr Withers which has caused the unavailability long before his counsel became actively engaged in the two months leading up to the hearing.

[34] We also note that even if we had exercised our discretion in favour of the evidence being allowed after judgment had been reserved, we consider that the evidence has little probative value in helping us decide on the charges. As we note later in our determination, it is not simply a matter of Ms Marshall's knowledge of Mr Withers' business affairs and involvement, and her own business experience, both attested to in the further evidence, which is important. It is Ms Marshall's understanding of what Mr Withers' business affairs and involvement meant for her own interests, and the fact that Mr Withers himself knew of the conflict and his inability to advise all concerned in an independent way to ensure all interests were adequately protected, but took no steps to avoid that situation which is important. Mr Adamowski's evidence does not affect that situation, even if admitted.

[35] The application for further evidence being admitted after close of case and reservation of judgment is declined for the reasons noted.

[36] This determination now moves to deliver the Tribunal's decision and also to set out more fully the reasons for the Tribunal's decision given at the hearing declining Mr Withers' application for interim name suppression.

The Undertaking Charge

[37] The allegations in respect of this charge were that Mr Withers had failed to meet his personal undertaking to pay an amount due to the Christchurch City Council as a development contribution. His undertaking had been given on 5 August 2010 in respect of a subdivision being undertaken by a company for which he was acting, and in which he also had an interest.

[38] Mr Withers had asked the Council to agree to accept payment of the required development contribution once the titles to the subdivision became available, rather than the usual position of the contribution being paid prior to the titles being available.

[39] Mr Withers had undertaken that he would pay the development contribution on the sale of one of the lots involved, for which the company completing the subdivision had an unconditional contract.

[40] His undertaking to pay on such sale was accepted by the Council, and it allowed the subdivision to proceed and titles to be issued without the required contribution being first paid.

[41] The charge alleged that Mr Withers did not comply with his undertaking. He did not make the payment promised when the lot concerned was sold some weeks later, in mid October 2010. The Council had to pursue Mr Withers through its solicitors and eventually obtained payment of the development contribution in August 2012.

Evidence regarding the Undertaking Charge

[42] In support of the Undertaking Charge, evidence was given at the hearing by Christopher William Gilbert by way of affidavit. Mr Withers did not require Mr Gilbert, who is an in-house lawyer for the Christchurch City Council, for cross-examination.

[43] Mr Gilbert's unchallenged evidence was that the Council was dealing with a company, Clifden Holdings Limited ("Clifden"), in relation to the subdivision of land it owned at Taylors Mistake Road, Christchurch. Mr Withers was acting as solicitor for Clifden on the matter, and he was also a director and shareholder in Clifden.

[44] The Council had issued a resource consent for the subdivision, and a development contribution of $117,916.10 was required to be paid by Clifden to the Council as part of the subdivision process.

[45] The Council's policy was that the development contribution should be paid before a certificate necessary to allow the survey plan to be deposited with the Registrar General of Land would be made available. Without that certificate, the subdivision could not progress.

[46] In a letter dated 5 August 2010 to the Christchurch City Council, Mr Withers, noting that the development contribution was due before the required certificate would be issued by the Council, sought a deferment of the requirement to pay the contribution. He proposed that the certificate should be made available without the Council first receiving payment of the development contribution, against his personal undertaking to pay the Council on the sale of a lot in the subdivision. Mr Withers said in his letter that there was an unconditional sale contract for lot 6 in the subdivision, with settlement to be completed within 15 working days of the issue of a title. He then provided his undertaking to the Council in the following terms -

> "We personally undertake to pay the Development Contribution fee of $117,916.10 to the Council following completion of settlement of the sale of lot 6.
>
> Funds will be released on settlement from our trust account to the Council."

[47] Relying on that undertaking, the Council provided the required certificate, which allowed new titles to issue and the sale of lot 6 to proceed. A transfer of lot 6 was registered some 10 weeks later, on 18 October 2010. The Council did not receive payment from Mr Withers following settlement of that sale, as Mr Withers had undertaken it would.

[48] A year later, on 18 October 2011, the Council contacted Mr Withers, noting that it had become aware that the lot had been sold. It requested payment of the development contribution amount which had been due from settlement proceeds in accordance with his undertaking.

[49] Mr Withers responded by asking that the arrangements constituted by the undertaking be varied by the Council, suggesting that the Council be paid after another lot had been sold. Alternatively, he suggested, the Council might deal with payment of the development contribution by "*splitting the reserve contribution over the remaining allotments"*. Mr Withers also offered the Council a security by way of bond.

[50] The Council rejected this request to defer payment of the development contribution, by letter of 8 November 2011 to Mr Withers. It required Mr Withers to

honour the personal undertaking he had given the Council and to pay the development contribution. Mr Withers did not make any payment in response to this demand.

[51] Mr Withers did not dispute these facts, but said that he eventually paid the amount due in August 2012. He said his failure to honour his undertaking should be seen in the context of matters beyond his control, and taken into account when assessing his conduct.

[52] He said in evidence that at the time of giving the undertaking he had no reason to doubt that he would be able to fulfil that undertaking. The development contribution was to be paid from sale proceeds arising from the sale of a lot in the subdivision for which there was a contract in existence at the time of his undertaking.

[53] Mr Withers said that he did not honour his undertaking because Clifden had been the subject of a legal claim by the Trust which sold the Taylors Mistake Road land the subject of the subdivision to Clifden. That legal claim resulted in a Deed of Settlement between the Trust and Clifden. Mr Withers said that he had mistakenly considered that the provisions of the Deed precluded him from using the sale proceeds to pay the Council as planned. [12]

[54] A second reason for his failure to honour his undertaking, Mr Withers said, was that the mortgagee who held security over the land in the subdivision changed its repayment policy after he had given the undertaking. As a result of seismic activity affecting Christchurch, Mr Withers said that the mortgagee concerned began requiring that all sale proceeds be applied in reduction of its lending, whereas prior to that it had accepted partial application of sale proceeds.[13]

[55] Mr Withers said in his evidence that he had expected that the Council would be prepared to compromise in the face of the effects of the seismic activity and the Deed of Settlement, which he said affected his ability to meet his undertaking. He said that at the time he gave the undertaking he had no doubt that the commitment

[12] In his affidavit of 5 June 2013, at paragraph [79].
[13] Ibid, at paragraphs [78] and [79].

could be met, but that subsequent events had conspired against him and his ability to make the payment he had undertaken to make.

[56] Mr Withers acknowledged that he should have approached the Council as soon as it became apparent that his proposed method of funding the undertaking was no longer available as a result of the unexpected events noted, but that he did not address the matter with the Council because of the circumstances applicable. He said he struggled both professionally and personally in the aftermath of the seismic activity, that times were not easy, being affected by the extraordinary events of late 2010 and early 2011, and that his actions needed to be judged in that context.

Discussion on the Undertaking Charge

[57] The evidence before the Tribunal was that the sale of Lot 6 took place no later than 18 October 2010, being the date of registration of transfer from Clifden to the purchasers. That is just over 10 weeks after Mr Withers had given his undertaking to the Council, on 5 August 2010.

[58] Notwithstanding that the undertaking was recent at the time of the sale, Mr Withers took no step to honour his undertaking on that sale and made no contact with the Council about his ability to meet the undertaking.

[59] A year later, when the Council became aware of the sale and Mr Withers' failure to meet the undertaking, it wrote to him seeking payment, but still Mr Withers did not make payment, instead seeking a variation to the arrangement, which was rejected by the Council. In the absence of payment the Council pursued Mr Withers, and finally obtained payment in August 2012.

[60] Rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("CCCR"), applicable to Mr Withers in respect of his undertaking, provides:

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

[61] In this case Mr Withers has given an undertaking to the Christchurch City Council personally, which he has failed to honour.

[62] A failure to honour an undertaking is a serious matter. Lawyers rely on their ability to give undertakings in the course of practice, and any undermining of the integrity of a solicitor's undertaking is adverse to the interests of the profession as a whole and the public it serves.[14]

[63] Here the failure has been deliberate, and involved an additional element of self interest arising from Mr Wither's directorship and shareholding in Clifden.

[64] In submissions for the Standards Committee, Mr Webb said that in breaching his personal undertaking, and failing to pay the development contribution, Mr Withers had preferred his own interests to fulfilling his professional obligations by honouring his undertaking. Mr Webb noted also that the extenuating circumstances Mr Withers claimed to justify his failure to honour his undertaking really arose from the February 2011 seismic event, and that was some 4 months after the undertaking had been breached.

[65] We note also that the Deed of Settlement said by Mr Withers to have made the honouring of the undertaking difficult, was dated 6 April 2011, some 6 months after the undertaking had been breached.

[66] In any event, in our view the risk of changed circumstances rests with the solicitor giving the undertaking, and that risk should not be passed to the person having the benefit of the undertaking. When a solicitor gives a personal undertaking, it will be a rare event that would allow the obligation to be ignored on the basis of changed circumstances.

[67] We do not consider that there were changed circumstances allowing the undertaking to be ignored when due, and see no proper basis for Mr Withers' failure to honour this undertaking when it became due in mid October 2010.

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[14] See the discussion regarding the importance of the integrity of undertakings by a Full Bench of the High Court in *Bhanabhai v Auckland District Law Society*, CIV 2008-404-5736 at [59] – [62].

[68] A change of bank policy[15] does not excuse the failure. Such risk is a matter for the giver of the undertaking, and that person has to cope with the consequences of such a risk eventuating, not the beneficiary of the undertaking.

[69] The Deed of Settlement, said by Mr Withers to have affected his ability to meet the undertaking, arose after his breach of undertaking had occurred. Also, there is nothing in the Deed of Settlement which would have operated to preclude Mr Withers from meeting his undertaking in any event, as Mr Withers accepted at the hearing.

[70] There is no dispute by Mr Withers that he breached his undertaking. The issue is whether, in all the circumstances, that constitutes misconduct or any one of the other professional disciplinary offences noted in the alternative set out in the Undertaking Charge.

[71] We accept that the breach of an undertaking will not necessarily lead to a finding of misconduct[16], but in this case there has been a deliberate avoidance by Mr Withers of paying what he had personally undertaken to pay, a failure to communicate with the beneficiary of the undertaking after the undertaking became due to be honoured, and continuing delay in finally settling the obligation when pursued.

[72] Mr Withers claimed that changed circumstances, arising from the Canterbury seismic events of late 2010 and early 2011, adversely affected his ability to honour the undertaking. We do not consider those events justify or explain his failure, particularly when all the circumstances noted are considered.

[73] There is a context here that has to be considered – Mr Withers' personal interest in the value of the undertaking (the postponement of an amount due by Clifden to the Christchurch City Council), his failure to meet his undertaking some 10 weeks after it was given when the subject lot was sold, his failure to address the

[15] The Tribunal notes that there was no independent evidence that such a change had occurred by October 2010, and that it applied to the sale of the lot concerned in such a way that the development contribution (normally a matter preceding completion of subdivision and any sale of a lot) could not be paid from proceeds of sale.
[16] For example see the observations in *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401 at [47] – [48].

honouring of the undertaking with the Council (the beneficiary of his undertaking) for nearly a year before the Council realised it had not been paid what was due, and his continuing failure to pay when required to do so for some considerable period thereafter.

[74] We find that the breach of undertaking was a calculated and serious departure from accepted standards. It was a deliberate failure to honour the undertaking, with no payment offered when due under the undertaking and no steps being taken to mitigate the non-payment by contacting the beneficiary of the undertaking. Rule 10.3 CCCR was also wilfully breached as a result of Mr Withers' conduct.

[75] The undertaking was due for performance on settlement in October 2010. That is some months before the earthquake of 22 February 2011 which caused the devastation referred to by Mr Withers in his affidavit, but in any event, as we have said, by giving an unconditional personal undertaking, Mr Withers assumed unconditional responsibility for payment. His lack of any approach to the Christchurch City Council when the undertaking was due for payment is indicative in our view of an attempt to let the matter lie unpaid for as long as possible.

[76] These findings lead us to the conclusion that Mr Withers' conduct constitutes misconduct under both s 7(1)(a)(i) and s 7(1)(a)(ii) LCA. We do not consider that the subsequent events claimed by Mr Withers to have affected his ability to honour the undertaking change the position. This was a personal undertaking involving a matter in which he had an interest beyond being a legal adviser, and which provided him (or at least his family trust) with a benefit. Even if his ability to perform the undertaking was affected by some intervening event (which we do not accept) Mr Withers, by his undertaking, had assumed the consequences of such an event and not being able to give effect to what he had promised.

The LPA Conflict Charge

[77] It was alleged in the LPA Conflict Charge that Mr Withers had acted as a lawyer on transactions in respect of which he was conflicted and lacked independence.

[78] The transactions related to some land at Taylors Mistake Road, Christchurch, which was originally held by a client, Ms Marshall, on trust for her sons, and then held by the sons themselves as trustees of the SCK Trust which Mr Withers had formed for Ms Marshall. This trust sold the land to Clifden and took a mortgage back for some of the purchase price it had agreed to leave owing on settlement. The Standards Committee alleged that Mr Withers had acted for both Clifden and SCK Trust when there was an actual conflict of interest, and that as a consequence Mr Withers could not discharge his obligations to both of his clients involved in the transactions.

[79] The Standards Committee submitted that this was a particularly serious conflict of interest situation. It alleged dishonesty in the way Mr Withers sought to be able to prefer his interests over those of his client, the SCK Trust, and in the way he did not reveal his own interest in the transactions as a director and shareholder in Clifden.

[80] Mr Withers denied he was acting as lawyer for SCK Trust on the sale and mortgage back, other than on what he described as simple matters of process. His evidence was that he had advised Ms Marshall (representing the trust) that he could not act on the matter. Mr Withers said that Ms Marshall had required him to assist only with process matters, and that she had accepted responsibility for getting her own "commercial" advice on the transaction. He also said that he had ensured Ms Marshall was aware of his interest in Clifden.

Evidence regarding the LPA Conflict Charge

[81] The evidence showed that land at Taylors Mistake Road was held initially in the name of Ms Marshall, on a bare trust for her three sons. A formal trust was established in place of the bare trust by Mr Withers on instructions from Ms Marshall. This formalised trust was known as the SCK Trust and the beneficiaries remained Ms Marshall's three sons who were also the trustees.

[82] In early 2007, Ms Marshall, with the approval of her sons (two of whom resided overseas), was to endeavour to sell the land at Taylors Mistake Road owned

by the trust, and manage on its behalf any resulting sale process. Mr Withers knew that a sale was proposed, and he advised Ms Marshall that he was aware of a party who could be interested in purchasing the land. That party was a Mr Hickey.

[83] Ms Marshall said in evidence that she was aware that Mr Hickey was a friend and client of Mr Withers, and that at that time she did not consider this relationship a matter of importance even though she realised that Mr Withers would be acting for both the trust and Mr Hickey. She said that Mr Withers did not explain to her what difficulties and risks could arise out of such a situation.

[84] Ms Marshall also said that Mr Withers made no mention of her seeking independent advice on behalf of the trust, and said she presumed that there was nothing wrong with Mr Withers proceeding in the way intended. Ms Marshall said in her evidence that she had no reason not to trust Mr Withers to conduct himself properly in advising her on the sale by the trust.

[85] Ms Marshall's evidence was that at the time she did not know that Mr Withers was Mr Hickey's business partner. Similarly, when Mr Hickey nominated Clifden as the purchaser of the trust's land at Taylors Mistake Road under the contract initiated in Mr Hickey's name, she said she did not know that Mr Withers was a director and shareholder of Clifden.

[86] In her evidence Ms Marshall said that Mr Withers: did not advise her to retain another solicitor; did not tell her that he had an interest in Clifden, other than as its solicitor; and did not tell her that he could not advise her on the commercial merits of the transactions. She also said that Mr Hickey did not tell her that Mr Withers had an interest in Clifden and was undertaking the project with Mr Hickey.

[87] The process followed on the sale of the trust's land at Taylors Mistake Road to Clifden was:

(a) In March 2007 Mr Withers advised Ms Marshall (who was acting as the trustees' representative) that Mr Hickey offered to purchase the land for $1.4m. That offer was accepted by the trust.

(b) An Agreement for Sale and Purchase was prepared by Mr Withers. It contained some special conditions regarding matters about which the purchaser, Mr Hickey, had to be satisfied before the contract would be confirmed. The agreement was dated 30 March 2007 and showed the vendor's solicitor as being Mr Withers.

(c) The following month, Mr Withers contacted Ms Marshall advising that the agreement had to be renegotiated, as the purchaser could not proceed unless there was some compromise on what was sought by the trust. In a letter dated 3 April 2007,[17] Mr Withers noted that he had "*had further discussions with Jim Hickey"* and that Mr Hickey would be able to confirm the contract if the trust agreed to buy one section in the proposed subdivision for $800,000 including GST, and left an equivalent amount owing pending the transfer of the section. Mr Withers asked Ms Marshall to confirm if this was acceptable, noting that to protect the trust's interest a caveat could be lodged *"if you felt things were not progressing in a satisfactory manner".* The proposal was rejected by the trust.

(d) On 10 May Mr Withers made a second proposition to Ms Marshall,[18] this time suggesting another section be taken by the trust for $400,000. It was proposed that on settlement the purchaser, now described as Clifden following a nomination by Mr Hickey[19], pay only $1m of the purchase price on settlement. The balance was to be left owing and satisfied by Clifden transferring the section to be acquired for $400,000 by the trust, on completion of the subdivision to be undertaken by Clifden on the land. Mr Withers suggested that *"adequate protection would be put in place in the meantime"*. He made no comment in the letter as to what that protection would be. The proposal was rejected by the trust.

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[17] Affidavit of Shannon James Marshall dated 13 July 2012, exhibit SJM12.
[18] Affidavit of Shannon James Marshall dated 13 July 2012, exhibit SJM13.
[19] Mr Hickey had a right to nominate a third party to acquire the land incorporated in the Agreement for Sale and Purchase.

(e) On 16 May 2007,[20] Mr Withers advised Ms Marshall that a fresh valuation now valued the land at $1.287m and that "*Jim has suggested settlement proceed within the next week on the basis that you leave owing the sum of $375,000. It would be secured in an appropriate fashion. This would relieve you of any obligation to take an interest in any section."* After some discussion, it was ultimately agreed that the trust would leave $350,000 owing by the purchaser and secured by mortgage, in place of a full cash payment on settlement of the sale and purchase.

(f) The sale was completed on 20 June 2007, and the land transferred to Clifden. By letter of 19 July 2007[21] to Ms Marshall, Mr Withers reported on the settlement and rendered his fee on the transaction which was taken by deduction from the proceeds of sale.

(g) An amount of $350,000 was left owing by the trust under an unregistered mortgage, which was expressed as being interest free (apart from a penalty rate if there was default), and due for repayment in 12 months[22]. There seems to have been some uncertainty as to whether the loan was intended to be for six months or twelve months,[23] but nothing turns on that issue. The mortgage was subject to a registered first mortgage, securing an advance to Clifden of $1m, which had a priority amount of up to $2m.

(h) The amount left owing was not paid on due date.

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[20] Affidavit of Shannon James Marshall dated 13 July 2012, exhibit SJM14.
[21] Ibid, exhibit SJM15.
[22] Ibid, exhibit SJM 43.
[23] For example see the affidavit of Shirley Marshall dated 16 July 2012 at paragraphs 24 and 26, the affidavit of Shannon James Marshall dated 13 July 2012 at paragraphs 41(d), 41(c), and 54 ,and the affidavit of Murray Ian Withers dated 5 June 2013 at paragraph 43, all referring to a loan period of six months, and compare that to the further affidavit of Shirley Marshall dated 19 June 2013 at paragraph 17, the mortgage document exhibited as "SJM43" to the affidavit of Shannon James Marshall dated 13 July 2013, and Exhibit "SJM41" to that affidavit which is a letter from Mr Withers to the New Zealand Law Society, all referring to a loan period of one year.

Discussion on the LPA Conflict Charge

[88] Mr Withers' position throughout has been that he was not acting for the trust in the normal sense, in that he was not providing any legal services other than attending to mechanical matters such as registration of documents to facilitate the transaction. He said he had an extremely limited retainer as a consequence of his refusal to act as lawyer to the trust and provide advice on the "commercial" aspects of the transaction. Ms Marshall, who was the trustees' representative on the transactions said she considered at all times that she was dealing with Mr Withers in his capacity as the trust's legal adviser on the transactions.

[89] We note that Mr Withers appeared to be corresponding with Ms Marshall as the trust's representative on all matters regarding the transaction as it developed initially.[24] There was no evidence of Mr Withers making any of the various proposals made regarding the transactions to anyone other than Ms Marshall.

[90] In his evidence Mr Withers endeavoured to meet this issue by saying that he was uncomfortable about writing to Ms Marshall direct, as she had required, but did so because Ms Marshall indicated that she would pass the correspondence on to her advisers. Ms Marshall denied that she said any such thing and maintained that she was relying on Mr Withers as the trust's lawyer. There was no evidence of any other adviser responding to the various matters proposed by Mr Withers.

[91] Ms Marshall said that she had a concern (as did the trustees) with the arrangements whereby the trust left $350,000 owing on terms beneficial to Clifden on what turned out to be an unregistered mortgage. Mr Withers said in his evidence that he "*recommended that the Trust take a registered second mortgage to secure* (the trust loan) *but Mrs Marshall did not want to have anything on the title showing that the Marshalls had any interest in the property.*"[25]

[92] Ms Marshall denied this, saying that at all times she had thought the trust's loan of $350,000 was properly protected by a registered mortgage. This evidence of

[24] For example see Exhibits SJM12, SJM13, and SJM14 at n 17, 18, and 20 above.
[25] In his affidavit of 5 June 2013, at paragraph [44].

Mr Withers also confirms he was giving advice to Ms Marshall for the trust, recommending a registered mortgage. Similarly do his comments regarding how the trust might protect its interests with caveats if any issue emerged, that adequate protection could be put in place, and how money left owing would be secured in an appropriate fashion, as set out in letters Mr Withers sent to Ms Marshall.[26] Finally in this regard, we note that after settlement of the sale to Clifden Mr Withers billed the trust $1,407 for his services on the sale.[27]

[93] We consider there is little doubt that Mr Withers was acting for the trust on the sale. The evidence showed that he played a full role in providing advice to the trust on that sale transaction and its various developments, with his advice to the trustees via Ms Marshall whom he knew represented the trust.

[94] It was made clear to Ms Marshall, Mr Withers contended, that he had an interest in Clifden, because he said he referred to it as a company owned by *"Jim and I,* and Ms Marshall would have known about his involvement from past transactions proposed to Ms Marshall involving Clifden. Mr Hickey also said that he had told Ms Marshall that Mr Withers had an interest in Clifden. Ms Marshall denied any such advice or knowledge.

[95] The letters and emails from Mr Withers are phrased in ways that do not inform a reader of Mr Withers' interest in Clifden. References are to "*Jim"*[28] and make no reference to Mr Withers in any way, so that his interest is not revealed. Mr Withers' evidence was that he signed the agreement for sale and purchase of the land, and he exhibited a copy of the contract bearing his signature, he said, as a director of Clifden. This again, he suggested, showed that he had an involvement with Clifden beyond being its legal adviser.

[96] No-one on the Marshall side of the transaction had any recollection of Mr Withers signing the agreement of 30 March 2007 on behalf of Clifden. We note that Clifden was not a party to the contract when it was formulated in March 2007 in any event, so Mr Withers would have had no reason to sign it at that point on behalf of

[26] See the exhibits referred to in n 24 above.
[27] Complainant's Bundle of Documents at pages 122 and 123.
[28] See the exhibits at n 24 above.

Clifden. At that stage Clifden was still an undisclosed nominee, the nomination coming at a later point, so we are left wondering why the contract now bears his signature. Certainly no-one on the Marshall side recalls it at the time.

[97] Mr Withers also pointed to a copy of the unregistered mortgage for $350,000 given by Clifden to the Trust in June 2007,[29] noting that he had signed it as a director of Clifden. He said he signed the mortgage in front of Ms Marshall so she must have known, at least at that time, that he had an interest in Clifden. Ms Marshall denies having seen Mr Withers sign the mortgage as a director of Clifden, and says she was not alerted to his interest in Clifden until advised by her accountant in early 2010.

[98] Ms Marshall also said that she had no idea Mr Withers had guaranteed the mortgage from Clifden to the trust. If she had known of course she would also have realised that Mr Withers had a personal interest in the transaction. We note that the copy of the unregistered mortgage before us in evidence did not bear Mr Withers' signature as guarantor.

[99] The email correspondence between Mr Withers and Ms Marshall before the Tribunal in evidence, as well as making no reference to or disclosure of Mr Withers' involvement in Clifden, also indicates Ms Marshall's lack of awareness of Mr Withers' interest in Clifden and of any guarantee he says he gave.[30] We note also that if Mr Withers was a guarantor he was not pursued under that guarantee by the trust despite it taking High Court proceedings against Clifden, which also supports the claim that Ms Marshall and the trustees did not know of the guarantee.

[100] In his evidence Mr Hickey said that at an onsite meeting when he was initially considering the acquisition from the trust, he said to Ms Marshall that Mr Withers was his solicitor and that "*we*" (that is Mr Withers and Mr Hickey), would be doing the project together through Clifden. Ms Marshall could not recall that conversation, and said that in her view it did not take place. In cross examination Mr Hickey gave some more detail about the conversation he said had taken place, and it appeared to relate

[29] Complainant's Bundle of Documents at pages 158 and 159.
[30] For example see Exhibits SJM32, SJM24, SJM19, and SJM22 to the affidavit of Shannon James Marshall dated 13 July 2012.

to "*Murray*" having an involvement, but there was room for uncertainty as to his capacity.

[101] We note that while we accept that Ms Marshall was probably not aware of Mr Withers' interest in Clifden, her knowledge is not the key issue. The real issue is Mr Withers' conflict and lack of independence, something that Mr Withers' was well aware of and about which he did nothing to ensure the trust was not adversely affected.

[102] In his evidence Mr Withers said that he had advised Ms Marshall when Mr Hickey's initial offer had been made that as he was acting for the purchaser he could not act for her and that she must assess the commercial merits with advice from others. He also said that his interest in Clifden had been made known to Ms Marshall.

[103] In our view the evidence shows that Mr Withers was acting for the trust in its sale to Clifden, and it is unrealistic to say in those circumstances that he had a limited mandate only. The evidence also did not support Mr Withers' claim that his retainer ceased with registration of the transfer, and that when the mortgage default occurred he was no longer acting. The email exchanges with Ms Marshall do not indicate that Mr Withers was no longer acting for the trust at the relevant times, as he continued to discuss options and recovery by the trust from "Jim".[31] Certainly Ms Marshall considered she was liaising with Mr Withers as the trust's solicitor.

[104] Ms Marshall's belief (and that of Shannon Marshall who also gave evidence) was that at all times Mr Withers was acting for the trust on the sale of the land. Ms Marshall said that she did not accept that Mr Withers had told her he could not act for her and that she must assess the commercial merits of the transaction with advice from others. She acknowledged that if she had felt it necessary to get independent advice she would have done so, but she did not understand the implications of any conflict Mr Withers had in acting for the trust and Mr Hickey. She also did not know that Mr Withers had an interest in Clifden.

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[31] For example see exhibits SJM19 – 22, SJM24, SJM26, SJM31, and SJM 32, to affidavit of Shannon James Marshall dated 13 July 2012.

[105] Ms Marshall relied on Mr Withers for advice on the contract, its variations, and the mortgage to the trust, and considered he was acting for the trust in his various communications with her.

[106] Mr Withers commenced acting where there was a potential for conflict in the circumstances of the transaction. Informed consent was required if Mr Withers was to endeavour to act for both vendor and purchaser in the transaction. No informed consent was obtained because the evidence was that Ms Marshall (and the trustees she represented) did not understand the risks and difficulties that could arise. In any event, the conflict that developed was insurmountable, and Mr Withers continued to act.

[107] While Ms Marshall knew Mr Hickey was associated with Mr Withers, her evidence, which we accept, is that she did not for one moment think that association would prejudice her, expecting Mr Withers to take care of the trust's interests.

[108] The lack of independence is compounded by the difficulties experienced in the transaction, with variations to contract terms being sought on a number of occasions by Mr Withers, including the leaving of a significant amount owing on an unregistered second mortgage to a company in which he was interested, and on favourable terms. Subsequently Clifden defaulted on the mortgage.

[109] Even if there had been informed consent at the commencement, as soon as these conflict issues started to appear Mr Withers had a duty to ensure the trust understood the position that had developed, and to withdraw because he could not be independent in his advice. He did not explain to Ms Marshall how this issue affected the trust, he did not withdraw, and he has tried to justify his continuation on an implausible "limited retainer" basis agreed with his client, which the client denies ever existed.

[110] The whole matter is then further compounded by Mr Withers' personal interest in Clifden. He says he revealed his interest. Ms Marshall says he did not, and the documentary trail of emails and letters that were sent between the parties at the time

support her position. Those emails and the correspondence misleadingly refer only to "*Jim"* and omit to record Mr Withers' participation on the purchaser's side.

[111] For Mr Withers it was submitted that these references to "*Jim"* were consistent with Mr Withers' view that Mr Hickey was essentially controlling matters as the transaction was negotiated and then varied. Mr Hickey made it clear in his evidence that was not the case. He said in response to questions from the Tribunal that Mr Withers made the suggested adjustments to the sale and purchase transaction originally proposed, and shaped the transaction as it was being negotiated, not Mr Hickey. In those circumstances we consider Mr Withers' continual references in the correspondence to "*Jim*", as if "*Jim*" was the driver of the transaction, is supportive of the fact that Mr Withers did not openly declare and explain the implications of his personal interest in the transaction to Ms Marshall, and that he intended she not become aware of his personal involvement.

[112] There was no communication from Mr Withers to anyone other than Ms Marshall, Mr Withers claiming he understood her to be taking her own advice and passing his proposals on to others to facilitate that advice. Ms Marshall says she did not do that and was at all times relying on Mr Withers as her lawyer in this matter. No other adviser, said to be assisting Ms Marshall by Mr Withers, ever contacted Mr Withers to respond to or discuss any proposal he had made.

[113] The difficulty for Mr Withers is that his correspondence at the time and his acknowledged activity on the transaction, do not support his contention that he was not acting as the trust's lawyer and that he was not giving Ms Marshall any advice on the transaction.

[114] We do not consider that Ms Marshall was made aware of the adverse effects that could arise for the trust from the conflict situation. She said she did not understand the true nature and effects of Mr Withers' lack of independence arising from his interest in Clifden. This was particularly important after Clifden defaulted on payment of $350,000 left owing on the sale price by the trust, and recovery options were being discussed with Mr Withers.

[115] Whether or not Ms Marshall and the trust were aware of this personal interest in Clifden is largely irrelevant, because Mr Withers was aware of course. That he remained engaged, corresponding with Ms Marshall to renegotiate the sale and purchase on extremely favourable terms to Clifden (one year interest free loan on an unregistered second mortgage of little security value given the value of the property and registered first charge), and continuing to engage with Ms Marshall after the mortgage default, highlights his failure to ensure independent advice to assist the trust.

[116] Mr Withers has shown a complete indifference to his professional obligation to ensure that his client was fully informed regarding conflict and his inability to give independent advice to the trust. Mr Withers' evidence attempting to justify his "limited" involvement, and claiming complete disclosure of his conflict and informed consent, shows he does not yet adequately appreciate the requirements of his professional obligations in this regard. He compounds this by claiming that when the mortgage default occurred he was no longer acting, and that his limited retainer had ceased, a matter we consider the evidence does not support.

[117] As we have noted, the evidence shows that Ms Marshall considered Mr Withers was acting as the trust's lawyer on the sale of its land, and on the mortgage arrangements in respect of some unpaid purchase price. Mr Withers played an active role on both sides of the sale and purchase transaction and he did not explain what the risks of that conflict of role were, Ms Marshall saying she had not considered it would be an issue as she relied on Mr Withers as the trust's lawyer.

[118] When the risks crystallised and an actual conflict arose Mr Withers did not cease acting and ensure the trust received independent advice. He remained fully engaged with Ms Marshall to finalise a transaction on the sale, involving a loan from the trust on advantageous terms (interest free if no default) to the purchaser. When the resulting second mortgage (which had not been registered) became overdue, Mr Withers continued to engage with Ms Marshall.

[119] In our view Mr Withers' conduct here meets the test for misconduct. His failure to ensure conflict was avoided and independent advice available is a

deliberate departure from accepted and well known standards.[32] The conduct is compounded in this case by Mr Withers' personal interest in the purchaser, which he claimed Ms Marshall was aware of, but which she denied. On the evidence we accept that she was not aware of the implications of him acting for both parties to the transactions, and that she was not aware that Mr Withers had a personal interest in the matters she was discussing with him. Even if he had disclosed his interest to Ms Marshall, that would not have remedied the issue of conflict and lack of independence, which required him not to act for Ms Marshall.

[120] An important issue here is that it is Mr Withers' professional responsibility to avoid conflict and ensure independent advice, he was fully aware of all the facts and issues affected by his conflict and lack of independence and he has failed to protect the trust. His claims of limited mandate, cessation of retainer, and full disclosure and informed consent are not available to him on the evidence.

[121] We find this charge of misconduct proven, as we assess his conduct as a serious departure from accepted standards of professional behaviour.

The LCA Conflict Charge

[122] The LCA Charge deals with Mr Withers' conduct from and including 1 August 2008, the date LCA came into force in place of LPA. It relates to allegations that Mr Withers, who was still conflicted and lacked independence, took further steps relating to matters that developed as a result of the transactions referred to in the LPA Conflict Charges ..

[123] It was alleged that Mr Withers had continued to act for both the trust and Clifden in relation to the mortgage default by Clifden post 1 August 2008, and had failed to take adequate steps to recover monies due by Clifden or to enable enforcement of the trust's rights. He had attempted to negotiate a fresh settlement proposal that had the effect of reducing the liability of Clifden, to the detriment of the Trust.

[32] Supra, paragraph [8].

[124] It was also alleged that during this period the trustees and Ms Marshall remained unaware that the person they relied on as their solicitor in respect of these matters was in fact interested in the defaulting borrower, Clifden. If Mr Withers' contention that he had also guaranteed the mortgage (a fact Ms Marshall said she was unaware of, as we have noted and accepted) was correct, then while he was personally responsible for the debt on which Clifden had defaulted he continued to give advice on various recovery proposals and to suggest settlement mechanisms at less than full cash payment. His advice did not extend to any suggestion that the trust might take independent advice to pursue his personal guarantee.

[125] This charge against Mr Withers alleged conduct that constituted misconduct, and also that he had breached his obligation to be independent in providing legal services to the trust, and his obligation to act in accordance with all fiduciary duties and duties of care owed to the Trust,[33] and that he had breached various provisions of CCCR.

[126] The alleged breaches of CCCR are more particularly set out at paragraphs 43 (a) – (f) of the particulars of this charge. These rules address the need for independence and freedom from compromising influences or loyalties[34], prohibit a lawyer acting where there is a risk of conflict (both as between competing clients and where the interests of a lawyer and client conflict)[35], prohibit a lawyer from carrying on a business or activity which could compromise a lawyer's ability to discharge professional obligations[36], prohibit a lawyer acting for more than one client where there is more than a negligible risk that may adversely affect a lawyer's ability to discharge obligations to a client[37], require prompt disclosure of relevant information that a lawyer has in relation to a matter on which the lawyer is engaged by a client[38], and prohibits misleading or deceptive conduct by a lawyer regarding any aspect of that lawyer's practice[39].

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[33] Section 4(b) and (c) Lawyers and Conveyancers Act 2006.
[34] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 5.
[35] Ibid, Rule 5.4.
[36] Ibid, Rule 5.5.
[37] Ibid, Rule 6.1.
[38] Ibid, Rule 7.
[39] Ibid, Rule 11.1.

[127] For the LCA Conflict Charge to be proven (and recognising the alternative charges laid on these allegations, but for current purposes just addressing the question of misconduct) against Mr Withers we would have to be satisfied that his conduct from 1 August 2008 did include conduct of the nature noted in ss 7(1)(a)(i) or (ii) LCA.

[128] As previously noted[40] s 7(1)(a)(i) effectively requires the same tests as established by judicial decisions made when LPA was in force[41] to enable a finding of misconduct under that sub section. A wilful or reckless breach of s 4(b) or (c) LCA, or of any of the rules noted under CCCR, would enable a finding of misconduct under s 7(1)(a) (ii) LCA.

Evidence regarding the LCA Conduct Charge

[129] The evidence regarding this charge showed that Mr Withers was engaging in exchanges of correspondence and emails with Ms Marshall after 1 August 2008, whereby he delayed and obfuscated regarding who was responsible for repaying the overdue mortgage. He said to Ms Marshall that it was Mr Hickey who was driving the decision-making in the matter, and that it was Mr Hickey who had financial issues delaying repayment of the mortgage. Mr Withers also made further proposals regarding a settlement of the mortgage liability by Clifden with the Trust, involving the trust taking some of the land at Taylors Mistake Road, something the trustees again rejected.

[130] In this regard we note the following:

(a) When repayment of all money owing had still not been received by February 2009, some months after it had become due under the mortgage, Ms Marshall requested that Mr Withers meet with the trustees to discuss the matter. Mr Withers responded in an email by asking if the trustees wished "*to sue"* Mr Hickey.[42]

[40] Supra para [6].
[41] Above, n 3.
[42] Exhibit SJM22 to affidavit of Shannon James Marshall dated 13 July 2012.

(b) In various email exchanges with Ms Marshall in evidence before us Mr Withers noted that Mr Hickey was struggling, was having difficulty making payment, and again suggested that the trustees take a lot in the subdivision as payment. When that was not accepted he suggested that he would arrange a meeting whereby the trustees could "*battle it out with* (Mr Hickey) *or sue* (Mr Hickey) *or whatever".*[43]

(c) Further emails from Mr Withers continually referred to Mr Hickey's issues and concerns, Mr Hickey not wanting to pay any more and again suggesting a compromise involving the trust accepting some land and some cash in substitution of full repayment of the outstanding advance.[44]

(d) The trustees eventually went to another solicitor and took court action against Clifden. Satisfaction of outstanding amounts was to be obtained under the provisions of a Deed of Settlement with Clifden dated 6 April 2011. The terms of the Deed were not complied with by Clifden, but satisfaction of all amounts was subsequently achieved.

Discussion on the LCA Conflict Charge

[131] We are satisfied that Mr Withers' post 1 August 2008 conduct, reflected by him trying to seek some form of settlement for Clifden, without ensuring the trustees and Ms Marshall received independent advice (which would have included the right to pursue him personally if he was correct in his assertion that he gave a guarantee, despite evidence that neither Ms Marshall nor the trustees knew of his interest in Clifden or that he had personally guaranteed the debt) is misconduct.

[132] It is misconduct under s 7(1)(a)(i) LCA, being an unacceptable and deliberate departure from required professional standards.

[43] Exhibit SJM31 to affidavit of Shannon James Marshall dated 13 July 2012.
[44] For example, see Exhibit SJM32 to the affidavit of Shannon James Marshall dated 13 June 2012.

[133] It is also misconduct under s 7(1)(a)(ii) LCA as it constitutes a wilful breach of s 4(b) and (c) relating to the need to comply with fundamental obligations of independence and to observe particular duties. The conduct probably also breaches various other provisions of CCCR as noted above, but having made the findings we have we do not consider it necessary to also discuss and analyse each of those rules as those rules simply describe elements of the misconduct we have found proven as misconduct under s 7(1)(a)(i) LCA.

[134] It was submitted for Mr Withers that this charge was a duplication of the LPA Conflict Charge, with matters such as Mr Withers' alleged failure to advise his interest in Clifden being a continuing course of conduct that should not be the subject of a separate charge. We accept that example is a continuing course of action that would not justify a separate charge, but the important issue here is that as the trust's concern about overdue payment grew, Mr Withers took inadequate steps to recover or protect the overdue funds and misled the trust, and that was fresh misconduct.

[135] He misleadingly characterised issues then affecting repayment as arising from Mr Hickey's position, but took no steps to register an instrument on the title to protect the position, nor did he seek to recover the funds. Mr Withers made a fresh proposition to the trust at this time to vary the arrangements, and that would have had the effect of reducing Clifden's cash payment liability if accepted by the trust.

[136] Mr Withers took no step to enforce the trust's rights at a time when the trust was requesting his assistance in resolving the difficulties arising from (the trustees thought) Mr Hickey's financial position. No mention was made by Mr Withers to the trust of its ability to exercise its rights against Mr Withers under a guarantee he now says he had given.

[137] These are separate instances of conduct post 1 August 2008. While all relate to the continuing conflict situation, these instances of conduct have been separately charged under LCA, otherwise they would remain unheard and unaddressed. While the conflict situation and lack of independence are continuing matters, they only form the background that makes Mr Withers' post 1 August 2008 conduct misconduct.

[138] In the end the trustees had to retain other solicitors and issue proceedings to obtain payment from Clifden. Mr Withers has let his personal interests get in the way of his professional obligations, and the way he has done that in this case is in our view clearly misconduct, for the reasons noted.

Summary and Determination

[139] The evidence of Shannon Marshall was that throughout the period covered by the conflict charges Mr Withers had consistently sought that the trust take some of the risk and, following Clifden's mortgage default, some of the loss arising from Clifden's venture with the land. As Shannon Marshall said in his evidence:[45]

> "At all times we relied upon Mr Withers to look after the Trust's best interests in his capacity as the Trust's solicitor."

[140] That is the expectation any member of the public would have of their lawyer: that their best interests would be looked after by their lawyer. That cannot occur in situations of conflict between clients of a lawyer, or where there is conflict between a lawyer's interests and a client's interests. In this case both of these situations occurred. A lawyer must always be able to be independent, so fiduciary duties and duties of care owed to clients can be properly observed.

[141] There has been a serious failure of integrity and probity by Mr Withers in respect of all three charges, and we have some concerns about the position he has taken in endeavouring to explain his conduct.

[142] Mr Withers deliberately failed to honour his undertaking. We do not accept that the claimed reasons for breach are tenable or excuse his breach of undertaking for the reasons noted.

[143] He has acted in an impossible conflict situation, as between clients and as between a client and his own interests. He lacked independence which has detrimentally affected the interests of the trust he was meant to be representing. His claims of limited retainer are not available on the evidence and it is implausible

[45] Paragraph 80(m) of his affidavit sworn 13 July 2012 filed in this matter.

position for a lawyer to adopt in these circumstances. We accept that the trust was unaware of the true circumstances affecting Mr Withers' involvement. The documentary trail does not support Mr Withers' position on the conflict charges. More importantly, Mr Withers was fully aware of his conflict and his lack of independence, but continued to act in the self-interested way shown by the evidence, whereby he attempted to obtain benefits for his trust.

[144] Each misconduct charge has been proven to the required standard of proof, the balance of probabilities[46] in our view. There have been significant professional failures by Mr Withers, and we are satisfied that on each charge his conduct amounts to misconduct for the reasons we have set out.

[145] We formally record that we find each of the charges proven against Mr Withers and that his conduct in each case constitutes serious misconduct.

Directions

[146] The Case Manager is to liaise with counsel with a view to establishing a date for a penalty hearing on a suitable date after submissions on penalty have been filed.

[147] The Standards Committee is to file and serve submissions on penalty within two weeks of the date of this determination.

[148] The practitioner is to file and serve his penalty submissions within two weeks after service of the penalty submissions by the Standards Committee.

Reasons for Refusal of Suppression

[149] At the commencement of the hearing Mr Withers made an application for Interim Name Suppression, which the Tribunal heard and declined, indicating it would give its full reasons in due course.

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[46] Section 241 Lawyers and Conveyancers Act 2006 notes this as the applicable standard to charges under that Act, and see also *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, confirming that this standard required flexibility in application according to the seriousness of the allegations, but nevertheless retaining the single standard, the balance of probabilities.

[150] The grounds of the application were based on a concern that the charges alleged Mr Withers had acted in a way that was dishonest and deceptive in order to obtain a pecuniary advantage. Mr Withers was defending the charges, and felt that his reputation should not be adversely affected prior to any finding on the charges.

[151] He noted that the staff he employed in his practice were "mentally fragile" following a number of relocations and disruption following the Canterbury seismic events of 2010 and following. Mr Withers said he wanted to avoid further stress as it could cause irreparable damage to his practice and result in staff job losses if his name was not suppressed in the interim, until the charges had been decided.

[152] Mr Withers also said that he held a number of senior positions in the community in charitable and sporting organisations and that as a result people in those organisations looked to him for leadership and guidance. He wanted to ensure that only if the charges were proven would the issues become known to such organisations.

[153] Finally, Mr Withers noted some difficult personal family circumstances, involving a recent family death, and was concerned that publicity regarding the charges would add further stress to his family, notwithstanding his immediate family was aware of the charges.

[154] Mr Withers also noted that it was some years since the initial events the subject of the charges had occurred, and that he had been able to continue to practise in the meantime, effectively submitting that there was no public risk issue that required publication of his name.

[155] The Standards Committee opposed the application on the basis that professional disciplinary hearings should be public unless there was a particular matter that weighed against that norm.

[156] It also opposed on the basis that the application was very late. Mr Withers had failed to comply with a requirement of the Tribunal to lodge any formal application for suppression (if that was his wish), made in March 2013. An application on the

morning of the hearing was too late it said, because it did not give the committee an adequate time to consider and respond to the application.

[157] Also, the committee submitted, the timing of the application meant that the matter had been in the public domain for a considerable period (the charges were laid in July 2012) and the efficacy of interim suppression was doubtful in those circumstances. This was compounded by the fact that the matters before the Tribunal had also been the subject of proceedings in the High Court in which the trust had successfully pursued Clifden for monies outstanding.

[158] In its oral ruling on interim suppression at the hearing the Tribunal referred to the need for open justice and recognition of the principles of free speech. It noted that it had to balance these public interest issues against the private interests of Mr Withers.

[159] It ruled that the evidence in support of the application provided in Mr Withers' affidavit was insufficient to outweigh the public interest in open proceedings, notwithstanding that this was an application for interim suppression.

[160] As noted, the starting point in weighing up the competing interests in an application for suppression is the importance of freedom of speech, open judicial proceedings, and the right of the media to report.[47] This position has been affirmed as equally applicable to civil cases.[48]

[161] The Tribunal has taken the position in suppression applications that its powers to suppress in s 240 LCA should also be read in conjunction with the purposes of LCA set out in s 3 of that Act.[49] Public confidence in the provision of legal services is maintained by the ability of the public to access and scrutinise information about disciplinary proceedings. This approach was approved in *Hart v Standards Committee (No. 1).*[50]

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[47] *R v Liddell* [1995] 1 NZLR 538 (CA).
[48] *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA) at [29].
[49] Including the maintenance of public confidence and protection of consumers of legal services – see *Hawkes Bay Standards Committee v H* [2010] NZLCDT 28.
[50] *Hart v Standards Committee (No.1) of the New Zealand Law Society* HC AK CIV-2011-404-7750 (13 December 2011).

[162] In reaching our view that we should decline Mr Withers' application for suppression we weighed his interests against those of the public having regard to the issues we have noted above regarding open justice, freedom of expression, and the right of the media to report. The charges are serious, not trivial. The particular factors relied on by Mr Withers are not unexpected consequences of the charges being laid and heard, and we saw nothing of such a nature as to make publication of his name disproportionate to the public interest in open justice.

[163] For these reasons we declined Mr Withers' application made at the commencement of the hearing, for interim name suppression.

DATED at AUCKLAND this 5th day of September 2013

DJ Mackenzie
Chair