LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 237

Ref: LCRO 083/2020

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

DECISION

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

Introduction

[1] Ms BA has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of Mr SC, a lawyer, at the relevant time a sole practitioner practising as a barrister and solicitor (the firm).

[2] Mr SC acted as instructing lawyer for Ms BA's brother, Mr FM, a trustee of a family trust of which Mr FM, Ms BA and their sister were beneficiaries, in defence of Ms BA's proceedings in the High Court to have Mr FM removed as a trustee. For part of that time, Mr SC also acted for a company, of which Mr FM was a "substantial" shareholder, on refinancing a bank loan secured by mortgage against the company's property.

[3] Ms BA claims in late October and early November 2018, Mr SC received and applied money from the family trust for Mr FM's personal benefit by paying that money to a bank in part repayment of the company's bank loan without first checking whether the family trust had authorised use of the money for that purpose.[1] In the latter part of 2016, Mr SC had assisted the company to arrange a two-year extension of that bank loan.

[4] In February 2018, Ms BA issued proceedings against Mr FM and the other trustee, an accountancy firm's trustee company, to remove them as trustees. On 28 February 2018, Mr FM asked (by email) Mr SC to act as instructing lawyer to a barrister [Mr FM] had "appointed" to represent him in defending Ms BA's proceedings.

[5] Mr SC agreed (by email) the following day, 1 March 2018. Later that day he received a copy of the statement of defence prepared by the barrister.

[6] The company's bank loan was due for payment in October 2018. During August and September 2018, Mr FM arranged, through a broker, a replacement loan from another bank.

[7] Mr SC was absent from the firm on leave in October 2018. Settlement preparations for the refinancing of the company's bank loan were attended to by a legal executive employed by the firm which included informing Mr FM of a shortfall between the higher amount to repay the bank loan, and the lesser amount of the replacement bank loan.

[8] Mr SC returned to his office from leave on 29 October 2019. The following day, 30 October 2019, two payments of $100,000 each, were made to the firm by the family trust, recorded on the family trust's bank statement as "SC Law Advance". The legal executive says she receipted the money "as being from Mr FM and the FM Family Trust".[2]

[9] Late November/early December 2018, Ms BA's lawyer informed (by telephone) Mr SC that use of the family trust money by Mr FM for the company "may be inappropriate".

[10] On 19 December 2018, the High Court made an interlocutory order against Mr FM. Having received a copy of that order on 16 January 2019, Mr SC immediately informed Mr FM and the barrister of Mr SC's intention to seek leave of the High Court to

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[1] Mr FM is a barrister.
[2] Shown on the firm's trust account bank statement from "FM Family T[rust]", in respect of "[Mr] FM".

withdraw as instructing lawyer. On 25 January 2019, Mr SC gave notice to that effect in a memorandum to the High Court.

[11] At a case management conference on 12 February 2019, the High Court granted Mr SC's request to withdraw as instructing lawyer. Ms BA says in March 2019 the accountants' trustee company resigned as a trustee, and Mr FM was subsequently ordered by the High Court to resign. She says the Public Trust was appointed as trustee in their place.

Complaint

[12] Ms BA lodged a complaint with the Lawyers Complaints Service on 5 August 2019. She described Mr SC's conduct of receiving $200,000 from the family trust and applying that money towards repayment of the company's existing bank loan as "extremely inappropriate conduct" for a lawyer.

[13] She asked for (a) the "return" of the money to the family trust, or (b) Mr SC "to be held accountable for his actions".

(1) Receipt, and application of funds

[14] Ms BA complained that without contacting her and her sister, as beneficiaries of the family trust, Mr SC "accepted $200,000 from [the family trust] knowing" about the dispute between her and Mr FM.

[15] Ms BA explained that "from or before 1 March 2018", the date of Mr FM's statement of defence, Mr SC was instructing lawyer for Mr FM in defence of her proceedings concerning the family trust in the High Court.

[16] Nevertheless, Ms BA says on 30 October 2018, Mr SC accepted two payments of $100,000 each from the family trust which the firm then applied towards repayment of the company's existing bank loan.

(2) Conflict of duties

[17] Ms BA stated having obtained, "on or about 19 December 2018", an interlocutory order against Mr FM, on 25 January 2019, Mr SC withdrew as instructing lawyer for Mr FM in those proceedings.

[18] She said her lawyer had already told Mr SC that by receiving and applying the family trust's funds towards repayment of the company's bank loan whilst acting for Mr FM in defence of her proceedings, [Mr SC] had a conflict of duties.

Response

[19] I refer to Mr SC's response to Ms BA's complaint in my later analysis.[3]

Standards Committee decision

[20] The Committee delivered its decision on 5 May 2020 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

(1) Receipt, and payment of funds

[21] The broad issue identified by the Committee was whether Mr SC "breached any of his professional obligations as a result of his involvement in the refinancing transaction". In other words, whether by receiving the family trust money via Mr FM, and then applying that money towards repayment of the bank loan, Mr SC contravened any professional obligations or duties.

(2) Instructions

[22] The Committee concluded Mr SC was (a) "entitled to rely on the instructions" from Mr FM on behalf of the company, and (b) "under an obligation to act on those instructions", and "protect [the company's] interests" notwithstanding that "may not have been in Ms BA's interests".

[23] In reaching that decision, the Committee stated Mr SC "was required to act on [the company's] instructions" which "included" instructions "relating to the payment of the funds" to refinance the bank mortgage.

[24] The Committee stated it "was satisfied by Mr SC's explanation" that the legal executive, who attended to the matter when he was on leave, (a) "was not aware of Mr SC's position as instructing solicitor" for Mr FM in defence Ms BA's proceedings, and (b) had been told by Mr FM "the necessary funds [were] available" for the refinancing of the bank loan.

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[3] Mr SC, letter (by email) to the Lawyers Complaints Service (13 December 2019).

[25] In such circumstances, the Committee's view was there was "no reason for either Mr SC or the legal executive to question the source of those funds".

(3) Ms BA's proceedings

[26] The Committee noted Mr SC's further explanation that he "had no knowledge" of the status of Ms BA's proceedings against Mr FM before he spoke with Ms BA's lawyer "around" late November or early December 2018.

Application for review

[27] Ms BA filed an application for review on 11 May 2020.

[28] She says she disagrees with the Committee's decision. She asks that Mr SC, or the legal executive be held accountable for not taking any action to ensure the $200,000 paid "was legitimately approved" by the trustees, or beneficiaries of the trust.

[29] Ms BA says it is "unacceptable" for (a) Mr SC being "[un]accountable" for "checking the legitimacy" of the payment of $200,000 to the firm received from Mr FM, and (b) Mr FM, also a lawyer, to have applied funds from the family trust towards repayment of "a personal debt".

[30] She says she "do[es not] believe" the firm's legal executive did not know Mr SC was instructing lawyer for Mr FM in defence of her proceedings. She asks whether "there are checks required for such transactions". She asks the firm to produce a signed letter from the legal executive who attended to the company's refinancing matter.

[31] Ms BA says although Mr SC was absent from the office on leave when the funds were received, because he had access to the firm's trust account "he too was aware of the transaction".

Response

[32] In his response, Mr SC says he has "nothing [he] wishes to add" to his response to Ms BA's complaint. He says the legal executive would produce "a brief email regarding her role in the transaction".[4]

[4] Mr SC, email to LCRO, 5 June 2020. I refer to the legal executive's email in my later analysis.

Hearing

[33] Although initially directing, pursuant to s 206(2) of the Act, that the review be dealt with on the papers, I subsequently directed the case manager to set the matter down for a hearing (by teleconference) which was attended by both parties on 30 November 2020.

Nature and scope of review

[34] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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.

[35] More recently, the High Court has described a review by this Office in the following way:[6]

> 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.

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

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

Issues

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

(a) When acting for (i) Mr FM in defence of Ms BA's proceedings, and (ii) the company on the refinancing of its bank loan, did Mr SC owe Ms BA, and the family trust any professional obligations and duties? If so, what were those obligations and duties, and did Mr SC carry them out?

(b) Upon receipt of the $200,000 from the family trust, did Mr SC have a duty, or cause to enquire whether the family trust had authorised the use of that money by Mr FM for the shortfall to repay the company's bank loan?

(c) In that regard, what were the requirements of the Act, and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (Trust Account Regs.) that applied to Mr SC when the firm received, and applied that money towards repayment of the company's bank loan?

Analysis

(1) Another lawyer's client – issue (a)

[38] Ms BA's complaint concerns Mr SC's conduct when acting for (a) Mr FM as instructing lawyer in defence of her proceedings to remove Mr FM as a trustee of the family trust, and (b) the company on the refinancing matter.

(a) Professional rules

[39] The first question to consider is whether Mr SC owed professional duties to Ms BA, or the family trust in those circumstances. Because Mr SC did not act for either, it is helpful to draw the distinction between lawyers' professional obligations and duties owed to their clients on the one hand, and to non-clients on the other.

[40] Should a determination be made that a lawyer's conduct warrants a disciplinary response there are two findings that can be made: (a) unsatisfactory conduct pursuant to s 12 of the Act; or (b) misconduct pursuant to s 7.[7]

[41] When a lawyer is providing regulated services, defined in s 6 of the Act, one of the three categories of unsatisfactory conduct concerns "conduct consisting of a contravention of [the] Act, or of any regulations or practice rules made under [the] Act

[7] A misconduct finding can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

that apply to the lawyer …, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under [s] 7)".[8]

[42] The professional duties that bind lawyers when acting for clients are contained in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) which, as the name suggests, concern the way in which lawyers must (a) conduct themselves, and (b) act for their clients.

[43] Although the Rules, which expand on lawyers' fundamental obligations, do not represent "an exhaustive statement of the conduct expected of lawyers", they do "set the minimum standards that lawyers must observe and are a reference point for discipline," and conveniently fall into three broad categories.[9]

[44] First, those rules which directly concern the provision of legal services by lawyers to their clients; secondly, those which concern lawyers' dealings or interactions with other lawyers, and third parties; and thirdly, those rules which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.[10]

(b) Client

[45] The duties which lawyers owe their clients include the duties to act competently and in a timely manner;[11] to treat clients with respect and courtesy;[12] to respond to client inquiries promptly;[13] to provide clients with information on the principal aspects of client service and client care at the commencement of a retainer;[14] to be independent;[15] to protect and promote clients' interests to the exclusion of third parties' interests;[16] to keep

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[8] This is unsatisfactory conduct as defined by s 12(c) of the Act. It can apply when a lawyer is not providing regulated services. The other categories where a lawyer is providing regulated services are, first s 12(a): "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer"; and second, s 12(b): "conduct … that would be regarded by lawyers of good standing as being unacceptable including (i) conduct unbecoming …; or (ii) unprofessional conduct". See also 12(d) - "a failure …, to comply with a condition or restriction to which a practising certificate held by the lawyer … is subject …".

[9] Section 4 of the Act specifies lawyers' fundamental obligations: "(a) to uphold the rule of law and facilitate the administration of justice in New Zealand"; "(b) to be independent…"; "(c) to act in accordance with all fiduciary duties and duties of care…"; (d) "protect, subject to overriding duties as officers of the High Court… the interests of clients". See the Rules and the Schedule at Notes about the rules; and s 107(1) of the Act.

[10] Section 4.

[11] Rule 3.

[12] Rules 3.1.

[13] Rules 3.2 and 7.2.

[14] Rules 3.4 and 3.5. Rules 3.4A and 3.5A apply to barrister's sole.

[15] Rules 5, 5.2, 5.3 and 5.4.

[16] Rule 6.

clients informed, consult with them;[17] to hold clients' information in confidence;[18] to charge clients fees that are fair and reasonable.[19]

(c) Non-clients

[46] There may be circumstances when a lawyer owes a duty, other than a professional duty, such as a duty of care in negligence, to persons for whom the lawyer does not act.

[47] However, "the existence of a duty" owed by a lawyer to a non-client has been described as "exceptional", and, in the context of Ms BA's proceedings against Mr FM, "almost inconceivable" to an opposing party in litigation. Having regard to policy considerations such as the different interests possessed by each party, the duties owed by a lawyer acting for one party in a transaction to an opposing party have been described as "limited".[20]

[48] Illustrations of professional duties in the second category of the Rules (other lawyers, third parties) include, when the lawyer is "acting in a professional capacity", the duty to "conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy"; and when the lawyer "knows that a person is self-represented", to "normally inform that person of the right to take legal advice".[21]

[49] As noted above, lawyers' professional duties in the third category include rules which, in broad terms, concern the administration of justice itself. For example, a lawyer acting for a client in litigation has a duty to uphold the rule of law; an overriding duty to the Court; the duty of honesty to, and not to mislead or deceive the Court; and the duties to protect Court processes.[22]

[50] Such duties do not, however, "give rise to [a] cause of action in favour of the other party".[23]

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[17] Rule 7.1.
[18] Rule 8.
[19] Rules 9 and 9.1.
[20] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3].
[21] Rules 12 and 12.1; see also r 12.2 concerning third-party fees.
[22] Rules 2, 2.1, 13, 13.1, and 13.2. Other rules which can apply when a lawyer may not be acting for a client include, r 2.2: not to attempt to obstruct, prevent, pervert or defeat the course of justice; and rr 2.5 and 2.6: not to provide false certificates.
[23] Webb, Dalziel, Cook at [5.4.3], referring to *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281 (CA) at 293.

(d) Discussion

[51] Mr SC did not act for Ms BA, who was independently represented, or the family trust, and therefore did not owe them any of the client related professional duties in the first category of the Rules referred to above. Ms BA's proceedings against Mr FM were entirely separate from the company's refinancing matter.

[52] Equally, from the information produced, there is no evidence Mr SC, as instructing lawyer for Mr FM, and acting for the company on the refinancing, contravened any of the rules I have referred to in the second category owed to Ms BA and the family trust as non-clients.

(2) Handling money – issues (b), (c)

[53] This leads to me consider whether, having been "assured" by Mr FM he had funds "available" for the company to make up the repayment shortfall, Mr SC had (a) a duty to comply with Mr FM's instructions to apply the $200,000, received by the firm from the family trust by electronic transfer on 30 October 2018, for that purpose, or (b) knowing, as he acknowledges, Ms BA's proceedings sought to remove Mr FM as a trustee concerned the family trust, a duty, or cause to enquire of Mr FM, and possibly his co-trustee, whether [Mr FM] was entitled to the money for that purpose.[24]

(a) Instructions

[54] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions. A lawyer:[25]

> …must not act in contravention of a client's instructions. It may be appropriate for the lawyer to counsel against a particular course of action when it is considered not to be in the client's best interests. But when clients are firm in their instructions, the lawyer may not substitute the lawyer's own judgment for that of the client.

[55] However, where the lawyer is unsure about the client's instructions then:[26]

> … it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action.

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[24] As noted earlier, described on the family trust's 30 November 2018 bank statement as "SC Law advance".
[25] Webb, Dalziel and Cook, above n 20 at [10.3].
[26] At [10.3].

[56] If a prospective client's instructions to the lawyer "could require the lawyer to breach any professional obligation" then the lawyer may decline the instructions.[27] If, when carrying out of the work on a retainer, the client's "instructions … require the lawyer to breach any professional obligations," then the lawyer may terminate the retainer.[28]

[57] A lawyer must also disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[29]

(b) Trust account requirements

[58] Lawyers "hold a position of privilege and trust" in handling their clients' funds. In order to "maintain public confidence in the legal profession", and "protect the consumers of legal services" the trust account requirements that apply to lawyers "must be strict[ly] observ[ed]."[30]

[59] Lawyers' trust accounts are subject to "review", and "investigation" by the Law Society Inspectorate.[31] A lawyer who is a trust account supervisor and therefore responsible for oversight of the trust account "is a trustee for the purpose of a criminal breach of trust" under s 229 of the Crimes Act 1961. Proven "misappropriation of trust money" by a lawyer "is likely to be seen in terms of theft by a person in a special relationship or criminal breach of trust" pursuant to s 220, or s 229 of the Crimes Act 1961.[32]

[60] For these reasons, I refer to the requirements in the Act and the Trust Account Regs, that applied to Mr SC when he received the money from the family trust into, and paid that money from his trust account.

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[27] Rule 4.1.
[28] Rule 4.2.1(a).
[29] Rules 7 and 7.1.
[30] *Auckland Standards Committee 5 v Holmes* [2011] NZLCDT 31 at [24]; *Johnson* v *Canterbury-Westland Standards Committee 3* [2019] NZHC 619 at [85], cited in Paul Collins "Professional Responsibility in New Zealand" (online ed, LexisNexis) at [19.1.1]. Also, see s 3(1) of the Act: the consumer protection purposes of the Act.
[31] Trust Account Regs at Parts 6 and 7.
[32] Collins at [19.1.1].

(i) Receipt of money

s 110 of the Act

[61] The statutory requirements that apply to lawyers when receiving money into, and paying money from a lawyer's trust account are contained in s 110(1) of the Act.

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

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

[64] There may, however, be occasions when it is problematic for a lawyer carrying out these requirements, such as an absence of clarity of "the identity of the person on whose behalf" the lawyer has received the funds; or where the lawyer is instructed to apply the funds "for an illegitimate or unlawful purpose" thereby risking a breach of trust by the lawyer.[34]

[65] In *Fletcher* the Court referred to exceptions to the "absolute" requirement of s 110(1) to comply with a client's instructions "as to the disbursement of funds held in a trust bank account and where the client is a trustee". The Court stated a lawyer has "overriding duties" (a) to avoid committing or being party to a criminal offence", and (b) "to take all reasonable steps to prevent any person from perpetuating a crime or fraud through [the lawyer's] practice".[35]

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

[34] Collins, above n 30 at [19.1.3].

[35] *Fletcher* at [84]. See also r 2.4 of the Rules.

[66] The Court stated these exceptions "entitled a [lawyer] to decline to accept the instructions from the person concerned and also provided a defence to any criminal or disciplinary charges for contravention of [s110(1)]".

[67] Equally, the Court added a lawyer would not be required to comply with a client's directions "if by doing so [the lawyer] would become liable, with the requisite knowledge, as a knowing recipient of trust property transferred in breach or for dishonestly assisting that breach".[36]

[68] Nevertheless, because liability for a fiduciary or trust breach is personal and unlimited, the observation has been made that "all prudent lawyers will make proper enquiry in receiving and transferring money or property on behalf of a client who is a trustee or fiduciary".[37] Such enquiry may lead to the lawyer applying to the Court for directions.[38]

Trust Account Regs, reg 12

[69] Regulation 12 of the Trust Account Regs details what a lawyer must do when receipting money into the lawyer's trust account.[39]

[70] In summary, (a) the receipt must be (i) "recorded in a trust account ledger" with "a separate ledger account" for "each client", (ii) "recorded promptly and accurately" in the lawyer's practice's trust account receipt records", and "the relevant client ledger account", and (b) each entry "must state (i) "the amount, date, purpose, and source of the receipt", and importantly, (ii) "the client for whom the trust money is to be held".[40]

Trust Account Guidelines

[71] Practical assistance for lawyers in complying with these requirements is contained in the Lawyers Trust Accounting Guidelines (Trust Account Guidelines) published by the Law Society.[41] Guideline 5.2 provides that money paid "directly" to the

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[36] *Fletcher* at [85].
[37] GE Dal Pont Lawyers' Professional Responsibility (4th ed, Thomson Reuters, Sydney, 2010 at [19.35], cited in in *Fletcher* at [85].
[38] Collins, above n 30 at [19.1.3].
[39] Regulation 11 of the Trust Account Regs: the requirement to keep trust account records.
[40] Regulation 11(3) and (4) of the Trust Account Regs states: entries in the "client ledger accounts" require "references that identify their source or destination and enable them to be traced backward and forward"; also, reg 3 defines "client", "in relation to a practice, includes any person on whose behalf money is… held by the practice", and that "practice" "means and includes a sole practitioner, a partnership, and an incorporated firm" .
[41] Published 2018. The relevant guidelines are at 5.1 to 5.16. Although described as non-mandatory, the Guidelines state that "compliance…will generally ensure compliance" with the trust account requirements in both the Act, and Trust Account Regs.

lawyer's "trust bank account" must be "identified promptly and entered into the trust receipting system". Under guideline 5.4, "[t]he receipts must record complete information about the parties involved and on the nature of the payment as indicated by the layout of the [receipt] form".[42]

(ii) Payments

[72] Pursuant to reg 12(1), payments or transfers from money held in trust for clients must similarly (a) be "recorded in a trust account ledger" with "a separate ledger account" for "each client", (b) be "recorded promptly and accurately" in the lawyer's practice's (i) trust account receipt records", and (ii) "the relevant client ledger account".

[73] Regulation 12(6) includes among the preconditions a lawyer must satisfy before his or her practice makes a transfer or payment, "sufficient funds", and "obtain[ing] the client's instruction or authority for the transfer or payment".[43]

[74] The Trust Account Guidelines similarly provide practical guidance for lawyers to comply with these requirements. Guideline 6.1 includes in the "security measures" required for payments by "electronic banking", that "[t]ransfer of funds from the trust account should require the involvement of two individuals", one who "sets up the transaction", and the other "authorises it". Full "supporting documentation for both the payment being made and the payee bank account number must be provided to the person authorising the payment.[44]

[75] Guideline 6.9 requires that the person "preparing a payment … should ensure" that "the principal or director of the practice" who authorises the payment "has sufficient information and supporting evidence" to "be satisfied that [the payment] has been properly set up".

[76] Importantly, guideline 6.10 emphasises the act of authorisation "represents an important part of the control of the trust account".[45]

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[42] Guideline 5.11 restates both the statutory and regulatory requirements that money received by the lawyer into his or her trust bank account "be banked promptly, daily where practicable".
[43] Regulation 12(6)(a) and (b): the other preconditions concern (c) payments to a third party; and (d) transfers to another client by trust journal entry.
[44] Trust Account Guidelines at 6.1 to 6.19. Guideline 6.2 covers having client authority; guideline 6.4 specifies "…only one person and a back-up should be responsible for preparing electronic payments … (preferably not the same person as responsible for receipting)"; guideline 6.5: payments only by "electronic banking transfer or by cheque"; guideline 6.6: payment details must include "the date, payee, account debited, … purpose".
[45] Guideline 6.11: delegation of that authority "should be given only to suitably knowledgeable and experienced employees" in "urgent cases where a principal or director is not available", and "supported by procedures to ensure that payments released are true and correct".

(c) Discussion

[77] It remains to be considered whether Mr SC complied with the Rules that concern a client's instructions, and with the trust account requirements, when the firm receipted the money from the family trust into, and paid that money from his trust account towards repayment of the company's existing bank loan.

Ms BA

[78] At the hearing Ms BA claimed Mr FM did not have authority to use the family trust's money for the company's refinancing. She said Mr FM, was the "key problem" in her family, and Mr SC "had been caught up in it".

[79] She says Mr FM "took" the money from the family trust "without the consent of the other trustee", and "without the knowledge" of herself, and her sister as the "other beneficiaries." She asks how, in such circumstances, Mr FM could apply the family trust's funds "towards his personal debt".

[80] She says, as instructing lawyer for Mr FM, as well as acting for the company on the refinancing, Mr SC knew about Ms BA's proceedings against Mr FM. She says receipt of the family trust's money would have raised questions in Mr SC's mind whether that money was available to Mr FM for that purpose.

[81] In Ms BA's mind, the name of the family trust ought to have "suggest[ed]" to the legal executive and Mr SC that the other beneficiaries may have been "affected" by Mr FM "taking funds for his personal use". She contends it was therefore inappropriate for Mr SC to receive and apply money from the family trust, arranged by Mr FM, towards repayment of the company's bank loan.

[82] Ms BA says knowing Mr SC acted for Mr FM in defence of her proceedings, she was "shocked" [Mr SC] "accepted" the family trust's funds. She says she "find[s] it unbelievable" and "unacceptable" Mr SC could receipt money for the company, "clearly…labelled" from "a [family] trust", without "having any obligation to check the legitimacy of [the] source".

[83] She says she would have "accepted" an explanation by Mr SC that the firm received and applied the family trust's funds towards repayment of the company's bank loan in "error". She describes the legal executive's explanatory letter produced by Mr SC as a "whitewash". She says she does not accept his "excuse" of having been on leave with the legal executive "acting".

[84] In her view, because Mr FM is a "prominent lawyer" in the district, it would be "very unusual" for the legal executive "not to have known" Mr SC was instructing lawyer for Mr FM in defence of her proceedings which concerned the family trust.

[85] Ms BA says the legal executive "confirm[s]" in [the legal executive's] letter that [the legal executive] did not first "check" with the other trustee, or other beneficiaries, whether that payment for "a large sum of money" was "legally consented".[46]

[86] She expects Mr SC, before going on leave, would have had "a number of communications" with, and "probably briefed" the legal executive about her proceedings.[47] She says because Mr SC returned to his office on 29 October 2018, he would have known about the payments received from the family trust into the firm's trust account the following day.

Mr SC

[87] In response, Mr SC says the legal executive, who had worked for him for 20 years, had "her own client base" and worked "95% autonomously", "handled" the company's refinancing while he was on leave in October 2018.

[88] Both Mr SC and the legal executive say during that time the legal executive told Mr FM further funds were required to meet a shortfall to repay the company's existing bank loan.

[89] At the hearing, Mr SC referred to Mr FM's 28 October 2018 email to the mortgage broker, and the accountant in which Mr FM stated he "ha[d] sufficient funding in place to settle on 1 November 2018". Mr SC says the legal executive relied on that "assur[ance]" from Mr FM and had "no reason" to "doubt Mr FM's word", or "question the deposits".

[90] Mr SC says when the sum of $200,000 was paid into the firm's trust account on 30 October 2018, the legal executive (a) "presumed the money came from Mr FM, and the FM family trust", and (b) "believe[d]" that trust was "Mr FM's own trust". Mr SC says he does not know who had signing authority for the trust's bank account.

[91] He says apart from acting for the company in 2016 when the company obtained a two-year extension of its bank loan, and again in October 2018 when refinancing that loan, and as instructing lawyer for Mr FM in defence of Ms BA's proceedings, he had not acted for Mr FM previously, or since.

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[46] Ms BA, email to LCRO (10 June 2020); Ms TP (legal executive), letter to LCRO (5 June 2020).
[47] Ms BA, email to LCRO (6 May 2020).

Mr SC as instructing lawyer

[92] Also at the hearing, Mr SC says his attendances as instructing lawyer for Mr FM in defence of Ms BA's proceedings were minimal, and "in hindsight" he "ought to have been more proactive". He said he did not see Ms BA's statement of claim, and Mr FM's statement of defence, prepared by the barrister, was "brief, just a list of denials".

[93] He says his office had been "unfortunately used as a postbox" for the proceedings, and he had not been in communication with Mr FM about them. He says he knew the proceedings sought Mr FM's removal as a trustee, but he did not tell the legal executive about them, or discuss them in the office.

[94] However, he says until told by Ms BA's lawyer "late November or early December 2018" that the company's use of the family trust's money "may be inappropriate", apart from having received a copy of Mr FM's statement of defence from the barrister at the outset when he agreed to act as instructing lawyer, he had only received a copy of a memorandum concerning a directions conference in June 2018.

[95] He says upon receiving a copy of the interlocutory order against Mr FM on 16 January 2019, he withdrew as instructing lawyer a month later.

Company's refinancing

[96] Mr SC says on his return to the office on 29 October, he found settlement of the company's refinancing had been postponed from 1 November until 7 November because the replacement bank loan documents had not arrived in time.

[97] He said apart from asking the legal executive whether the funds to settle had been received, he cannot recall whether he reviewed the file, but there was "no record" about this on the file.

[98] He said he may have spoken to the legal executive "once or twice" about the matter, but his "input was nil" and he did not know the source of the shortfall funds required to repay the existing bank loan. He said the legal executive attended to Mr FM on signature of the Authority & Instruction for e-dealing registration, and the firm's invoice to the company was not finalised until the end of November.

Receipt of funds

[99] Mr SC said the "majority of funds are received by the firm electronically". He said the trust account bank statement is printed each day, the legal executive having

"writ[ten] details" on the receipts for the firm's accountant. He said he would normally receive a copy, sometimes with queries from the legal executive.

[100] He says there was "nothing" on the firm's 30 October trust account bank statement to "alert" him to any concerns. He says he "relied" on Mr FM's "assurance" and "did not see" on the trust account statement that the family trust had provided the shortfall funds to repay the existing bank loan. He says he "got on well" with Mr FM, and "had no concerns about [Mr FM's] professionalism."

Payment of funds

[101] As noted above, the process of authorisation of a payment from the firm's trust account by a partner or principal of the firm serves as a useful check on whether the payment can be made, including sufficient funds, and the client's authority and direction to make the payment.

[102] Mr SC explained that the legal executive's request for his authorisation to make that payment would have been accompanied by a printout of the company's trust account ledger, and authority to pay. However, he acknowledges he again did not notice the family trust had provided the shortfall for repayment of the company's existing bank loan, and any possible connection with Ms BA's proceedings.

Consideration

[103] In summary, Ms BA's complaint about Mr SC's conduct concerns whether by acting for Mr FM in defence of Ms BA's proceedings (a) upon receipt of the family trust's money, and (b) again when the firm paid that money towards repayment of the company's bank loan, Mr SC had cause, and therefore a duty to make enquiry of Mr FM about [Mr FM's] entitlement to that money for the company's refinancing.

[104] Mr SC says although instructing lawyer for Mr FM in defence of Ms BA's proceedings, [Mr SC] had little involvement in those proceedings. He also acknowledges he did not review the company's refinancing matter with the legal executive on his return from leave on 29 October 2018.[48]

[105] The following day, 30 October 2018, without knowing Mr SC was instructing lawyer for Mr FM in defence of Ms BA's proceedings, the legal executive receipted the money into the firm's trust account for the credit of the company.

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[48] Rule 11.3: "a lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practise on his or her own account".

[106] Similarly, when requested by the legal executive on 7 November, the settlement day of the company's refinancing, to authorise payment of that money to the bank, Mr SC acknowledges he did not, on that final check, notice Mr FM had arranged the shortfall of funds for the company from the family trust.

[107] Mr SC and the legal executive state they relied on Mr FM's assurance the family trust's money was available to [Mr FM] for repayment of the company's bank loan.

[108] It follows that if I am to be persuaded Mr SC's conduct of receipting and paying the money received from the family trust warrants a disciplinary response, Ms BA must show, on the balance of probabilities, Mr SC contravened (a) any one or more of the Rules, or (b) any of the trust account requirements I have referred to.[49]

[109] Alternatively, that Mr SC's conduct (a) "fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer", or, (b) was "unacceptable", or "unbecoming", or "unprofessional".[50]

[110] At that time, Mr FM was still a trustee of the family trust. Apart from acting for Mr FM in defence of Ms BA's proceedings, no evidence has been produced that might have put Mr SC on notice that Mr FM may not be entitled to the $200,000 from the family trust money.

[111] That is not to say whether or not Mr FM was entitled to the money, but that the issue of his authority to access, or his entitlement to that or any other money from the family trust had yet to be determined by the Court.[51] At the time that the funds were receipted by the legal executive and described as money from Mr FM, and the family trust, Ms BA's concerns about Mr FM's role as a trustee were similarly yet to be considered by the Court.

[112] As noted earlier, it was not until after settlement of the company's refinancing on 7 November 2018 that Mr SC was told by Ms BA's lawyer later that month that Mr FM's use of the family trust's money "may be inappropriate", and on 16 January 2019 he received a copy of the interlocutory order against Mr FM. On 12 February 2018 the High Court granted Mr SC's request to withdraw as instructing lawyer for Mr FM.

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[49] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [112]: "There is … a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them".
[50] Sections 12(a) and (b) of the Act referred to earlier.
[51] Sections 67 and 68 of the Trustee Act 1956; also see *Nevill's Law of Trusts, Wills and Administration* (online 13th ed, LexisNexis, 2018) at [12.2.2].

[113] Again, at the hearing, Mr SC repeated he had taken Mr FM at his word, and apologised if, when acting on both matters, he had not taken sufficient care which led to Ms BA being disadvantaged.

[114] He said if acting for the company again in those circumstances, he would have asked the accountants' trustee company, as co-trustee, for its view on the use of the family trust's funds by the company, and communicated any concerns to Mr FM. Otherwise, Mr SC said he could not say what his next steps would be other than he could have been "placed in a difficult position".

[115] In such circumstances, I make the observation that one of the steps Mr SC may have taken was to ask Mr FM to provide a copy of a trustees' resolution authorising use of the money by the company; or, as noted earlier, advised Mr FM to apply to the Court for directions, perhaps as part of Ms BA's proceedings.

[116] Alternatively, depending on the nature of Mr FM's further instructions, possibly terminate both retainers.[52]

(c) Conclusion

[117] Mr SC acknowledges he could have done better with his supervision of the legal executive's work, and administration of his trust account. Particularly, as instructing lawyer for Mr FM, knowing (a) the family trust in those proceedings, and (b) the family trust which provided the shortfall money arranged by Mr FM for the company, were one in the same.

[118] However, from my analysis of the information produced, and having heard from the parties, when receipting the money from the family trust into, and paying that money from his trust account I do not consider Mr SC contravened any of the Rules, or the trust account requirements I have referred to.

[119] For these reasons, I am drawn to the conclusion that having received Mr FM's instructions the money was available to him, in the absence of any information that required Mr SC to obtain clarification of those instructions, Mr SC was obliged to carry them out.

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[52] Rule 4.2: "A lawyer who has been retained by our client must complete the regulated services required by the client under the retainer unless –… (c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination"; r 4.2.1: "Good cause includes – (a) instructions that require the lawyer to breach any professional obligation …".

[120] In reaching that position I considered whether the outcome might have been different had Mr SC, being up to date with both matters, known the money Mr FM had arranged for the company was from the family trust, the administration of which was central to Ms BA's proceedings against Mr FM. Again, unless alerted to any concerns with Mr FM's instructions, it is my view Mr SC would similarly have been obliged to implement them.

[121] Whether or not Mr SC knew Mr FM had arranged the shortfall funds for the company from the family trust, either way, the absence of any information at that time showing Mr FM was not entitled to that money is unlike one of the exceptions to the strict observance of s110 discussed by the Court of Appeal in *Fletcher* referred to earlier, where the lawyer concerned was held to be "a knowing recipient of trust property transferred in breach or for dishonestly assisting that breach".

[122] Nevertheless, it is to be emphasised, as also noted earlier, "a prudent lawyer" whose client is a trustee or a fiduciary "will make proper enquiry in receiving and transferring money or property on behalf of [the] client".[53]

Decision

[123] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that any further action on the complaint is unnecessary or inappropriate is confirmed.

Anonymised publication

[124] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 18TH day of DECEMBER 2020

B A Galloway
Legal Complaints Review Officer

[53] Dal Pont, above n 37 at [19.35].

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

Ms BA as the Applicant
Mr SC as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice