LCRO 118/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Otago Standards Committee
BETWEEN	**Mr OM** Applicant
AND	**Mr PR** Respondent

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

DECISION

Introduction

[1] The background to Mr OM's complaint concerned a dispute that he had with BAI. The complaint was made against the law firm of YZA which acted for BAI, but since that firm is not incorporated, the Standards Committee took the complaint to be against Mr PR (the Practitioner) whose business card was attached to information that Mr OM had sent with his complaint.

[2] The complaint was not upheld by the Standards Committee. This review application was made by Mr OM who is referred to as the Applicant.

[3] The background is that BAI claimed the Applicant owed it money, and when the Applicant wanted certain repairs done to machinery on his farm, BAI agreed to undertake the repair work providing that an amount of money representing its claim was paid into the trust account of YZA. The Applicant agreed.

[4] It appears that Mr QD, a director of BAI, drafted an Agreement between his company and the Applicant. It was dated 19 August 2009 and it contained two specific clauses that are material to the complaint, and this review.

[5] Clause 1 provided that the amount of $11,930.00 would be paid by the Applicant into YZA trust account and held by that firm pending a resolution between the Applicant and BAI over disputed accounts, also providing for any monetary adjustments to be made. Materially, clause 1 provided that the "*money needs to be agreed by both parties*".

[6] Clause 2 recorded that BAI would start (the repair) work as soon as possible. Clause 3 was a little unclear, but appeared to record the Applicant's agreement to pay for the proposed repair work without disputing BAI's account.

[7] The evidence indicates that the Practitioner had perused this agreement at some time and advised that a portion of Clause 3 should be deleted, which Mr QD did before he brought the agreement to the Applicant for signing.

[8] The Applicant took the agreement to his own lawyer, Mr FA, who in his own handwriting inserted at the end of Clause 1, the following: *"[n]o payment shall be made from [YZA] Trust account without the written agreement of both parties."*

[9] The Applicant then took the Agreement and a cheque for $11,930.00 to YZA and obtained a receipt. There was no evidence that the Practitioner saw the Agreement in its final form.

[10] BAI undertook the repair work and at some stage afterwards Mr QD contacted YZA law firm to say that the money in the firms trust account could now be released. Payment was then made to BAI.

[11] Several months later the Applicant discovered that the payment had been made to BAI from the YZA trust account. He had not given his written authority that the money could be released, and disputed that he had agreed to the payout, and also disagreed that he and Mr QD had discussed the disputed invoices. In the Applicant's view the law firm should not have released the money to BAI without his written consent in accordance with the Agreement.

[12] Eventually the Applicant made a complaint to the New Zealand Law Society, alleging breach of trust and/or breach of fiduciary obligation to hold the money in trust for both him (the Applicant) as well as BAI.

[13] The Standards Committee did not uphold the complaint because it was not persuaded that the Practitioner was aware of the hand written amendment to Clause 1 of the agreement. The added difficulty was that Mr PR, through serious ill health, was no longer practicing as a lawyer, and was unable to respond to the complaint himself or participate in the enquiry.

[14] It appears that the Standards Committee focused its consideration on the alleged breach of fiduciary duty and/or trust, when it concluded that in the absence of evidence that Mr PR knew of the amendment, there was no basis for a finding that there had been a breach of any duty when the firm paid out what appeared to be the client's funds. The Committee decided to take no further action, pursuant to Section 138(2) of the Lawyers and Conveyancers Act.

Review Application

[15] The Applicant sought a review on a number of grounds. A review hearing was held on 19 June, attended by the Applicant and his counsel (Mr FA), and for the law firm, Mr HK appeared.

[16] Also present was the Practitioner's brother who was able to give evidence as to the Practitioner health. I record at this point that there was no dispute that the Practitioner himself was not able to participate in this proceeding due to ill health. No objection was raised to the Practitioner's brother remaining at the hearing so as to be able to report back to the Practitioner.

[17] The first ground of review was that the complaint was not against the Practitioner, but against the law firm of YZA. The Applicant was of the view that the Standards Committee should have considered the firm's knowledge at the relevant time.

[18] It was explained to him that the law firm is not incorporated, and as a matter of jurisdiction the Standards Committee could not consider a complaint against the firm. It appears that the Applicant had pinned one of Mr PR's business cards to the Agreement when he took it to YZA, and this together with the fact that Mr PR had acted for BAI led the Committee to identify Mr PR as the lawyer against whom the complaint had been made. In any event, the first ground of review, namely that the complaint is against the law firm, cannot progress as there is no jurisdiction to do so.

[19] The second ground of review was based on the Applicant's view that there could be no doubt that the law firm of YZA was aware of the hand written amendment

to Clause 1 of the agreement. The Applicant contended that there had been an admission by the firm that the need for the Applicant's consent to the payment was known prior to paying out the money, and that this appeared to have been ignored by the Standards Committee.

[20] The Applicant explained the circumstances in which he had left the Agreement and the cheque with the law firm. He submitted that the law firm had the original copy of the Agreement which contained the hand written amendment. The Applicant places some weight on his belief that the Practitioner was aware of the amendment that required his written agreement to release the money.

[21] The outcome sought by the Applicant was to have Mr QD return the full amount of the payment to YZA law firm. I explained to him that it was not within my power to order Mr QD to do anything.

[22] There was a detailed discussion and analysis of the terms of the Agreement, the way that the money had been receipted into YZA, and the terms on which the payment had been made from that trust account.

Considerations

[23] My view was that there was little to be gained by focusing on the question of whether the Practitioner had, or had not, been aware of the hand written amendment in the Agreement. What the amendment added was the requirement for the Applicant's consent (to pay out to BAI) to be in writing. There was a dispute about whether the Agreement in its final form (with the handwritten amendment) was in fact seen by the Practitioner. This did not appear to materially alter Clause 1 of the Agreement which in any event anticipated that both of the parties would need to reach agreement about the disputed invoices before a final payment of the fund should be made to BAI.

[24] It is clear from the Agreement that both of the parties had agreed that the money was to be deposited into the YZA's trust account, and to remain there until they had reached agreement about the overdue accounts that were owed by the Applicant to BAI. That there needed to be agreement about the disputed accounts is evident from the final sentence of Clause 1 which reads, *"If any money is owed or to be credited to* (the Applicant) *then* (BAI) *will return any money to* (the Applicant) *as soon as possible (this money needs to be agreed by both parties)."*

[25] In this case, when paying out the money to BAI, it appears that YZA relied solely on the confirmation of its own client (Mr QD) that the terms of the Agreement had

been met. This was explained by Mr HK who, after having had pieced together as best as he was able, informed the Standards Committee that his understanding was that Mr QD and the Applicant had *"checked off the work done, went through the accounts and* (the Applicant) *agreed that all was in order and that it was appropriate for the funds to be released to* (BAI)*. Funds would not have been released unless and until we were of a view that both parties had agreed to this.*" This suggested that there was knowledge of the terms of the Agreement, and that the firm would not have released the money unless it was satisfied that both parties had agreed.

[26] This did not resolve the issue about the Applicant's written consent, but nevertheless raised the question about whether it was appropriate that the firm dispersed the money, relying solely on the advice of its client that the other party (the Applicant) had agreed to this.

[27] Mr HK (for the law firm) noted that the firm was not a party to the agreement, and that no undertaking had been sought from the firm as to holding the funds for any purpose. He refuted that there had been any breach of fiduciary duty.

[28] In reply Mr FA submitted that it was incumbent on a law firm to be aware of the purposes for which money is deposited into a trust account, and to have that properly recorded.

[29] The firm was clearly not a party to the Agreement and Mr HK made the valid point that in the absence of any undertaking given by the firm in respect of the fund, it is difficult to see on what basis there had been a breach of fiduciary duty. However, if the Practitioner (or any other person authorising the payment) was aware of the express terms on which monies held by the firm could be released, this would impose a trust obligation to hold the money on those terms.

[30] Mr FA's submission was essentially directed to the firm's obligation to ascertain the purposes for which money is paid over to the firm. The submission also has validity. The Lawyers and Conveyancers Act (Trust Account) Regulations 2008, provides (section 12) how money is to be receipted and paid into the trust account. Section 12(4) requires that each entry of the receipt of trust money must state the amount, date, purpose and source of the receipt, and the client for whom the trust money is to be held. In this particular case the firm's trust records showed money having been received from the Applicant as "payment on account", and held in trust for BAI on an interest bearing account. There is no reference to the money being held for any other purpose.

[31] The Standards Committee did not go so far as to consider whether the money left with YZA had been receipted in accordance with the Regulations, since the Committee's focus was solely on whether Mr PR would have had knowledge that no payment was to be made without the written consent of the Applicant.

[32] The circumstances surrounding the actual depositing of the Applicant's payment with the law firm were unclear. The Applicant explained that he handed the Agreement and the payment to an administrator in the firm, but there is no clear evidence about what information accompanied that payment such as would have led to specific information being recorded about its dispersal. The Applicant appears to have made the assumption that the payment would be held on the terms of the Agreement which he had handed over at the same time, but no clarity can be obtained about what was understood by the person processing the payment. It appears to have been understood that the payment was to the credit of BAI, but it would be unlikely that an administrator would have distilled the conditions of its release by reference to the Agreement. The complaint is however made against the Practitioner and there is no evidence that he was aware that the Agreement had been returned to the firm (or returned in an amended form), or that the payment had been made. It is unlikely that the Practitioner himself would have made the entry in the firm's trust ledger.

[33] I accept that the responsibility for accurate recording of receipts lies with the firm, but whether there was a receipting error by the firm, or whether there was inadequate communication surrounding the payment is a question that cannot be resolved. On the basis of the trust account documentation there appeared to have been no barrier to the payment of the money to BAI when it was requested. All I am able to conclude is that the capturing of information relating to this receipt appears to have been inadequate in this case.

[34] Who should bear the responsibility in a disciplinary context, poses some difficulty in this case. The Applicant made it clear that he had not lodged a complaint against the Practitioner and did not consider him to be responsible, as he sought that the whole law firm should be answerable for what he considers to be the wrongful payment.

[35] There was further discussion at the review hearing about the possible remedies or outcomes. Mr HK was of the view that there should be no financial implications for YZA, because the Applicant had suffered no loss. It was acknowledged that the payment that ought to have been held in the trust account was in effect a security in the context of which the Applicant intended to resolve the disputed debts with BAI, but

otherwise did not create any rights on the part of either the Applicant or BAI. Mr HK submitted that in the event that the Applicant and BAI had been unable to reach an agreement, the Applicant would still have needed to resort to his legal remedies to resolve the disputed debt issue.

[36] Mr HK was willing to accept that there had been an error in this case, and the further submission (accepted by the Applicant) was that there was no intention to have deprived the Applicant of any security that he had expected as a result of the money being held in the lawyers trust account.

[37] Mr FA (for the Applicant) agreed that the Applicant still had legal remedies available to him insofar as any dispute concerning what he owes BAI can still be resolved through the Disputes Tribunal.

[38] I accept that the Applicant suffered no loss, or at least no monetary loss, as a consequence of the payment, and in those circumstances there appeared to be no basis for a compensatory payment.

[39] In the course of the review hearing the discussion covered the absence of any foundation for a compensatory remedy for the Applicant, there being no obvious transgressor, and a voluntary agreement made by Mr HK that a written apology would be forwarded to the Applicant in relation to the firm's error. I informed the parties that the surrounding circumstances appeared to be such that it was appropriate to exercise my discretion to take no further action in the matter.

[40] In this case the Applicant's confidence has been dealt a blow, having left a payment with the law firm in good faith that the terms of the Agreement would be adhered to. This did not happen and he feels aggrieved at having been let down. It is important to recognise that the Applicant's grievance is legitimate.

[41] Mr FA's advice to the Applicant had been based on the terms of the Agreement and he cannot be criticised for the advice he gave. His assurances to his client were based in a reasonable expectation of certain matters being the case.

[42] The outcome to this review was in terms discussed at the review hearing, at which time I advised the parties that the Standards Committee decision would be confirmed and explained my reasons for doing so, and also noting that Mr HK would provide an apology to the Applicant, to be sent to Mr FA.

Final comment

[43] It is important to note that when trust money is received by a law firm, and where a complaint arises in relation to the way that it has been receipted and dispersed, a Standards Committee should pay particular attention to this aspect of the complaint, given that it lies at the heart of the confidence and trust that members of the public can have in a law firm.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act, the Standards Committee decision is confirmed.

DATED this 14th day of August 2012

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Hanneke Bouchier
Legal Complaints Review Officer

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

Mr OM as the Applicant
Mr FA as Counsel for the Applicant
Mr PR as the Respondent
Mr HK as Counsel for the Respondent
The Otago Standards Committee
The New Zealand Law Society