LCRO 127/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [North Island] Standards Committee
BETWEEN	**MR WB and** **MR WA** Applicants
AND	**[NORTH ISLAND] STANDARDS COMMITTEE** Respondent

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

DECISION

Introduction

[1] This is an application for review of a determination by the Standards Committee in which it found that Messrs WB and WA had breached the provisions of s 110(1)(b) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] In the same way as my decision in LCRO 126/2012, this decision is of some importance in that it concerns an arrangement between WAA and VXZ, whereby VXZ operated without a trust account and directed funds which had been paid to clients pursuant to Employment Relations Act proceedings into the trust account of WAA.

Background

[3] Following an inspection by the New Zealand Law Society Inspectorate of WAA trust account, the Standards Committee commenced an own motion investigation pursuant to s 130(c) of the Act.

[4] Mrs AT, a New Zealand Law Society (NZLS) audit inspector, was appointed pursuant to s 144 of the Act to conduct an investigation, and reported to the Committee on 15 February 2011. In her report, Mrs AT advised:

two hundred and fifty three sub ledgers have been opened in the name of [VXZ] within the trust account maintained by [WAA].

...

I have spoken with Ms [VX] who explained that she would not be able to state "hand on heart" that she had obtained a letter of engagement from each and every client although it was her normal policy to do so.

[5] VXZ standard terms of engagement included the following paragraph:

[VXZ] does not operate a solicitor's trust account but has an arrangement with [WAA] Barristers and Solicitors to use their trust account. By authorising [Ms VX] and/or [VXZ] to act on your behalf, you are also authorising any monies to be collected or held on your behalf, to be deposited into the [WAA] Barristers and Solicitors trust account to be dealt with in accordance with your instructions, and the rules and legislation that govern solicitors trust accounts.

[6] Mrs AT's report continued:[1]

I understand that Ms [VX] deals only with employment relationship matters and she stated that authorities to lodge the monies within the [WAA] trust account were contained in her client's settlement statements. However I have found that other monies had been transferred from a bank account in the name of [VXZ] to cover disbursements and fees payable to [WAA].

[Mr WB] of [WAA] explained that the bank account in the name of [VXZ] was operated jointly by Ms [VX] and the partners of [WAA] and the fees were not to be taken from settlement funds clients were requested to pay monies to cover their legal costs into this account.

...

From my enquiry into the administration of the account by [WAA], I have found that Ms [VX] rendered each client an individual bill of costs and these were handed to the trust account administrator at [WAA] to enable disbursements to be debited to the ledger together with 50% of the costs payable to [WAA].

If compensation monies had been received on behalf of the clients, it was the normal practice to debit disbursements and 50% of the fees to the [WAA] float account and to pay the remaining share of the fees to the [VXZ] business account by direct credit.

However, if the fees were to be paid from monies received into the joint business account a pro-forma bill to cover the [WAA] costs was posted to the trust ledger

and Ms [VX] was responsible for drawing her share of the fees from that account.

It was not [WAA's] policy to render a bill of costs to [VXZ].

[7] By way of further explanation it is helpful to refer to the following extracts from a letter dated 28 October 2010 sent by Mr VZ, counsel engaged by Ms VX, to the Standards Committee:

1. [VXZ] is a company of which [Ms VX] is the Director.

2. The company occupies office space in the premises of the law firm [WAA]. It also has use of the firm's reception, accounting, power and telephone facilities.

3. Instead of paying rent as a sub-tenant, the company pays for its use of the facilities by dividing its fee income equally between [WAA] and itself.

4. The legal practice of [VXZ] is that of representation of claims by present and former employees, employers and unions made under the Employment Relations Act 2000.

5. Ms [VX] has the option of carrying out such services as a Barrister and Solicitor (which she has chosen), a Barrister or as a non-lawyer advocate. Her view is that she prefers to practise as a lawyer, thus excluding the advocate option. She believes that as a Barrister and Solicitor she can function professionally in a more straightforward and efficient way than as a Barrister. Likewise from [WAA's] perspective that also is preferred.

6. Payments for claims made under the Employment Relations Act 2000 are required by the Act to be made either to the claimant directly by the payer or into a Solicitor's trust account. I attach a copy of s l50A with commentary and of ss 149(3) and 150(3) which are referred to in s 150A. Thus [VXZ] arranges for its clients to pay into the [WAA's] trust account. Also enclosed is a copy of a settlement form commonly in use for the purpose of the Act.

7. In the Inspectorate's report of 31 May 2010 to [WAA], reference was made to there having been 193 matters for which ledgers had been set up. This number needs to be put into perspective. It is made up of three categories: clients of [WAA] referred to [VXZ] who remain [WAA's] clients; clients of [VXZ] for whom compensation monies are received; and clients for whom no compensation is received and only fees are transacted. The middle group is the only one relevant for the present purpose and at a maximum would comprise a third of total matters.

[8] The settlement form referred to by Mr VZ in paragraph 6 included the following direction by the client:

[1] Report from Mrs AT to NZLS, 15 February 2011 at p 2.

> Within 7 days of both parties signing this record of settlement the employee shall receive:
>
> i. A certificate of service outlining his years of service, roles and duties; and
>
> ii. $ [AMOUNT] in accordance with section 123(1)(c)(1) of the Employment Relations Act 2000 to be made by direct credit into the [WAA] Barrister and Solicitors trust account [bank account number].

[9] The above paragraphs from Mrs AT's report and Mr VZ's letter are sufficient to record the nature of the arrangement between VXZ and WAA.

The Standards Committee determination

[10] Having considered all of the material before it, which included submissions from Mr VZ and advice from Mr AS, the Standards Committee recorded its determination in the following way:[2]

> 13. Having inquired into the matter and conducted a hearing the Committee determined that there has been unsatisfactory conduct on the part of the practitioner pursuant to s 152(2)(b)(i) of the Act by way of breaches of s 110 of the Act. In providing a surrogate trust account to [VXZ], Mr [WB] and Mr [WA] were in breach of s 110(1)(b). They were obliged to hold the money exclusively for the person on whose behalf it had been received, to be paid to that person or as that person directed. The surrogate trust account resulted in a confusion of identity about "the person on whose behalf the money had been received". Mr [WB] and Mr [WA] considered [WAA] was holding the money on Ms [VX]'s behalf but the evidence showed it was the money of the individual clients of [VXZ].
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> 14. The Committee noted there was nothing to suggest dishonesty on the part of the practitioners however there had been serious breaches of the legal requirements for the operation of lawyers' trust accounts, which exist for the protection of clients and for the maintenance of public confidence in the legal profession.

[11] It then made the following orders:

> In relation to Mr [WA] the Committee makes the following orders:
>
> a. That Mr [WA] be censured pursuant to s 156(1)(b) of the Act;
>
> b. That Mr [WA] pay to the New Zealand Law Society by 3 June a fine of $1,000 pursuant to s 156(1)(i) of the Act;

[2] [North Island] Standards Committee determination, 3 May 2012.

c. That Mr [WA] pay to the New Zealand Law Society by 3 June 2012 the sum of $1,000 in respect of the costs and expenses of and incidental to the inquiry and the hearing pursuant to s 156 (i)(n) of the Act;

d. That the name of Mr [WA] not be published.

In relation to Mr [WB] the Committee makes the following orders:

a. That Mr [WB] be censured pursuant to s l56(1)(b) of the Act;

b. That Mr [WB] pay to the New Zealand Law Society by 3 June 2012 a fine of $1,000 pursuant to s 156 (1)(i) of the Act;

c. That Mr [WB] pay to the New Zealand Law Society by 3 June 2012 the sum of $1,000 in respect of the costs and expenses of and incidental to the inquiry and the hearing pursuant to s 156(i)(n) of the Act;

d. That the name of Mr [WB] not be published.

[12] Messrs WB and WA have applied for a review of that determination.

Review

[13] This review proceeded by way of a hearing in Hamilton held on 26 March 2013. Messrs WA and WB attended and were represented by Mr VZ. The Standards Committee was represented by Mr AS, accompanied by Mrs AT.

[14] An initial observation to be made is that it is somewhat disappointing that this matter has proceeded by way of an investigation followed by findings against the Practitioners. I note that Mr WB sought to meet with the Complaints Service for the purpose of resolving the matter by conciliation, negotiation or mediation in terms of s 143 of the Act but it does not appear that any such meeting occurred.

[15] I understood Mr AS to submit that once the Standards Committee became appraised of the matter by way of the own motion investigation, that it was required to continue through to a determination. The Standards Committee has a discretion to determine at any time to take no further action in respect of a complaint or matter,[3] so I do not necessarily agree with that comment (if I have understood Mr AS correctly), but in any event, it does not seem that any of the lawyers involved accepted the possibility that the arrangement did not comply with provisions of the Act nor evidence a willingness to change the procedures that they had established.

[3] Section 152(2)(c) Lawyers and Conveyancers Act 2006.

Has there been a breach of s 110(1)(b) of the Act?

[16] Mr AS submitted that the arrangement entered into between WAA and VXZ breached the policy of the Act and the specific requirements of s 110(1)(b).

[17] In broad terms, he submitted that it would be undesirable for lawyers who are exempt from the requirements of the Lawyers and Conveyancers Act and the Trust Account Regulations,[4] by reason of the fact that they do not operate a trust account, to conduct significant trust account activity through what he referred to as a "surrogate" trust account.

[18] The validity of that submission is self evident. The Act and the Regulations are designed to ensure protection of client funds, and if a lawyer is able to avoid the application of the various provisions by an arrangement such as this, that objective would not be met.

[19] In addition, Mr AS argued that the arrangement adopted by the lawyers confused the identity of the lawyer receiving the money with that of the lawyer (or law firm) which held the money. The principle that the lawyer receiving the money should be the same lawyer who holds the money also meets with ready acceptance.

[20] Section 110(1) of the Lawyers and Conveyancers Act provides as follows:

> **110 Obligation to pay money received into trust account at bank**
>
> (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—
>
> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—
>
> (i) the practitioner; or
>
> (ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs."

[21] The issue for consideration is to identify whose funds the firm of WAA was in receipt of and how those funds should be held in the firm's trust account.

[22] Mr VZ focussed on the evidence provided by Messrs WB and WA and submitted

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[4] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

that they always considered they were acting on the instructions of the individual client and not on instructions from VXZ. He submitted that payments were always made at the direction of the client and that if a client did not want funds disbursed whilst VXZ did, they would always act on the instructions of the individual client. Mr VZ submitted that control of the funds lay with the client and WAA, and not with VXZ.

[23] It is pertinent at this stage to recall that the client recorded in WAA's trust account was VXZ. A reference to the ledgers provided in the course of the own motion investigation show that the client is recorded as "[VXZ] re [name of client]".

[24] Regulation 12(6)(b) of the Trust Accounts Regulations provides:[5]

> A practitioner may make transfers or payments from a client's trust money only if-
>
> (a) the client's ledger account has sufficient funds and they are available for that purpose; and
>
> (b) the practice obtains the client's instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it
>
> (the remainder of the regulation is not relevant to this matter)

[25] Consequently, no payment out of the account could be made without the authority of VXZ.[6] Although separate ledger accounts were created for each person within that client account, that did not alter the fact that the client was recorded as VXZ.

[26] Stripping away all the assurances provided by Messrs WB and WA, the simple fact of the matter is that the trust account clearly records VXZ as the client. The client was not the individual. If they were, they would have been recorded in the same way as WAA's own clients who were referred to VXZ.

[27] It would be expected that the arrangement established between VXZ and WAA would have been given careful consideration when it was established and that Messrs WB and WA would have been conversant with the basis on which the arrangement was established. It is therefore difficult to ignore the initial responses from Mr WB to Mrs AT and the Lawyers Complaints Service and I have some doubt about the statements made by Messrs WA and WB that they always considered that they held the funds to the order of the individual clients.

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[5] Regulation 12(6)(b) Lawyers and Conveyancers Act (Trust Account) Regulations 2006.
[6] Regulation 6(b) Lawyers and Conveyancers Act (Trust Account) Regulations 2006.

[28] In this regard I refer to Mr WB letter dated 7 July 2010 in response to Mrs AT's initial letter:

> We have opened a ledger in the name of [VXZ] ("the company"). That ledger is under the control of [Ms VX], who operates as a solicitor on her own account under the name or style of [VXZ], sub-leasing accommodation at our premises.

[29] In the same letter, Mr WB wrote, "[w]e hold the money exclusively for the Company [VXZ] and this is paid as the Company directs."[7]

[30] Some months later (on 4 March 2011) Mr WB again wrote to the Standards Committee:

> We [WAA] in the course of our practice, received money for or on behalf of [VXZ] and we ensured that the money was paid promptly into a bank account in New Zealand to a separate trust account in the name of [WAA] and we held that money exclusively for [VXZ] to be paid to [VXZ] as it directed.

[31] There can be no clearer statements than those.

[32] Mr WB however then qualifies those statements by advising that they were aware of a "sub-trust" and that VXZ had obligations to "its particular clients".[8] The implication here would appear to be that WAA were assuming VXZ obligations to their clients in respect of the funds. That is a concept which does not sit comfortably with a lawyer's direct obligations to his or her clients.

[33] The affidavit from Mr WD (the firm's accountant) provided in the course of this review, only serves to further underline the reality that in terms of the Act and the Trust Account Regulations, the funds were under the control of VXZ. I refer to paragraph 5 of Mr WD's affidavit:[9]

> On instructions from [Mr WA] and [Mr WB], the partners of [WAA], I established within the trust account of [WAA] a client account for [Ms VX] under the name of "[VXZ]" which was Ms [VX]'s trading name.

[34] At paragraph 7.3 of that affidavit Mr WD goes on to depose:[10]

> In the case of [Ms VX] the "cheque authority" form would be filled out either by her or by her secretary and given to our accounts clark.

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[7] Letter from Mr WB to NZLS, 7 July 2010.
[8] Letter from Mr WB to NZLS, 4 March 2011.
[9] Affidavit of Mr WD, 15 March 2013 at [5].
[10] Above n 8 at [7.3].

[35] These statements reinforce the reality that the funds were under the control of VXZ regardless of the actions taken by Messrs WA and WB. They acted on requests from Ms VX.

[36] Mr VZ referred to the statement by the Standards Committee that “Mr [WB] and Mr [WA] aided VXZ in the commission of an offence.”[11] Mr VZ argued that:[12]

> It is not a case of [WAA] having themselves breached s 110. They were entitled to receive monies for people who were not their clients, then to hold it in terms of the section. The Committee did not hold that [WAA] had relinquished their obligation in favour of [VXZ] to pay the funds only at the direction of clients.

[37] To some extent, the comment by the Standards Committee that WAA had aided the commissioning of an offence is somewhat incidental to the finding. The finding of the Standards Committee was that in providing a surrogate trust account to VXZ Mr WB and Mr WA were in breach of s 110(1)(b) of the Act. To this extent Mr VZ’s submission that the Standards Committee did not find the lawyers to be in breach of s 110 is incorrect. Instead of creating a client account for each individual client of VXZ, the firm instead credited the funds to a sub-ledger within the client account of VXZ.

[38] If WAA considered that the funds were held for the individual clients, a separate client account should have been opened for each client and the funds credited to that account. That did not happen, and therefore Messrs WB and WA were in breach of s 110(1)(b).

[39] As noted above, I have come to the view, that despite their stated views of the status of funds held and to whose order they were held, this was not reflected in the trust account arrangement and in reality the funds were within the control of VXZ and in trust account terms, WAA were obliged to adhere to any instructions issued by that firm.

Penalty

[40] The Standards Committee ordered both Mr WA and Mr WB to each pay the sum of $1,000 pursuant to s 156(1)(i) of the Act by way of a fine, and also to each pay the sum of $1,000 in respect of costs and expenses pursuant to s 156(1)(n).

[41] The function of a penalty in a professional context is to punish the practitioner to act as a deterrent to other practitioners and to reflect the public’s and the profession’s

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[11] Above n 2 at [10(c)].
[12] Submissions from Mr VZ for review hearing to LCRO, at [18].

condemnation of the practitioner.[13] Weighed against these criteria, I see no reason to interfere with these Orders.

[42] In addition, I also concur that the award of costs is appropriate.

[43] The Standards Committee also censured both Messrs WB and WA and I have given separate consideration as to whether this was appropriate.

[44] When the matter was originally raised by Mrs AT in her report following a routine inspection of the firm's trust account, the firm's response was defensive of the arrangement. Mr WB replied:[14]

> We cannot see how we are in breach of s 110 of the Lawyers and Conveyancers Act 2006. The Company is treated by us in the same way as we would any other client. For the sake of clarity and transparency we have opened individual matters for each of the company's clients.

[45] Again, following receipt of Mrs AT's report to the Standards Committee, as investigator for the Committee, Mr WB wrote in a tone which suggests that the firm did not accept the arrangement could be anything other than correct and that Mrs AT's interpretation was not.

[46] I acknowledge that Mr WB did request to meet with the Standards Committee to explore the possibility of negotiation, conciliation or mediation[15] and the reason that the Standards Committee did not pursue this option is not evident from the determination. However, it is likely that the Committee was guided by Mrs AT's report and the partners had made it clear they did not accept the report. It may be that the Committee determined that the likelihood of resolving the matter was slim, but nevertheless it would have been desirable for such a meeting to take place.

[47] Mr VZ also suggested that the partners meet with the Committee,[16] but expressed the purpose of the meeting as being "to explain and discuss this particular management of the trust account with the purpose of assisting the Committee's understanding of it."[17]

[48] Their proposals for the meeting did not give any indication that WAA were seeking to alter the arrangements in any way so as to establish a structure that would meet with the approval of the Committee and Mrs AT – instead the purpose of the

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[13] *Wislang v Medical Council of New Zealand* [2002] NZAR 573.
[14] Letter from WAA to Mrs AT, 7 July 2010.
[15] Letter from WAA to Legal Standards Officer, 4 March 2011.
[16] See letters from Mr VZ to NZLS, 18 October 2010 and 28 October 2010.
[17] Above n 15.

meeting seemed to be that they hoped to persuade the Committee that what they were doing was correct. This response contrasts with the responses of [name] and [name] in the case involving similar facts which I understand received some publicity in [North Island town]. In that case, both lawyers readily acknowledged that the arrangement did not comply with the Act (the Law Practitioners Act 1982 in that case) and ceased the arrangement immediately.

[49] It could be argued that the imposition of a censure is somewhat harsh. However, the sense I have from the file is not necessarily one of co-operation on the part of Messrs WB and WA coupled with an acceptance that the arrangement may need to be modified, but rather one of a refusal to consider that the arrangement did not comply with the Act and the Trust Account Regulations, and an intention to continue with the arrangement notwithstanding Mrs AT's report. Such an approach could be described as dogmatic, although that may too be somewhat overstating the case.

[50] Nevertheless, compliance with the Act and the Trust Account Regulations to ensure protection of client funds are matters which all levels of the disciplinary process strictly enforce. The purposes of the Act include the protection of consumers of legal services and the maintenance of public confidence in the provision of legal services. Those objectives cannot be achieved if questionable arrangements are in place to deal with client funds. I do not mean questionable in the sense that funds were at risk but that the arrangement could be described as a device to allow VXZ to avoid the obligation to operate a trust account itself, and the checks and balances that go with it. Seen in this light, the arrangement entered into between VXZ and WAA would not enhance public confidence in the provision of legal services and brought uncertainty as to the status of client funds within WAA trust account which did not add to the protection of consumers of legal services.

[51] After giving the matter some considerable thought, I have come to the view that the censure imposed by the Standards Committee was appropriate in the circumstances.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

Costs

In accordance with the Costs Orders Guidelines issued by this Office, costs orders follow where an adverse finding is made or upheld against a practitioner. Pursuant to s

210(1) of the Lawyers and Conveyancers Act, Messrs WB and WA (jointly and severally) are to pay a sum of $1,200 to the New Zealand Law Society by way of costs, such sum to be paid by no later than 5 July 2013.

DATED this 5th day of June 2013

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O W J Vaughan
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 WA as the Applicant
Mr WB as the Applicant
Mr VZ as the Representative to the Applicants
The [North Island] Standards Committee as the Respondent
Mr AS as the Representative to the Respondent
The Standards Committee
The New Zealand Law Society