LCRO 133/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 2
BETWEEN	**ABP LTD** of [North Island] Applicant
AND	**MR VW** of [North Island] Respondent

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

DECISION

[1] After considering a complaint made by ABP Ltd (the Applicant) against Mr VW (the Practitioner), the Waikato Bay of Plenty Standards Committee 2 decided that Section 138(1)(f) of the Lawyers and Conveyancers Act 2006 applied and that no further action should be taken. This section confers a discretionary power on the Standards Committee to take no further action on a complaint if, in the opinion of the Standards Committee -

> there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, and it would be reasonable for the person aggrieved to exercise.

[2] The Applicant sought a review of that decision, contending that the Standards Committee had erred and that it had been wrong as to fact and the law.

Background

[3] The Applicant is a contracting company which had contracted with the Practitioner's client (the developer) to remove soil from a development site. At a

particular point in time a dispute arose between the Applicant and the developer concerning some of the work; the developer had withheld payment. The two contracting parties reached an agreement concerning these matters, which was recorded in a Settlement Deed and executed by the parties in May 2005.

[4] The Practitioner was a staff solicitor in the law firm, and was the solicitor acting for the developer. This Deed was drafted by the Practitioner.

[5] The Settlement Deed set out the background to the Deed, identifying the basis of the dispute between the parties by reference to the "possibility" of building materials having been left in-situ, noting that the Applicants claimed that certain payments were due and the developer's concern about the possibility of unwanted material having been buried in the development site. The Settlement Deed provided that a certain sum of money would be retained for a period of three years, and set out the terms and conditions on which that money was to be applied.

[6] The Deed provided that the retention money was to be held in the Trust Account of the solicitors acting for the developer, and in the name of the developer. All interest accrued was for the benefit of the Applicant who was liable for the tax on the interest.

[7] The Deed clearly set out the steps to be taken in applying the funds. Clause 6 of the Deed was as follows:

> [The developer] irrevocably authorises [the law firm] to hold the monies referred to in this Deed and to invest them on interest hearing deposit and to pay such funds to the person entitled in terms of this Deed. [The developer] shall not be entitled to call for repayment of such monies except in accordance with the terms of this Deed.

[8] The Practitioner subsequently authorised a payment from that fund to the developer without reference to the Applicant and therefore in contravention of the provisions of the Deed. In making this payment the Practitioner was acting on the instruction of his client.

[9] The Applicant filed proceedings in the District Court against the developer. The action was successful, and led to the developer being ordered by the Court to refund to the law firm's trust account the money that had been paid out. A subsequent appeal upheld that decision. The money was not refunded to the firm's trust account, and the developer company was subsequently liquidated.

[10] The Applicant then filed a complaint against the Practitioner, seeking compensation. The letter of complaint had alleged that the payment may have been in breach of the Trust Account Regulations both as to the manner in which –

(a) the funds were held and the way they were disbursed; and

(b) without consideration of the Practitioner's obligations pursuant to the Settlement Deed which the Practitioner had signed.

Standards Committee's Decision

[11] The Standards Committee did not uphold the complaint, having noted that the Practitioner was not a party to the agreement between the Applicant and the Practitioner's client (the developer). The Committee referred to "other issues of concern were more properly determined by a Court", but did not explain what these were. The Committee noted that the Practitioner had acted on the instructions of his client in authorising payment and took the view that he was obliged to act on that instruction.

Review Hearing

[12] A review hearing was held on 7 July 2011, attended by the Practitioner and also by the Directors of the Applicant Company and their counsel.

[13] The Practitioner explained his understanding of the background to the Deed and the basis of the payment having been made to the developer. He said that part of the developer's land had been sold to a third party who had allegedly discovered some building remnants in the soil and had taken his own remedial action to have this removed, and then presented the bill to the developer for reimbursement.

[14] The Practitioner had perceived that the fund was intended to protect the developer rather than as a comfort fund for the Applicant. He said that being aware of the terms of the Deed, prior to authorising the payment he discussed the developer's request with a senior lawyer in the firm, and notwithstanding their awareness of the terms and conditions of the Deed, it was perceived by them that the payment requested by their client in the particular circumstances that the request had been made was in line with the spirit of the agreement, even if not the exact words. The Practitioner said there had been an engineer's report provided which concluded that there were defective materials left in the land that the Applicants had worked on, which had persuaded him and his colleague that the payment should be made.

[15] The Applicant claims that a large sum is still owed to it by the developer, and no satisfaction has been obtained from the court proceedings. The Applicant has now pursued the Practitioner for having wrongfully authorised the payment to the developer.

This review deals only with that portion of the money that was paid from the firm's Trust Account referred to above.

Applicable standard

[16] The payment from the Trust Account was made in January 2008. This predated the Lawyers and Conveyancers Act 2006 which commenced on 1 August 2008. The complaint was made in December 2009. In these circumstances the complaint falls to be considered under the transitional provisions of section 351 of the Lawyers and Conveyancers Act. Under this section the jurisdiction of a Standards Committee arises only if the conduct complained of could have led to disciplinary proceedings being commenced against the Practitioner under the Law Practitioners Act 1982.

[17] The applicable standards are those that were in force at the time of the conduct. There are found in the Law Practitioners Act and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. The standards are found in ss 106 and 112 of the Law Practitioners Act. The threshold for disciplinary intervention under the Law Practitioners Act was relatively high and could include findings of misconduct or conduct unbecoming.

[18] Misconduct was generally considered to be conduct of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if negligent, such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise. (*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). I do not see the Practitioner's conduct reaching this level of wrongdoing.

[19] The test for 'conduct unbecoming' (which could relate to conduct both in the capacity as a lawyer, and also as a private citizen) is the less strict standard of whether the conduct is acceptable according to the standards of *"competent, ethical, and responsible practitioners*" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). I have considered the Practitioner's conduct in terms of this standard.

Considerations

[20] For reasons that will become clear, this decision is written in two parts. The first part deals with the substantive complaint. The second part deals with remedial issues and identifies areas where further enquiry is yet to be undertaken.

Substantive complaint

[21] The Practitioner was an employee of a law firm in which capacity he acted for a property developer company who was a client of the firm. Since the above events the Practitioner has left the firm and set up his own practice. The firm is a partnership and the Practitioner has no further connection with that firm. However, the change in circumstances does not prevent the Practitioner's professional conduct being considered in relation to the complaint.

[22] The Practitioner drafted the Settlement Deed which required that retained monies were to be held in the firm's trust account under the name of the firm's client (the developer). This would have accorded with the Trust Account Regulations applicable at that time.

[23] The purpose of the Settlement Deed is as clearly discernable to me as it appears to have been to both the District and the High Courts, that monies retained were intended to provide a fund to cover potential problems that could arise, and to set out the terms and conditions for how money from that fund should be applied in such circumstances.

[24] By Clause 6 of the Deed the developer "*irrevocably*" authorised the Practitioner's firm to hold the money (on the above terms), and stated that the developer "*shall not be entitled to call for repayment of such monies except in accordance with the terms of this Deed*."

[25] Clause 4.4 provided that if any defect appeared within three years and such defect was shown to be caused by the Applicant, then the Applicant was required to remedy the defect forthwith in a manner satisfactory to the developer and its engineers. If the defect was not remedied within a reasonable time then the developer was entitled to use the fund to meet the remedial costs.

[26] The Practitioner has explained how he came to authorise the payment from the Trust Account to the developer. At the time that he authorised the payment the Practitioner knew that this contravened the Settlement Deed. He had drafted the Deed and was aware of its terms, and decided that the payment fell within the spirit of the agreement. The fact that he took advice from, or discussed the matter with, a senior colleague does not absolve him from being accountable for his own professional conduct.

[27] Although the Practitioner sought to defend the action on the basis that there was an expert engineer's report concluding that the Applicant was responsible for defective materials had been left in the land, and that the fund was intended to cover costs in

such an event, this overlooks the provision in the Deed that required the Applicant to be informed of any defect and have the opportunity to examine it, and to remedy it if the defect was *"shown to have been caused by.*[the Applicant]..". These are my own observations, but as much was noted by the District Court which captured the point by stating:

> The deed set aside a fund, to be held in trust, which could be resorted to for the costs of remedial work only after and by procedures which the defendant (the developer) chose not to follow.

[28] On appeal the High Court upheld the decision, having no difficulty concluding that the payment ought not to have been made. The Judge concluded that the Practitioner's client ought not to have given directions for payments to be made from that fund, noting that the Practitioner's client "*had irrevocably authorised its solicitors to hold the fund referred to in the Deed, to invest it …".*

[29] The Practitioner also observed that the complaint had started life as a Trust Account issue and had expanded to become a disciplinary issue. The original complaint was described in terms of a breach of the Trust Account Regulations. However, where there is evidence of a wrongful conduct it is entirely proper that the conduct of the Practitioner involved in that matter should come under scrutiny.

[30] The Solicitors' Trust Account Regulations 1998, then applicable, required money received by a law firm to be recorded and documented in a manner governed by the Regulations. Section 89 of the Law Practitioner Act 1982 provided:

> All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such money shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor.

[31] The Solicitors Trust Account Rules 1996, as amended by the New Zealand Law Society Council Resolution of 1 October 1999, provided, by Rule 5, that any trust receipts were required to state, inter alia, the purpose and source of the receipt.

[32] It is a question of fact whether the money held by the solicitors is for a particular purpose. In the leading case of *Heslop v Cousins* [2007]3 NZLR 679 Chisholm, J discussed the rights of a lawyer to exercise a line over trust money, but the principles applicable to the obligation of a lawyer in relation to trust monies are universally applicable. His Honour observed that

> A solicitor has no lien or right of set off if funds have been deposited into the solicitor's trust account for a particular purpose. In that situation the solicitor is obliged to use the funds for the particular purpose for which the funds have been entrusted to the solicitor.

[33] Quoting Beaumont J in *Re Wright* (1984) 1 FCR 51 Chisholm, J continued,

> Where a money is paid to a solicitor for a particular purpose so that the solicitor becomes a trustee of that money, the solicitor's lien will not attach to the money unless it is allowed to remain in the solicitor's hands for general purposes with the client's express or implied consent after the particular purpose has been fulfilled or has failed … thus in such cases, a threshold question, essentially one of fact, arises as to whether the moneys were paid to the solicitor of a specially designated purpose on the one hand or were merely paid to him 'in the ordinary course of his business as solicitor for the client' on the other.

[34] Notwithstanding that the Applicant was not a client of the Practitioner or the firm, there was nevertheless a duty on the Practitioner to ensure that the money was not paid out in contravention of the purpose for which it was held, which was set out in the Settlement Deed. The Practitioner knew that authorising the payment would be in breach of the express terms of the Deed to pay the money to his client, but took the view that it fell within the spirit of the Deed. The Practitioner's firm was in effect stakeholder for the fund which comprised monies claimed by the Applicant but which were subject to a potential claim by the developer in circumstances outlined in the Deed.

[35] There were no circumstances in this case that supported the payment being made to the developer at the time that it was authorised, notwithstanding that the developer was a party to that Deed, and had instructed the Practitioner to pay it out. In authorising the payment, any claim to the money was effectively put out of the reach of the Applicant. In this matter I have no difficulty in finding that the Practitioner was in breach of his professional obligations.

[36] The next question is whether the breach reached a threshold for an adverse finding to be made under the Lawyers and Conveyancers Act 2006. This can arise only if the conduct could have led to disciplinary proceedings being taken against the Practitioner.

[37] I do not see the conduct as reaching a threshold that would support a finding of misconduct. However, the threshold for 'conduct unbecoming' is lower, the test being whether the conduct is acceptable according to the standards of "*competent, ethical, and responsible practitioners"*. In my view the Practitioner's conduct in this matter was neither competent or responsible. It follows that the conduct reaches the section 351 threshold. In these circumstances there is jurisdiction under the Lawyers and Conveyancers Act 2006 to make an adverse finding against the Practitioner, and it is appropriate that a finding of unsatisfactory conduct should be made.

Fine

[38] The Practitioner has been found guilty of unsatisfactory conduct and it is appropriate that he be punished. In this case I consider an appropriate punishment to be in the form of a fine. The level of fine should reflect the degree of wrongdoing. I have taken into account that this was not a situation where the Practitioner was reckless or that he failed to consider the matter before authorising the payment. I accept his evidence that he discussed the situation with a senior colleague, and may have been guided by that colleague.

[39] I have also considered that the Practitioner did not fully comprehend the responsibility that attached to the holding of that fund by the law firm. Taking all matters into account, an appropriate level of fine is $600.

Costs

[40] It is also appropriate that the Practitioner should contribute to the costs of this review. In accordance with the LCRO Guidelines, a review involving a hearing where an adverse finding is made against the Practitioner, would normally result in a contribution by the Practitioner of $1200 towards the cost of the review. In the present circumstances the Practitioner will be ordered to contribute the sum of $1,000.

Remedial matters and further enquiry

[41] The Applicant seeks compensation in the amount that was paid from the fund in breach of the Deed. By virtue of Section 156(d) a compensatory order may be made where it appears that any person has suffered loss by reason of any act or omission of a Practitioner. However, an order for compensation requires evidence of loss to the claimant.

[42] In my view further enquiry needs to be made in order to (a) ascertain whether and what loss has been suffered by the Applicant and (b) who should bear the responsibility of it.

[43] The immediate and perhaps obvious remedy is that an amount equivalent to the unauthorised payment should be refunded to the firm's trust account. Further enquiry needs to be undertaken, and consideration given to the question of remedial accountability. I have previously noted that the Practitioner was at the time in issue an employee of the firm, and also that the payment decision was made in conjunction with a senior practitioner in the law firm.

[44] Whether or not the amount paid out represents the Applicant's 'loss' is yet to be ascertained. In this regard I am aware of the dispute concerning the Applicant's claim

to have suffered a loss. The Applicant disputed the accuracy of the engineer's report that was presented to the Practitioner when he authorised the payment to the developer. That report had concluded that the Applicant was responsible for unwanted materials that had been removed by the developer's purchaser. The Applicant vigorously denies this. I noted, as had the Courts, that the Applicant had no opportunity to have tested the matter at the time. This is further complicated by the fact that no opportunity for inspection by the Applicant had arisen under the Settlement Deed since the defective materials had already been removed by the third party purchaser at that time the payment was sought by the developer.

[45] A further complication arises due to the fact that the Deed provided for the fund to be held for a term of 3 year, a time frame that has long since passed

[46] The review process cannot resolve these issues. Further consideration also needs to be given to how this may be resolved. Whether this process should involve mediation or other processes is a matter that the Standards Committee needs to consider.

[47] In order to make further progress on the above issues it is appropriate that this matter be referred back to the Standards Committee for its further considerations. A re-direction order pursuant to Section 209(1) will be made accordingly.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee decision is reversed. The Practitioner's conduct is found to reach the threshold of conduct unbecoming. Accordingly the Practitioner is found to be guilty of unsatisfactory conduct pursuant to section 12 (b)(i) of the Lawyers and Conveyancers Act 2006.

Orders

- Pursuant to Section 156(1)(i) of the Lawyers and Conveyancers Act the Practitioner is ordered to pay a fine in the sum of $600. This sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

- Pursuant to section 210 of the Lawyers and Conveyancers Act the Practitioner is ordered to pay $1000 towards the cost of the review. This sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

Redirection Order

Pursuant to section 209 of the Lawyers and Conveyancers Act 2006, the Standards Committee is directed to reconsider the following issues in the light of the above finding:-

- Whether loss has been suffered by the Applicant such as to support a compensatory order, and if so what the quantum of that order should be
- Whether there should be an investigation into the conduct of any other lawyer or lawyers in relation to the wrongful payment.
- The responsibility of any person, whether the Practitioner, other lawyers in the Practitioner's former law firm, or the partnership as a whole, in relation to any loss suffered by the Applicant. (It is open to the Standards Committee to take such steps as may be considered to be appropriate to assist the parties to resolve the matter of compensation).
- To issue a new decision in relation to these matters which shall be subject to review by this office.

DATED this 3rd day of August 2011

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:

EC as the Applicant's Counsel
VW as the Respondent
The Waikato Bay of Plenty Standards Committee 2
The New Zealand Law Society