LCRO 139/2017

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	**ML** Applicant
AND	**OP and QR** Respondent

DECISION

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

Introduction

[1] Mrs ML has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning the conduct of Mr OP, a partner in the firm of [Law Firm A], and Ms QR, a legal executive employed by that firm.

[2] Ms QR, under supervision, acted for Mrs ML from December 2016 to the end of April 2017 on the sale of Mrs ML's residential property at [XX Street, Suburb] (the property) to [TTT] Limited [(TTT)].

[3] The Agreement for Sale and Purchase (the Sale Agreement) provided for the payment of a deposit of $10,000 by [TTT] "upon settlement going unconditional to the vendor's lawyer's trust account". The agreed settlement date was 30 April 2017. After [TTT]'s lawyer informed [Law Firm A] that the condition had been satisfied, [TTT] paid the deposit to [Law Firm A].

[4] [Law Firm A]'s Agreement for Legal Services (ALS) in respect of the sale, which Mrs ML signed, contained an authority for [Law Firm A] to deduct their fees from money held on behalf of Mrs ML in the firm's trust account. Mrs ML had provided the same authority to [Law Firm A] in April 2016 in respect of her earlier instructions concerning her will, and previous proposals to sell the property.

[5] [Law Firm A] had invoiced the will matter in July 2016, and the sale proposals matter in September 2016. On 20 October 2016 Mrs ML signed a Deed of Acknowledgement of Debt, supported by an Agreement to Mortgage, in favour of [Law Firm A] as security for payment of those fees. [Law Firm A] lodged a caveat against the title to the property on 4 November 2016.

[6] In March 2017 Mrs ML sought Mr OP's advice about withdrawing from the sale to [TTT]. Soon after she changed lawyers to [Law Firm B], Barristers and Solicitors.

[7] On 28 April 2017 Mr BG's firm, on behalf of Mrs ML, requested Ms QR to cancel the sale agreement. On 3 May 2017 Mr BG's firm reminded Ms QR of that request, informed her that Mrs ML would not be proceeding with the sale, and withdrew Mrs ML's authority for [Law Firm A] to deduct their fees from the deposit held in the firm's trust account. The following day, Mrs ML forwarded to [Law Firm A] her authority to uplift her "deeds, files, records, …".

[8] On 5 May 2017 Ms QR provided to Mr BG's firm invoices in respect of the three matters, and a statement. The statement showed that a balance of $5,606.99 was held by [Law Firm A] on Mrs ML's behalf following deduction of the amounts of those invoices from the deposit money held. Ms QR stated that Mrs ML had agreed to [Law Firm A] deducting their fees from Mrs ML's funds held in the firm's trust account pursuant to the ALS' Mrs ML had signed.

[9] This review largely concerns Mrs ML's complaint that [Law Firm A] were not entitled to deduct their fees from the deposit funds held on her behalf in the firm's trust account after she had withdrawn her earlier authority to do so and informed the firm that the money was to be returned to [TTT].

[10] The question raised in Mrs ML's complaint requires a consideration of s 110(1)(b) of the Lawyers and Conveyancers Act 2006 (the Act) which specifies how a lawyer is to handle a client's money, s 113(2) of the Act which acknowledges a lawyer's "just claim or lien …against that money", and reg 9 of the Lawyers and Conveyancers Act: Trust Account Regulations 2008 (the Trust Account Regulations) which contains the requirements a lawyer must meet before being permitted to deduct fees from funds held

in the lawyer's trust account on behalf of a client. The relevant parts of these provisions are set out in full in the appendix to this decision.

[11] Mrs ML also complained that [Law Firm A]'s fees are not fair and reasonable. In her review application she states that this aspect of her complaint also concerns the office expenses charged by [Law Firm A] in all three invoices.

Complaint

[12] In her complaint lodged with the New Zealand Law Society Complaints Service (NZLS) on 24 May 2017 Mrs ML alleged that [Law Firm A]:

(a) did not follow her instructions first, not to deduct the firm's fees from the deposit held in that firm's trust account, and secondly, to return that money to [TTT] having been informed that the sale agreement had been cancelled; and

(b) charged fees that were not fair and reasonable in respect of the sale proposals, the sale to [TTT], and in respect of her will "that [was] not finalised and signed".

[13] She sought:

(a) return of the deposit to [TTT]; and

(b) [Law Firm A]'s fees reduced to a reasonable level.

Standard Committee decision

[14] The Committee, which delivered its decision on 20 June 2017 determined, pursuant to s 138(2) of the Act, that no further action on the complaint was necessary or appropriate.

[15] Concerning the deduction of fees issue, the Committee determined that:[1]

(a) because Mrs ML had changed lawyers to Mr BG's firm, [Law Firm A] took the correct approach in their response to Mr BG's firm, namely, that it was for his firm to issue the notice of cancellation and to arrange the refund of the deposit to [TTT];

[1] Standards Committee determination, 20 June 2017 at [6]–[8].

(b) Mrs ML had signed Terms of Engagement that provided for payment of [Law Firm A]'s fees from any of her funds held by [Law Firm A] in their trust account;

(c) the deposit paid by [TTT], following satisfaction of the condition in the sale agreement, was not held by [Law Firm A] as a stakeholder but "for Mrs ML alone";

(d) the cancellation of the Sale Agreement, agreed between Mrs ML and [TTT], "meant that the funds were not held for any specific purpose"; and

(e) it followed that [Law Firm A] were "entitled to deduct their fees pursuant to their signed agreements with Mrs ML".

[16] In arriving at its decision that [Law Firm A]'s three invoices, both individually and collectively, were fair and reasonable the Committee referred to r 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and the requirement in that rule to take into account the fee factors set out in r 9.1. The Committee noted those of the fee factors which it considered relevant to each matter.[2]

Application for review

[17] Mrs ML filed an application for review on 25 July 2017.

[18] Concerning her complaint about [Law Firm A] having deducted their fees, Mrs ML repeats that she seeks the return of the deposit, in full, to [TTT] in accordance with her instructions to [Law Firm A]. She states that because "[Law Firm A]'s fees have reduced the deposit considerably and [she does] not have the money available to pay [TTT]", as a consequence, she is "in breach of the Settlement Agreement" reached with [TTT].

[19] Mrs ML seeks itemised invoices, and reduction of the fees "to reflect market price". She says that "if and when the fees are reduced to a reasonable level, [she] will pay them off over time".

[20] Although not specifically referred to in her complaint, Mrs ML also seeks reduction of the office expenses "to reflect actual and reasonable costs", removal of those expenses "if … not normally … passed on to a client" or if she "did not use or receive" the benefit of those office expenses. The main items she refers to include charges for "Insurance Contribution", "Bureaux" (all three invoices), "Settlement

[2] At [9]–[12].

Attendances" (sale proposals invoice), "LINZ Attendance" (sale to [TTT] invoice). She also queries why she has been charged for "stationery", "postage" (all three invoices), "facsimile charges" (sale proposals, sale to [TTT] invoices), "Email printing charges" (sale proposals, sale to [TTT] invoices).

Response

Deduction of fees

[21] In response, Mr OP states that the position he took in his letter dated 12 May 2017 to Mr BG stands. In essence Mr OP's argument is that:

(a) because the Sale Agreement was unconditional, [Law Firm A] did not hold the deposit as a stakeholder pursuant to cl 2.3, 2.4 of the Sale Agreement, but on behalf of Mrs ML in part payment of the purchase price;

(b) the deposit was not held by the firm for a particular purpose as discussed in *Heslop v Cousins;*[3]

(c) [Law Firm A] was authorised to deduct their fees pursuant to first, the authorities to deduct fees provided by Mrs ML in the three ALS' signed by her and secondly, s 113(2) of the Act which provides that "[n]othing in section 110 or [section 113] takes away or affects any just claim or lien". He states that it follows a valid claim or lien will prevail over a client's instructions, and that [Law Firm A] had complied with s 110 of the Act;

(d) at no stage had [Law Firm A] waived their lien or stated to Mr BG that the firm would not deduct their fees, or indicated that the funds could be released if authorised by [TTT]; and

(e) Mr BG's contentions that first, Mrs ML's request to [Law Firm A] to cancel the agreement and return the deposit changed this position, and secondly, having done so "the funds became the property of [TTT]" were both misconceived. Mr OP states that this is because [Law Firm A] held the deposit on behalf of Mrs ML, not as a stakeholder. Therefore he says the funds were held subject to the lien which remained until [Law Firm A]'s costs had been paid.[4]

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[3] *Heslop v Cousins* [2007] 3 NZLR 679 (HC).
[4] *Re Hawkes* [1898] 2 Ch 1 referred to.

Fees

[22] The fee component in the will invoice was $570 plus GST, office expenses and disbursements. Mr OP states that Mrs ML did not raise any concerns following receipt of the invoice, and had signed her will on 23 May 2016.

[23] Concerning the sale proposals, first, to Mrs ML's grandson and partner, and secondly, on the open market, the fee component of [Law Firm A]'s invoice was $1,530 plus GST, office expenses and disbursements. Similarly, Mr OP states that Mrs ML did not raise concerns about this invoice until she complained about [Law Firm A] having deducted their fees.

[24] [Law Firm A]'s fee on the proposed sale to [TTT] was $1,402.50 plus GST, office expenses and disbursements. Mr OP states that at the time Mrs ML "sought to cancel the agreement after the anticipated settlement date" most of the legal work had been carried out except for settlement itself.

[25] In relation to Mrs ML's concerns about the office expenses, Mr OP drew the distinction between disbursements which are payments to third parties such as LINZ, and office expenses which concern internal administrative charges such as photocopying, postage, insurance contribution. He says that both disbursements and office expenses were authorised in cl 2.2 of the firm's Terms of Business brochure provided to Mrs ML.

[26] Mr OP explained that in many cases office expenses "are an allowance for such costs, as opposed to an actual cost, which is why they are shown as office expenses, rather than a disbursement". He considers that the firm's "… charges for these office expenses are reasonable and in line with accepted practice". Concerning the "LINZ Attendance" item he stated that:

> … all of the relevant dealings had been set up in Landonline … [and] whilst we did not obviously charge for any registration fees, we consider that we were entitled to charge for the contribution towards the software costs included in [that] charge …

[27] Finally, he points out that Ms QR was involved in the proposed sale to [TTT] only, and not the earlier matters.

Review on the papers

[28] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[29] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[30] 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.

[31] 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

[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].

> coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[32] 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:

(a) consider all of the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

Issues

[33] The issues I have identified on this review are:

(a) Was [Law Firm A] entitled to deduct the fees, office expenses and disbursements on 5 May 2017 after Mr BG, on Mrs ML's behalf, had on 3 May 2017 informed Ms QR that the sale "will not be proceeded with", instructed her to "return in full the deposit … to [TTT]", and instructed her not to deduct [Law Firm A]'s fees?

(b) Did [Law Firm A]'s later claim on 12 May 2017 that the firm had a "just claim or lien" over the deposit held in [Law Firm A]'s trust account on behalf of Mrs ML nonetheless entitle the firm to deduct those fees, office expenses and disbursements as the firm did on 5 May 2017?

(c) Are [Law Firm A]'s fees fair and reasonable?

Analysis

(1) Handling clients' money — a client's directions

[34] Concerning money paid by a client to the client's lawyer, s 110(1)(b) of the Act provides that:

> A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person:
>
> (a) …; 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.

[35] Consistent with the consumer protection purposes of the Act, a contravention of this provision is treated seriously. A person who "knowingly" contravenes subsection (1) (or subsection (2)) "is liable on summary conviction to a fine not exceeding $25,000".[7]

(2) Deduction of fees

[36] In circumstances where a lawyer wants to deduct fees from a client's money held in the lawyer's trust account, r 9.3 of the Rules, also set out in the appendix, provides that:

> A lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[37] The effect of reg 9 of the Trust Account Regulations, referred to in r 9.3, is that a lawyer cannot deduct his or her fees from a client's money held in the lawyer's trust account without having first provided an invoice to the client, a copy of which is available for inspection at the lawyer's premises, or, where the client has provided written authority for the deduction which specifies the amount and particular purpose to which the money is to be applied. Relatedly, reg 10 requires that a lawyer must hold a client's money in respect of which an invoice has not been issued until the money is disbursed on the client's behalf, or applied in payment of fees in accordance with reg 9.

(3) Interrelationship of s 110, reg 9

[38] In *Heslop v Cousins*,[8] the High Court discussed the interrelationship of the predecessors of s 110, and reg 9 when considering whether, contrary to the client's instructions, the lawyer concerned was entitled to deduct fees from the client's funds held in trust.[9] The lawyer had argued that reg 9 "effectively provides a code which enables fees to be deducted once an account has been rendered regardless of the client's directions".[10] The Court's answer that reg 9 did not provide such a code was unequivocal:[11]

> … the [lawyer's] position is untenable. It is clear from [section 110] that a client's direction is fundamental and must be obeyed. Regulation [9] is subordinate to that requirement and cannot override it. Thus even if an account is rendered a solicitor is not entitled to deduct his or her costs from funds held in the trust account if the deduction would be contrary to the client's direction.

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[7] Lawyers and Conveyancers Act 2006, s 110(4).
[8] *Heslop v Cousins*, above n 3, at [195].
[9] Law Practitioners Act 1982, s 89. Solicitor's Trust Account Regulations 1998, reg 8.
[10] *Heslop v Cousins*, above n 3, at [195].
[11] At [196]. As far as I can ascertain, there have not been any subsequent decisions which disapprove of this position.

[39] The Court noted that this was "consistent with guidelines issued by the New Zealand Law Society in 1998", which provided that whilst a lawyer was permitted to deduct fees from the client's funds held in trust once an invoice had been issued (guideline 6.16) the lawyer was nonetheless required to comply with the client's directions (guideline 6.17). The equivalent 2008 Guidelines similarly provide that a lawyer is not permitted to deduct fees unless an invoice has been issued, or the client has provided written authorisation (6.16). However, the previous guideline (6.17) to pay the trust money as the client directs (s 110 (previously s 89)) has not been carried forward.[12]

(4) A lien

[40] Section 113(2) provides that:[13]

> Nothing in section 110 or this section *takes away or affects* any just claim or lien that a practitioner, related person or entity, or incorporated firm who holds money to which section 110(1) or (2) applies may have against that money. [emphasis added]

[41] There are two types of lien which a lawyer can claim pending payment of costs by a client: (a) a retaining lien, also known as a general or possessory lien, which "entitles solicitors to retain their clients' papers or other chattels until their costs are paid"; or (b) a particular lien, "also designed to safeguard solicitors' costs but arises over any personal property recovered or preserved, or any judgment obtained for the client by the solicitors' exertions in litigation".[14] The characteristics of a lien have been described as "a possessory security and entitled the holder of the lien to do no more than retain the asset in question".[15]

[42] In *Heslop* the lawyer, who had issued an invoice, contended that he had a lien over the client's funds held in the lawyer's trust account.[16] After reviewing the relevant authorities, the Court accepted the client's argument that a lien could not be claimed where the funds were held for a particular purpose:[17]

> 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

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[12] At [196]. New Zealand Law Society "Trust Accounting Guidelines" (November 2008) <www.lawsociety.org.nz>.
[13] Brought forward from section 71 (4) of the Law Practitioners Act 1955.
[14] GE Dal Pont, "Lawyers' Professional Responsibility" (6th ed, Thompson Reuters, Sydney, 2017) at [16.10], [16.20] (retaining lien), [16.115] (particular lien). See also *Shand v MJ Atkinson Ltd (in liq)* [1966] NZLR 551 (CA) at 559 per Turner J.
[15] *A v Z* LCRO 40/2009 (May 2009) at [28].
[16] *Heslop v Cousins*, above n 3, at [188].
[17] At [190] per Chisholm J.

> obliged to use the funds for the particular purpose for which the funds have been entrusted to the solicitor.

[43] On the facts in *Heslo*p, because the funds were held for a particular purpose, namely, payment to a bank to obtain a release of mortgage, the Court held that the lawyer had "wrongly claimed a lien/set-off over the funds held in his trust account".[18]

[44] In *Shand v MJ Atkinson Limited (in liquidation),* which was not referred to in *Heslop,* the Court of Appeal explained the purpose of the predecessor of s 113(2). There the lawyer had claimed a right of set off for costs up to the date of liquidation against a liquidator's demand for a company's funds held in the lawyer's trust account. In deciding that s 104 of the Bankruptcy Act 1908 did not prevent set-off, the Court stated that the intention of the then equivalent of s 113(2), s 71(4) of the Law Practitioners Act 1955, was to preserve a lawyer's right of set off which had existed before that date:[19]

> This right of set-off is in my view clearly the right - or one of the rights, for the particular lien of the solicitor must also be included - which [s 71] subs. (4) was concerned to preserve.
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> If then, as I believe was the position (and still appears to be the position in England …) … a solicitor had, under the general law, a right to set-off his costs against amounts due by him as solicitor to a bankrupt client, then [this] provision … kept that right alive notwithstanding the requirement to pay clients' money into trust accounts, for a claim to set off for costs seems to me to fall squarely within the words "just claim".

[45] This is consistent with the words "[n]othing …takes away or affects" in s 113(2). The other rights referred to were "any just claim or lien" which the Court of Appeal considered "included" the right of set-off.[20]

(5) Funds held for a particular purpose

[46] Although, in *Heslop*, the funds were held for a particular purpose, the Court commented that the "wider statement in Laws NZ which seem[ed] to indicate that a lien or set-off is available whether or not the funds are held in the trust account for a particular purpose" was not supported by the authority referred to in Laws NZ.[21] The Court referred to the decision relied on by Laws NZ, *Loescher v Dean,* in which the contrary view was expressed:[22]

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[18] At [192], [227].
[19] *Shand v MJ Atkinson Ltd (in liq),* above n 14, at 566 per Turner J, and 569 per McCarthy J referring to s 71(4) of the Law Practitioners Act 1955, first introduced in s 2 of the Law Practitioners Act 1892, carried forward in s 47(5) of the Law Practitioners Act 1908.
[20] At 567 per Turner J.
[21] *Heslop v Cousins*, above n 3, at [191].
[22] *Loescher v Dean* [1950] Ch 491, 495 per Harman J.

> … here the money was not entrusted to the solicitor for any specific purpose: it was paid to him in the ordinary course of his business as solicitor for the client. He receives it as the client's agent, as does any other solicitor, and he pays it into the client account as he is bound to do.

[47] The conclusion reached by the Court in *Heslop* was that if the money was held for a particular purpose "… a lien and/or set-off was not available. If not, a lien and/or set-off was available".[23] It is to be noted however that the Court of Appeal in *Shand* expressed "… real doubt whether …[a] retaining lien, which a solicitor has in respect of his client's chattels, and in particular documents, extends to moneys deposited in a trust account".[24]

[48] Commenting on *Heslop* and *Shand* it has been observed that:[25]

> At the least, a just claim or lien must be capable of applying to funds in the trust account where the client has specifically authorised deduction for the payment of fees, and the lawyer has acted in reliance on that authority, but the client purports to rescind the authority. Such a case would seem to provide *a compelling basis for a "just claim".* (emphasis added)

[49] Referring to *Heslop* the author adds that:[26]

> … it is unclear whether the mere assertion of a right to deduct fees from trust money, because of a general entitlement expressed in the lawyer's terms of engagement, is sufficient. The more specific the terms of an authority to deduct fees, the more likely it is that the lawyer will be able to establish a just claim

[50] Since *Heslop*, this Office has held that where a lawyer holds a client's funds for a particular purpose, then the lawyer concerned is not entitled to deduct fees in the absence of a direction from the client to do so. In *A v Z* the LCRO found that the client had not consented to the deduction of fees, and applying *Heslop* held that s 110 was "paramount" to reg 9 and therefore the deduction was not authorised.[27] Although in *A v Z* the client's funds were not held for a particular purpose,[28] the LCRO observed that "no lien attached [in *Heslop*] because the funds were held for a particular purpose".[29]

[51] I understand that the Law Society's most recent position on this subject is expressed in a letter to the profession following *A v Z*.[30] Having discussed that decision

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[23] *Heslop v Cousins*, above n 3, at [192].
[24] *Shand v MJ Atkinson Ltd (in liq),* above n 14, at 568 per McCarthy J, and Turner J at 562. Dal Pont*,* above n 14 at [16.45] notes that this "is the subject of conflicting authority".
[25] Paul Collins "Trust Accounting and Dealing with Client's Money"(paper presented to the Auckland District Law Society seminar, Ethics: Practical Guidance for Avoiding Common Pitfalls, 15 September 2016), 45 at [1.13].
[26]At [1.13].
[27] *A v Z*, above n 15, at [23].
[28] At [24].
[29] At [27].
[30] *A v Z*, above n 15.

the letter stated that "if the issue of the validity of regulation 9(1)(a) were to arise again in the future it would ultimately need to be resolved by the court" but that: [31]

> In the meantime there are good reasons to support the validity of a regulation which is consistent with section 113(2) and the judgement in *Shand* … While the above issue remains in any doubt, the prudent course for lawyers would be to: - advise the client in terms of r.3.4(a) of the RCCC that fees may be deducted from funds held for the client and ensure that the client accepts in writing the terms of engagement; and - comply with regulation 9 of the Trust Account Regulations at the time a fee is deducted.

[52] In two decisions from this Office since *A v Z* where a client's funds were held by a lawyer for a specific purpose and the lawyer had deducted fees, the LCRO has exercised a discretion not to make a finding against the lawyer concerned.

[53] In the first decision the lawyers concerned had provided an undertaking to the Standards Committee that if found not to have been entitled to deduct their fees then they would refund the money deducted to the client.[32] The LCRO reserved "the right to …make a finding of unsatisfactory conduct" if the undertaking was not carried out.[33] In the second decision where the client had already paid the first of two invoices issued by the lawyer, the LCRO noted that the client was in a position to dispute the second invoice.[34] In both decisions the LCRO "acknowledged [the] uncertainty which surrounds"[35] the issue of deduction of fees, with the intention that the decision "will reinforce the findings … in *A v Z* with regard to funds held for a specific purpose".[36]

(6) Discussion

[54] In Mr BG's letter of 3 May 2017 to Ms QR, Mrs ML withdrew her authority for [Law Firm A] to deduct their fees from the deposit funds held in the firm's trust account, and directed Ms QR to pay the funds to [TTT].

[55] In these circumstances, the central question is whether Mr OP's claim that [Law Firm A], by going ahead and deducting their fees, were entitled to rely (a) on Mrs ML's prior authorities to deduct, as claimed in Ms QR' letter of 5 May 2017 to Mr BG's firm,

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[31] John Marshall "Deduction of fees — clarification" (2009) 736 Lawtalk 5. See also Jeremy F Kennerley (2014) Lawtalk"Lawyers in Practice" 837 at 25, and Jeremy F Kennerley "Client service and lawyers nominee companies" (2014) Lawtalk 843 at 26 where much the same comment is made by the Law Society's Financial Assurance Manager.
[32] *DE v FG* 86/2014 (16 March 2015) – the clients paid funds to the lawyer to settle a building dispute.
[33] At [32]
[34] *AR v ZE* LCRO 83/2012 (6 May 2016) – the funds were held for the purchase of a replacement property.
[35] *DE v FG* at [31]; *AR v ZE* at [84]–[85].
[36] *DE v FG* at [22], reiterated in *AR v ZE* at [84].

and (b) on a lien as subsequently claimed by Mr OP in his letter of 12 May 2017 to Mr BG.

(a) Authorities

[56] Mr OP relies on the ALS', signed by Mrs ML, which authorised [Law Firm A] to deduct their fees.

[57] He contends that before agreeing to cancel the Sale Agreement that Mrs ML ought to have obtained confirmation from [Law Firm A] that the full amount of the deposit would be available for repayment by her to [TTT]. He claims that he is not responsible for the consequences of Mrs ML cancelling the Sale Agreement when it was "plainly obvious that [Law Firm A] were likely to maintain a lien against those funds in respect of [Law Firm A]'s] unpaid fees".

[58] The authority, which was not irrevocable, was contained in cl 4 of the ALS' signed by Mrs ML:

> 4. The Client agrees:
> …
> (c) to [Law Firm A] deducting monies from any funds held in the Trust Account of [Law Firm A] to the credit of the Client provided tax invoices are rendered by [Law Firm A] to the Client.

(b) Funds held for a particular purpose

[59] Mr OP contends that the deposit funds held on Mrs ML's behalf in [Law Firm A]'s trust account were not held for a particular purpose. However, Ms QR' file note of the meeting with Mrs ML on 16 March 2017, when Mrs ML discussed with Mr OP and Ms QR [Mrs ML's] desire to withdraw from the sale to [TTT], notes Mrs ML's intention to purchase alternative accommodation that was a "good enough place to stay …". The deposit funds held in [Law Firm A]'s trust account were already earmarked for a particular purpose.

[60] Mrs ML's instructions of 3 May 2017 changed that position. The consequence of Mrs ML and [TTT] agreeing to cancel the Sale Agreement, coupled with Mrs ML's direction to pay the full deposit to [TTT] meant that the money was held by [Law Firm A] in their trust account on Mrs ML's behalf for the particular purpose of being paid back to [TTT] and not for general purposes as Mr OP contends.

[61] In my view, having received Mrs ML's directions on 3 May 2017, the funds became earmarked or labelled for return to [TTT]. Following the decision in *Heslop*,

Ms QR and Mr OP were required by s 110 (1)(b) to carry out Mrs ML's directions to return that money to [TTT]. As in *Heslop*, where the funds were held by the lawyer concerned for a particular purpose, it was no longer open to Ms QR and Mr OP to deduct the firm's fees from the deposit funds, or to assert a lien over those funds.[37]

[62] On the particular facts of this matter, Mrs ML had directed Ms QR that the funds were held for a particular purpose. It is my view that in such circumstances Ms QR and Mr OP were not, as Mr OP contends, entitled to deduct the firm's fees invoiced to Mrs ML in reliance on s 113(2) to do so. By deducting the fees, they placed the firm's interest ahead of their client's directions and in doing so contravened s 110(1)(b).[38]

[63] In his letter to Mr BG dated 12 May 2017, Mr OP stated that [Law Firm A] would maintain their entitlement to have recourse to the funds in their trust account for the unpaid fees until satisfactory arrangements, such as undertaking to pay the fees, were made. However, a week earlier on 5 May 2017, the firm had deducted the fees. In *Shand* the Court of Appeal expressed the view that:[39]

> [o]nce a solicitor has banked moneys which have come into his hands, it appears to me that he has lost possession of those moneys, and what he has is a *chose in action*, i.e. a claim against the bank in which he has deposited it. … The general or retaining lien which a solicitor has on his client's documents does depend largely on possession, and is lost when possession is relinquished.

[64] Because I have reached the view that the deposit funds were held for a particular purpose it is not necessary to consider Mr OP's later, 12 May 2017, claim to a lien over those funds.[40]

Fees

(1) Rules 9, 9.1

[65] In determining that [Law Firm A]'s (Ms DH and Ms QR) fees are fair and reasonable, the Committee referred to the requirement in r 9 to take into account the fee factors set out in r 9.1.

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[37] *Heslop v Cousins*, above n 3, at [184], [198] — payment to a bank to obtain a release of mortgage.
[38] *At* [192], [227]. Duncan Webb, Kathryn Dalziel and Kerry Cook, *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 329.
[39] *Shand v MJ Atkinson Ltd (in liq),* above n 14, at 559 per Turner J; *A v Z, above n 15,* at [28].
[40] *Heslop v Cousins*, above n 3, at [192].

[66] Rule 9 prohibits a lawyer from charging a client a fee that is more than fair and reasonable for the legal services provided by the lawyer:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[67] Referring to the relevant authorities, the LCRO has observed that considerations to be taken into account when determining whether a fee is fair and reasonable include:[41]

> (a) setting a fair and reasonable fee requires a global approach; (b) what is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases; (c) while time spent must always be taken into account it is not the only factor; (d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[68] Because the process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation",[42] the LCRO has acknowledged that "different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow".[43]

[69] For that reason there is a "proper reluctance to 'tinker' with bills by adjusting them by small amounts," and that it "is therefore appropriate for Standard's Committees not to be unduly timid when considering what a fair and reasonable fee is".[44] Also, that "where there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable".[45]

[70] It is only when a fair and reasonable fee has been determined "can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged".[46] A particular lawyer's approach to billing may not necessarily "be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances".[47]

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[41] *Hunstanton v Cambourne* LCRO 167/2009 (10 February 2010) at [22]. See also *Chean v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [24]..
[42] *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 (CA) per Donaldson J at 441–442
[43] *Hunstanton v Cambourne, above n 41,* at [62].
[44] At [62].
[45] At [62].
[46] At [11].
[47] At [15].

(2) Regulation 29 — special circumstances

[71] It will be noted that each of the three invoices issued by [Law Firm A] is for less than $2,000. In such circumstances reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that:

> unless the Standards Committee … determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs –
>
> (a)….; or
>
> (b) relates to a fee that does not exceed $2,000 exclusive of [GST]

[72] Circumstances which this office has held fall into the category of special circumstances include where two or more bills of cost can be considered "together as one bill of costs for the same transaction".[48]

[73] Although the Committee does not refer to this point, I proceed on the basis that it would have done so and considered that special circumstances applied, particularly in relation to the two invoices concerning Mrs ML's sale proposals, and the sale to [TTT] respectively.

(3) Will

[74] [Law Firm A]'s invoice dated 8 July 2016 was for $570 plus GST (fee component).

[75] The firms' letter of retainer dated 28 April 2016 advised, "indication only", a fee "in the vicinity of $400 plus GST, office expenses and disbursements". A month later on 19 May 2016 Ms DH, a legal executive employed by [Law Firm A], provided an update noting time recorded of $420 plus GST. She stated that the revised "anticipated" fee would be "approximately $600 plus GST, office expenses and disbursements".

[76] The total time recorded by Ms DH on this matter was 1.9 hours, which at her hourly rate of $300 plus GST resulted in an indicative fee of $570 plus GST which she invoiced to Mrs ML.

[77] As is reflected in the narrative of attendances contained in the invoice, [Law Firm A]'s pre-billing report, dated 7 July 2016, includes the usual attendances that one would expect of a lawyer on the preparation of a straight forward will where the will maker

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[48] *Reading v Bracknell* LCRO 81/2009 (18 July 2009) at [22], [23].

appoints two trustees, and leaves his or her estate to his or her children in equal shares with a gift over to grandchildren.

[78] The preparation of most wills follow a similar pattern, whereby the lawyer concerned first obtains the client's instructions, provides preliminary advice, drafts the will, obtains confirmation from the client, and then attends the client on execution.

[79] In my view, total time expended of 1.9 hours in relation to these attendances at Ms DH's hourly rate is fair and reasonable both to the client, Mrs ML, and to [Law Firm A] (r 9.1(a)).

[80] I consider it appropriate that Ms DH's hourly rate of $300 plus GST include a weighting of other factors namely, the skill, specialised knowledge and responsibility required (r 9.1(b)), the importance of the matter to the client (r 9.1(c)), and the fee customarily charged in the district and locality (r 9.1(m)). Having previously provided, what in effect was a fee estimate (r 9.1(j)), that factor is also relevant with the final fee being $30 plus GST less than the updated indication or estimate provided.

[81] Taken overall, I consider that the fee of $570.00 plus GST was fair and reasonable to both Mrs ML and to [Law Firm A].

(4) Sale proposals

[82] [Law Firm A]'s (Ms DH) invoice dated 6 September 2016 was for $1,530 plus GST (fee component).

[83] In the same letter of retainer Ms DH noted time recorded at that stage of $390 plus GST, and stated that an "approximate [fee] indication would be provided". Also on 19 May 2016, Ms DH informed Mrs ML (letter) that in addition to the time recorded of $750 plus GST in respect of the proposed sale to Mrs ML's grandson, the firm's fee in respect of an open market sale would be "in the vicinity of $1,350 to $1,450 plus GST, office expenses and disbursements".

[84] The total time recorded by Ms DH on this matter was 5.1 hours, again, at her hourly rate of $300 plus GST, which resulted in an indicative fee of $1,530 plus GST.

[85] As noted earlier, this matter concerned Mrs ML's proposals to sell the property first, to her grandson, and later on the open market. Most of Ms DH's attendances detailed in the firm's pre-billing report concerned communications with Mrs ML, [The Real

Estate Firm] (real estate agents), and the lawyers acting for Mrs ML's grandson. The time spent by Ms DH on these matters ranged from one to three units of time.[49]

[86] The major attendances related to Ms DH's initial meeting with Mrs ML to discuss the sale proposal, and a month later, when Mrs ML considered an open market sale, Ms DH's perusal of the listing agreement and discussions with Mrs ML about that.

[87] Taking into account the time and labour factor (r 9.1(a)) I am satisfied that the time recorded by Ms DH for the legal work she undertook is not unexpected in an open-ended exercise such as this.

[88] Concerning the factor in respect of the importance of the matter to Mrs ML, and the results achieved (r 9.1(c)), it might have been expected that some allowance be made for the fact that there was no definite outcome for Mrs ML, namely a sale. However, an allowance of say 10–15 per cent would still have left the fee invoiced within an acceptable range for the attendances described.

[89] For these reasons, I consider that [Law Firm A]'s fee in this matter was fair and reasonable to both Mrs ML and [Law Firm A].

(5) Proposed sale to [TTT]

[90] Ms QR acted on this matter. Her time recorded was 4.3 hours at her hourly rate of $300 plus GST. The value of the total time recorded of 4.6 hours, which included three units recorded by another author at the hourly rate of $375 plus GST, resulted in an indicative fee of $1,402.50 plus GST.

[91] The narrative of attendances on [Law Firm A]'s time records evidence that by the time Mr BG's firm requested Ms QR to cancel the sale agreement on 28 April 2017, preparation for settlement of the sale, scheduled for 30 April 2017, had largely been carried out.

[92] In the particular circumstances of this matter, I consider that Ms QR' hourly rate would have incorporated a weighting for the skill, specialised knowledge, and responsibility required (r 9.1(b)), and for the importance of this matter to Mrs ML (r 9.1(c)). It is also to be noted that because [Law Firm A] had provided, in effect, an estimate the corresponding factor (r 9.1(f)) is also a relevant factor to be taken into account.

[93] It is not uncommon for lawyers who act for clients on the sale of a property that does not proceed to make some allowance in respect of the time and labour expended

[49] One unit = six minutes (10 units per hour).

(r 9.1(a)). However, in such situations it would not be fair to penalise a firm for the fact that the transaction did not proceed to completion for reasons beyond the firm's control. In any event, the final fee of $1,402.50 was below the higher end of [Law Firm A]'s fee "indication" of $1,550 plus GST, and also falls within an acceptable range.

[94] For these reasons, I consider that [Law Firm A]'s fee on this matter was fair and reasonable to both Mrs ML and [Law Firm A].

Conclusion

[95] Although I have found that the fee components in [Law Firm A]'s three invoices are fair and reasonable, in her review application Mrs ML questioned whether [Law Firm A] was entitled to charge office expenses, referred to earlier, that were not actual costs incurred by her. This issue was not specifically referred to in her complaint, and was not considered by the Committee. It will be noted that "disbursements" are included as a separate item in the invoices for both the sale proposals, and sale to [TTT].

[96] As also noted earlier, Mr OP considers that the "office expenses", which he explained include an "insurance contribution", "Land Information New Zealand and other software licence fees", and "Bureaux", are "reasonable and in line with accepted practice".

[97] The authority for a Standards Committee to consider a complaint about a "bill of costs" is contained in s 132(2) of the Act, which draws no distinction between the lawyer's fee on the one hand, and disbursements and office expenses on the other. This aspect of Mrs ML's complaint does raise an issue of principle, namely, whether it is permissible to charge such "office expenses" to clients in this manner. Although it is open to me to consider this on review, because the parties did not have the opportunity to address the matter before the Committee the proper course is for me to return this issue to the Committee to consider the appropriateness or otherwise of some or all the office expenses charged.

[98] Concerning the deduction of fees issue, whilst it is open to me to make a finding against both Mr OP and Ms QR for deducting [Law Firm A]'s fees contrary to Mrs ML's direction, I do not propose to do so in respect of Ms QR for the simple reason that as an employed legal executive of the firm she would have been working on the matter under the supervision and direction of Mr OP, or another partner in the firm.[50] I do so however in respect of Mr OP, who I have found on the particular facts of this matter deducted the

[50] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 11.3.

firm's fees contrary to Mrs ML's instructions first, not to do so, and secondly to repay the full deposit to [TTT] when the firm held security for costs payable by Mrs ML to the firm.

Decision

[99] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) Confirmed as to the finding to take no further action concerning Mrs ML's allegation that [Law Firm A]'s fees were not fair and reasonable in respect of the fee component of [Law Firm A]'s invoices only.

(b) Reversed as to the finding to take no further action concerning Mrs ML's allegation that [Law Firm A] deducted their fees from funds held on behalf of Mrs ML in their trust account contrary to her direction, and substituted with a finding that Mr OP contravened section 110(1)(b) of the Act which constitutes unsatisfactory conduct under section 12(c) of the Act which includes "a contravention of [the] Act".

Orders

[100] In giving consideration as to whether it is appropriate to order a penalty, I refer to the guidance provided by the High Court which has stated that the "predominant purposes [of orders] are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties and to provide scope for rehabilitation in appropriate cases".[51]

[101] It is evident from the number of complaints about lawyers deducting fees received by Standards Committees, and review applications considered by this Office that uncertainty concerning the application of the relevant statutory and regulatory provisions considered earlier remains, including the requirements, as decided in *Heslop,* where a client's funds are held by the lawyer concerned for a particular purpose.

[102] It is for this reason I have concluded that in these particular circumstances a finding that Mr OP contravened s 110(1)(b) which constitutes unsatisfactory conduct is sufficient in itself without additional penalty.

[103] I do however order that:

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[51] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [22]. See also Lawyers and Conveyancers Act, s 3, the consumer protection purposes.

(a) Pursuant to section 156(1)(h)(i) of the Act, Mr OP rectify his error concerning the requirements of section 110(1)(b), and repay the whole of the sum of $10,000.00, representing the deposit paid by [TTT], to Mrs ML or as she directs no later than the 12th day of February 2018.

(b) Pursuant to section 209 of the Act, the aspect of Mrs ML's complaint about [Law Firm A]'s invoices that raises questions about the firm's office expenses be returned to the Committee to consider whether some or all of the office expenses charged were appropriate.

Costs

[104] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr OP is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by the 12th day of February 2018 pursuant to s 210(1) of the Act. Pursuant to s 215(3)(a) of the Act, the costs order may be enforced in the District Court.

DATED this 21st day of December 2017

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B A Galloway
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:

Mrs ML as the Applicant
Mr OP, Ms QR as the Respondents
Mr UX as a Related Party
[Area] Standards Committee [X]
The New Zealand Law Society

Appendix

section 110(1)(b):

Obligation to pay money received into trust account at bank

A [lawyer] who, in the course of his or her practice, receives money for, or on behalf of, [the client]:

(a) …; and

(b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or is that person directs.

section 113(2):

Protection of money received

(1) …

(2) Nothing in section 110 or this section takes away or affects any just claim or lien that a practitioner, related person or entity, or incorporated firm who holds money to which section 110(1) or (2) applies may have against that money.

Regulation 9, Lawyers: Trust Account Regulations 2008:

Restriction on debiting trust accounts with fees

(1) No trust account may be debited with any fees of a practice (except commission properly chargeable on the collection of money and disbursements) unless—

(a) a dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or

(b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.

(2) If fees are debited under subclause (1)(a), an invoice must be delivered or posted to the person who has a legal or beneficial interest in the trust account to be debited before or immediately after the fees are debited.

(3) For the purposes of subclause (2), a practitioner or partner in the practice is not to be treated as having a legal or beneficial interest in the trust account to be debited, solely because the practitioner or partner issues the invoice in respect of that trust account.

Regulation 10, Lawyers: Trust Account Regulations 2008:

Fees and disbursements paid in advance of invoice

All money paid to a practice in respect of professional services for which an invoice has not been issued, whether described as a retainer or otherwise, must be retained in a trust account until it is—

(a) disbursed on the client's behalf; or

(b) applied in payment of fees in accordance with regulation 9.

Rule 9.3, Lawyers: Conduct and Client Care Rules 2008:

Fees in advance

A lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.