LCRO 175/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Wellington Standards Committee
BETWEEN	**MS MC** Applicant
AND	**MR VB** Respondent

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

DECISION

Background

[1] In 2006 AEC purchased a property in Wellington with the intention of developing it into residential units. Ms MC was a shareholder and director of the company.

[2] The company engaged AEE to arrange the necessary finance and a document described as a "Mandate Agreement" was entered into. AEE performed its obligations under that Agreement and a fee of $77,483.00 became payable.

[3] AEE agreed to require payment only of $8,000.00 at that stage with the balance to be paid from the construction funding in due course.

[4] The principal of AEE was Mr MD and it was he who Ms MC dealt with throughout this matter.

[5] The project did not proceed as planned and by 2008 various creditors were seeking payment. AEE had by that time arranged funding through Kiwibank and it was agreed that a drawdown of $705,000.00 would be made which, together with funds from each of Ms MC and the other shareholder/director in the company, would enable these payments to be made.

[6] Ms MC had instructed Mr VB of AED to act on behalf of the company for this project. Although Mr VB knew Mr MD and had had previous dealings with him, Ms MC had engaged Mr MD independently of Mr VB.

[7] As a condition of its loan, Kiwibank required all drawdowns to be approved by the company's consultant, AEF as being within the budget approved by Kiwibank. It was also intended that the company accountant, Mr VA, should audit the payments made, but there is dispute over what stage the audit was to take place.

[8] The drawdown was paid by Kiwibank on 18 April 2008 and all payments were made by AED on 21 and 22 April 2008. Included in the payments was a payment of $193,500.00 to AEE.

[9] Following the drawdown and completion of the payments, AED reported to AEC and provided a full statement of all payments.

[10] The project was completed but AEC subsequently went into liquidation.

The complaint and the Standard Committee's decision

[11] In December 2010, Ms MC lodged a complaint with the Complaints Service of the New Zealand Law Society. Her initial complaint was that AED acted on the instructions of Mr MD only and did not have authority from AEC to make the payment to AEE.

[12] As the investigation proceeded, Ms MC also raised two other complaints. The first of these was that Ms MC had relied on advice from Mr VB as to the appropriate fee to be paid by AEC to those persons who entered into the underwriting agreements with AEC. The second further complaint raised by her was as to the quantum of the fees charged by AED.

[13] Having considered all of the material provided in connection with this matter, the Standards Committee determined pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 that further action was inappropriate or unnecessary. It recorded its reasons for this determination in the following way:

1. The Committee was of the view that the affidavit of Mr [MD], director and shareholder of [AEE], answered the questions it had raised.

a) Mandate

There is evidence, which confirms that there was a mandate agreement created on 2 April 2008, and there is a copy of the unsigned mandate, the original having apparently been inadvertently lost/destroyed.

b) Authority

Mr [MD]'s evidence is that the mandate governed the relationship between [AEE] and [AEC]. He believes that he held at all times the necessary authority from [AEC] to authorise [AED] to make payment of the fees recorded in [AED]'s statement of 28 April 2008, subject only to fees payable to [AED] and [AEF]. On the day of settlement Mr [MD] met with Mr [WB] of [AED] and approved and authorised the disbursement of funds.

2. Ms [MC]'s dispute is with [AEE] not with Mr [VB] and it is open to Ms [MC] to take civil proceedings against the company.

[14] The Committee did not refer to either the complaint with regard to the underwriting fees or costs.

The application for review

[15] Ms MC has applied for a review of that determination. She considers that the Committee was unduly influenced by the evidence provided to the investigation by Mr MD and in particular an unsigned copy of a new Mandate Agreement which he alleges was signed in 2008 and which authorises payment to AEE.

[16] Ms MC disputes that the 2008 Mandate was signed and asserts that it was not produced by Mr MD until she commenced her inquiries in 2010. She also points to the fact that this Mandate Agreement does not authorise payment to AEE for $193,500.00 but refers to a lesser sum of $184,500.00. In short she declares that no valid fee agreement documents, agreements of any kind, or a tax invoice were held by AED when they paid the sum of $193,500 to AEE nor did they have authority from AEC to do so. She asserts that the payment was made to Mr MD on his own authority.

Review

[17] A review hearing took place in Wellington on 2 May 2012. Ms MC was accompanied by a support person. Mr VB attended and was represented by Ms WC and accompanied by Mr WB, the solicitor who affected the drawdown and made the payment in dispute.

[18] Mr WD on behalf of Mr VB had previously made the point in his submissions to the Complaints Service that it was Mr WB who was responsible for the disbursement of

the drawdown funds and that the worst Mr VB could be accused of was inadequate supervision. At the review hearing however, Mr VB did not seek to avoid responsibility for the matter on this basis and I have proceeded with this review accordingly.

The payment to AEE

[19] The major aspect of Ms MC's complaint relates to the payment made to AEE. It is important to note that in a letter to this Office dated 2 December 2011, Mr WD on behalf of Mr VB, acknowledged that Mr VB did not have a written authority from AEC authorising the various payments set out in the statement dated 28 April 2008. Mr WD also acknowledges that the firm did not have a written record of any oral instruction given by the company authorising the payments.

[20] He goes on to state that "we acknowledge that this is a technical breach of rule 5(7)(b) of the Solicitors' Trust Account Rules but say that we have produced to the Standards Committee more than sufficient evidence establishing that authority was indeed given to make the disbursements and that Ms MC fully appreciated exactly how the money was allocated and paid".

[21] At the time that the payments were made, the relevant Rule was the Solicitors' Trust Account Rules 1996. Rule 5(7) of the Rules provides as follows:

> "A solicitor may make transfers or payments from a client's trust money only if –
>
> (b) the solicitor 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"

[22] In conjunction with the Trust Account Rules, the New Zealand Law Society Board issued a set of Guidelines; compliance with which generally ensured compliance with the Rules. Paragraph 6.1 of the Guidelines referred to the requirements of Rule 5(7) and paragraph 6.2 sets out the only situations where the express authority of the client was not required. These were:

- where the payment was to the client; or
- where the transfer was to the client's interest bearing deposit account; or
- where the authority was inherent in other documents (such as a will or agreement for purchase of a property).

[23] It is the third situation on which Ms WC relies to excuse Mr VB from strict compliance with the Rule.

Is the exemption applicable?

[24] Paragraph 6.2 of the Guidelines identify that the only circumstance where an express client authority was not required to authorise payment to third parties. The first and second exemptions referred to payments to the client directly or to place funds on deposit for the benefit of the client. The third exemption refers to an inherent authority in other documents such as a will or an Agreement for Sale and Purchase. It is pertinent to note that these are documents which would have been signed by the client. It must also be noted that the law firm must be able to produce a copy of the signed document on which it relies to satisfy the exemption.

[25] The only document which could fall into this category is the Mandate Agreement which Mr MD asserts was produced and signed in 2008. He provided forensic evidence that the document was created on 2 April 2008 and states that he believes this would have been signed by the parties. However, he cannot produce the original and suspects that it may have been inadvertently lost or destroyed when AEE moved offices in early 2010.

[26] This document identifies the responsibilities of AEE as being to:

- collate data in a format that was acceptable to Kiwibank and other parties;
- manage the project to its current position while liaising with professional connections and the construction company;
- arranging construction and residential facilities;
- arranging underwrite agreement.

[27] The fee for the services is recorded as being $184,500.00. The Agreement provided that "until such time as you have paid AEE the commission, you acknowledge and agree that this Agreement will serve as an irrevocable authority from you to the lender for the lender or his agent to deduct the commission from the funding and to forward the commission immediately to AEE upon your first receipt of any sum from the lender."

[28] It is taken as agreed that the "commission" referred to is the same as the "merchant banking fees".

[29] For Mr VB to rely on this authority, it would need to be accepted that he was "the lender's agent" for the purposes of the payment. Although AED was acting for Kiwibank in connection with the advance, it is difficult to accept that the firm would be

considered to be Kiwibank's "agent". Reliance on this provision in the Mandate Agreement is somewhat tenuous.

[30] For her part Ms MC is adamant that this document was only produced by Mr MD in 2010 when she lodged her compliant, and was never signed by her or on behalf of AEC. In any event, AED have not complied with the Trust Account Rules or Guidelines in that they have not retained a signed copy for themselves on their file.

[31] There are also discrepancies in the amount to be paid. In his letter to AEC dated 2 August 2010 Mr MD provided a breakdown of the fees as follows:

- Mandate Agreement, 9 June 2006, financial management fee - $8,000.00
- Mandate Agreement, 2 April 2008, Brokerage fee - $132,000.00
- Financial Project Management fee - $25,000.00
- Underwrite Arrangement Fee - $28,500.00

TOTAL - $193,500.00

[32] I note that this figure differs from the figure of $184,500.00 referred to in the copy Mandate Agreement.

[33] Various other documents identifying the amount being paid have also been referred to during the course of the Standards Committee investigation and this review. The budget prepared by AEF included a figure of $132,000.00 for merchant fees and other professional fees for which a summary only was provided.

[34] The declaration of disclosure certificate signed by AEC submitted to Kiwibank included a figure of $122,000.00 for brokerage fees whilst the loan offer from Kiwibank referred to a sum of $150,000.00 for both Kiwibank and merchant bank fees.

[35] All of these figures indicate some degree of uncertainty as to the exact amount to be paid to AEE.

[36] In addition, Ms MC asserts that the project management fee should in the first instance have been paid monthly if it was to have been paid at all, and in any event, she claims that it should not have been paid at all, at least to AEE, as she had taken over this role.

[37] A summary of these issues is as follows:

a) There is a dispute as to when the 2008 Mandate Agreement was produced.

b) Ms MC denies that the document was ever produced and/or signed.

c) It is doubtful if AED could be considered to be an “agent” of Kiwibank Limited.

d) There are discrepancies with regard to the amount to be paid.

e) Mr VB cannot produce a signed copy of the Mandate Agreement.

[38] Mr VB therefore provides extraneous evidence to support his contention that Ms MC was aware of and approved the payment. Much of the evidence provided to the Standards Committee and to this review has been directed towards this.

[39] In this regard, there is no question that AEC agreed to pay AEE merchant bankers fees. This is evidenced by the authority dated 15 October 2007 addressed to Kiwibank, in which AEC authorises Kiwibank to deduct the bank’s establishment fee and the “merchant banker’s fee”. Even allowing for the fact that AED was not Kiwibank or its agent, it is reasonable to accept that such authority would form an exception to the Rule in the nature of the documents referred to in the Guidelines. What is in dispute is how much the payment should have been.

[40] At the review hearing, reference is made to a meeting which took place at AED’s office on 15 April 2008. Present at that meeting were Mr VB, Mr VA, a representative from AEF, Mr MD, Ms MC and the other director/shareholder. It was asserted by Mr VB that one of the purposes of the meeting was to discuss the drawdown. He asserts that it is inconceivable that the meeting would not have discussed how the funds would be applied. Mr WB has provided a statement that he recalled entering the room where the meeting was being held towards the end of the discussion. He states:

> “Those present were discussing what was to happen with the balance of funds after repayment of existing lending facilities and consultant’s fees. The balance leftover was $15,527.64. It was agreed by all including Ms [MC] that the balance should remain in [AED]’s trust account as a GST float or for contingencies that might arise in respect of the project. Ms [MC] commented that it was a good idea for the money to remain with [AED] as it would be too tempting if the funds were remitted to the company’s account.”

[41] I do find it somewhat odd that some detailed file note or other record of the meeting was not made and retained by Mr VB on his file. In any event, this does not really advance Mr VB’s position, other than to bolster his assertions that Ms MC was aware that payment was going to be made to AEE. There is no evidence that she had authorised payment of the sum of $193,500.00 to AEE.

[42] Following the hearing, this office wrote to Mr VA and AEF to seek any information or details about the meeting.

[43] Mr VA has responded advising that his limited recollection of the meeting was that the ongoing operational procedures were covered. He recalls that this included monthly drawdowns from Kiwibank and that Mr MD gave a verbal outline of the key costs of the project and how they were to be funded.

[44] AEF have responded by advising that they do not have any records of the meeting, but recalls that the meeting was to discuss the drawdown of funds and further recalls that the fees to be paid to AEE were also discussed.

[45] These limited comments do tend to support Mr VB's contentions that the meeting discussed the drawdown to take place and the fees to be paid to AEE.

[46] In her letter of 23 February 2011 to the Complaints Service, Ms MC asserts that Mr MD was a personal friend of Mr VB and believed that he was also a client or former client. As Mr VB noted in his response of 25 March 2011, these assertions imply collusion between Mr VB and Mr MD. Mr VB refutes this absolutely. Nothing that has been provided by Ms MC supports such an inference and is to be disregarded.

[47] Following consideration of the material supplied by the parties, I am drawn to the conclusion that Mr VB did breach the Trust Account Rules in making the payment of $193,500.00 to AEE. The breach lies not so much in the fact that the payment was made at all (for which authority has been provided in the document referred to in the authority to Kiwibank), but in that payment of the specific amount of $193,500.00 was not authorised.

[48] It is not appropriate that I should attempt to determine what the correct amount of the payment should have been. AEE continues to trade and AEC has its remedies against the firm. AEC is in liquidation and it is likely that Ms MC could not herself commence these proceedings; however, that is not a matter with which I should concern myself.

The law

[49] The finding above however does not automatically result in an adverse finding against Mr VB.

[50] The conduct in question took place in early 2008. On 1 August 2008 the Lawyers and Conveyancers Act 2006 came into force. As Ms MC's complaint was lodged in 2010, the transitional provisions of the Lawyers and Conveyancers Act needs to be considered. Section 351(1) of the Act provides as follows:

> "If a lawyer…is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the Complaints Services established under section 121(1) by the New Zealand Law Society."

[51] The relevant standards are set out in sections 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanction may be imposed where a practitioner is found guilty of misconduct in his or her professional capacity or conduct unbecoming a barrister or solicitor (the provisions relating to negligence and to criminal convictions are not relevant here). Further guidance can be obtained from the Rules of Professional Conduct for barristers and solicitors which were the applicable Rules at the time in question.

[52] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. Misconduct is generally considered to be conduct:

> of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence 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). Conduct unbecoming is perhaps a slightly lower threshold. The test will be 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 p811).

[53] Measured against these comments, I have no hesitation in coming to the view that the conduct complained of is not such that proceedings of a disciplinary nature could have been commenced against Mr VB. The evidence provided by Mr VB makes it clear that Ms MC cannot deny being aware that all outstanding fees were to be paid from the drawdown to be made and that would have included the fees due to AEE. I am a little surprised by the statements made by Ms MC to the effect that she had little understanding or control over these payments. She was after all, one of two directors and shareholders of the company undertaking the development, and it seems a little odd that she would not have had a greater understanding of the project than she professes to have had. Mr VB asserts Ms MC was very much more in control than she says she was.

[54] However, the fact remains that Mr VB did not have the appropriate form of authority as required by the Trust Account Rules to make the payment. The outcome

of this review may very well have been different if the provisions of the Lawyers and Conveyancers Act were to be applicable. Even if that were the case, I would not have felt constrained to make any compensatory order as sought by Ms MC. The disciplinary process is not directed primarily at providing compensation to complainants, and does not provide the appropriate means and/or processes to establish what, if any, overpayment had been made. The company retains the ability to sue AEE for that in the Courts.

[55] The outcome of this review with regard to this aspect of the complaint is therefore the same as that arrived at by the Standards Committee, but the reason is substantially different. To that extent therefore, the decision of the Standards Committee is modified but the decision to take no further action is confirmed.

Did Mr VB provide advice to Ms MC with regard to the underwrite agreements?

[56] As noted in [12] above, Ms MC included in her correspondence to the Complaints Service a complaint that she trusted the advice of Mr VB as to the appropriate fee to be paid to the underwriters of the sales. She noted that she relied upon his experience in property matters in seeking this advice.

[57] Mr VB refutes this allegation and advises that he prepared the agreements following comprehensive instructions from Mr MD as to the terms of same. These terms had been agreed directly between Mr MD and Ms MC. This included the fee paid to the underwriters, one of whom was Mr VB.

[58] This was also a matter on which Mr VB had referred Ms MC to another solicitor for independent advice. In his letter to Mr VB dated 23 April 2008, the independent solicitor reported as follows:

> "I also discussed in depth the underwriting agreements between [AEC] and the various underwriting parties."

[59] Consequently, this aspect of Ms MC's complaint, although not addressed by the Standards Committee, warrants no further enquiry or investigation and this was accepted by Ms MC at the review hearing.

Costs

[60] Ms MC also included in her letter of 23 February 2011 to the Standards Committee the following statement:

> "In addition, I further request that the quantum of legal fees charged to [AEC] with respect to the property development project at [street address] be investigated by

> the Complaints Service. Fees in excess of $120,000 were paid to [AED] for matters associated with this project. Despite repeated requests for proper detail regarding the make up of these fees such detail was not provided. Once again I am now not satisfied that the fees were fair and reasonable for the work carried out."

[61] This aspect of Ms MC's complaint has not been investigated at all by the Standards Committee and in the circumstances I propose to direct the Committee to consider this aspect of Ms MC's complaint and to provide its determination in relation to that.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee to take no further action with regard to Ms MC's complaint concerning the payment to AEE is confirmed, but modified as set out in this decision.

Pursuant to section 205 of the Act there will be no further inquiry or investigation into Ms MC's complaint with regard to the underwriting agreements.

Pursuant to section 209(1)(a) of the Act, the Standards Committee is directed to reconsider Ms MC's complaint as set out in paragraph 4 on the last page of her letter dated 23 February 2011 and to make a determination in respect thereof.

DATED this 18th day of June 2012

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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:

Ms MC as the Applicant
Mr VB as the Respondent
Ms WC as the Representative of the Respondent
The Wellington Standards Committee
The New Zealand Law Society