LCRO 192/09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Hawkes Bay Standards Committee
BETWEEN	**MS WARRINGTON** of North Island Applicant
And	**MR MAIDENHEAD** of North Island Respondent

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

DECISION

[1] Mrs Warrington (the Applicant) sought a review of a determination by the Hawkes Bay Lawyers Standards Committee dismissing her complaint against Mr Maidenhead (the Practitioner). After making enquiries the Committee decided to take no further action on the complaint pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006. This section confers a discretion on Standards Committees where, if the course of the investigation of a complaint, and having regard to all of the circumstances of the case, it considers that no further action is necessary or appropriate.

Background

[2] The Applicant had befriended Seven who, unbeknownst to her, was an undischarged bankrupt in relation to a third bankruptcy. Seven persuaded the Applicant to part with $9,000. He told her he needed this sum as a deposit for a business opportunity, the purchase of a lodge. She agreed to lend him $9,000 (by drawing against her available credit on her visa)

which was to be paid directly into the trust account of Seven's lawyer. This was the trust account of the Practitioner's law firm. The Applicant said Seven provided her with the details of the trust account, and when she telephoned the law firm to discuss how the transfer was to be accomplished, she was told to ensure that the deposit was marked for "Seven....". On 21 November 2008 the Applicant deposited the money into the trust account and it appeared on the firm's bank statement showing the names of both the Applicant and Seven.

[3] The deposit was in fact receipted by the firm to the credit of a company, X Ltd. Within a day or so the money was transferred to another law firm as a deposit on the purchase of a lodge by X Ltd. When X Ltd was unable to meet the balance of the deposit by January 2009 the vendors cancelled the contract and the deposit money was forfeited.

Complaint

[4] The basis of her complaint against the Practitioner is that he knew or ought to have known at the time that she made the payment to the Practitioner's trust account for the credit of Seven, that he was an undischarged bankrupt and could not, for that reason, be in possession of this amount of money, and that it should have been returned to her. She believes that the Practitioner owed her a duty of care when he accepted her money into the trust account. She holds him accountable for this loss.

[5] The Practitioner disputes any liability. He informed the Standards Committee that the company's sole shareholder/director, Mr Three., had advised that deposit monies would be coming, and when the money arrived as had been indicated, it was immediately credited to X Ltd at Mr Three.'s instruction. He added that in any event the money had been applied to the intended purpose, for the deposit on the purchase of the lodge. The Practitioner denied that the firm was acting for Seven at that time although acknowledged that it had done so in the past. The Practitioner said that the firm's client was X Ltd and that Seven was neither a shareholder nor a director of that company.

[6] In his 15 September 2009 letter to the Standards Committee the Practitioner explained that an enquiry into Seven's solvency status was made when it had appeared to the fee earner on that file that Seven *'had reached an arrangement directly with the vendor of the ... lodge to be employed in the business and we were merely checking the position in relation to the* [X Ltd] *transaction to verify* [Seven's] *contention that he was able to take part in the operation of a business*. [Seven's] *status itself was not directly relevant to the work that we were undertaking for* [Mr Three.] *and* [X Ltd*] at that time*." He added that the Ministry of Economic Development

(MED) had posted on its solvency website information showing that Seven had been "automatically discharged" as from 7 November 2008.

[7] This posting appeared some 10 days or so prior to the Applicant making her payment into the trust account. This information was in fact incorrect because the Official Assignee had opposed the automatic discharge, but that the erroneous information was publically notified as undisputed. A correction was made to the website months later.

[8] The Standards Committee noted that no solicitor/client relationship existed between the Practitioner and the Applicant, that the Practitioner therefore owed her no professional duty and that his duty was owed X Ltd to the exclusion of all others. This led to the view that other than to receipt the funds as indicated by the Applicant, the Practitioner was under no obligation to exercise a duty of care to protect her interests in relation to her deposit. The Committee added that the Practitioner could not in any event have provided advice to the Applicant concerning the loan, and referred to Rule 6 and 6.1 of the Conduct and Client Care Rules 2008.

> Rule 6:
> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.
>
> Rule 6.1:
> Conflicting duties
> 6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligation owed to 1 or more of the clients.

[9] The Committee also referred to Rule 8 of the Rules which places on lawyers an obligation of confidence. The Committee stated that whether or not the Practitioner had current instructions from Seven in relation to the proposed purchase of the lodge by X Ltd it would not alter his professional obligation to hold all information concerning Seven in strict confidence

> Rule 8
> A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business affairs acquired in the course of the professional relationship.
> Duration of duty of confidence

> 8.1 A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.

Review application

[10] The Applicant sought a review of that decision because she felt that none of her concerns had been addressed directly or in a straight forward way. As well as objecting to some of the legalistic language, she said that she had not been given copies of the Practitioner's correspondences to the Standards Committee (of 27 August and 15 September 2009) and had thus been denied an opportunity to comment on them before the Committee reached its decision. This was confirmed by the Standards Committee file.

[11] Her main objection, however, related to the Standards Committee's observation that there was no solicitor/client relationship. She does not consider this fully or reasonably answers her complaint. She submitted that the money she deposited in to the Practitioner's trust account had not been dealt with according to her instructions, and she questioned whether the handling of her money had been in accordance with the applicable regulations. She wrote: *"I am sure that not only myself, but the general public would believe that paying money into a Trust Account gives assurance that the funds will be handled responsibly and in the manner instructed.*" Her deposit has been clearly marked for the credit of Seven, she denied any relationship with X Ltd, and she knew nothing of Mr Three. who she noted had apparently instructed the firm to credit her money to the company, X Ltd.

[12] The review hearing was attended by the Applicant and also the Practitioner and Six the main fee earner in relation to the file. The Applicant provided further information about her knowledge of the relationship between the Practitioner and Seven. She contended that the Practitioner had acted for Seven in the past and claimed that he and Seven had also been involved together in a business relationship. She contended that the Practitioner was, or ought to have been, well acquainted with Seven's solvency status. She holds him responsible for failing to honour the 'trust' implied by a trust account. In her view any enquiry by the Practitioner's firm ought to have gone further than information posted on the MED website, and such enquiry would have disclosed that Seven remained a bankrupt and therefore could not 'receive' such a sum, and the money should have been returned to her. She also referred to the existence of a "disclaimer" on the website information.

[13] The Practitioner essentially reiterated his earlier position. Evidence given by Six appeared to be at some odds with information that the Practitioner had given to the Standards Committee, in particular concerning who had given instructions for the receipt and disposal of the Applicant's deposit. Six said the instruction had been given by Seven, and this was corrected by the Practitioner to Mr Three., although in the course of the hearing I understood that the instructions or directions were conveyed by both Mr Three. and Seven.

[14] If the Practitioner is to be accountable for the Applicant's loss of her money, there must be some recognisable legal obligation that, if breached, entitles her to a remedy. The Applicant was not the Practitioner's client. However, that is not necessarily a complete answer if there was a breach by a lawyer of some professional obligation, which caused a loss for which he could be made accountable to the Applicant.

[15] Although the Applicant did not specifically identify or refer to any particular professional duty owed by the Practitioner it appeared that her complaints were directed at whether the Practitioner had complied with the relevant regulations in the way her deposit had been handled, and whether the Practitioner had knowledge about Seven that was material to his entitlement to have received the money.

[16] I note that the Applicant deposited her money into the trust account some 10 days after Six's search of the MED website showing that Seven had been automatically discharged from bankruptcy. I was unable to discern any information that led me to question the Practitioner's actual knowledge at the time of that deposit. At the time of the web search neither Six nor the Practitioner could have known that the Applicant would subsequently make a deposit into the firm's trust account.

[17] There is evidence from a file note, which is dated 22 October 2008, that the Practitioner was at that time aware that Seven was then an undischarged bankrupt; the file note records that Seven *"remained a bankrupt*". However, the MED website search is dated 14 November 2008. I am left with the fact the Applicant's deposit occurred on 20 November 2008, some three weeks after there had been public notification on the MED insolvency website that Seven had been automatically discharged as from 7 November. There is nothing on the Practitioner's file to suggest that the Practitioner or Six had actual knowledge, or could have suspected, that the website information was wrong.

[18] Enquiry by this office disclosed that the 'automatic discharge date' arose on 7 November 2008, and that this appeared to have occurred inadvertently when an objection to the

discharge by the Official Assignee was not recorded; this had led to the incorrect 'default' entry being recorded on the website.

[19] For the purposes of the Applicant's claim, this conclusion makes irrelevant any failure by the Practitioner concerning compliance with the Trust account regulations. That is to say, had the money been deposited in the first instance to the credit of Seven (instead of X Ltd) as might have been done, there is nothing to have prevented Seven from instructing that it be transferred to X Ltd as deposit for the lodge purchase, (which would have accorded with the Applicant's loan arrangements with Seven), nor any reason for the Practitioner to have intervened. From this I am obliged to conclude that whether or not the Practitioner complied with the regulations is immaterial since it cannot assist the Applicant to recover her money from the Practitioner.

[20] The second enquiry is whether the Practitioner had any knowledge that ought to have led him to question the accuracy of the MED website information. The essence of the Applicant's submissions is that the Practitioner's knowledge ought to have led him to question Seven's entitlement to receive the money she had deposited for his credit. If there was evidence that the Practitioner knew, or reasonably suspected that the MED website information was wrong, then questions would arise as to his professional obligations in handling money received for Seven.

[21] I have already noted above that there is no evidence to show that the Practitioner's actual knowledge was inconsistent with the information on the MED website at the time that the Applicant deposited her $9,000 into the Practitioner's trust account. I do not think that it was unreasonable that the Practitioner (or Six) relied only on the MED notification. Unless the Practitioner owed her some duty of care I see no reasonable basis for imposing on him an obligation to have made further enquiry in order to protect a payment made by an unknown person and for an unknown purpose, notwithstanding that it was stated to be for the benefit of Seven. There is nothing to indicate that the MED notice was incorrect and no reasonable basis for questioning why the Practitioner should not have accepted it at face value. I have found no reason to conclude that the Practitioner had knowledge that should have led him to question whether Seven was entitled to receive the payment at the time it was made by the Applicant.

[22] My conclusion that the Applicant cannot properly support a claim against the Practitioner is based on that fact that her loan to Seven was made after there had been public notification of his being automatically discharged from bankruptcy, and the absence of evidence that the

Practitioner had knowledge that was inconsistent with that notification. In these circumstances any prior failures or omissions by the Practitioner in relation to his professional conduct are too remote and cannot support the claim made by the Applicant. For these reasons the review application must fail.

Other matters arising in connection with the investigation

[23] The information I have considered raised some additional concerns in connection with the enquiry. One related to the extent to which Seven was involved with the purchase of the lodge by X Ltd whilst still an undischarged bankrupt (before the MED website posting). The other raised a question about whether the Practitioner complied with the trust account regulations.

Conduct issues

[24] The Practitioner's response to the Standards Committee (and to this office) gave the impression that Seven had no involvement with either X Ltd or that company's purchase of the lodge, and that his occupation (or running) of the lodge was an arrangement directly with the vendor. However, information obtained in the course of this review suggests otherwise.

[25] My examination of the Practitioner's file revealed evidence of Seven's direct involvement in the purchase of the lodge and suggests that prior to the incorporation of X Ltd negotiations for the lodge purchase were already underway (having commenced in early September), that these negotiations were primarily with Seven, and that arrangements made on 9 September for the purchaser to go into possession (in connection with the purchase contract) resulted in Seven then taking possession of the lodge and its business, albeit at that stage as 'caretaker' since the full deposit had not yet been paid. Correspondence by the vendor's lawyer frequently referred to Seven as the client of the Practitioner's firm in relation to the lodge purchase. Mr Three. appears to have been conspicuously absent in relation to most of these communications. I also observe that the monies advanced for the purchase (deposit) was that which Seven had acquired from the Applicant, and that Seven was also to be a guarantor for the vendor's loan to X Ltd. At the time of the company formation and the negotiations for the purchase of the lodge (in September and October 2008) Seven was still an undischarged bankrupt, and the evidence of the file note indicates that this was known to the Practitioner.

[26] The above evidence led me to question the Practitioner's advice to the Committee concerning Seven's involvement in a business activity. The file note earlier referred to suggests that the Practitioner was aware as late as October 2008 that Seven was still an undischarged bankrupt. Rule 2.2 of the provides: Conduct and Client Care Rules provides:

2.2 A lawyer must not attempt to obstruct, prevent, pervert or defeat the course of justice.

2.3 **Proper Purposes**. A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

2.4 **Assisting in fraud or crime**. A lawyer must not advise a client to engage in conduct that the lawyer knows to be fraudulent or criminal, nor assist any person in an activity that the lawyer knows is fraudulent or criminal. A lawyer must not knowingly assist in the concealment of fraud or crime.

[27] The above evidence is sufficient in my view to warrant further enquiry into whether the Practitioner may have engaged in conduct that contravened Section 4 of the Lawyers and Conveyancers Act and Rules 2.2 and or 2.4 of the Rules of Conduct and Client Care.

Trust Account Regulations

[28] As part of its enquiry the Standards Committee put several questions to the Practitioner in respect of the Applicant's deposit and how it had been credited in the firm's trust account, and on whose direction. The evidence that has been provided in relation to the firm's handling of the Applicant's deposit had not, in my view, sufficiently demonstrated that there was proper compliance with the applicable regulations.

[29] This office had also asked the Practitioner to explain how he had complied. He replied that the deposit was not expressed as being an advance to Seven in the terms of the information on the bank statement, although he acknowledged is could be ambiguous. Other than referring to the oral instructions of Mr Three. and Seven, it is difficult to see a paper trail connecting the Applicant's deposit for Seven to the money being credited in the Practitioner's trust account records to X Ltd, and on the instruction of Mr Three., a person unknown to the Applicant (and perhaps also on the instruction of Seven who is stated to not be a client). The Practitioner believed he had complied with the regulations and he forwarded a letter from his Chartered Accountant who was of the view that the receipt was handled was in accordance with the regulations, in particular regulations 13 and 14.

[30] My concerns relate to whether there was compliance with Regulation 12 insofar as there is no trail linking the deposit (on any view of the deposit details) with the credit to X Ltd. Regulation 12 requires every receipt to record the amount, date, purpose and source of the

receipt, and the client for whom the trust money is to be held. The Practitioner had informed the Standards Committee that Seven was not a client of the firm at the time of the deposit, but it is not clear why that would have prevented a ledger record of a credit to Seven and a record of his authorisation for a transfer to X Ltd. Whether or not the Practitioner properly complied with the regulations in this case is a matter needs to be clarified, not only for this review but to properly inform lawyers of compliance issues.

Outcome

[31] The question for the review was whether there is any breach by the Practitioner of his professional obligations that justified the Applicant's claim against the Practitioner. On the basis of the information available to this office, I can see no basis upon which she could succeed in her review application. The Applicant needed to establish a link between her loss, and the Practitioner's actions or omissions in the context of his professional obligations as a practising lawyer. This ultimately turned on the matter of the Practitioner's knowledge. For reason set out in this decision there is no proper basis for upholding the complaint. This review application must fail.

Decision

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

Section 209 Reconsideration

This investigation has identified matters arising in connection with the complaint that appear to warrant further enquiry. This is a direction to the Standards Committee to reconsider:

(a) whether there was proper compliance by the Practitioner with the Lawyers and Conveyancers Act 2 (Trust Account) Regulations 2008 and

(b) whether any part of the Practitioner's conduct raises concerns in relation to Section 4 of the Lawyers and Conveyancers Act 2006 and Regulation 2. of the Lawyers: Conduct and Client Care Rules 2008.

(c) whether the outcome of the above enquiries indicates that there is a basis for reconsideration of the Standards Committee's decision on the Applicant's complaint.

DATED this 29th Day of April 2010

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:

Ms Warrington as the Applicant
Mr Maidenhead as the Respondent
The Hawkes Bay Standards Committee
The New Zealand Law Society