

LCRO 200/2010

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 2

BETWEEN

THE NEW ZEALAND LAW SOCIETY

of Wellington

Applicant

AND

MR ZJ

of Auckland

Respondent

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

DECISION

[1] The Standards Committee issued a decision in August 2010 following an own motion inquiry into the conduct of Mr ZJ (the Practitioner) concerning the operations of his firm's Trust Account. The own motion investigation was the result of a report prepared by the New Zealand Law Society Inspectorate in February 2010, which found 'serious failures' on the Practitioner's part to comply with the Trust Accounting requirements of the Lawyers and Conveyancers Act 2006, the Trust Account Regulations and the Rules of Conduct and Client Care.

[2] The Standards Committee had identified five areas in which there were shortcomings on the part of the Practitioner. The bulk of its decision sets out the steps taken by the Practitioner to remedy the various matters that had been uncovered.

[3] Having noted that the omissions had been rectified and that the Practitioner had sought the assistance of an expert to address past problems, updated and corrected outstanding matters and established procedures for staff training, the Committee was satisfied that the remedies undertaken by the Practitioner were sufficient and that great improvement had been made. On that basis the Committee resolved to take no further action pursuant to Section 152(2)(c) of the Act.

[4] The review applicant is the New Zealand Law Society (NZLS). The NZLS noted the Committee's satisfaction with the remedies undertaken by the Practitioner, and its decision to not to take a punitive approach by making no adverse finding against the Practitioner. The NZLS noted that the Practitioner's conduct had involved serious breaches of the professional rules and that the Committee had made no adverse finding against the Practitioner.

[5] The review application was made because the NZLS sought clarification of where such matters sit in the spectrum of unsatisfactory conduct, and in the interests of ensuring both the consistency and quality of the Complaints Service as required by Section 124(e) of the Lawyers and Conveyancers Act 2006. The NZLS referred to the stated purposes of the Act as is set out in Section 3, which is to maintain public confidence in the provision of legal services and to recognise the status of the legal profession. The NZLS questioned whether the remedial action taken by the Practitioner should have been taken into account in mitigation of penalty rather than the substantive decision to take no further action.

[6] Responding to the application, the Practitioner basically outlined the background to how the trust account problem had arisen and the steps he had taken to remedy the concerns that had been identified by the Inspectorate. The Practitioner considered that the Standards Committee had in fact recognised that there had been no serious discretions warranting the use of punitive action. He wrote that by acknowledging that at worst the matter calls for a finding of unsatisfactory conduct the NZLS was clearly not suggesting that the Committee made a significant error in judgment.

[7] The Practitioner concluded his submissions with, *"If the NZLS wishes to review the Committee's decision the NZLS is effectively questioning the soundness of the Committee's decision and we do not believe that the seriousness of this matter warrants the NZLS exercising its discretion in undermining the authority of the Committee in that way."*

[8] The Standards Committee advised that it did not wish to comment on the application.

[9] Both parties have agreed that the Application may be determined without a formal hearing and therefore in accordance with section 206(2) of the Lawyers and Conveyancers Act 2006 the matter is being determined on the material made available to this office by the parties

Considerations

[10] This review application is unusual in that it was made by the NZLS. However, Section 197(1)(a) of the Lawyers and Conveyancers Act 2006 provides for a review application to be made by the NZLS and to do so is entirely appropriate in respect of a Standards Committee decision to take no further action where a lawyer's conduct has, in the NZLS view, involved a serious professional failing. That the NZLS sought clarification of "*where such matters sit in the spectrum of unsatisfactory conduct*" is consistent with its the functions in relation to the Complaints Service, in particular Section 124(e) which requires the NZLS "*to ensure throughout New Zealand both the consistency and quality of the complaints service.*"

[11] I have reviewed all of the information on the file. The Practitioner's conduct that led to the own motion investigation is outlined in considerable detail in the Report of the New Zealand Law Society Inspectorate following an audit of the Trust Account of the Practitioner's firm in around early 2010.

[12] A considerable number of failures were identified at that time by the New Zealand Law Society Inspectorate, many of which had been ongoing for many months. These were identified as involving:-

- bank reconciliation
- trust account records
- NZLS certificates
- overdrawn firm's accounts
- letters of engagement provided not complying with the Conduct and Client Care Rules.

[13] The Inspectorate's report included specific details of the various failures, making reference to records not being located at the time of inspection, some still not having

been located several months later, errors and failures in trust account records and reconciliations, and failure to provide, or provide on time, NZLS certificates and in some case certifying such certificates as 'clean' when there were unresolved issues with those reconciliations. The report informed the Practitioner of his responsibilities for administration of the Trust Account and of his failures to have complied with the regulations which included the failure to have taken appropriate measures to verify the correctness of and sign all reports required by the regulations.

[14] The Practitioner's response to the complaint set out in detail the remedial steps he had taken, and was continuing to take, with the assistance of a trust account specialist who had been recommended by the Inspectorate.

[15] He also provided an explanation about how matters had come to end up in the disarray discovered by the Inspectorate. In short this had resulted from a partnership dispute in 2005 which, although eventually resolved later that year, had also seen several of the firms "key personnel employees" leave the firm. The Practitioner explained the efforts he had made throughout 2006 but it appears that staff employed to operate the accounts lacked the necessary experience which had led to many of the difficulties.

[16] The Practitioner had informed the Committee that he had believed that the firm's reconciliations were in order until late May 2009, after which date they had experienced technical problems with the database which, despite efforts, had not be remedied, and it was not until August that the source of the problem was identified. He added that despite his intention to prepare the necessary reports and records for the Law Society that could not be done due to the malfunctioning software. He concluded by acknowledging that there had been a problem which had escalated, also acknowledging his responsibility for ensuring that there were functioning systems in place.

[17] After receiving the Practitioner's response the Standards Committee resolved to set the matter down for a hearing pursuant to section 153(4) of the Lawyers and Conveyancers Act 2006. A Notice of Hearing was sent to the Practitioner which identified the issues of concern to the Committee. He was invited to make written submissions, which were received by the Committee in July 2010.

[18] The Practitioner's letter mainly focused on the action he had taken to remedy the issues identified by the Inspectorate. He also included further explanation about the background that had led to the problems. His information included a letter from the

trust account expert who had continued to assist the firm, who provided information updating progress on remedial matters. At that stage it appears that only a few matters were outstanding and that the firm's accounts were otherwise generally up to date.

[19] The information was considered by the Standards Committee at its August meeting after which the Committee issued its decision. The Committee noted its satisfaction with the remedial steps that the Practitioner had taken, which were considered to be "sufficient". On that basis the Committee resolved to take no further action pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006.

[20] My review of the file shows that that the Standards Committee identified the broad concerns that had been raised by the Inspectorate's Report, but also that the Committee focused much of its attention on the remedial action taken by the Practitioner. This may explain why some important issues identified in that Report disappeared from focus.

[21] I particularly refer to the Practitioner's failures in relation to Regulation 17(1) of the Trust Account Regulations concerning the NZLS Certificates, the audit Report having noted that some monthly certificates were sent by the Practitioner as "clean" in that they certified that everything was correct with no exceptions, when there were ongoing problems. The particulars were that the Practitioner had failed to provide a certificate for May 2009, that for the months of June, July and August certificates were received in time in the following months when the Practitioner was "*in no position to so certify*", and that certificates for September and October 2009, though received late, "*did not disclose that there were unresolved issues.*"

[22] Whether and how the Committee viewed this aspect of the Practitioner's conduct is not known as the Committee's file does not specifically refer to it. The Notice of Hearing had identified the Practitioner's "*failure to certify to NZLS whether trust ledger reconciled and a complete and accurate record of transactions*", and the Practitioner's response had focused on the remedial action he had taken.

[23] There was no suggestion of defalcation in the Inspectorate's report, and the concerns clearly reflected a systemic failure to keep the books in good order and in compliance with the regulations. Nevertheless, that the Practitioner sent monthly certificates to the NZLS with certifications that were misleading, known to be misleading, and thereby concealed the problems which were prolonged as a result, is a serious matter.

[24] When a lawyer provides inaccurate and unreliable information to the NZLS, this ought to be a matter of concern. It inevitably raises questions about the lawyer's honesty, or in any event demands an explanation in the context of a disciplinary enquiry. That such enquiry appears not to have been made in this case may be explained by the focus on the remedial steps being taken by the Practitioner, and the historical problems, not caused by the Practitioner, that had given rise to the muddled situation of the firm's trust account.

[25] I have considered the NZLS review application in the light of all of the information on the file. By his own admission the Practitioner had breached Section 12 (c) of the Act in that his failures amounted to "*conduct that consisted of a contravention of this Act, or of any regulation or practice rule made under this Act that apply to the lawyer ...*". This acknowledgement related to the Lawyers and Conveyancers Act (Trust Account) Regulations 2006, and also to Rule 3.4 of the Conduct and Client Care Rules 2008 in relation to Letters of Engagement that the Inspectorate also found did not comply with the legal requirements. This was sufficient for the Standards Committee to have made a finding of "*unsatisfactory conduct*". Instead the Committee exercised its discretion to take no further action.

[26] The 'review issue' in this case therefore concerns the manner in which the Standards Committee exercised its discretion. This can be the subject of review by this office although there would need to be good reasons for intervention. Since the discretionary power is conferred by Lawyers and Conveyancers Act 2006, the way in which the power is exercised manner should be considered in the light of the purposes of the legislation and the role of Standards Committee within the statutory scheme.

[27] A principal purpose of the Act is to maintain public confidence in the provision of legal services, and to recognise the status of the legal profession. (Section 3 of the Act.) This is achieved significantly by means of a complaints service which is overseen by the New Zealand Law Society as a first-tier investigator. Investigations are undertaken by the NZLS through its Standards Committees which have the overall responsibility of making findings on complaints and imposing penalties. In effect this process may be seen not only in terms of addressing the particular complaint before the Committee, but also as establishing standards for professional practice, with the penalties imposed as signalling to both lawyers and the general public the consequences for failing to meet those standards.

[28] The concern in this particular case is that the Standards Committee decision may be perceived as a signal that no consequence will necessarily follow a wrongdoing

providing that all reasonable remedial steps are taken when the wrongdoing is discovered. This is plainly not the intention of the Act. It calls into question the exercise of the Standards Committee's discretion in this case.

[29] In this case there were many months during which the Practitioner was knowingly in breach of the Trust Account Regulations, and he took no effective remedial steps until discovery became inevitable. This was not a one-off omission, but an ongoing failure that was known to the Practitioner. During that time he concealed the problems by the misleading certificates to the NZLS. This is a matter of significant concern.

[30] I do not lightly interfere with the exercise of a discretionary power on the part of the Standards Committee which comprises of a body of lawyers and has lay representation. However, the duration of the failures in resolving the trust account problems, and the furnishing of erroneous and misleading certificates to the NZLS, are serious matters, each sufficient to justify a determination of unsatisfactory conduct against the Practitioner. Together they make such a finding proper and inevitable, and necessary if the objectives of the Act are to be observed.

[31] It is therefore appropriate that a determination of unsatisfactory conduct be made against the Practitioner.

Penalty

[32] An adverse finding has been made against the Practitioner, and consideration should be given to a penalty. In considering an appropriate penalty in this case I take into account the Standards Committee's expression of satisfaction that the Practitioner has taken significant remedial steps to remedy the trust account problems. The evidence indicates that the Practitioner has incurred significant costs in attending to these matters and there is no objection to this being reflected in the penalty. In the circumstances I consider a modest fine of \$500 to be appropriate, taking into account the costs already incurred by the Practitioner's remedial actions.

[33] Given the seriousness of the professional failings it is appropriate to mark the conduct out as being unacceptable. In respect of the Practitioner having provided misleading certificates to the NZLS, it is appropriate to impose a censure pursuant to section 156 (1)(b) of the Act.

Costs

[34] In the light of an adverse finding having been made it is appropriate that the Practitioner contribute to the costs of this review. This review was conducted on the

papers, and was straightforward. Taking into account the Cost Guidelines of this office the Practitioner is ordered to contribute the sum of \$900 towards the costs of the review.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed. The Practitioner is found to be guilty of unsatisfactory conduct pursuant to Section 12 of the Act.

Orders

- (a) The Practitioner is censured
- (b) The Practitioner is ordered to pay a fine of \$500. This sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- (c) The Practitioner is ordered to pay \$900 costs, this sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 4th day of April 2011

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

The New Zealand Law Society as the Applicant
Mr ZJ as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society