

LCRO 201/2010

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

YJ

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 YJ (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 June 2010, which found numerous 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 eight areas in which there were shortcomings on the part of the Practitioner which the Committee viewed as serious. The Committee took into account the fact that the Practitioner had taken steps to rectify the matters raised in the inspectorate's report, and "*decided to exercise some leniency in the circumstances*", but indicated that a different approach would be taken should such matters arise again in the future. On this basis the Standards Committee

resolved, pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action

[3] The New Zealand Law Society (NZLS) sought a review of this decision. The NZLS acknowledged the reasons for the Committee's decision, and understood that *"the Committee did not come to its decision lightly having debated the issue long and hard."* The NZLS nevertheless noted that the conduct of the Practitioner had been viewed by the Committee as 'serious' and questioned whether this justified a finding of 'unsatisfactory conduct' as defined by Section 12(c) of the Act, as conduct consisting of a contravention of the Act, or of any regulation or practice rules, not being a contravention that amounts to misconduct.

[4] In seeking the review 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.

[5] The Practitioner was informed of the review application and invited to respond within a stated time frame. The Practitioner did not forward any response to the review application but consented to the review proceeding on the papers.

[6] 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

[7] 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."*

[8] I have reviewed all of the information on the file. This includes the Inspectorate's report and also a lengthy affidavit provided by the Practitioner to the Standards Committee for its enquiry.

[9] The enquiry had commenced as an 'own-motion' complaint by the NZLS pursuant to section 130(d) of the Act, in relation to concerns outlined in considerable detail in the Report of the New Zealand Law Society Inspectorate following an inspection of the Trust Account of the Practitioner's firm in around mid 2010.

[10] The failings, which were itemised in a general way in the Committee's decision, involved stale cheques, monthly reconciliations, client balances and stale balances, Trust Account Journal, Letters of Engagement, Indemnity Insurance, agency fees and Trust Account supervision. The Committee also considered the Practitioner's response which was in affidavit form, and included his admission of errors and omissions, and listed the remedial steps he had taken and the extent to which matters had been, and were continuing to be, remedied.

[11] The Committee accepted that the failings identified by the Inspectorate's report were "*serious*", but taking into account the remedial action by the Practitioner to rectify those matters, the Committee "*decided to exercise some leniency in the circumstances but noted that should similar issues arise again in the future, the matter may be viewed differently by the Committee.*" In these circumstances the Standards Committee exercised its discretion to take no further steps in this matter, pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006.

[12] Section 138(2) provides for a Standards Committee to take no further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or appropriate.

[13] The 'review issue' in this case 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 should be considered in the light of the purposes of the legislation and the role of Standards Committee within the statutory scheme.

[14] 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.

[15] In this case a considerable number of failures were identified by the New Zealand Law Society Inspectorate. Some were less serious than others, and mostly involved small amounts resulting from administrative errors in the Practitioner's practice, or by the bank in debited fees and interest from the trust account. The Inspectorate described these as a *"plethora of reconciling items on your month end reconciliation"*. Many had been previously identified in an earlier 2006 Report, including the problem of stale cheques (there were 8 unrepresented cheques). The Report noted that the majority of the items referred to in the report were *'worthy of mention on a month end exception report to the New Zealand law Society'*. It appears that the Practitioner had filed three exception reports between September 2006 and 31 August 2008, none of which had related to the items identified by the Inspectorate.

[16] There was, however, a significant problem involving the sum of \$7000 that had been transferred from the Trust Account into the Practitioner's general account, apparently due to a bank error when he was arranging an overdraft in 2005. There had been some discussion about this between the Inspectorate and the Practitioner in November 2006 but steps taken by the Practitioner had not remedied the problem which was still outstanding when the Inspectorate returned in 2010. The 2010 Report stated, *"What this means is that you have had an unauthorised advance of \$7,000 from the clients of your practice for almost 5 years..."*. The Inspectorate noted the Practitioner's explanation that he had sought advice about how to fix the problem but had encountered difficulties and his admission to having buried his head in the sand about this matter. The Report continued, *"An error of this magnitude should have been reported to the New Zealand Law Society on your end of month certificates. I have obtained copies of all of the exception reports that you have filed since May 2004 and there is no mention of this particular incident."*

[17] It is abundantly clear that the Inspectorate considered the situation was far from satisfactory and required prompt remedial action. In a concluding comment the Inspectorate wrote:

“My only comment is that it appears as though you have already gone through this exercise once with very little improvement. For completeness I have enclosed with this report a copy of the earlier compliance review report and my letters and your response. You will see that the original review was undertaken on 20 October 2006 and a report was sent to you on 31 October 2006. A copy of this report was received into the Auckland inspectorate office and as a result of our concerns I wrote to you on 6 November 2006 requesting your comments about the report and details of remedial action taken by you. You failed to respond to that letter and on 13 February 2007 I again wrote to you requesting your response. You failed to respond to this letter, and on 23 March 2007 I again wrote to you requesting your response. You then responded by letter dated 28 March 2007 where you outlined remedial action you had taken. It appears now that the majority of the procedures you said you had put into place have not in fact been carried out.”

[18] The Standards Committee decision referred to the Practitioner’s response which included a detailed explanation for a number of the matters identified by the Inspectorate and also described the steps that had been taken to remedy most (but not yet all) the items identified by the report. The Practitioner did not seek to excuse his lapses, properly acknowledged that error or oversights did not excuse the failures, and the steps being taken to remedy matters, all of which led the Committee to exercise leniency.

[19] 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 steps are eventually taken to remedy the errors and omissions. This is plainly not the intention of the Act. It calls into question the exercise of the Standards Committee’s discretion in this case.

[20] 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.

[21] While a number of the items involved administrative or clerical errors and bank errors, these were known to the Practitioner who had agreed, but failed, to remedy the

matters and so they continued for several years. It might reasonably be concluded that the Practitioner's attitude towards his professional responsibilities for his Trust Account was more than somewhat lax. That he failed to sort out the \$7,000 error involving his Trust Account is a grave concern. That the Practitioner continued throughout to furnish to the New Zealand Law Society, monthly certificates that failed to disclose problems that were known to the Practitioner must be considered as serious.

[22] Although the Standards Committee identified the broad concerns that had been raised by the Inspectorate's Report, little, if any, consideration appears to have been given to the duration of the errors, and the fact that despite earlier assurances the Practitioner had failed to remedy similar (some the same) errors identified in a previous report. Nor did the Committee refer to the fact that the Practitioner had throughout this time continued to forward certificates to the NZLS that failed to disclose any of these problems. This was not a one-off omission, but an ongoing failure that was known to the Practitioner. When a lawyer provides inaccurate and unreliable information to the NZLS, this ought to be a matter of concern. It demands an explanation in the context of a disciplinary enquiry.

[23] It is against this backdrop the Standards Committee decided to exercise leniency. 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 lengthy duration of the failures which the Practitioner had previously been informed of but had failed to address, and the furnishing of misleading certificates to the NZLS, are serious matters, and each is sufficient to justify a finding of unsatisfactory conduct against the Practitioner. Together they make such a finding proper and necessary if the objectives of the Act are to be observed.

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

Penalty

[25] 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 that the Standards Committee is satisfied that the Practitioner has taken remedial action to remedy the trust account problems. In the circumstances I consider a fine of \$800 to be appropriate.

[26] Given the seriousness of the professional failings it is also 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

[27] 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(c) of the Act.

Orders

- (a) The Practitioner is censured
- (b) The Practitioner is ordered to pay a fine of \$800. 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 11th 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
YJ as the Respondent
The Auckland Standards Committee 2