LCRO 220/09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Waikato/Bay of Plenty Standards Committee 2
BETWEEN	**MS MANCHESTER**
	of North Island
	Applicant
And	**STANDARDS COMMITTEE**
	Respondent

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

DECISION

[1] This is an application for review of a decision of the Standards Committee dated 18 November 2009 which made a finding of unsatisfactory conduct against the Applicant, fined her $1500, ordered her to pay $500 towards the costs of the investigation, and ordered her to attend and pass a regional Trust Account Supervisors course.

[2] Although the NZLA Trust Account Inspector was named as the Respondent, this matter relates to an enquiry commenced by the Standards Committee as an 'own motion' investigation. The Inspector is not therefore a party to the review, and I have approached this review on the basis that the parties are the above Applicant and the Standards Committee. Both consented to the review being conducted on the papers.

Background

[3] The grounds for the review cover much of the Standards Committee enquiry over the seven months or so between the Standards Committee's first contact with the Applicant and making a determination. The background is relevant to the review application and I therefore set this out in some detail. The Applicant is a barrister and solicitor with a small practice (including a very small conveyancing component) in a provincial centre. She was visited by a NZLS Inspector on 18 February 2009 who carried out an inspection of her trust account "to verify compliance with the Lawyers & Conveyancers Act 2006" ("the Act") which had come into force some six months earlier.

[4] In a letter to the Applicant dated 9 March 2009 the Inspector set out the "scope of inspection" and her "findings". The letter identified concerns with the Applicant's bank reconciliations, interest bearing deposit account, receipts, payments, ledger records, bank deposits, monies held on behalf of barristers sole, and letters of engagement. The Inspector also forwarded a report directly to the Complaints and Standards Officer (CSO) which summarised those issues contained in her letter to the Applicant.

[5] The Applicant was informed by the CSO on 30 March 2009 that the matters raised by the Inspector's report were under the consideration of the Standards Committee. She was warned about the seriousness of the shortcomings found by the Inspector, and that the deficiencies needed to be rectified and seeking from her a timeline. A reminder letter was sent to the Applicant some 5 weeks later (on 4 May 2009), seeking her response so that the matter could be considered at the next Committee meeting. The CSO added that her failure to respond could led to a summons by the Committee for her or her files.

[6] Two weeks later the Applicant replied (email 19 May 2009) to say that she was waiting for the Inspector to provide her with contact information for training. She set out the steps she had taken with regard to several issues that had been identified by the Inspector. Her e-mail was forwarded by the CSO to the Inspector on 27 May, who noted that not all of the concerns appear to have been addressed.

[7] Also on 27 May the CSO wrote to the Applicant to remind her that there were other issues still outstanding. These were detailed and she was asked to confirm that these matters had been dealt with. It was noted with some concern that two months had passed since his first request.

[8] The CSO wrote to her again on 17 June 2009 noting that nothing more had been heard from her, and sought her early response to avoid stronger action being taken by the Committee.

[9] He wrote to her again on 10 July 2009, noting that the only brief response received was her 19 May email. She was requested to attend the next meeting of the Standards Committee (the date given was the following month) and to bring her file with her. He added that if she had fully complied with the Inspector's requirements prior to that meeting the Committee may dispense with her attendance providing that the Inspector confirmed everything was in order. He reminded her that the Inspector's report had been issued four months ago.

[10] The Applicant responded on 23 July 2009 and outlined the various steps she had taken. She concluded, "*I trust the steps that I have taken to address the issues raised by* (the Inspector) *in her letter to me dated 9 March 2009 are adequate. On that basis, I anticipate that you will not require my attendance at your next meeting on …. Please note that I have sent a copy of this letter to* (the Inspector)."

[11] On 17 August 2009 the CSO wrote again to the Applicant seeking her confirmation of the appointment of an appropriate person to manage her trust account, seeking details of that person so that the Inspector could make a final report.

[12] On 1 September 2009 the Applicant responded that the there was no training available for the person she had arranged to be trained for the manual trust account system. She added that she considered she had attended to all matters raised in the Inspector's report and that she was in a position to continue operating her trust account, adding that "*In these tough economic times I cannot justify employing someone specifically to operate such a small trust account when I am in a position to do so."*

[13] On 16 September 2009 she received a further letter from CSO informing her that a hearing would be conducted at the next Standards Committee meeting to consider a final determination. She was invited to make submissions on potential penalty, costs, and publication in the event of an adverse decision. The CSO added that the Committee was anxious to have her confirm by that time the person she would appoint to assist her with her trust account management, who must be approved by the

Standards Committee in conjunction with the Inspector. The letter concluded with a reference to the "extended powers" contained in section 156(1) of the Lawyers and Conveyancers Act.

[14] On 22 September 2009 the Applicant wrote a fairly detailed letter to the Standards Committee. She explained at some length the steps she had taken to address the Inspector's various concerns. Towards the end of her letter she added,

> *"I assume that you are conducting this investigation under section 130(c) of the Act. Please confirm that this is the case and further, advise whether you believe there has been misconduct or unsatisfactory conduct on my part. You advised me in your last letter dated 16 September 2009 that a hearing, I presume pursuant to section 152(1) (b), will be conducted at the next meeting of the Complaints Committee. If I am correct that this matter was commenced pursuant to section 130 (c). I presume the reference to the Complaints Committee hearing is in error.*
>
> *In my submission, based on the steps I have taken to address the concerns raised by* (the Inspector), *I do not believe the Standards Committee can find that there has been unsatisfactory conduct on my part*."

She also noted the sanctions available pursuant to section 156, adding that she had already been the subject of sanctions under subsections (h), (l) and (m).

[15] Meanwhile, on 18 September 2009 the CSO received a letter from the Inspector who, referring to the Applicant's letter of 23 July, considered that the Applicant had corrected very few of the issues she had noted in her report. She added that she had spoken with the Applicant by telephone and as a result of that conversation had clarified some of the issues that required attention. The Inspector concluded by informing the CSO that the Applicant had conceded she still did not fully understand trust accounting procedures, and that she had undertaken to purchase a legal software package, or employ a person with suitable training to operate her system, or use an accounting bureau, by 31 October 2009. The CSO asked that the Inspector confirm by the end of the month that the action had been taken by the Applicant.

[16] On 30 October 2009, after her final contact with the Applicant, the Inspector wrote to both the CSO and to the Applicant. She informed the CSO that improvements had been made, but that at the time of her visit the Applicant had not adopted any of the options she had proposed. She included details of remaining shortcomings. While

noting that the volume passing through the trust account was small, she added that in her view the Applicant lacked an understanding of the controls that should be in place. This letter was not cc'd to the Applicant.

[17] The Inspector's letter to the Applicant noted that she continued to maintain a manual ledge without the assistance of supporting staff, and that there remained areas where her trust account records did not always meet the requirements of relevant legislation. Details were provided. The Inspector's concluding comments acknowledged improvements but that there remained instances where records did not maintain a clear audit trail.

[18] On 18 November 2009 the Standards Committee determined that there had been unsatisfactory conduct on the part of the Applicant. Although areas of improvement had been noted, the reason for the Committee's decision was based on the Applicant's failure to have addressed many of those areas still been found to have been wanting. The Applicant was fined $1500, ordered to pay $500 towards the costs of the investigation and to "attend and pass" the next regional Trust Account Supervisors course within the district. Her name was not to be made public.

Basis for Review

[19] The grounds for the review application were:

(a) An error in the Standards Committee decision in referring to the Inspector's letter to the CSO as dated 19 March 2009, whereas it was in fact dated 19 March;

(b) That the Standards Committee decision had referred to a complaint having been made by the Inspector, although no such complaint had been made;

(c) That different information was provided by the Inspector to her and to the CSO. This particularly referred to the Inspector's letter to the Applicant dated 30 October 2009 (final inspection) from which she understood she had largely met the concerns, while the Inspector had informed the CSO that she lacked understanding of the controls that needed to be in place for her trust account and would benefit from attending a trust account supervisor's course, matters that she said had not been put to her;

(d) She disputed the Standards Committee's observation that she had agreed to purchase a software system or make arrangements through an accounting Bureau, contending that she had told the Inspector that she could not afford the software, and that the small number of transactions

through their trust account did not justify the expenditure. She disputed the Committee's reference to having considered the transgressions as minor or unimportant. All of these matters were, in her view, an insufficient basis for a finding of unsatisfactory conduct;

(e) Finally, even if there had been unsatisfactory conduct she saw the imposition of a fine is disproportionate to the findings, describing it as a punitive response that would have been more appropriate to an intentional wrongdoing.

Considerations

Erroneous date of letter

[20] The erroneous reference to a date of a letter, and to a Complaints Committee rather than a Standards Committee, while unfortunate, cannot be considered serious.

No notice of a complaint

[21] It appears that the reference to a complaint having been made was also erroneous. No complaint had been made by the Inspector who was simply reporting back to the Standards Committee following her inspection of the Applicant's trust account, as is required pursuant to s. 32(2)(d) of the Lawyers and Conveyancers Act trust Account Regulations 2008.

[22] In fact the enquiry was undertaken pursuant to section 130 of the Lawyers and Conveyancers Act 2006 which allows a Standards Committee to investigate, of its own motion, any matter that appears to indicate that that there may have been misconduct or unsatisfactory conduct on the part of a practitioner. In this case the Standards Committee subsequently confirmed that it was not acting on a complaint by the Inspector, but had undertaken an 'own motion' enquiry. It is understandable that its reference to a complaint having been made by the Inspector would have caused confusion.

[23] One of the questions for this review is to consider the significance of this error. The complaints procedure is subject to the rules of natural justice, which means that a person subject to an investigation by the Standards Committee is entitled to know the detail of the case against him/her and to be made aware of an enquiry being underway. The individual is entitled to be informed of all matters relevant to an investigation and to be given the full opportunity to respond to matters of concern.

[24] The Standards Committee explained that despite not being informed that an 'own motion enquiry was underway, the Applicant was aware of the enquiry, and had been advised of the extent of that enquiry and what was required from her on an on-going basis throughout several months of the investigation, including the fact that the Standards Committee required the explanation so that it could make a decision on the matter.

[25] The evidence of the above correspondence in this case reveals a trail of detailed communications to the Applicant from the CSO and the Inspector which, in my view, could have left her in no doubt of the fact that the matters of concern raised by the Inspector were before the Standards Committee. I do not accept that the Applicant could have been unaware of the Standards Committee's involvement, or of the matters that were considered to be unsatisfactory, or that she did not have the full opportunity to respond to them. It is also clear from the fact that she was requested to appear before the Committee that this enquiry was being undertaken in a disciplinary context, albeit that this became apparent to her at a later stage.

[26] While it would have been clearer had the Applicant been made aware at an earlier stage that there were disciplinary consequences for her failure to attend to the omissions concerning her management of her trust account, it would be difficult to conclude that she could have been unaware that she was being monitored by the Standards Committee and that her failure to comply with the trust accounting regulations exposed her to disciplinary sanction. In one of her letters to the CSO she referred to her assumption that the Standards Committee's investigation was pursuant to section 130(c) of the Act. In these circumstances the principles of natural justice appear to have been satisfied in this case.

Different information being provided to the Standards Committee and the Applicant

[27] The Applicant was concerned about the differences between the Inspector's 30 October 2009 letter to her and that sent to the Standards Committee. In each the Inspector expressed somewhat differently her conclusions from her re-inspection, in particular her conclusion that while there was improvement, the Applicant still lacked an appropriate understanding of the necessary controls. The Applicant concluded that if the Inspector had also sent her a copy of her letter dated 30 October to the Standards Committee she would *"have been privy to the information given to the Law Society and understood the concerns she said she continued to have in respect of my trust account*".

[28] I accept that that there were differences between these letters. The Inspector's letter to the Applicant did not specifically state her conclusion (to the Committee) that the Applicant was still deficient in trust account management and so should attend a specific course, but she did refer to examples of on-going problems that should have left the Applicant in no doubt that her work was still not up to the required standard.

[29] While there was some discrepancy in the correspondence referred to by the Applicant I cannot agree this was significant insofar as there is no basis for a contention that she could have been unaware of either the enquiry or what she needed to do to comply with the Inspector's requirements. While she made certain assumptions concerning her compliance, these were not borne out by the information she received. That is not to suggest that the Inspector explicitly raised each matter again in the October encounter, but rather to recognise that the Applicant had throughout been aware of the necessity to demonstrate how she would ensure compliance and had failed to take any of the steps that had been proposed.

[30] I do not think that the Applicant has suffered any injustice by the Inspector not passing on to the Committee her belated financial reasons for not fulfilling her undertaking regarding Junior Partner or adopting the accounting bureau option, especially after the history of procrastination over the issue. As late as her 22 Sept letter to the Standards Committee (following the CSO's invitation to her dated 16 Sept to provide submissions before the approaching "final determination") the Applicant was advising the Standards Committee of her "undertaking" to the Inspector to purchase Junior Partner "this week".

[31] Nevertheless, a Standards Committee's should ensure reports by NZLS inspectors are sent to the persons affected by the reports as soon as they are received. A Standards Committee should make available to any person subjected to any investigation copies of material on the Standards Committee file on the same basis as with a litigant seeking Discovery as that person is entitled to know what information is before a Standards Committee. I note that the CSO, in his letter to this office of 27 January 2010 (in which he confirms the process followed by the Standards Committee), stated that all the Inspector's reports and letters to the Standards Committee were given to the Applicant.

Finding of 'unsatisfactory conduct'

[32] The Applicant considered that the finding of unsatisfactory conduct was harsh. She submitted that in the previous 20 years of her trust account operation she has "never been unable to account for every cent of (her) clients' money", and that instead of helping her the Standards Committee has dealt with the matter "in a wholly punitive manner". I have no information about previous dealings between the Applicant and her local Law Society but in any event, there was no question of any defalcation or inappropriate activity by the Applicant. Rather, it was a matter of insufficient robust controls on the operation of her trust account. While the Applicant had taken some steps towards compliance with the regulations, she was made her aware throughout that she had not satisfied the Inspector's requirements.

[33] I observe that before the Standards Committee made its "final determination" it invited the Applicant to make submissions on "potential penalty, costs, or name publication" in case there was "an adverse decision". In her 2 page letter dated 22 Sept 2009 the Applicant outlined the steps she had taken dealing with Inspector's concerns (including giving the "undertaking" to purchase Junior Partner) and argued that "based on the steps (she had) taken to address the concerns…" that had been raised there had not been unsatisfactory conduct on her part. She also suggested that she had "on an informal basis" already been subject to sanctions under s156 (h)(l)(m). On that basis and because of her lengthy history of operating her trust account "successfully" she submitted no other sanctions were called for.

[34] The Committee's determination noted that the Applicant had not followed up on purchasing either a software system or using an accounting bureau or other trained staff. The Committee recorded the Applicant's concerns about the cost, but also noted that this lack of action resulted from a belief that these were unimportant and minor transgressions.

[35] The Applicant disputed that she had agreed to take the above steps, alleging that she had informed the Inspector that she could not afford to do so. However, the above correspondence indicates that the Applicant agreed to take different steps with regard to managing her trust account, and in my view the Committee's determination fairly reflected these actions. The Applicant may have erroneously assumed that the expense of the various options was a sufficient reason to continue with the manual processes, but these had clearly been considered to be an unsatisfactory option.

[36] "Unsatisfactory conduct" is defined in section 12(a) of the Act as *"…. conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer*".

[37] It is clear from the Lawyers and Conveyancers Act 2006, the various Regulations which accompanied it and the societal considerations that underpinned the "new regime" for NZ lawyers that the requirements for trust account management have to be followed scrupulously, and that it is the duty of Standards Committee's to ensure that result.

[38] Putting aside for a moment the question of the possible consequences of a quicker and better response by the Applicant, it is clear that on 18 February 2009 her trust account management in "several areas" did fall short of the "reasonably competent lawyer" standard and that accordingly the matters raised by the Inspector constituted "unsatisfactory conduct" as at the time of her inspection on 18 February 2009. Despite the regular follow up by the Standards Committee and the Inspector over many months, the Applicant did not meet the required level of compliance.

[39] While the Applicant disagreed that she "minimised or trivialized" the Inspector's concerns, it is instructive to note the her responses to the trust accounting issues over the seven months from when it was first brought to her attention to the time of the Standards Committee decision was released that she did not consider it necessary to act promptly on the requests made by the CSO to attend to matters identified in the inspector's report. While the Committee's comment may seem a little harsh, the length of time the Applicant took to remedy matters could be seen as a failure to take matters as seriously as she should have.

[40] Having considered all the information is difficult to find any reasonable basis for challenging the views taken and comments expressed by the Standards Committee in respect of action proposed by the Applicant, or to find a basis for criticising the Standard Committee's determination.

Penalty

[41] In her submission the Applicant argued that even if there was unsatisfactory conduct a fine is inappropriate and disproportionate. She also referred to financial hardship (without elaboration). The Applicant submitted that the penalty was more deserved by "those who acted intentionally in misleading their clients and placing their

funds at risk". She suggests that the Standards Committee should have "utilized" s 156 (j)(l)(m) (which include random inspection, the taking of management advice, and undergoing practical training or education).

[42] It is not unreasonable to suppose that the penalty reflected the Committee's assessment of the wrongdoing. Had the Applicant responded in a more timely manner to concerns that have been identified then perhaps the Standards Committee might have been persuaded to take no further action but her ever-changing solution to the main concern about her trust account made it inevitable that the Committee would not deal with her leniently.

[43] I cannot accept that the Applicant was not offered assistance and support. The Inspector's letter to her after the 18 February 2009 inspection provided practical advice on remedying the various problems, references to appropriate legislation, and concluded with a request not to hesitate to request further assistance.

[44] The maximum fine a Standards Committee can impose is $15,000, and in the circumstances a fine of ten percent of the maximum is not excessive in the circumstances of this case. The steps taken by the Standards Committee in stressing to the Applicant the importance it placed on good trust account management, seeking immediate rectification and inviting comment, all within 2 weeks of receiving the adverse report from the Inspector, plus the detailed identification of problems and suggested solutions which were conveyed to the Applicant, can only be contrasted with the unimpressive response she provided, demonstrated in the timelines referred to above.

[45] It was the Standards Committee's considered decision to fine the Applicant a relatively modest amount, plus a contribution to costs. I consider the financial penalties not unduly punitive or disproportionate. Legal practitioners need to realise that they must comply with the spirit and letter of the new Act and its Regulations, and especially in trust account matters, to understand that a prompt and effective response is called for when an adverse or similar report is received from a NZLS inspector.

[46] I note that in her submissions the Applicant advised that she had decided to close her trust account and practice only as a barrister. Obviously if these steps have been taken, or are due to be taken within say one month of the date of this decision

then there is no need for the Applicant to attend the course she was ordered to do as part of her penalty.

[47] The Applicant's submissions do not justify a different finding on culpability or penalty from that of the Standards Committee. The review application is declined

Cost of Review

[48] The Applicant has been unsuccessful in her application for review. In the light of this it is appropriate that an order of costs be made against her. I observe that under the scale on the Costs orders Guidelines of this office an order of $1,200 would be made. However, I taken into account that the matter was relatively straight forward and conducted on the papers without the necessity of a hearing in person. Accordingly I consider that an order of costs of $750 is appropriate.

Decision

Pursuant to section 211(1) (a) of the Lawyers and Conveyancers Act 2006 the Standards Committee is confirmed.

DATED this 31st day of May 2010

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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 Manchester as the Applicant
The Standards Committee as the Respondent
The New Zealand Law Society