LCRO 301/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Wellington Standards Committee 2
BETWEEN	**JANE STEVENSON** Applicant
AND	**WB** Respondent

The names and identifying details of the Respondent and his and the applicants clients in this decision have been changed.

Application for review

[1] Ms Stevenson has applied for review of the penalty and publication decision by Wellington Standards Committee 2 following a finding of unsatisfactory conduct against her. Ms Stevenson acted for Mr VA in relationship property proceedings and WB acted for Ms VA. The complaint related to a breach of an undertaking by Ms Stevenson to hold money undisbursed. In particular she paid money to discharge a debt owed on a credit card in respect of which her client was being pursued. It was agreed that the debt was a relationship debt.

[2] Ms Stevenson did not seek a review of the substantive finding of the Committee that her conduct was unsatisfactory or of the orders of censure and that she pay compensation (which it is understood she has done). She seeks a review only of that part of the determination which ordered that her name be published.

Applicable principles

[3] The considerations to be taken into account in determining whether an order for publication including the identity of the practitioner should be made are set out in reg

30 of the Complaints Service and Standards Committees Regulations.[1] That regulation provides:

> When deciding whether to publish the identity of a person who is the subject of a censure order, a Standards Committee and the Board[2] must take into account the public interest and, if appropriate, the impact of publication on the interests and privacy of—
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> (a) the complainant; and
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> (b) clients of the censured person; and
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> (c) relatives of the censured person; and
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> (d) partners, employers, and associates of the censured person; and
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> (e) the censured person.

[4] The proper approach to publication more generally has been the subject of a number of decisions of this Office and elsewhere. This was traversed in *HF v SZ.*[3] There it was noted that a useful summary of the relevant principles could be found in *Krishnayya v Director of Proceedings,*[4] *S v Wellington District Law Society,*[5] and *F v Medical Practitioners Disciplinary Tribunal.*[6] The applicable principles were identified as follows:

> a. the public interest referred to is the interest of the public, including the members of the profession, who have a right to know about proceedings affecting a practitioner. The interests of any person includes the interests of the practitioner being disciplined;
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> b. The proceedings before a disciplinary tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public and the profession;
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> c. In considering the public interest the tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession. It is the public interest in that sense that must be weighed against the interests of other persons, including the appellant, when exercising the discretion whether or not to prohibit publication.
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> d. The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach dictated by the statute.
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> e. The issue will generally be determined by considering whether the presumption in favour of publication, and all the circumstances of the case, is outweighed by the interests of the appellant or the public interest.
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> f. Often the answer to that question will be to consider whether the interests of the public, including the profession, will be adequately protected if a suppression order is made. In many cases the issue is whether or not the balance is in favour of protecting the public by means of publication, or

[1] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
[2] Regulation 30(1) provides that publication may only take place with the prior approval of the Board and that is dealt with in [28] to [30] of this decision.
[3] *HF v SZ* LCRO 186/2009, 16 January 2012.
[4] *Krishnayya v Director of Proceedings* HC Napier CIV-2007-441-631 16 October 2007.
[5] *S v Wellington District Law Society* [2001] NZAR 465 (HC).
[6] *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001.

> against the interests of the appellant in carrying on his profession uninhibited by any adverse publicity.

[5] I note immediately that unlike some disciplinary jurisdictions, the proceedings of a Standards Committee are presumptively private. Accordingly the "open justice" reasons are not dominant. Rather the focus must be on the protective role that professional orders play.

[6] The analysis therefore requires a balancing of the promotion of the interests of the public (in which is included other practitioners who deal with Ms Stevenson) against the adverse effect that publication of Ms Stevenson's name would have on her interests.

[7] The application for review by Ms Stevenson proceeds on fundamentally two grounds. First it is argued that the breach of undertaking was unintentional and at the less serious end of the scale. In this regard, Ms Stevenson is challenging the findings of the Standards Committee in its determination dated 21 March 2013. In that determination, the Committee noted that "it considered that her actions were so serious that a decision to lay charges against her was avoided by a small margin."[7] This finding cannot be part of the review of the penalty and publication determination and to the extent that it is discussed goes to a consideration only of whether or not Ms Stevenson's name should be published.

[8] Second it is argued that the impact on Ms Stevenson would be very significantly adverse. Together it is argued in the application for review that publication would be a disproportionate response to the wrongdoing.

[9] Ms Stevenson in her application for review states that she does not accept that she acted recklessly but rather the breach of the undertaking was due to inadvertence.

[10] It is claimed that Ms Stevenson mistakenly thought that there was agreement to pay out the sum. I do not accept this.

[11] The basis upon which funds were to be held by Ms Stevenson was set out in an exchange of correspondence between Ms Stevenson and WB. Ms Stevenson sought agreement for various debts to be paid out of the funds (which were the proceeds of sale of a dwelling which was relationship property). She stated that:[8]

> … we will agree to the balance of sale proceeds being held undisbursed in our trust account until relationship property matters are agreed between the parties, or determined by Court.

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[7] Standards Committee determination dated 21 March 2013 at [21].
[8] Fax Stevenson to WB (30 September 2011).

[12] By return email WB agreed in principle with the sale of the property but stated that he would revert in respect of the proposed payment of debts. This was followed up by a letter of 17 October 2011 from WB which went through the proposed payments and agreed to a number of them, but not to others (and not to the payment in question here). On 18 October 2011 Ms Stevenson responded by fax stating that "we have already undertaken to hold the balance of funds undisbursed until agreement is reached".

[13] Accordingly when the property was sold and funds came into the trust account of Ms Stevenson she held those funds on behalf of both Mr and Ms VA. Except as expressly authorised by both clients she was prohibited from disbursing those funds. That prohibition flows not only from her own undertaking, but also by virtue of the fact that the funds were held for Mr and Ms VA jointly and therefore for the purpose of dealing with the funds (and Lawyers and Conveyancers Act (Trust Account) Regulations 2008) both Mr VA and Ms VA were her clients.

[14] By s 110 of the Lawyers and Conveyancers Act 2006 Ms Stevenson held money on behalf of both Mr VA and Ms VA and was obliged to "hold the money, or ensure that the money is held, exclusively for [Mr and Ms VA], to be paid to that person or as [Mr and Ms VA] directs".

[15] The fact that the obligation of a lawyer to deal with trust funds with the utmost integrity and in accordance with all undertakings and regulations is of paramount importance goes without saying. Any failure in this regard is a matter of serious import.

[16] It is difficult to accept that Ms Stevenson simply forgot she held those funds jointly and it was not to be disbursed until agreement was reached or a court determination made. If that is her argument, then she needs to make sure that procedures are developed to ensure that undertakings are not overlooked.

[17] However, there was extensive correspondence between WB and Ms Stevenson with regard to the disbursement of the proceeds of sale leading up to settlement such that Ms Stevenson cannot have overlooked the importance of checking exactly what had been agreed could be paid from the proceeds of sale. Somewhat ironically, she challenged WB's objection to releasing the notice of claim registered against the title without agreeing relationship property matters by saying: "To imply the money is not safe once the claim is removed from the title is a challenge to the validity of our undertaking".[9]

[18] If an undertaking has been given in respect of funds, then the terms of that undertaking must be carefully checked before dealing with the funds in any way.

[19] In this case, the funds represented the net proceeds of sale of relationship property, where Ms Stevenson had acted for both Mr and Ms VA. Those funds should have been held by Ms Stevenson in a separate trust account ledger for both of them and this would or should have acted as a clear reminder that any disbursement from those funds required approval from both parties.

[20] The undertaking to hold the net proceeds of sale "over and above the agreed repayments"[10] was repeated in the week prior to settlement. The statement to Ms Stevenson's client dated 26 October 2011 as to the funds received and paid out did not include the Westpac credit card debt. Indeed, Ms Stevenson's fax to WB dated 8 March 2012 acknowledges that the payment "was the only application of sale funds to date has been a payment of $12,000 to ICMS Credit Systems Limited to repay the Westpac visa." This indicates to me that Ms Stevenson was well aware that this payment had not been agreed by WB. Rather than being an unintentional breach as Ms Stevenson submits, it seems to me that Ms Stevenson either (at best) recklessly paid out the funds without checking what had been agreed or not, or did so intentionally. The fact that the payment was made only days after the settlement indicates that it was more than likely to be the latter. I do not accept that this was an unintentional oversight.

[21] While it may well be that Ms VA was not being co-operative in respect of the resolution of financial matters (and this was being effected through WB) and Mr VA was under considerable financial pressure, this does not justify Ms Stevenson taking it upon herself to pay out funds to her client in breach of her undertaking and her obligations under the Lawyers and Conveyancers Act 2006.

[22] Ms Stevenson says that she believed that there was agreement to pay the amount in question as it was on the initial list of debts to be discharged from the settlement sum. However it appears that the payment (which was of some $12,000) was not made on settlement. In particular the settlement statement for the transaction dated 28 October 2011 recorded the various agreed payments (including for example $5000 in cash to each of Mr and Ms VA). The statement noted that the remaining balance of $65,388.30 was "funds to matrimonial file to hold". This therefore appears to be a clear acknowledgement that other than the payments in that statement the balance was to be held undisbursed by Ms Stevenson. There can be no basis for any belief that there was agreement to disburse the $12,000.

[23] It appears (from a letter from Ms Stevenson to the Society of 11 June 2012) that payment of the sum was made some days after settlement on 31 October 2011. It is of

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[9] Fax Stevenson to WB (18 October 2011).
[10] Fax Stevenson to WB (20 October 2011).

note that had Ms Stevenson thought that it was an agreed payment it might properly have been made on the day of settlement and recorded in the settlement statement provided to WB. Due to the fact that it was paid out after settlement it appears it did not come to the attention of WB or his client until some time later when an affidavit for contemplated court proceedings was provided.

[24] In the application for review Ms Stevenson's arguments focussed on her position that, in the context of the relationship property dispute, the payment was in the interests of all parties. She was also critical of WB insisting that the money be repaid, considering his stance to be unreasonable. Whether or not the position of WB or his client was unreasonable, the obligation to hold the money undisbursed was clear.

[25] Ms Stevenson was, at the least, reckless as to her obligations when she paid the money out to discharge the credit card debt. I agree with the conclusion that the Standards Committee reached in its first determination of 21 March 2013 that this was a serious breach. I also consider that there is a significant public interest in letting other practitioners know when an undertaking is breached and by whom.

[26] Of most weight in determining whether publication of identity is appropriate is the question of what impact such publication would have on the individuals identified in reg 30 of the Complaints Service and Standards Committees Regulations 2008. Ms Stevenson identifies in particular the adverse impact on her and her practice in the relatively tight knit community of Kapiti. She also states that the publication will affect the whole practice of the firm. From this I infer that she means other employees and members of the partnership.

[27] Ms Stevenson does not identify exactly what the adverse consequences would be. It appears that she is concerned with the embarrassment that would be caused, but perhaps also a loss of business flowing from a loss of standing in the community. She also refers to a risk that other practitioners will be more cautious in accepting her undertakings.

[28] While I have no doubt that this will be a matter of some embarrassment, I doubt whether it will have a very significant impact on the practice of Ms Stevenson. The major impact that could be expected from publication of Ms Stevenson's name is that other practitioners may be cautious in accepting an undertaking from Ms Stevenson. In that regard the publication order will be fulfilling its purpose of protecting the segment of the public (other lawyers) that the order is intended to protect. Practitioners may otherwise be somewhat aggrieved if publication was not ordered.

[29] For the above reasons I consider that the decision of the Standards Committee to order publication was correct.

Regulation 30(1)

[30] In its determination, the Standards Committee overlooked the important proviso in reg 30(1) of the Complaints Service and Standards Committees Regulations, that it may only direct publication of a practitioner's name with the prior approval of the Executive Board of the New Zealand Law Society. Regulation 30(2) requires the Board to take into account the same factors the Standards Committee must consider.

[31] I am aware that reg 30(1) requires the Committee to obtain **prior** approval of the Board before directing publication and that it could be argued that the determination of the Standards Committee is invalid because it has not obtained prior approval before issuing its determination. This would be an unduly technical approach to the issue which s 200 of the Lawyers and Conveyancers Act 2006 directs should not be the approach on review.

[32] The determination of the Standards Committee is therefore modified to acknowledge this requirement to refer this decision to the Board before effect is given to this publication order. WB's attention is directed to this requirement such that no dissemination of the Standards Committee determination or this decision should take place unless and until the approval of the Board is obtained.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed but modified to require the Committee to obtain the approval of the Board before publication is effected.

Publication

For the sake of completeness, I direct pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, that this decision be published in full but excluding identifying details of WB and Mr and Ms VA.

DATED this 11th day of December 2014

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:

Jane Stevenson as the Applicant
WB as the Respondent
RV as a related person
Wellington Standards Committee 2
New Zealand Law Society