LCRO 40/2009

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 No 3
BETWEEN	**MR ABBOT** of Auckland
	Applicant
AND	**MR MACCLESFIELD** of Auckland
	Respondent

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

DECISION

Background

[1] This matter raises an important question regarding the basis upon which a lawyer may deduct fees from funds held on behalf of his or her client on trust. While this review concerns matters which occurred prior to 1 August 2008 the new provisions largely duplicate the earlier ones and as such the observations made in this review will be generally applicable.

[2] On 24 September 2008 Mr Abbot complained to the New Zealand Law Society regarding the conduct of Mr Macclesfield of the firm XX & Partners. The matter was referred to the Auckland Standards Committee 3 for consideration.

[3] On 6 March 2009 the Auckland Standards Committee 3 resolved to take no action on the complaint. That decision was notified to Mr Abbot and Mr Macclesfield by a letter from the New Zealand Law Society Complaints Service dated 11 March 2009.

[4] Mr Abbot sought a review of the decision of the Standards Committee by an application received in this office on 24 March 2009. The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s

206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and the Standards Committee.

[5] Mr Abbot's complaint concerns the conduct of Mr Macclesfield when he acted for Mr Abbot (and interests connected with Mr Abbot) in a dispute about certain property owned through various entities in shares between Mr Abbot and his daughter and son-in-law (Mr YY). Disagreements arose about the management of the property and ultimately the property was sold to entities controlled by Mr YY.

[6] The complaint by Mr Abbot was that when the transaction was completed Mr Macclesfield deducted his fees from the proceeds of the sale of the share of the property in the sum of $10 944.84. Mr Abbot complained that although some costs were properly incurred in the disposal of the interest in the property, the majority of the costs should have been paid by Mr YY or by a related company ZZ Limited (ZZ). In fact Mr Macclesfield reversed two of the invoices and re-invoiced ZZ at Mr Abbot's request. The complaint therefore had three strands. One was the complaint that Mr Macclesfield wrongly charged Mr Abbot amounts properly chargeable to Mr YY, the other was that the amounts of the bills were deducted without authority, and the third is that ZZ invoices were deducted from Mr Abbot's account.

[7] Mr Macclesfield responded to the complaint in a letter of 1 December 2008 providing copies of the bills and timesheets in the matter. Mr Abbot replied to that response on 7 December 2008 by a further letter reiterating his complaints. The Committee requested from Mr Macclesfield a copy of the firm's trust account records in this matter which were provided on 13 January 2009. These were provided to Mr Abbot who commented on 17 January and provided copies of earlier correspondence in the matter.

[8] The Standards Committee considered the matter on 6 March 2009 and concluded that the work charged for by Mr Macclesfield was undertaken for Mr Abbot and appropriately charged to him. It also observed that the invoices for ZZ had been re-invoiced at Mr Abbot's request and he had received copies of those invoices. The Committee concluded that because Mr Abbot had received copies of the invoices and was ultimately responsible for payment of the costs Mr Macclesfield was entitled to deduct his fees from the proceeds of the sale which came into his trust account. In reaching this conclusion the Solicitors Trust Account Rules and Regulations in force at the time were relied upon.

[9] In the application for review Mr Abbot traversed at length the dispute between himself and Mr YY however, the substance of that dispute is not directly relevant to the questions that I must determine.

Was Mr YY liable for the fees?

[10] Mr Abbot maintained that Mr YY, his son-in-law ought properly be held liable for a large part of the costs incurred in this matter. He argued that Mr YY had been obstructive and he should not have to pay for the correspondingly increased costs. Mr Macclesfield observed that the matter was acrimonious and Mr YY made matters difficult. However, it is clear from the material provided that Mr Macclesfield was providing advice and assistance only to Mr Abbot and related entities. Mr YY had his own advisor. While it may be correct to say that Mr YY "caused" the increased costs, this does not mean that he is liable to meet them. The Standards Committee was correct to find that Mr Macclesfield was not obliged to seek to recover his costs from Mr YY.

[11] Although it did not appear to be directly in issue the Committee also noted that it considered the fees charged were not unreasonable for the work undertaken. This finding of the Committee is appropriate.

Deduction of fees

[12] Mr Macclesfield also complained that Mr Macclesfield had taken the sum of $10 944.84 from a sum of $700 000 due to Mr Abbot and which he had expected to be deposited in full in his National Bank account in accordance with his directions. Mr Abbot has also complained that he had not received any appropriate invoices or statements in respect of the amounts deducted until February 2008.

[13] The settlement date was 18 October 2007. The trust account statement indicates that at that time bills dated 12 October 2006 and 31 October 2006 had been entered. On that 18 October 2007 the $700 000 was received into the Trust Account of XX & Partners. A payment of $689 055.16 was made to Mr Abbot on the same day. This left a credit balance (after deduction of the earlier rendered accounts) in the trust account of $7 195.67. A further bill was then rendered on 26 October which was in part satisfied by the credit balance.

[14] The Standards Committee concluded that Macclesfield was entitled to deduct his fees from money held in trust and that he had acted in accordance with the then extant rules and regulations relating the manner in which trust funds can be dealt with.

[15] Mr Macclesfield argued in his submission to this office that he was authorised to deduct the fees in question by virtue of the consent of Mr Abbot. In support of his argument he referred to a meeting of 17 October 2007 and produced file notes of that meeting. On that note the following was recorded: "balance of settlement funds → Nat Bank Family Trust Acc". Mr Macclesfield concedes that he cannot recall the detail of the meeting but states that this note indicates that there was a discussion between the parties regarding deductions to be made from settlement funds. He points out that the only deductions to be made were in respect of fees. He also pointed out that XX and Partners had acted previously on similar matters and had deducted fees from the proceeds of settlements without objection. Mr Macclesfield also notes that he did not deduct a sum of $1 874.54 on the basis that Mr Abbot disputed liability for this amount. Mr Macclesfield argues that on this basis Mr Abbot consented to the deduction of the fees from the funds received.

[16] Mr Abbot emphatically denies that any discussion regarding the deduction of fees occurred and states that he did not consent to the deduction.

[17] I am not convinced that Mr Abbot consented to his fees being deducted from the proceeds of the settlement. The only evidence of this is an inference drawn by Mr Macclesfield from notes he took at a meeting. While his argument is tenable, it is equally tenable that there was no discussion of the fact that fees would be deducted from the funds when received. While a lawyer is permitted to act on oral instructions, there are obvious evidential difficulties should the existence of those instructions be questioned. Moreover, given the fact that the law requires Mr Macclesfield to deal with trust funds at Mr Abbot's direction it is reasonable to require Mr Macclesfield to discharge the onus of showing the existence of those directions: *Re Nelson* (1991) 106 ACTR 1.

[18] Given the fact that Mr Abbot expressly rejects the suggestion that the deduction of fees was discussed at that meeting I conclude that it is more probable than not that Mr Abbot did not consent to the deduction of fees. The question therefore is whether such consent was required for such a deduction to occur.

[19] The applicable rules are found first in s 89 of the Law Practitioners Act 1982 which provided:

> (1) All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such money shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor.
>
> (2) …
>
> (3) …
>
> (4) Nothing in this section shall be construed to take away or affect any just claim or lien that any solicitor may have against any money so received by him.

That section has now been replaced with s 110 of the Lawyers and Conveyancers Act 2006 which largely duplicates s 89.

[20] Section 91(1)(a) of the Law Practitioners Act provided that regulations may be made "Regulating the use and audit of trust accounts of solicitors, and prescribing duties of solicitors in regard to trust accounts". Solicitors Trust Account Regulations 1998 were made pursuant to that authority. Regulation 8 of those regulations provided:

> (1) No trust account may be debited with any fees of a solicitor (except commission properly chargeable on the collection of money and disbursements), unless—
>
> (a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
>
> (b) An authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.

It is of note that those Regulations have since been replaced with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 which contain an identical provision in Regulation 9.

[21] Lawyers have routinely relied upon these regulations as authorising the deduction of fees from clients without the client's consent. In particular reg 8(1)(a) is relied on as authorising such a deduction providing a dated invoice has been issued. Because of the use of the word "or" it is maintained that it is not necessary to obtain any authority in writing to deduct fees from funds held in trust.

[22] It is not at all clear that the legislature intended by s 91 of the Law Practitioners Act that regulations could increase the rights (as opposed to duties) of lawyers in relation to funds of clients held in trust. There is a considerable tension between s 89 of the Law Practitioners Act which states that client's funds are to be held "exclusively for that person, to be paid to that person or as he directs" and the claimed right to take funds for fees without consent of clients.

[23] The issue of the basis upon which lawyers are entitled to deduct fees from trust accounts was considered by Chisholm J in *Heslop v Cousins* [2007] 3 NZLR 679. In that case it was held that s 89 of the Law Practitioners Act 1982 was the paramount provision and that the subordinate regulations could not override the obligations imposed by the statutory provision. In *Heslop* Mr Heslop had given his lawyer, Mr Cousins clear directions as to how trust funds were to be used. Mr Cousins refused to follow those instructions on the basis that he was entitled to deduct his fee from the funds held. On those facts Chilshom J held "even if an account is rendered a solicitor is not entitled to deduct his or her costs from funds held in the trust account if the deduction would be contrary to the client's direction".

[24] The present case is slightly different in that (as Mr Macclesfield points out) there was no special purpose to which the funds were to be put (in *Heslop* they were to be used to discharge obligations on a property settlement). Rather the direction of the client was that the funds received be deposited into his bank account for his general purposes. However, the fact remains that s 89 (now s 110 of the Lawyers and Conveyancers Act) provides that the lawyer is obliged to hold a client's money "exclusively for that person, to be paid to that person or as he directs". In so far as the Solicitor's Trust Account Regulations 1998 are inconsistent with that obligation they can have no force.

[25] I conclude that a lawyer may only deal with trust funds in two ways pursuant to s 89 of the Law Practitioners Act 1982 (or s 110 of the Lawyers and Conveyancers Act 2006). That is by paying those funds to the client, or paying them at the direction of the client. Accordingly if a lawyer wishes to deduct his or her fees from the funds of a client held in trust he or she must obtain the direction of the client to do so.

[26] Mr Macclesfield did not have the authority of his client to deduct his fees from funds held in trust in this case. In light of this the deduction of his fees was in breach of his professional obligations.

Relevance of lien

[27] Mr Macclesfield in his submission to this office stated that because the funds were not held for a particular purpose his right of lien or set off was not affected (citing Chisholm J in *Heslop* at para 190). The learned author of the Laws of New Zealand takes a different view when in the current edition she states that a lien does not "apply to money held in trust unless there is express authority from the client to deduct legal fees from trust money" (para 79 *Lawyers and Conveyancers* citing *Heslop v Cousins*). With respect to that author, Chisholm J in *Heslop* found that in that case a lien could exist for fees regardless of the instruction of the client (a lien is after all a non-consensual security interest). However on the actual facts of that case it was held that no lien attached because the funds were held for a particular purpose.

[28] Accordingly Mr Macclesfield is correct in his assertion that he had a lien over the funds held in trust. A lien is, however, fundamentally different from a right to deduct fees. A lien is a possessory security and entitled the holder of the lien to do no more than retain the asset in question. It may have been that Mr Macclesfield was entitled to retain money in his account in respect of invoices that had been rendered and costs that had been incurred. However that is not what occurred here. Mr Macclesfield deducted the fees form the funds held in trust. In doing so he was exercising rights which went beyond those available pursuant to the lien.

Rendering of accounts

[29] Mr Abbot also complained that Mr Macclesfield did not provide him with the accounts in a timely way. Mr Abbot stated in his letter to the Standards Committee of 17 January 2009 that he received the invoices dated 12 October 2006 and 31 October 2006 on the 14th of December 2006. He states that he did not receive the accounts dated 31 July 2006 and 26 October 2007 until 1 February 2008 when he met Mr Macclesfield at his offices. This assertion was also made in the letter accompanying the application to this office.

[30] Mr Macclesfield stated in his letter to the Standards Committee that Mr Abbot has received copies of all of these invoices. Mr Macclesfield does not appear to address the issue of when the invoices were provided to Mr Abbot. There is no evidence from Mr Macclesfield as to when the invoices were sent to Mr Abbot.

Inferences may be drawn from this silence given the assertion from Mr Abbot that they were not sent in a timely way.

[31] I have found above that fees may not be deducted without the direction of the client. However, Mr Macclesfield may have been relying on the widely held view that the Solicitors Trust Account Regulations did not require such a direction provided that reg 8(1)(a) was complied with. That regulation stated that fees may be deducted where "A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate". However it is qualified by reg 8(2) which provides that:

> If fees are debited under subclause (1)(a) before an invoice is delivered or posted to the person liable for the payment or to that person's solicitor, an invoice must be delivered or posted to that person or to that person's solicitor immediately after the fees are debited.

Accordingly even if it were accepted that it was permissible to deduct fees without a direction to that effect, it would be subject to the timely provision of accounts to the client.

[32] Given that Mr Macclesfield has not provided evidence which contradicts that of Mr Abbot that the invoices of 31 July 2006 and 26 October 2007 were delivered to Mr Abbot on 1 February 2008 I find this to have been the case.

The ZZ Invoices

[33] Two of the invoices which were paid from the funds held in trust for Mr Abbot were invoices addressed to ZZ. They were invoices dated 12 October 2006 and 31 October 2006. Those invoices were provided to Mr Abbot prior to the deduction of funds from the trust account. Mr Abbot had an interest in ZZ (with, it appears, Mr YY) and that company leased the land which was the subject of the dispute.

[34] Mr Macclesfield states that the invoice of 31 July 2006 for $1 814.06 in total was initially addressed to Mr Abbot, but at his request it was reversed and addressed to ZZ. From the trust account records provided by Mr Macclesfield to the Standards Committee it appears that this invoice was replaced by the later invoice of 12 October 2006 for $2 539.69. Presumably the increased amount reflected further work undertaken in the interim. The invoice of 31 October 2006 for $1 209.38 in total was also addressed to ZZ. While it is not explicitly stated by Mr Macclesfield, it can be

inferred that he maintains that this invoice was also addressed to ZZ at Mr Abbot's behest.

[35] The Standards Committee concluded that because Mr Abbot was ultimately responsible for the costs Mr Macclesfield was entitled to deduct his outstanding fees in respect of the ZZ invoices.

[36] Given that I have found that any payment from a trust account must be at the direction of the client in accordance with s 89 of the Law Practitioners Act 1982 it follows that payment of the ZZ accounts was also in breach of that obligation. I observe however that if lawyers agree to invoice third parties for work rendered to their clients they do so at their peril. Any side agreements under which the client will be ultimately responsible for payment would need to be clearly recorded and any direction to meet the account due from a third party from trust funds held for the client would need to be stated in clear terms.

Applicable professional standards

[37] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date.

[38] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[39] I state at the outset that I do not consider that the conduct of Mr Macclesfield could be considered to be reprehensible inexcusable, disgraceful, deplorable or dishonourable. As such the threshold for misconduct is not reached.

[40] I take into account the fact that aspects of the conduct of Mr Macclesfield were premised on a widespread misapprehension as regards the rights of lawyers to deduct fees from monies held on trust. However, I am of the view that this was clarified by the decision in *Heslop v Cousins* which was delivered on 15 June 2007. Caution must be exercised in accepting ignorance or misinterpretation of the rules applicable to lawyers and their practise as an excuse for their breach. In any event I have made a finding that even had Mr Macclesfield been acting on the rules as understood prior to *Heslop* he breached his obligations under regulation 8(2) of the Solicitors Trust Account Regulations 1998 to provide invoices to Mr Macclesfield in a timely way.

[41] I am of the view that the conduct complained of would not be acceptable according to the standards of "competent, ethical, and responsible practitioners" and therefore amounts to conduct unbecoming. While I find the conduct to have been unacceptable on this standard, I do so on the basis that a competent ethical and responsible practitioners would know and adhere to the applicable rules relating to the management of the trust account.

Penalty

[42] Pursuant to 211(1)(b) of the Lawyers and Conveyancers this office may exercise any of the powers that could be exercised by a Standards Committee in the proceedings in which the decision was made. Section 352 of the Lawyers and Conveyancers Act states that (because these events occurred prior to the coming into force of that Act) the penalty imposed must be one that could have been imposed at the time the conduct occurred. I am of the view that this is a matter which, at the time the conduct occurred, would have been referred to a District Disciplinary Tribunal and not to the New Zealand Law Practitioners Disciplinary Tribunal. As such the relevant penalties are those found in s 106(4) of the Law Practitioners Act 1982.

[43] While a power exists under the provisions of ss 106 of the Law Practitioners Act 1982 to order a practitioner to reduce his fees and to refund amounts paid, this would not be appropriate in the present circumstances. The work undertaken was done for the benefit of Mr Abbot on his instructions. I have not accepted the argument that Mr

YY should be responsible for these costs. I have also upheld the Standards Committee's finding that the fees were reasonable. I have considered whether I should order that the fees in respect of the ZZ invoices should be refunded to Mr Abbot's trust account. If such an order were made Mr Macclesfield may well be within his rights to re-invoice Mr Abbot and exercise his lien over the funds. As such an order of that nature would be futile.

[44] Given my finding that the conduct of Mr Macclesfield was not egregious I do not consider a fine appropriate. There is no need to visit Mr Macclesfield with a punitive sanction of that nature. I note, however, that I reach this conclusion on the basis that in this case the main breach was due to an error made based on a widespread misapprehension that a lawyer was entitled to deduct fees from money held on trust. There is no reason why that misapprehension should continue within the legal profession.

[45] In light of the foregoing I make the following order:

- Mr Macclesfield is censured pursuant to s 106(4)(b) of the Law Practitioners Act 1982.

Costs

[46] It is also appropriate that an order be made in respect of the costs of this review. I note that the review itself was conducted relatively efficiently. Section 210(1) of the Lawyers and Conveyancers Act empowers me to make such order as to the payment of costs and expenses as I see fit. That power is further particularised in s 210(3) which provides that an order against the lawyer complained about may be appropriate. Section 210(4) provides that expenses included such amounts in respect of salaries of staff and overhead expenses as are considered properly attributable to the proceedings.

[47] I take into account the fact that the facts of this matter were relatively straightforward and that it was disposed of on the papers and without the need for a hearing in person. In light of this the following order is made:

- Mr Macclesfield pay to the New Zealand Law Society $900.00 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

[48] It is also appropriate to impose an order in respect of the costs of the investigation of the New Zealand Law Society. Accordingly pursuant to s 210(3) of the Lawyers and Conveyancers Act:

- Mr Macclesfield is to pay to the New Zealand Law Society the sum of $250 in respect of the costs of the investigation of the Society within 30 days of the date of this decision.

Publication

[49] I have noted that the conduct in respect of which Mr Macclesfield has been found guilty in this matter may have arisen through a longstanding misconception regarding the rights of lawyers to deduct fees from funds held on trust. It is important that this misconception is dispelled. For that reason I consider that publication is desirable as being in the public interest. As I have said, the conduct of Mr Macclesfield was not inexcusable, disgraceful, deplorable or dishonourable and as such there is no public interest in the disclosure of the identity of the parties to the review. Accordingly I make the following direction pursuant to s 206 (4) of the Lawyers and Conveyancers Act 2006:

- This decision is to be made available to the public with the names and identifying details of the parties removed.

Result

[50] The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee is reversed. The following orders are made:

- Mr Macclesfield is censured pursuant to s 106(4)(b) of the Law Practitioners Act 1982.

- Mr Macclesfield pay to the New Zealand Law Society $900.00 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

- Mr Macclesfield is to pay to the New Zealand Law Society the sum of $250 in respect of the costs of the investigation of the Society within 30 days of the date of this decision.

- This decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 29th day of May 2009

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Duncan Webb

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

Mr Abbot as applicant
Mr Macclesfield as respondent
XX & Partners as an entity entitled to apply for review under s 193 of the Act
The Auckland Standards Committee 3
The New Zealand Law Society