LCRO 55/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Hawkes Bay Standards Committee
BETWEEN	**MR AND MRS PORTSOY** of North Island Applicants
AND	**MR RIDING** of North Island Respondent

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

DECISION

Background

[1] The Practitioner in this review is Mr Riding. The complaints against him were made by Mr and Mrs Portsoy, who are the Applicants in this review. The Practitioner's firm came to be stakeholder of a fund that comprised payments from parties following a settlement conference on 27 November 2007 in the Weathertight Homes Tribunal. The proceeding involved the house owned by the Applicants which required repairs. The mediated settlement was based on an agreed scope of works as identified in a report prepared by the Weathertight Homes Resolution Service Assessor. The firm was not involved those proceedings, but the Practitioner's client, H Ltd, who was party to the Settlement Agreement, was to carry out the repairs pursuant to the Settlement Agreement. The Practitioner's firm was nominated as stakeholder of the money and the Practitioner was required to sign an undertaking to apply the money in accordance with the terms of the Agreement.

[2] It was soon discovered that more repair work was required than had been identified by the Assessor. Due to the nature of the additional repairs, that work needed to be shown in the plans and to be undertaken at the same time as the scheduled work. The Practitioner had sent a letter to the Applicants explaining the problems and outlining three options to resolve the matter. This was sent to the Applicants on 3 November 2008 but it seems they did not respond to the options. A second Mediation was held, and attended by the Applicants and the tradesmen. It was settled by a cash payment from each of the tradesmen in pro-rata shares based on their contributions to the Payments Schedule. Meanwhile, H Ltd sent invoices to the firm for payment and these were, in turn, paid by the Practitioner.

[3] The Applicants' complaints related to payments that the Practitioner had made from funds held by his law firm as stakeholder. It was alleged that payments made by the Practitioner fell outside of, and/or exceeded, the terms of the Settlement Agreement, amounted to a breach by the Practitioner of his undertaking, and left a shortfall to complete the repairs.

[4] The Practitioner denied the allegations. He contended that he had the authority of H Ltd to pay the invoices in issue. He acknowledged that the work and resulting costs were greater than had been anticipated but there was nothing that he or the firm could do about that as they were not involved in the remedial project in any capacity.

[5] The Practitioner further explained that while in some cases the discovery of fresh damage not detected by the Assessor's Report could give rise to a separate cause of action in the Weathertight Homes Tribunal, in this case there was a clause in the Settlement Agreement where the Applicants had agreed that the settlement would be in satisfaction of their claim, thus precluding them from pursuing any fresh claims against any parties they considered to be responsible.

Standards Committee decision

[6] The complaint was not upheld by the Standards Committee. In its decision the Committee traversed the events surrounding the matter, noting that a total sum of $14,000.00 had been paid to the Practitioner's firm's Trust Account as stakeholder, which was to be disbursed in accordance with the terms of the Settlement Agreement. The Committee noted that the Practitioner had paid to the contractors a total of $8,815.43 for plans and consultancy fees. Paragraphs 9 and 10 of the Agreement provided that payments "*shall only be used to pay contractors and/or materials in relation to the repairs".* The Agreement anticipated that the law firm would provide an undertaking in a form attached to

the agreement, and that undertaking was in fact provided by the Practitioner. The Committee accepted that payments made by the Practitioner had been authorised by H Ltd on invoices rendered. The Committee noted that one of the invoices had been disputed by H Ltd, that the Disputes Tribunal Ordered had ordered it to be paid and that the Practitioner had in fact paid it after it had been submitted by H Ltd.

[7] The Committee also noted that it was discovered that more remedial work was required than had been identified by the Assessor, and that the Practitioner had written to the Applicants about the extra work, also noting that at the time of writing the Practitioner had already disbursed funds in excess of those originally estimated for the design work to obtain the Building Consent. The Committee agreed that the Practitioner ought to have kept the Applicants informed as to payments being made, adding that the Settlement Agreement could have been drafted differently to provide greater accountability to the Applicants. The Committee concluded that the Practitioner was not at fault in acting on instructions of H Ltd in accordance with the undertaking and the terms of Agreement that had been signed by all of the parties.

[8] Notwithstanding that the actual quantum of payments exceeded the amounts shown in the Payments Schedule, the Committee saw the work as falling within the range permitted by the Settlement Agreement, that they had been made in accordance with the undertaking given by the Practitioner and that the Practitioner's client who had been charged with ensuring the work was done had authorised release of the funds to meet that obligation. That the payments exceeded the amounts originally estimated (and set out in the Pricing Schedule) did not, in the Committee's view, affect the Practitioner's position as stakeholder. The Committee noted that there was no provision in the Settlement Agreement for the stakeholder to obtain the prior consent of the Applicants before releasing funds. In all of the circumstances the Committee declined to uphold the complaint and decided to take no further action pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Review application

[9] The Applicants sought a review because they disagreed with the conclusion of the Standards Committee that there had been no wrongful conduct by the Practitioner. They reiterated their original complaint, alleging that the Practitioner had made payments from the trust fund in breach of his undertaking in that payments had been made for work that fell outside of the Settlement Agreement. In particular, the Applicants reiterated that the money

held in trust was to be used in payment of the work set out in the Pricing Schedule, which expressly excluded payments for professional services. They stated, "*in this case $8,815.43 out of a total of $14,000.00 was spent on professional services leaving little towards the costs of $25,793.00 which was estimated as the cost of the repairs.*" They also questioned whether the Practitioner had been authorised to make the payments. The issue for the review is whether the Practitioner made payments from the fund that fell outside of the undertaking he had given.

[10] Pursuant to section 206(2) of the Act, both parties consented to the review being determined on the papers, that is, on the basis of such information, records, reports, or documents as are available to me and without the parties appearing in person. This comprised of the Standards Committee file and all information provided by the parties for the review.

Considerations

[11] I have considered all of the information that was provided to the Standards Committee, and for this review. The information included the Settlement Agreement and the three Annexures to the Agreement. Annexure 1 was the Payments Schedule which set out the relative contributions of the parties to the Agreement, by a monetary contribution or by services to be provided. Annexure 2 was an undertaking by the Practitioner concerning payments from the fund, whereby the Practitioner agreed that the fund could only be used *"in payment of contractors engaged to carry out the work referred to in paragraph 4 of the Settlement Agreement and/or in accordance with paragraph 10 of the Settlement Agreement."* The documents in Annexure 3 are not relevant to this review, comprising a Compensation Certificate and a few related documents.

[12] In addition to the above documents are pages 27 and 39 which are extracts from a larger 39-page document headed *DBH Stand Alone Assessor's Report*. Page 27 set out the Assessor's qualifications and experience. Page 39 is headed, "*Appendix H – Pricing Schedule"*. This is a schedule showing the pricings that had been prepared by the Assessor for the various services. This made a $300 allowance for "*drawings, details as required and specifications.*" There was a further allowance of $700 for *"supervision by remediation specialist*". It is clear from the Agreement that the work anticipated that plans were required, and a Building Consent applied for, and in due course a Certificate of Compliance was expected to be issued. However, these costings were considerably short of the actual costs.

The charges by L, the remediaton specialist, came to $8,815.43, and were paid by the Practitioner from the trust fund.

[13] At the foot of the Pricing Schedule appears the following: *"Note: Excluded items – professional fees / Legal fees / Temporary accommodation and relocations costs / Removal of owner's property".* The Applicants rely particularly on this exclusion to support their complaint against the Practitioner. They provided copies of the five invoices relating to these payments, each invoice headed by, '*Fees for Professional Services'.* It is understood that they see this as evidence of the breach of undertaking because of the explicit exclusion of professional services, noting that all of the invoices paid by the Practitioner are headed, *Fees for professional services'*.

[14] On examination, the invoices include a description of the services performed by the contractors to which the invoice relates. These cover attendances involving the architect and drawing of plans for the building consent, and amendment to those drawings, inspection of the premises, and communicating with involved parties, including the Applicants. It is not disputed that the extent of the services exceeded that contemplated by the Settlement Agreement for the reason that the contractors discovered other remedial work that had not been identified by the Assessor. The evidence indicates that the additional repair work needed to be done at the same time as the work that had been identified, and accordingly needed to be incorporated into architectural plans and drawing for a building consent.

[15] On any view it would be difficult to see that the kind of work undertaken by L could be considered as falling outside of the scope of work contemplated by the Settlement Agreement. The remedial work required a building consent, which in turn needed drawings to be done. I cannot agree that these services fall into the exclusion only by virtue of being described as "professional services", since it was work of a kind expressly provided for in the Pricing Schedule. In this case the agreed remedial works were to be done under the supervision of a remediation specialist and required architectural drawings, and the nature of this work, which was contemplated by the Agreement and the Pricing Schedule, could properly be described in terms of "professional services". It seemed to me that the exclusion rather indicated that works of a kind other than contemplated by the Agreement were excluded.

[16] This view is also supported by the decision of the Disputes Tribunal Referee who considered the question of whether work undertaken by L exceeded the scope work that was agreed or required, in relation to a disputed invoice. The Referee accepted that L did exceed the work that had been expressly agreed. The Referee noted that L had identified

that more work was needed than had been identified by the Assessor, and concluded that the additional work done by L was implied by virtue of the nature of his contractual responsibilities.

[17] The undertaking given by the Practitioner was to use the money *"in payment of contractors engaged to carry out the work referred to it paragraph 4 of the Settlement Agreement and/or in accordance with paragraph 10 of the Settlement Agreement*." Paragraph 4 related to the contributions of the parties, in either money or services as set out in the Payments Schedule, with a handwritten entry also referring to the "works". However, clearly the Practitioner's undertaking could only extend to the monetary payment made to his firm's trust account. Paragraph 10 of the Settlement Agreement provided for a solicitors undertaking to be given "*in accordance with the preceding paragraph"*, which in turn referred to paragraph 9 which provided that the money *"may only be used in payment of contractors and/or materials in relation to the repairs*."

[18] All of the above indicates that the Practitioner's obligation was to ensure that payments were only to be made in relation to services or material for the remedial work. It appears from the invoices that payments were made for the kind of work contemplated by the Agreement. There is nothing to indicate that the Practitioner was required to make enquiries into the invoices other than ensuring that they related to the provision of services or materials for the remedial work.

[19] On further reflection it seemed to me that the underlying complaint may also have related to the Practitioner having made payments for those services that exceeded the amounts provided for in the Pricing Schedule. This appears from the Applicant's letter sent to the Standards Committee in January 2010 which provided greater insight into the nature of their grievance against the Practitioner. It suggested that they considered that the Practitioner had a responsibility to protect their interests, by ensuring that the work was confined to that provided by the terms of the Settlement Agreement, and that payments were confined to the Pricing Schedule, and to keep them informed throughout.

[20] The Standards Committee had noted that the Practitioner should have kept the Applicants informed but it could find no basis for an adverse finding against the Practitioner in relation to any omission or shortcoming about keeping them informed, noting that the Settlement Agreement could have been drafted in a way that gave them better protection. I agree with these observations, and may add that the Practitioner's undertaking was confined to making payments only in relation to the kinds of services to be carried out, and not in relation to the costings as they had been assessed by the Assessor. There is nothing to

indicate that the Practitioner was obliged to limit payments only to the quantum as assessed in the Pricing Schedule.

[21] In light of the above analysis, I can find no basis for a complaint that the Practitioner exceeded his authority in making the payments, or that he breached the undertaking he had given.

[22] Finally, addressing the additional complaints, it was alleged that the Practitioner had not obtained the authorisation for payment of the invoices. There is no evidence to support this contention. The Settlement Agreement provided that the Practitioners client, H Ltd, would be responsible for the repairs being done, and he employed L as the project manager. The Practitioner paid on invoices presented by H Ltd. All of the invoices are in fact addressed to H Ltd, the Practitioner's client, and it is not obvious how they could have come into the Practitioner's possession unless given to him by H Ltd. It was further alleged that the Practitioner had not kept them informed about the extra work. The evidence showed that the Applicants were aware of the additional work that was required, having been informed by a letter sent to them by the Practitioner and also by their contact and meeting with the contractor. It must have been evident to them that the amounts set out in the pricing schedule would not cover the additional work. There is also evidence of a further mediation in October 2008 when further contributions were made by the parties. Moreover, these were not matters within the professional responsibility of the Practitioner who did not act for the Applicants. It further appeared that the Applicants complaint was considerably directed at the level of charging by L. However, the quantum of the invoices issued by L was not a matter that involved the Practitioner.

[23] In conclusion, the Applicant's grievance is understandable, as must have been their dismay on discovering that all of the remedial work had not been originally identified or included in the assessment. There is evidence however that there was a further mediation and that further payments were made by the affected parties. The Applicants were self represented in all of the proceedings and the Committee properly noted that clauses included in the Agreement that were adverse to the Applicants may not have been so included had they had representation. Be that as it may, the issue for the Standards Committee, and for this review, is whether any part of the Practitioner's conduct could or should lead to an adverse disciplinary finding against the Practitioner. I agree with the conclusion of the Committee and therefore decline the review application.

Decision

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

DATED this 4th day of August 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:

Mr and Mrs Portsoy as the Applicants
Mr Riding as the Respondent
The Hawkes Bay Standards Committee
The New Zealand Law Society