LCRO 59/2010

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 1
BETWEEN	**AS** of Auckland, Barrister Applicant
AND	**ZF** of Auckland Respondent

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

DECISION

Background

[1] Mr AS (the Practitioner) was engaged by a Chinese client (ZE) on 10 September 2008 to help the Respondent (ZF) enlist the services of Mr AT, to represent Mr ZF's son on a charge of murder. All dealings were through Ms ZE as Mr ZF does not speak English.

[2] The Practitioner made contact with Mr AT, who was in Fiji at the time. Mr AT advised that he would act for Mr ZF's son on the basis that an initial retainer of $50,000 was paid prior to his commencing to act. He indicated that he would advise the name of his instructing solicitor on his return to New Zealand.

[3] Arrangements were made for Mr ZF to remit funds to the Practitioner's bank account.

[4] The instructions from Mr ZF also seem to have included instructions to the Practitioner to act in conjunction with Mr AT and the Practitioner advises that he attended virtually daily on Mr ZF's son during the period of his instructions.

[5] During the first week of October, the Practitioner received a letter from Mr AU advising that he was Mr AT's instructing solicitor. The Practitioner advises that in that letter Mr AU instructed him to deduct his fees from the funds held and account to him for the balance.

[6] After deducting the sum of $20,281.25 on account of fees and disbursements, the balance of $29,718.75 was remitted to Mr AU as instructed. The Practitioner's instructions ceased on 10 October 2008.

[7] Mr ZF subsequently instructed Ms ZD to act for him. Ms ZD approached the Practitioner claiming that the fees charged by him were not justified and sought a reduction of fees.

[8] The Practitioner did not accept that his fees were unjustified, but after some discussion, it appears that there was an agreement in December 2008 that the Practitioner would make an ex gratia payment to Mr ZF of $8,000 plus GST.

[9] Ms ZD wrote to the Practitioner on 23 December 2008, recording what she considered to be the arrangement. In that letter, she expressed the payment to be made by the Practitioner as being a reduction in fees. The Practitioner had not agreed to this as it involved an acceptance that his fees had been excessive.

[10] Notwithstanding several attempts by Ms ZD to communicate with the Practitioner, he neither made contact with her or made the payment as agreed.

- On 5 April 2009, Ms ZD lodged a complaint on behalf of Mr ZF with the Complaints Service of the New Zealand Law Society against the Practitioner in which she alleged:

- excessive costs;
- payment of Mr ZF's funds into a personal account, rather than a solicitor's Trust Account;
- deduction of fees without first rendering an account for approval;
- failure to honour the arrangements to make payment of the sum of $8,000 plus GST.

The Standards Committee Decision

[11] After investigating and holding a hearing 'on the papers' the Standards Committee issued its determination on 10 March 2010.

[12] It determined that the Practitioner's conduct constituted unsatisfactory conduct in the form of conduct unbecoming, ordered the Practitioner to reduce his fees by $8,000 plus GST and make payment of that amount to Mr ZF. In addition it fined the Practitioner $2,000, ordered costs in the sum of $2,000 to be paid, and ordered publication of the Practitioner's name and details of the decision in LawTalk.

[13] In its determination, the Committee:

- Noted that by accepting the sum of $50,000 from Mr ZF the Practitioner was in breach of Section 110 of the Lawyers and Conveyancers Act;
- that whilst there was some excuse for doing so by reason of the pressure of time, the Practitioner should have proactively sought advice from Mr AT as to who his instructing solicitor was;
- expressed reservations about the appropriateness of the Practitioner's fees, and noted that the Practitioner had failed to provide details of the work done, his time records and other costing information as requested by the Committee;
- was satisfied that the Practitioner had agreed to refund $8,000 plus GST to Mr ZF and noted that there was no evidence that the Practitioner disputed the agreement;
- determined that the Practitioner should honour the agreement reached in December 2008.

[14] The Committee also recorded its view that the manner in which the Practitioner dealt with the money received on behalf of Mr ZF, as well as his failure to pay the amount of $8,000 plus GST as agreed in December 2008, not only amounted to a breach of the Practitioner's obligations under Rule 9.3 to comply with the requirements of Regulation 10 of the Trust Account Regulations, but also his obligation under Rule 10 to promote and maintain proper standards of professionalism in his dealings.

Application for Review

[15] The Practitioner has applied for a review of the Standards Committee determination. In support of his application the Practitioner makes the following points:

(i) The issues raised by Ms ZD on behalf of Mr ZF were inherently unsuited to a hearing confined to the papers because there were a number of issues of credibility which could only be satisfactorily resolved by hearing evidence from the parties.

(ii) The decision was factually incorrect on material issues, in that it refers to retainer funds being held in a "personal account" when in fact the funds were held in an office account pending instructions from Mr AT.

(iii) The determination was illogical in that it refers to the fact that the alleged settlement in November 2009 (the mediated settlement) was never confirmed on behalf of Mr ZF, but that the Committee had never referred the terms of that settlement to Ms ZD for confirmation, and that if it had done so, it must be assumed that she would have confirmed the terms of the settlement because it was her proposal that formed the basis of the proposed settlement.

(iv) The Mediator had advised that the proposed terms of settlement required to be approved by NZLS and that no final agreement could be reached at the mediation and hence the Practitioner had written to NZLS on 12 November 2009 advising the terms of the proposed settlement and sought approval of those terms while at the same time undertaking to pay the ex gratia sum of $4,000 to Ms ZD.

(v) That the determination recorded that there was no evidence that the Practitioner had disputed the agreement reached in December 2008. This statement ignores the letter from the Practitioner to NZLS on 30 April 2009 in which he refuted the various assertions made by Ms ZD.

(vi) That because the parties agreed to go to mediation at the request of NZLS, the issue as to the appropriateness or otherwise of the Practitioner's fees were never subjected to cost revision. (It must be noted here that the Lawyers and Conveyancers Act 2006 does not provide for cost revision).

[16] The Practitioner then puts forward the following grounds for review:

(i) That it was unreasonable for the Complaints Service to proceed with the determination and disregard the outcome of the mediation, which the Complaints Service had itself directed the parties to undertake.

(ii) That the disputed evidence should be resolved by way of a hearing.

(iii) That no cost revision had been undertaken.

(iv) That there was no evidential foundation for the determination of the Standards Committee that Mr ZF was overcharged.

[17] The outcome sought by the Practitioner is that:

(i) The LCRO obtain confirmation from Ms ZD of the terms of the agreement reached at the mediation on 10 November 2009.

(ii) That the LCRO reverse the determination of the Standards Committee and exercise the powers of the Standards Committee to approve the terms of the settlement agreed between the parties at the mediation as a full and final settlement.

(iii) In the alternative, that the LCRO reverse the determination of the Standards Committee and refer the issues back to the Standards

> Committee with a recommendation that the Committee reconsider the issues having regard to the terms of the settlement agreed between the parties at mediation.

Review

[18] Although there are some irregularities in the manner in which consent has been provided, this review has proceeded on the basis that both parties have consented pursuant to s206(2)(b) of the Lawyers and Conveyancers Act to it being conducted "on the papers." This means that it has been conducted on the basis of the information, records, reports, and documents available to the LCRO. It is inferred that the Practitioner acknowledges any issues of credibility have been resolved.

[19] This review is important for the reason that it requires a consideration of the role of mediation in resolving complaints, and the ability of the parties to settle matters between themselves.

[20] Prior to the complaint being made to the Complaints Service, the issue which primarily concerned Mr ZF was the level of the fees charged by the Practitioner.

[21] After discussion between Ms ZD and the Practitioner, it seemed that agreement had been reached, whereby the Practitioner was to pay the sum of $8,000 plus GST, together with the sum of $1,200 held on account of disbursements, to Ms ZD.

[22] Ms ZD sent a letter to the Practitioner on 23 December 2008 recording what she considered to be the arrangement.

[23] The Practitioner failed to make the payments in accordance with the agreement as recorded by Ms ZD, and did not respond, notwithstanding several follow-up requests from Ms ZD.

[24] Up until this point, resolution of all matters was within the control of the parties.

[25] However, once the complaint was lodged by Ms ZD on behalf of Mr ZF, the matter fell to the Complaints Service to deal with in terms of its obligations under the Lawyers and Conveyancers Act.

[26] The complaint referred to other aspects of the Practitioner's conduct in addition to the Practitioner's charges and once the complaint was made, resolution was out of the control of the parties.

[27] This does not seem to have been appreciated by the Practitioner when he responded to the Law Society on 30 April 2009 and proposed settlement of all matters

on the basis that he would pay Mr ZF the sum of $8,000 plus GST on receipt of which Mr ZF was then to withdraw his complaint.

[28] Complaints are not necessarily capable of being resolved by the payment of money. If this were so, the integrity of the complaints system would be undermined, and complainants could be exposed to pressure to withdraw complaints in return for money.

[29] The Practitioner's failure to recognise this, is underscored by the fact that he subsequently withdrew the offer because it had not been accepted by Mr ZF. Resolution of the complaint was not for Mr ZF to decide.

[30] The Practitioner's attempts to settle matters at this time and on this basis can be seen as a failure on his part to acknowledge that there were serious matters before the Standards Committee which were not matters to be dealt with by the payment of money, whether as an ex gratia payment, or by way of an agreed reduction in fees.

[31] The matters to which I refer which are not capable of being resolved in this way are:

- The crediting of funds to the Practitioner's personal account rather than to a solicitor's Trust Account; and
- The allegation that fees were deducted from the funds held without client approval.

[32] The Complaints Service may have added to the Practitioner's misconceptions when proposing mediation, through a lack of clarity in defining what was to be the subject of mediation and the process involved.

[33] The Schedule to the Mediation Agreement records the description of the complaint and issues for mediation as being those "contained in Mr ZF's letter of complaint to the New Zealand Law Society dated 5 April 2009, and in subsequent correspondence between the parties and the Society".

[34] In reality, the only matter which was capable of being resolved by mediation, and even then only once it was adopted by the Standards Committee, was the amount of the Practitioner's fees. Other matters involved a consideration by the Standards Committee as to whether the Practitioner's conduct was such that it would attract disciplinary sanctions.

[35] This is identified in paragraph 5 of the Mediation Agreement, and in particular, paragraph 5.1 which provided that:

> "The parties acknowledge that the Standards Committee may continue to investigate the complaint, and may take any steps available to it under Part 7 of the Lawyers and Conveyancers Act, despite this mediation or any settlement or agreement resulting from it."

[36] As a result, the expectation of the Practitioner recorded by him in his letter of 12 November 2009 to the Standards Committee that the outcome of the mediation was that, "provided payment is made the matter will be concluded", was incorrect.

[37] The Standards Committee added to the uncertainty surrounding the mediation process when it proceeded with its hearing 'on the papers' without seeking confirmation of the outcome of the mediation from Ms ZD.

[38] The Practitioner is, understandably, puzzled as to what the status of the mediation was, if, having ordered the parties to attend, the Committee then seemed to ignore the outcome.

[39] The Practitioner is referred to s143(4) of the Lawyers and Conveyancers Act, which provides as follows:

> *" If the parties reach an agreed settlement in relation to the complaint or any issue involved in the complaint, the Standards Committee*
>
> *(a) may record the terms of the settlement; and*
>
> *(b) may ,by consent of the parties, declare all or some of the terms of the settlement to be all or part of a final determination of the complaint by the Standards Committee."*

[40] It is to be noted that the Standards Committee retains a discretion whether to adopt all or part of the mediated settlement as part of its decision but it is somewhat odd that the Standards Committee did not refer the Practitioner's letter of 12 November 2009 to Ms ZD for comment or confirmation as to its terms, and then subsequently determined to enforce what it considered to be an earlier agreement between the parties.

[41] It is a little difficult to understand how a complaint can be mediated, but if a complaint concerns fees only, then it can be seen how a mediated settlement would form the basis for a Standards Committee's decision. This complaint may not have been a good matter to have been referred to mediation, or otherwise, it perhaps should

have been restricted to the complaint about fees only. Given the terms of reference in the mediation agreement, it seemed that the whole of the complaint was open for mediation which was not the case.

The Practitioner's fees

[42] The Practitioner has been at pains to make it clear that he does not accept the allegation that his fees were excessive. The offers made to settle prior to the complaint being lodged, and then through the Complaints Service, and again at the mediation, were all made by the Practitioner on the basis that payment was to be an ex gratia payment, and was not to be considered as an acknowledgement by the Practitioner that his fees were excessive.

[43] The Standards Committee made an order pursuant to Section 156(1)(e) of the Lawyers and Conveyancers Act, that the Practitioner reduce his fees by $8,000 plus GST.

[44] The basis of this decision was that the Practitioner should be required to adhere to the Agreement reached on 23 December 2008.

[45] A party cannot be considered to have accepted the terms of an agreement by reason of the fact that he has failed to dispute them. In any event, the Practitioner did dispute the agreement as recorded by Ms ZD when he refuted the various assertions made by her in his letter of 30 April 2009 to the Complaints Service.

[46] That agreement as recorded by Ms ZD incorrectly stated that the payment was to be in reduction of the Practitioner's fees. That was a position that was never accepted by the Practitioner.

[47] From the Practitioner's point of view, the agreements reached in December 2008 and through the mediation, were to result in a settlement of all matters. This included a withdrawal of the complaint.

[48] Consequently, there is no logic to basing a decision on the December agreement. The orders made by the Standards Committee do not reflect the terms agreed to by the Practitioner, and include a fine and costs which of course would not have been in the contemplation of the Practitioner.

[49] Similarly, there is no logic to make orders based on the mediated settlement, as again, the Practitioner did not contemplate that a fine and costs order would be part of the result. That is not necessarily to excuse the Practitioner from familiarising himself with the provisions of the Act and the mediation process in the context of a complaint, but it is fair to say that his expectations were not unreasonable.

[50] On 9 September 2009, the Complaints Service wrote to the Practitioner requesting that he provide all information relating to his fees including particulars of times, records and details of the work carried out. This letter was sent after the Practitioner had failed to respond to the suggestion of mediation and also a follow-up letter.

[51] Following receipt of the letter of 9 September 2009, the Practitioner advised that he was amenable to the matter proceeding to mediation, and the information requested in that letter was never provided. The Committee therefore had no information on which to form any view about the Practitioner's fees.

[52] Prior to the Practitioner advising that he agreed to mediation, the Standards Committee had indicated that it intended to refer the matter to a Costs Assessor.

[53] In the circumstances, it is preferable for this process to run its course, and for any orders made by the Committee with regard to fees, to be made with the benefit of that report.

[54] There will therefore be an order directing the Standards Committee to reconsider the complaint with regard to fees.

The Client's funds

[55] The Standards Committee's determination records the circumstances in which the client's funds were received by the Practitioner and paid into his office account.

[56] The reason provided by the Practitioner for this was that Mr AT required his fees to be protected. As Mr AT was engaged in Fiji at the time, he was unable to advise who his instructing solicitor would be.

[57] In paragraph 3.2 of the letter accompanying the application for review, the Practitioner suggests that a barrister's "Office" account is different from what was described by the Standards Committee as the Barrister's "personal" account. Whilst

that may be so insofar as it affects how he applies the funds in each case, the account is correctly described as a "personal" account by the Committee. The deposit slip provided by the Practitioner identifies that the holder of the account is "[Mr AS]– Barrister". That is an account in the Practitioner's name and therefore a "personal" account. It is not a Trust account and the Practitioner's suggestion that it is anything other than a personal account is surprising.

[58] The Practitioner had arranged that the firm of AAN would be his instructing solicitors and Mr ZF's funds could have been paid into that firm's Trust Account.

[59] I also have some reservations about the correctness of the Practitioner issuing an account for payment of the retainer. The account was issued directly to the Respondent for the sum of the $50,000 by the Practitioner. ZD retainer is a sum of money that is to be held for payment of accounts to be rendered in the future as work is completed.

[60] When an account is rendered, it is due and payable and the inference is that the funds can be converted to the Practitioner's use immediately, which in this case would have been before the services had been provided. In this case, the funds were being paid primarily to protect Mr AT's fees and consequently it was incorrect for the Practitioner to render an account for payment on his letterhead.

[61] One other matter that deserves comment was also commented on by the Standards Committee. On 25 September 2008 the Practitioner sent an email to Ms Z signed off under the name of his instructing solicitors, AAN. What the purpose of this was is not clear, but it is highly irregular, and at least offends Rule 11.2 of the Client Care Rules.

Deduction of fees

[62] Ms ZD complained on behalf of Mr ZF, that the Practitioner had deducted fees from funds held without first rendering an account to Mr ZF for approval. The Standards Committee's investigation into this matter is inconclusive.

[63] The Practitioner says that he deducted his fees at the invitation of Mr AU who had at that stage been instructed by Mr ZF. He advises that there has never been an objection from Mr AU as to the steps taken and that he complied with Mr AU's letter precisely.

[64] However, the letter from Mr AU has not been produced by the Practitioner. If it says what the Practitioner says it does, then it would seem that he had authority to deduct his fees in accordance with Regulation 9(1)(b) of the Trust Account Regulations. Although the Trust Account Regulations were not applicable as the Practitioner's bank account was not a trust account it is appropriate that he should treat client funds in the same way as required by those Regulations. Without sighting the letter though, it is not possible to determine one way or another whether the Practitioner was authorised to deduct his fees as he says he was

[65] The decision of the Standards Committee in respect of these matters, was to find that the Practitioner's conduct constituted unsatisfactory conduct in the form of conduct unbecoming. This phrase is defined in Section 12 (b) of the Lawyers and Conveyancers Act as being conduct that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming a lawyer.

[66] I concur with the Standards Committee in that regard and the decision will be confirmed.

Costs

[67] The Standards Committee made an order requiring the Practitioner to pay $2,000 on account of costs. Although the matter is to be returned to the Standards Committee to reconsider the order with regard to the Practitioner's fees, the decision has otherwise been upheld. In addition, I consider that the inquiry was entirely warranted, and an order pursuant to Section 157(2) of the Act would not have been inappropriate. In the circumstances, the order as to costs will be confirmed.

Publication

[68] In its determination the Standards Committee noted five factors to be taken into account when considering whether or not the Practitioner's name should be published. The Standards Committee decision contains no discussion or reasoning in respect of these considerations and it is therefore not possible to ascertain which of the factors the Committee considered applied, or were given weight to. In its decision, the Committee resolved that the name of the Practitioner and the facts of the matter should be published in LawTalk.

[69] While the Practitioner has not taken specific issue with this, he nevertheless seeks that the determination of the Standards Committee be reversed. If the determination were to be reversed, then it follows that the publication order would also be reversed.

[70] The issue of publication has been commented on previously by this Office, and the position taken, that if a Standards Committee intends to order publication of a Practitioner's name, then it should, in the interests of natural justice, invite separate and specific submissions from the Practitioner on that point.

[71] In the circumstances, it is intended to follow that approach. In this instance, as the matter is to be referred back to the Standards Committee to reconsider the issue of the Practitioner's fees, it is appropriate that the question of publication be dealt with also by the Committee. The Committee will need to determine the issue of the Practitioner's fees before inviting submissions from the Practitioner on the question of publication.

[72] The Standards Committee's decision as to publication having been reversed, it is of course open to the Committee to resolve differently with regard to the matter of publication, and in those circumstances it would not of course be necessary to call for submissions.

Decision

1. Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the order of the Standards Committee requiring the Practitioner to refund the sum of $8,000 plus GST is reversed.

2. Pursuant to Section 211(1)(a) of the Act the order of the Standards Committee as to publication of the Practitioner's name and the facts of the case is reversed.

3. Pursuant to Section 211(1)(a) of the Act the Standards Committee finding of unsatisfactory conduct with regard to the Practitioner's handling of the client's funds is confirmed. The fine of $2,000 pursuant to Section 156(1)(i) is also confirmed.

Orders

1. For the reasons specified in paragraphs [42] to [54] the Standards Committee is directed pursuant to s209(1)(a) of the Act to reconsider the complaint as to the

Practitioner's fees and to issue its determination in respect thereof following such reconsideration.

2. For the reasons specified in paragraphs [68] to [72] if, following the determination in respect of the matter in Order 1 above, the Committee remains minded to order publication of the Practitioner's name, then it is to invite submissions from the Practitioner, and, if it considers it appropriate, from Ms ZD on behalf of Mr ZF, in respect thereof. The Committee is then to make its determination with regard to publication following a consideration of those submissions and the factors already identified by the Committee to be taken into account when considering publication.

DATED this 14th day of March 2011

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Owen 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:

Mr AS as the Applicant
Mr ZF as the Respondent
Ms ZE as Counsel for the Respondent
The Auckland Standards Committee 1
The New Zealand Law Society