

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

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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 DUNSTABLE (SNR)** of Auckland

Applicant

AND **MR LEIGHTON** of Napier

Respondent

DECISION

Background

[1] This is a review of a decision of the Hawkes Bay Standards Committee in respect of a complaint by Mr Dunstable against Mr Leighton. Mr Dunstable complained to New Zealand Law Society that he was instructed by Mr Leighton (or his firm) to provide expert advice regarding the value of certain paintings. That valuation was urgently required in connection with a hearing in the Family Court in which Mr Leighton acted for a Mr X. Mr Leighton considered that Mr X had instructed Mr Dunstable and that he was properly liable for the invoice rendered. He was not instructed by Mr X to pay Mr Dunstable from funds of Mr X's which he held on trust. Accordingly the invoice has not been paid.

[2] The Standards Committee dismissed the complaint and Mr Dunstable applied for that determination to be reviewed. 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 by the Standards Committee.

[3] The Standards Committee resolved to take no further action on the complaint on the basis that the instruction to complete the valuation came from Mr X and not from Mr Leighton. In this they relied on rule 12.2 of the Rules of Conduct and Client Care for Lawyers. The Committee also found that it was not open to Mr Leighton to pay Mr X from funds of Mr X held on trust in the absence of instructions to do so.

Background

[4] From the correspondence on the file it appears that some time in September 2008 Mr X contacted Mr Dunstable to seek a valuation in respect of certain paintings which were part of relationship property litigation he was involved in. The paintings were of European origin and under urgency Mr Dunstable completed the valuation after using certain international connections to obtain advice from Christies Auction House. There is no dispute that the valuation evidence provided was of a high standard and of assistance to Mr X in his litigation.

[5] An initial opinion was provided by Mr Dunstable to Mr X (and copied to Mr Leighton). Mr Leighton requested that it be presented in a way which was suitable for the purpose it was intended (presumably presentation to the Court). Various correspondence including email exchanges occurred between Mr Dunstable and Mr Leighton's firm. Mr Dunstable states that (although Mr X contacted him first) the valuations were for a court case and he dealt extensively with Mr Leighton's firm. In his view he was part of the "legal team". In light of these factors he considered that Mr Leighton ought properly be required to pay the invoices.

[6] Mr Dunstable rendered two invoices for his work. They were initially provided to Mr X (on 9 September 2008). It appears that payment was not forthcoming from Mr X. The invoices were then provided to Mr Leighton on 4 November 2008 with a request to pay. Mr Leighton replied on 11 November stating that he was referring the accounts to Mr X. He also noted that "we do have some funds in the event that there was a dispute of any kind and payment is able only to be made thereafter". Mr Dunstable took this as a statement that funds for the purpose of payment of the invoices were held by Mr Leighton. Mr X did not consent to the invoices being paid. Mr Dunstable was of the view that Mr Leighton (or his firm) was properly responsible for payment of the invoices and re-addressed them to him in January 2009. Various correspondence in this regard ensued without progressing the matter. Mr Dunstable suggested that Mr Leighton should pay him from Mr X's funds that he held. Mr Leighton declined to do so. Mr

Dunstable also sought Mr X's address from Mr Leighton however Mr Leighton refused to provide it on the basis that he was not authorised to release that information.

Consideration

[7] It appears from the correspondence that the initial instructions to provide the valuation came from Mr X. There appears little doubt that there is a contractual relationship between Mr Dunstable and Mr X in this regard. However, Mr Dunstable's efforts to pursue Mr X have been thwarted by Mr X being difficult to find. It is, however, clear from this that there is no obligation based on a contractual relationship for Mr Leighton to pay the invoice of Mr Dunstable.

[8] In some cases a lawyer will be obliged to pay the expenses incurred in the conduct of a client's affairs even in the absence of a contractual obligation to do so. If a lawyer undertakes to ensure that the third party is paid, or instructs the third party directly (without making clear that they will not be personally liable) then the Rules of Conduct and Client Care for Lawyers make it clear that the lawyer has a professional (as opposed to contractual) obligation to pay. The Standards Committee noted this citing r 12.2 which provides:

Where a lawyer instructs a third party on behalf of a client to render services in the absence of an arrangement to the contrary, the lawyer is personally responsible for payment of the third party's fees, costs, and expenses

In the present case Mr Leighton did not instruct Mr Dunstable. Rule 12.2 provides a clear statement regarding when a lawyer will be responsible for the fees of a third party. In the absence of instructions from Mr Leighton to Mr Dunstable there is no obligation on Mr Leighton to pay the invoices rendered. In reaching this conclusion the Standards Committee was correct.

[9] Mr Leighton noted that he holds funds of Mr X on trust. Mr Dunstable finds it objectionable that on the one hand Mr Leighton refuses to pay the invoices personally, and on the other hand refuses to pay the invoices from the funds of Mr X he holds. The obligations of a lawyer holding funds on trust are strict. Section 110(1)(b) of the Lawyers and Conveyancers Act provides that a lawyer who holds money on trust must "hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs". In light of this Mr Leighton is prohibited from paying Mr Dunstable from the funds of Mr X held on trust unless Mr X so directs. Because no direction to pay Mr Dunstable had been given to Mr Leighton by Mr X Mr

Leighton was prohibited from disbursing any funds to Mr Dunstable. The Standards Committee was correct to conclude that Mr Leighton had not acted unprofessionally in refusing to pay Mr Dunstable from funds held on trust.

[10] Mr Dunstable stated that Mr X has “run away” and that Mr Leighton was “hiding him” by not providing contact details. Rule 8 of the Rules of Conduct and Client Care provide that:

A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client’s business and affairs acquired in the course of the professional relationship.

The address and other contact details of a client are confidential information and it would be inappropriate for a lawyer to release those details to a third party without consent. The Standards Committee was correct in finding that Mr Leighton acted properly in refusing to release the contact details of Mr X.

Observation

[11] I observe that in his application for review Mr Dunstable asks whether he could send the accounts to Mr Leighton so that that might be passed on to Mr X at his “secret address”. This seems unobjectionable and in the normal course of events any correspondence sent to a lawyer would be provided to his client. I observe, however, that Mr Leighton has already referred the accounts to Mr X who has stated that Mr Leighton is not to meet the accounts and he will deal with the matter personally. It may be doubtful that there is anything to be gained by seeking to further communicate with Mr X.

[12] I have found that Mr Leighton has not acted unprofessionally in this matter. Mr Dunstable’s remedies lie against Mr X either in the Courts or perhaps the Disputes Tribunal. It is an unfortunate fact that if Mr X wishes to avoid Mr Dunstable extracting payment from him may be difficult. However, this cannot be visited on Mr Leighton.

Result

[13] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Hawkes Bay Standards Committee is confirmed.

DATED this 14th day of July 2009

D Webb
Legal Complaints Review Officer

Copies of this decision are to be provided to:

Mr Dunstable as applicant
Mr Leighton as respondent
Mr Leighton's practice as a related party
The Hawkes Bay Standards Committee
The New Zealand Law Society