LCRO 83/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of a Standards Committee
BETWEEN	**Mr AR and Mrs AR** Applicants
AND	**ZE** Respondent

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

Introduction

[1] In *ZE v Legal Complaints Review Officer,*[1] the Court quashed the finding of this Office that Ms ZE and [Law Firm X] had contravened ss 110(1) and (2) of the Lawyers and Conveyancers Act 2006, quashed the Legal Complaints Review Officer's (LCRO) finding of unsatisfactory conduct and set aside all orders made by the LCRO. The Court remitted the matter back to this Office to be reconsidered noting that Mr AR was entitled to have the "review determined on its merits".[2]

[2] The New Zealand Law Society had been joined as a party to the proceedings and counsel for the Society presented comprehensive submissions to the Court. At [39] of the judgment her Honour commented:

> The submissions by counsel for NZLS have been of great assistance to me and it is to be hoped that they will afford the same assistance to the LCRO when Mr AR's application for review is reconsidered.

[1] *ZE v Legal Complaints Review Officer* [HC].
[2] At [49].

[3] The ground of review upheld by the Court was that the LCRO had failed to consider the provisions of s 113 of the Lawyers and Conveyancers Act 2006 when reaching her decision.

[4] In its determination of 8 March 2012 the Standards Committee resolved to take no further action in respect of Mr AR's complaints, summarised by the Committee as follows:

> (a) That she [Ms ZE] had deducted fees from monies held in trust without authority.
> (b) That her fees exceeded the quote he was given at the outset.
> (c) The manner in which the conveyancing matter was handled.

[5] The effect of the judgment was that I must approach Mr and Mrs AR's application for review of the determination of the Standards Committee afresh.

The parties

[6] The Standards Committee processed the complaint as being a complaint by Mr AR. That is how the complaint application form was completed. The applicants for the review were recorded as "Mr & Mrs AR". Mrs AR is not a person who could apply for a review as she was not, and had not been treated by the Standards Committee as, a complainant. However, Mrs AR was involved in the matters giving rise to the complaint to the same extent as Mr AR. She also attended the review hearing. In the circumstances, it would be an unwarranted technical approach to exclude Mrs AR as a party, and I have referred to both Mr and Mrs AR as review applicants and complainants.

[7] The complaint was lodged against Ms ZE, and it was she in respect of whom the Standards Committee processed the complaint.

[8] In the previous review decisions, the LCRO included [Law Firm X] as a respondent as:[3]

> … the subject matter of the complaint and of this review relates to Ms ZE's conduct as director and principal of the firm and as a lawyer in practice on her own account.

[9] I have chosen to process this review as a review of a complaint against Ms ZE only, as I have not noted any argument by Ms ZE that the conduct complained about was that of [Law Firm X] as opposed to her own conduct.

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[3] LCRO decision 2 April 2014.

Background

[10] Ms ZE's firm acted for Mr and Mrs AR on the sale of their property. Mr AR objected to the firm on-charging to them increased LINZ fees after they had initially been issued with an incorrect invoice based on the pre-increase charges. Mr and Mrs AR withdrew their instructions to Ms ZE and her firm to act for them in relation to the purchase of a property which was due to be settled a few days after the sale, and directed Ms ZE to remit the proceeds of the sale of their property to them.

[11] Before doing so, Ms ZE deducted the firm's fees on the sale, and fees incurred in connection with the purchase. Mr AR had already paid the invoice for the sale and so the deduction of the updated invoice by Ms ZE of the fees on the sale, resulted in fees being paid twice.

[12] Prior to Ms ZE making the deduction, Mr AR had expressly forbidden Ms ZE and the firm from deducting fees due to the firm.

Mr AR's complaints

[13] The summary of Mr AR's complaints recorded in [4] accurately reflects the matters complained about. At the review hearing, Mr and Mrs AR agreed their complaints were as much about Ms ZE's reaction to Mr AR when he queried the replacement invoice on the sale, as the subsequent deduction of fees.

[14] However, the complaint concerning the deduction of fees was accorded major significance in the previous LCRO decision and the judgment of Peters J. This issue is also one of extreme importance to NZLS and the legal profession, and it is for this reason that NZLS was joined to the judicial review application. To that extent, Mr and Mrs AR's complaint, and Ms ZE's application for judicial review, have assumed an importance which Mr and Mrs AR would not have expected when lodging their complaint.

Review

[15] In the course of this review I have had reference to:

- The Standards Committee file.
- Submissions of the parties made in conjunction with the first review by this Office.

- Submissions by counsel for NZLS in the judicial review proceedings.
- The judgment of the Court in *TS v LCRO*.
- Submissions by the parties for this review.

[16] The review proceeded by way of a hearing with both parties in [City] on 14 April 2016. Ms ZE was represented by Mr NS and Mr and Mrs AR both attended the review hearing.

Lack of professionalism

[17] As noted, Mr AR agreed at the review hearing that he and his wife's complaints were as much about what they refer to as Ms ZE's lack of professionalism when they objected to being told they would have to pay more than quoted due to an increase in LINZ registration fees, as it was about the deduction of fees.

[18] They assert that when they objected to paying more than quoted, Ms ZE's ultimate response was to advise them that if they did not accept the increased fees she would not complete the settlement of the sale which was due to take place the following day.

[19] At the review hearing, Mrs AR advised that Ms ZE did not refer to any dispute resolution process in place for her firm. I note that paragraph [4] of the firm's client information provided to the ARs refers to a complaint procedure for handling complaints "designed to ensure that a complaint is dealt with promptly and fairly".

[20] In her response to the complaint Ms ZE advises that Mr AR "came into our office shouting and yelling how bad [the firm's] service was".[4] She says she apologised for the error and explained why the fees charged were greater than quoted, due to the increase in LINZ fees.

[21] The preface to the Conduct and Client Care Rules states "Whatever legal services your lawyer is providing, he or she must … let you know how to make a complaint and deal with any complaint promptly and fairly".[5]

[22] Rule 3.4 of the Conduct and Client Care Rules requires a lawyer to provide a client with information in writing on the principal aspects of client service which includes the procedures in the lawyer's practise for the handling of complaints by clients.

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[4] Letter ZE to NZLS (26 July 2011).
[5] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[23] The client information letter provided to Mr and Mrs AR follows the form set out in seminar materials presented by NZLS to inform lawyers about the requirements of the Lawyers and Conveyancers Act and the Client Care Rules which came into effect on 1 August 2008.[6]

[24] Ms ZE has complied with the express requirements of the Act and the Rules but the implementation of those requirements is what is referred to by Mr and Mrs AR when they refer to Ms ZE's "lack of professionalism".

[25] Rule 10 of the Conduct and Client Care Rules requires a lawyer to "promote and maintain proper standards of professionalism in the lawyer's dealings". Mr NS submitted that there was no justification for Mr AR to be rude, implying that if a client is rude, a lawyer is justified in breaching the obligation of professionalism. In that regard, I refer briefly to the comment by the Lawyers and Conveyancers Disciplinary Tribunal in *LCRO v Hong*[7] that "…a lawyer is expected, in the face of …provocation, to act with dignified restraint." Rudeness by a client, does not justify a lack of professionalism in response, by a lawyer.

[26] Subsequently, on 4 July, Mr AR sent what I would consider to be a conciliatory email, thanking Ms ZE and her staff for the quality of the service provided, and suggesting a compromise between the initial quote and the additional funds required to make payment of the increased LINZ fees. He advised that Ms ZE neither acknowledged nor responded to that email.

[27] I see no merit in making any findings on the facts or making a decision as to whether or not Ms ZE breached her professional obligations. What emerges from the evidence is that both parties contributed to an unpleasant altercation and neither party can be said to be blameless. It would be presumptuous of me to comment on the manner in which Ms ZE conducts relations with her clients, and in the circumstances I exercise a discretion provided by s 152(2)(c) of the Lawyers and Conveyancers Act to take no further action in respect of this aspect of the complaint.

Fees exceeding quote

[28] This aspect of the complaint can be readily dealt with. On 13 June 2011 Ms ZE's firm sent Mr and Mrs AR a letter of engagement. The section of the letter dealing with fees reads:

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[6] Ian Haynes and Alan Ritchie "Lawyers and Conveyancers Act – Rules of Conduct and Client Care" (NZLS seminar, June 2008).
[7] *LCRO v Hong* [2015] NZLCDT 27 at [52].

> Our standard fee for a straightforward sale is $800 plus GST. After 1st July 2011 LINZ will have increased charges these will be on-charged. This includes disbursements for up to one mortgage. The cost of building, valuation or LIM reports are not included.

[29] On 27 June, an invoice was sent to Mr and Mrs AR for $800 plus GST ($920). That fee **included** the costs of registering one discharge of mortgage. The invoice was incorrect, as the settlement date of the AR sale was 1 July 2011. At that time, the firm's fixed fee increased to $780 plus GST **plus** LINZ fees (total $977).

[30] At its heart, this is a contractual issue. Mr AR's complaint is that he was provided with a quote and an invoice for fees. The quote was for $800 plus GST ($920). Mr AR had paid that invoice by direct credit on 1 July. Ms ZE then deducted $977 for fees on the sale. This resulted in fees being paid twice.

[31] The firm's terms of engagement referred to the fact that LINZ fees would increase from 1 July and would be passed on to clients. The invoice rendered on 27 June was for $920 but replaced when it was realised it did not reflect the increased fees to be charged from 1 July.

[32] There are no professional standards issues arising from these events. There is no question about the reasonableness of the **fee** which remained the same. It was the ability to on-charge the increased disbursements which is at issue here and that is a matter for the civil jurisdiction (Disputes Tribunal or the Court). Similarly, Mr AR is entitled to a refund of the fees paid twice, without recourse to the complaints and disciplinary process.

[33] Consequently, I confirm the determination of the Standards Committee to take no further action in respect of this aspect of the complaint.

Deduction of fees

[34] In his complaint, Mr AR described the deduction of fees by Ms ZE in the face of his email specifically preventing her from doing so as "the biggest indecency". It also formed the basis of the adverse finding by this Office, and the issue in respect of which the matter was remitted back to this Office.

[35] As noted above,[8] the Court has quashed the findings of this Office on the grounds that the LCRO failed to consider s 113 of the Lawyers and Conveyancers Act in reaching her finding that Ms ZE and her firm had breached s 110 of the Act.

[8] At [1].

The relevant law

[36] The relevant law as it relates to this matter is to be found in ss 110 and 113 of the Lawyers and Conveyancers Act and regulations 9 and 10 of the Trust Account Regulations.[9] These provisions are included in this decision by way of an annexure.

[37] The sections of the Act and the regulations referred to, remained unchanged from the provisions of the Law Practitioners Act 1982 and the Solicitors Trust Account Rules in force prior to 1 August 2008. In themselves, those provisions repeated earlier renditions of the Lawyers Practitioners Act and the Trust Account Rules.

[38] Prior to a decision of this Office[10] on 29 May 2009, it was the common understanding of all lawyers that, provided an invoice was issued and delivered to the client either before, or immediately after, fees were debited, it was in order for fees to be deducted from funds held for a client. Many lawyers would not have been aware of the finer points that have been raised in such cases as *Heslop v Cousins*[11] and *Shand v M J Atkinson Limited (in liquidation)*.[12]

[39] The issues raised in those cases were brought into focus by the LCRO decision in *A v Z*. In that decision, the LCRO held that a lawyer may not deduct fees from funds held in trust without a direction from the lawyer's client. The LCRO's view of *Heslop v Cousins* was that it provided authority for the proposition that s 89 of the Law Practitioners Act "...was the paramount provision and that subordinate regulations could not override the obligations imposed by the statutory provision."[13]

[40] The LCRO went on to say:[14]

> 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 he was entitled to deduct his fee from the funds held. On those facts Chisholm 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.

[41] The LCRO concluded that:[15]

> ...a lawyer may only deal with trust funds in two ways pursuant to s 89 of the Law Practitioners Act (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

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[9] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.
[10] *A v Z* LCRO 40/2009.
[11] *Heslop v Cousins* [2007] 3 NZLR 679 (HC).
[12] *Shand v M J Atkinson Limited (in liquidation)* [1966] NZLR 551 (CA).
[13] Above n 10, at [23].
[14] At [23].
[15] Above n 10 at [25].

> 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.

The letter to lawyers 13 August 2009

[42] The New Zealand Law Society did not agree with the LCRO, and on 13 August 2009, the then President of the Society (Mr HN) sent a communication to all lawyers. In that letter, the President acknowledged "widespread concern in the profession at the decision of the LCRO". He advised that "the purpose of [the] letter [was] to assist lawyers to avoid difficulties when they take fees by deduction".

[43] NZLS considered that the outcome of *A v Z:*

> … was correct because an invoice was not delivered to the client until some four months after the lawyer had deducted his fee from the client's money in his trust account so that he was in fact in breach of what is now regulation 9(2) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 …

[44] The President referred to:

> … the LCRO's view that a lawyer was not entitled in any case to deduct client fees from a trust account without a specific direction from the client to do so…

For the reason that the:

> … predecessor to regulation 9(1)(a) may be inconsistent with the obligation to hold a client's money "exclusively for that person, to be paid to that person or as that person directs" under the predecessor to s 110 of the Lawyers and Conveyancers Act 2006 …, and that therefore the regulation had "no force".

[45] Mr HN advised that the NZLS Board had taken advice from counsel on the LCRO decision and had:

> … a different view [from the LCRO] based on s 113(2) of the LCA and the judgment of the Court of Appeal in *Shand* … which establish that a lawyer's "just claim" to set off costs may take priority over the obligation under s 110 and that there is therefore no inconsistency between the statutory and regulatory provisions.

[46] Mr HN referred to the requirements of regulation 9 to issue and deliver a dated invoice to the client before fees could be deducted. Of particular significance however, is the comment that advance notice of an intention to deduct fees must be given, which differed from the pre Lawyers and Conveyancers Act requirements, where lawyers deducted fees upon issue of an invoice.

[47] Mr HN's letter concluded by recommending that the:

> … prudent course for lawyers would be to:

- advise the client in terms of r 3.4(a) of the RCCC that fees may be deducted from funds held for the client and ensure that the client accepts in writing the terms of engagement; and

- comply with regulation 9 of the Trust Account Regulations at the time a fee is deducted.

Did Ms ZE have Mr AR's authority to deduct fees?

[48] Ms ZE did not have Mr and Mrs AR's written acceptance of the terms of engagement. Mr AR asserts he did not receive the letter of engagement or the firm's client information letter. Ms ZE is adamant that these had been sent, both in respect of the sale (on 13 June) and the purchase (on 17 June). These competing assertions cannot be reconciled, but on the standard of proof required for disciplinary matters (a balance of probabilities) I accept Ms ZE's evidence. In any event, nothing turns on that particular point as Mr AR was clearly aware that Ms ZE intended to deduct her fees when he sent the email of 1 July expressly forbidding her to do so.

[49] Mr NS submits that:[16]

> … the ARs therefore authorised the firm to deduct from any funds held on their behalf in the trust account any fees, expenses or disbursements for which the firm has provided an invoice.

This submission is based on (what I have accepted is) the fact that Ms ZE had provided the information required by rules 3.4 and 3.5. Clause 2.6 of the firm's terms and conditions stated "you authorise us: … (b) to deduct from any funds held on your behalf in our trust account any fees, expenses or disbursements for which we have provided an invoice".

[50] The letter of engagement went on to stipulate that "if you orally advise your acceptance or instruct us to proceed, you will in any event be bound by these terms".

[51] Ms ZE and Mr NS rely on the law of contract to support the assertion that the ARs had authorised Ms ZE to deduct her fees. The firm had advised Mr and Mrs AR that they intended to deduct fees from funds held. Mr and Mrs AR did not sign and return the terms of engagement thereby specifically accepting the terms and conditions. They did however proceed to instruct the firm to act for them.

[52] I have difficulty in accepting that an authority can be established by default, particularly one that directs how client funds are to be disbursed. It has been said in virtually every decision issued by this Office, Standards Committees, and the Lawyers

[16] NS submission for review (31 March 2016) at [12].

and Conveyancers Disciplinary Tribunal, that consumer protection is the fundamental objective of the Lawyers and Conveyancers Act. Is that objective fulfilled by allowing lawyers to rely on an implied acceptance of terms and conditions?

[53] The same disciplinary bodies have also been extremely diligent in protecting client funds and I include here just two references which reflect that approach.

(a) In a Lawyers and Conveyancers Disciplinary Tribunal decision[17] the Tribunal said:

> The Standards Committee emphasised that the purpose of a solicitor's trust account obligations was public protection. In particular, the protection of money paid to the solicitor, so that the solicitor was not free to deal with the funds as if they were the solicitor's own funds, and to ensure that such funds did not become available to the solicitor's creditors.

(b) In *Auckland Standards Committee* v *Sega* the Tribunal said:[18]

> It was all for Ms Sega's personal benefit and it occurred when she occupied a role of trust in a legal firm with direct contact with clients and the responsibility of handling firm cheques. As such, it can be seen as undermining the trust that clients are entitled to have in providers of legal services and therefore goes to the reputation of the profession generally and more importantly to the issue of protection of the public. One of the primary functions of this Tribunal is to look to ensure those two issues: protection of the public and protection of the confidence of the public in the legal profession.

[54] I find it difficult to accept that this fundamental function can be met by allowing a lawyer to deduct fees from money held in trust, on the basis of sending out a letter of engagement and terms of engagement, which include a statement that the lawyer intends to deduct fees from the client's funds. The client may or may not note this provision amongst the many other terms and conditions. It does not seem to me that trust and confidence in the profession can be engendered by allowing a lawyer to deduct fees from client funds without specific authority, which it is fair to say, is what a reasonable client would expect would have to be the case. I do not accept Mr NS's submission, that Mr and Mrs AR "authorised" deduction of fees on the basis they instructed Ms ZE to proceed to act for them after the letter of engagement and the firm's terms and conditions had been sent.

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[17] *Canterbury-Westland Standards Committee v Parsons* [2013] NZLCDT 48 at [22].
[18] *Auckland Standards Committee v Sega* [2013] NZLCDT 31 at [5].

[55] I can do no more than to reinforce the recommendation from Mr HN that lawyers should obtain written acceptance of terms and conditions if a lawyer wishes to rely on the stated intention to deduct fees.

[56] In the present instance, Mr AR had specifically directed in his email of 1 July 2011 that Ms ZE was not authorised to deduct her fees. Mr NS argues that it is untenable for a lawyer to proceed to provide legal services in reliance on an understanding that the lawyer is authorised to deduct fees, if that right (or authority) can then be countermanded at the whim of a client.

[57] If the authority was obtained by having the client sign the terms and conditions, it would be a simple matter to include a provision that the authority was irrevocable. That would overcome Mr NS's objection. In any event, the answer to Mr NS's objection lies (partially) in the provisions of s 113(2) of the Lawyers and Conveyancers Act.

Section 113(2) of the Lawyers and Conveyancers Act

[58] It is the role of the complaints and disciplinary process (of which this Office forms part) to reach findings as to whether or not a lawyer has met and complied with professional standards. This Office is now charged with interpreting and determining a provision that has caused much debate and discussion and also been the subject of several judgments of the courts, including the Court of Appeal.

[59] It has been said on many occasions that this Office will not make findings of law as that would usurp the role of the courts, and clearly a decision by this Office cannot have authoritative and binding status. Nevertheless I must proceed to complete this review taking the provisions of s 113(2) into account when doing so as directed by the Court.

[60] Section 113(2) provides:

> Nothing in section 110 or this section takes away or affects any just claim or lien that a practitioner, related person or entity, or incorporated firm who holds money to which section 110(1) or (2) applies may have against that money.

[61] Counsel for NZLS notes that s 113(2) was not referred to by the LCRO in *A v Z* or the High Court in *Heslop v Cousins*. In this regard, I take it that counsel was

referring to the "carve out" for a just claim, rather than for a lien, as the LCRO devoted a section of his decision to the relevance of a lien.[19]

[62] The first question that arises, is what constitutes a "just claim." Many lawyers will know to their cost, that what they consider to be a fair and reasonable fee is not perceived to be so by the client, and a client has the option of challenging the fee both as to liability and quantum. If the client's position is upheld, then it would seem to follow, that in hindsight, a fee which the lawyer considered represented a "just claim" has become an "unjust claim". As long as the funds claimed by the lawyer have not been appropriated into the firm's general account, the lawyer is in a position to immediately pay to the client, the difference between the amount originally claimed for fees, and the revised figure.

[63] That leads to the question as to whether a "just claim" or "lien" allows a lawyer to deduct fees. The answer as to whether or not a "lien" allows a lawyer to deduct fees is answered in the submissions. At paragraph [53], counsel says:

> From the perspective of whether a deduction breaches s 110, the question comes down to what would amount to a "just claim" in terms of s 113 **(noting that the other carve out for a "lien" would prevent a breach by virtue of refusing to follow a direction, but not actively appropriating money towards fees).**
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> (emphasis added).

[64] That submission accords with the general law relating to liens which allows a claimant to assert a claim over goods for payment of work done on the goods. That claim does not automatically convert to a right to appropriate goods.

[65] Having made that observation, counsel reverted to the reference in s 113(2) to a "just claim". He said:[20]

> There is Court of Appeal authority from the mid 1960s, on the predecessors to s 110 and s 113 holding that it preserved a solicitor's right to set off client funds (held generally rather than for a specific purpose) against fees incurred in *Shand v J Atkinson Limited*. Unfortunately it does not appear to have been brought to the attention of the LCRO in this case or in *A v Z*, or the High Court decision in *Heslop v Cousins* which was referred to in both of those LCRO decisions.

[66] It must be noted here that s 113(2) refers to a "just claim". It does not refer to a right of set off.

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[19] Above n 10 at [27]-[28].
[20] Counsel submission to the High Court 28 April 2015, at [54].

[67] In *Shand*, the Court of Appeal held that a lawyer had a right of set off for fees against funds held in a firm's trust account. Consequently, the reference to a "set off" in *Shand* was not made with reference to a "just claim" as referred to s 113(2).

[68] I do not intend to discuss the relevant law and decisions any further. As already noted, that is not the role of this Office and to do so would be venturing into the jurisdiction of the court. However, I would make the simple observation, that a "claim" (and a "just claim" at that) is not the same as a right of set off. In my view, the words "just claim" and "lien" referred to in s 113(2) should be interpreted as being similar in meaning as opposed to having a right of set off imported into them.

[69] The law relating to a right of set-off developed from 18th century English statutes and "is essentially different from counterclaim. Set-off is not a claim. Set-off is a defence, a shield and not a sword…".[21] I include this brief quotation from the Laws of New Zealand to support the view that it is wrong to equate the right of set-off to a "just claim" as referred to in s 113(2), such that s 113(2) cannot be set up as establishing a right to a clients funds and overriding the requirements of s 110.

Were the funds held for a specific purpose?

[70] Mr NS does not accept that the money held by Ms ZE was held for a specific purpose. That is a less than tenable proposition. The money held by Ms ZE was the proceeds of sale of the ARs' property. They had contracted to purchase a replacement property within a few days. It is difficult to hold to a position that the money was not held for the specific purpose of completing the purchase of the replacement property. In an email sent on 30 June at 15:47 Mr AR requested (again) details of the firm's bank account so he could make payment for the fees for the sale. The ARs had earlier received (on 27 June) the firm's invoice for payment, albeit an incorrect invoice.

[71] In the letter of engagement the firm stated that "fees are payable on or before settlement day …". It is not consistent therefore for Ms ZE to now argue that there was no specific purpose for the funds received on the sale of the property or at least to acknowledge that the funds received were not intended to be a source for payment of the firm's fees.

The email of 1 July

[72] On 1 July at 11:19, Mr AR sent an email to Ms ZE in which he reiterated his request for the firm's bank account details so he could make payment of the fees. Ms

[21] *Laws of New Zealand* Set-off and Counterclaim (online ed) at [1].

ZE had previously declined to accept Mr AR's cheque tendered in payment of the first (incorrect) invoice.

[73] Mr AR advised Ms ZE that they had arranged a different bank facility for payment of fees and expressly " … [forbade Ms ZE] from making any deductions from the proceeds of sale to cover … fees and charges".

[74] Ms ZE said she did not receive or read this email. It was addressed to action [Law Firm A's email address] which Ms ZE advises is the firm's general email address. I do not accept this as a reason for the email to be disregarded because it is Ms ZE's responsibility to ensure there are proper processes in place so that emails sent to the firm are viewed by the appropriate person. Even if she had not seen the email immediately or soon after it was sent, there would have been the opportunity to withhold a deduction, and there was certainly every opportunity to reverse it subsequently. Ms ZE did neither.

Discussion

[75] Ms ZE acted in accordance with what lawyers commonly understood to be the requirements of the Act and the Solicitors Trust Account Regulations prior to the commencement of the Lawyers and Conveyancers Act and the current Trust Account Regulations. The 2008 regime did not alter the relevant provisions in either the Act or the regulations.

[76] The understanding I refer to was that provided an invoice was issued and delivered to the client either before or immediately after fees were deducted, then a lawyer could deduct fees from funds held. That is reflected at paragraph [6.16] of the Solicitors Trust Account Guidelines issued by the NZLS Board which reads:[22]

> In other cases you may transfer your fees from the clients balance in your trust account when all of the following apply (refer reg 8):
>
> - You have sent (or handed) a dated invoice to the client or you send the invoice immediately after;
> - a copy of the invoice is available for inspection by the Inspectorate;
> - the amount of the fee is no more than is fair and reasonable for the work done (refer ROPC 3.01).

[22] The copy of the Guidelines referred to is in a handbook dated November 2006. The Trust Account Regulations were promulgated in 1998. It is my understanding that the 1998 Regulations and the associated Guidelines were carried over unaltered from previous versions.

[77] It is likely that many lawyers would have been unaware of the refinements to that position resulting from cases such as *Heslop v Cousins*.

[78] It is important however to note that paragraphs [6.17] of the Guidelines then went on to say:

> In every case you still have obligations to:
>
> - pay the trust money only "as the client directs" (s 89(1)(LPA)); and
> - observe the requirements of regulations 8 and 9 and of ROPC especially rule 3.01 and the requirements to tell any client who objects to the amount of any invoice about the costs revision process in part (viii) of the LPA. Also note particularly the duty to respect the trust of the client and not to promote your own interests to the detriment of the client, and this will apply particularly where a vulnerable client has no other source of advice available.

[79] By disregarding the specific direction in the email of 1 July Ms ZE promoted her own interest ahead of those of her clients. At the review hearing Mr NS advanced the view that Mr AR's actions were driven by a desire to take advantage of the incorrect invoice issued by the firm and to hold the firm to the pre 1 July fees. I can only assume that Mr NS's statements reflect Ms ZE's views, both at the time, and now. That being the case, Ms ZE acted to protect the firm's fees.

[80] The amount at issue in relation to the sale was $57. Ms ZE was protected for her fees on the purchase by the solicitor's lien she had over the file. That would have been required by any new lawyer instructed by Mr and Mrs AR although Ms ZE suggested that may not have been the case.

[81] Ms ZE did not assert a "claim" or "lien" over the funds to protect her outstanding fees and indeed, the provisions of s 113(2) do not seem to have been raised at any point during the Standards Committee investigation or the first LCRO review. The provisions of that section only came into focus in the submissions from counsel for NZLS to the High Court. Instead of asserting any just claim or lien, Ms ZE deducted her fees and delivered what had been referred to as a "statement"[23] to Mr and Mrs AR.

[82] Ms ZE's conduct could be described as a peremptory appropriation of Mr and Mrs AR's money with no attempt to engage in a dispute process. Certainly there seemed to be no attempt to maintain good relationships with Mr and Mrs AR and their somewhat conciliatory follow up email on 4 July was equally promptly rebuffed.

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[23] The document which has been referred to as a "statement" seems to be little more than a copy of the firm's trust account ledger.

[83] I hasten to add that the complaints and disciplinary process has no part to play in directing how lawyers relate to their clients. It seems to me that what Mr and Mrs AR referred to as a lack of professionalism falls predominantly into the realm of poor client relationships.

[84] In *DE v FG* I observed that:[24]

> The Standards Committee noted there was some confusion surrounding the requirements to be fulfilled before a lawyer can deduct fees from monies held in a lawyer's trust account. That situation has arisen following notification by the New Zealand Law Society that it took a different view from that expressed by the LCRO in *A v Z*.

I declined to enter into the debate at that time but expressed the hope that "… this decision will reinforce the findings of the LCRO in *A v Z* with regard to funds held for a specific purpose".[25]

[85] That decision is dated 16 March 2015 which postdates the events in this matter by some four years. However, even at that time, I acknowledged the uncertainties surrounding the law relating to the deduction of client fees and considered " … it would be unreasonable to make a finding of unsatisfactory conduct against [either lawyer] given the acknowledged uncertainty which surrounds [the] issue".[26] I further note here, that it would be equally unreasonable to make a finding of unsatisfactory conduct against a lawyer for not being "prudent" (the term used in the letter from the President) and obtaining Mr and Mrs AR's signatures to the terms and conditions.

[86] In *DE v FG* the matter was resolved by virtue of the fact that the lawyers had undertaken that if the finding was that they had not been entitled to deduct the fees they would be refunded and the outcome of the review relied upon the solicitor's complying with that undertaking. There is no such alternative outcome in this case and in any event there is no issue taken with the quantum of Ms ZE's fees, as there was in *DE v FG*. The fees are payable by Mr and Mrs AR including the increased LINZ fees.

[87] What is left therefore, is the actions of Ms ZE in the face of an expressed prohibition by Mr AR from deducting her fees. I consider that notwithstanding this, Ms ZE was able to assert a claim against the funds for the payment of her fees. However, instead, she appropriated them directly, but the practical outcome would have been the

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[24] *DE v FG* LCRO 86/2014 at [21].
[25] At [22].
[26] At [31].

same. Mr and Mrs AR (and any other client in the same circumstances) would have the same option of disputing either liability for the fees or the quantum.

[88] I am prepared to accept that Ms ZE considered she was acting in accordance with the established rules surrounding deductions of fees. The outcome of this review sought by Mr and Mrs AR was to have their money (together with interest) returned, a written apology from Ms ZE and her "authority to control a trust account revoked". No order is required to have the overpayment of fees refunded[27] and it is my understanding that this has occurred. If not, Mr and Mrs AR have remedies.

[89] In the absence of a finding of unsatisfactory conduct no orders can be made against Ms ZE. I consider the appropriate outcome of this review is to confirm the determination of the Standards Committee to take no further action against Ms ZE, adopting the same approach as taken in *DE v FG*. I acknowledge that this decision does not definitely resolve the questions surrounding a lawyer's ability to deduct fees from funds held in trust, but is an exercise of the discretion vested in Standards Committees and this Office to take no further action on a complaint, where it is not appropriate to do so. The reasons why it is not appropriate to do so, is the very fact that the law has not been resolved, and NZLS has made known its disagreement with the earlier decision of *A v Z* issued by this Office.

Decision

[90] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee dated 8 March 2012 to take no further action is confirmed, modified to the extent of any comments in this decision.

Publication

[91] An anonymised version of this decision will be published on the website of this Office. To the extent that NZLS, either party, or any other person wishes to refer to this decision to contribute towards the discussion relating to a solicitor's right to deduct fees from money held in trust, reference to that anonymised version is authorised pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006.

[27] Mr and Mrs AR paid the first invoice by direct credit and Ms ZE deducted the full amount of her fees subsequently.

DATED this 6th day of May 2016

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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:

Mr and Mrs AR as the Applicants
Ms ZE as the Respondent
Mr NS as the Respondent's representative
The Standards Committee
The New Zealand Law Society

Annexure:

Lawyers and Conveyancers Act 2006

Trust accounts

110 Obligation to pay money received into trust account at bank

(1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—

(a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—

(i) the practitioner; or

(ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and

(b) 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.

(2) An incorporated firm that, in the course of its practice, receives money for, or on behalf of, any person—

(a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of the firm; and

(b) 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.

(3) For the purposes of this section, a practitioner or an incorporated firm is deemed to have received money belonging to another person if—

(a) that person, or a bank or other agency acting for, or on behalf of, that person, deposits funds by means of a telegraphic or electronic transfer of funds into the bank account of—

(i) the practitioner or incorporated firm; or

(ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; or

(b) the practitioner or incorporated firm takes control of money belonging to that person.

(4) A person commits an offence against this Act and is liable on conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1) or subsection (2).

…

113 Protection of money received

(1) No money to which section 110(1) or (2) applies is available for the payment of the debts of any other creditor of the practitioner, related person or entity, or incorporated firm; nor is any such money liable to be attached or taken in execution under the order or process of any court at the instance of any such creditor.

(2) Nothing in section 110 or this section takes away or affects any just claim or lien that a practitioner, related person or entity, or incorporated firm who holds money to which section 110(1) or (2) applies may have against that money.

Lawyers and Conveyancers Act (Trust Account) Regulations 2008

9 Restriction on debiting trust accounts with fees

(1) No trust account may be debited with any fees of a practice (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.

(2) If fees are debited under subclause (1)(a), an invoice must be delivered or posted to the person who has a legal or beneficial interest in the trust account to be debited before or immediately after the fees are debited.

(3) For the purposes of subclause (2), a practitioner or partner in the practice is not to be treated as having a legal or beneficial interest in the trust account to be debited, solely because the practitioner or partner issues the invoice in respect of that trust account.

10 Fees and disbursements paid in advance of invoice

All money paid to a practice in respect of professional services for which an invoice has not been issued, whether described as a retainer or otherwise, must be retained in a trust account until it is—

(a) disbursed on the client's behalf; or

(b) applied in payment of fees in accordance with regulation 9.