LCRO 83/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the ABC Standards Committee
BETWEEN	**MR AR** Applicant
AND	**MS ZE and X** Respondents

DECISION

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

Introduction

[1] Mr and Mrs AR (the ARs) instructed X (the firm), an incorporated law firm of which Ms ZE is a director, on conveyancing matters. The firm transacted the sale of the ARs' existing property including receiving the sale proceeds into the firm's trust account, and took steps towards completing their purchase of a new property. The ARs terminated the purchase retainer before settlement, and Ms ZE deducted the firm's fees for the sale and purchase from the ARs' sale proceeds, before refunding the balance to them.

[2] The ARs' primary complaint is that Ms ZE made deductions from their money without their authority.

[3] Ms ZE said she and the firm had the ARs' authority to deduct its fees because the ARs had received the firm's terms of engagement, which said the firm could make deductions for fees from funds held in their trust account, and had continued to instruct the firm on that basis. She said she and the firm had complied with their obligations under the Lawyers and

Conveyancers Act 2006 (the Act) and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations), and that neither she nor the firm has done anything wrong.

[4] The ARs disagreed, and complained to the New Zealand Law Society (NZLS).

Standards Committee

[5] The Auckland Standards Committee 2 considered the ARs' complaint was against Ms ZE, found that Ms ZE had complied with the Regulations, and on 8 March 2012 decided pursuant to s 138(2) of the Act that having regard to all the circumstances of the case, any further action was unnecessary or inappropriate (the decision).

[6] The ARs were dissatisfied with the decision and applied for a review.

Grounds for Review

[7] The ARs' complaint encompassed a number of concerns, including that Ms ZE sent an envelope to the address they were staying at that was not marked for their attention, and it was opened by other people in the house. The ARs say Ms ZE's failure to properly address the envelope resulted in a breach of their privacy. When the envelope arrived, someone other than the ARs opened it, and the ARs say those people read it, and became aware of their personal financial position.

[8] Ms ZE says it is the firm's usual practice to use window envelopes, but on this occasion it was not her, but someone else at the firm, who handwrote the envelope in question without adding the ARs' names.

[9] There is no evidence that Ms ZE was responsible, or had any direct control over anyone else who may have been responsible, for a breach of the ARs' privacy. While any breach of privacy is regrettable, that aspect of the ARs' complaint will therefore not be considered further on review.

[10] The ARs also say the first sale invoice the firm issued was incorrect, was amended with a lack of transparency and that when they received the replacement invoice they complained to Ms ZE. The ARs say they did not receive the purchase invoice before Ms ZE deducted the fees.

[11] Rule 9(1)(a)[1] requires an invoice to have been issued for a practitioner's fees, and sent to the ARs. Ms ZE says that she personally put a copy of the purchase invoice in the post to

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[1] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

the ARs on 30 June 2011, and although the ARs say they also did not receive a copy of that invoice, I accept Ms ZE's evidence that she sent it. It is unfortunate that the ARs have not received so many of the documents that the firm can show it sent. In the circumstances, the ARs not receiving copies of invoices, while regrettable, does not constitute a professional conduct issue for Ms ZE or the firm. That aspect of the ARs' complaint will therefore not be considered further on review.

[12] The ARs also say that they paid twice for the sale, once by Ms ZE deducting the firm's fees, and once by the ARs paying by internet banking on 1 July 2011. The ARs say that by deducting the firm's fees knowing the ARs had already paid them, Ms ZE knowingly misappropriated money from the funds held to their account in trust.

[13] The firm's final settlement statement shows that the firm's fees for the sale and purchase were deducted on 1 July 2011. The money the ARs paid by internet banking was receipted into the firm's trust account on Friday 8 July, and paid out on Monday 11 July. Although the ARs made that payment, it took a week to arrive. When it did, the firm promptly refunded the overpaid amount. No professional conduct or trust accounting issues arise, so that matter will therefore not be considered further on review.

[14] The final aspect of the ARs' review application relates to the absence of signed terms and conditions authorising the firm to deduct its fees from the funds it held for the ARs in its trust account. This aspect of the review has two facets. The first is Ms ZE's obligation as a lawyer to provide written information on the principal aspects of the services that will be provided to the firm's clients. Although the ARs may not have received the terms of engagement and supporting information, the firm's email records clearly indicate those documents were sent to the ARs at their usual email address. The provision of information matters will therefore not be considered further on review.

[15] However, the second facet, and the major concern of this review, is the allegation that Ms ZE deducted money from the proceeds of the sale of the ARs' property, despite a clear direction from them that she was not to deduct fees from their settlement funds.

Review Issue

[16] The issue on review is whether Ms ZE or the firm breached s 110(1)(b) or (2)(b) of the Act by failing to hold, or ensure that the money was held, exclusively for the ARs, to be paid to the ARs or as the ARs directed.

Jurisdiction

[17] The jurisdiction of a Legal Complaints Review Officer (LCRO) extends to determining, on the balance of probabilities, whether a practitioner or incorporated firm acted in a way that met, or failed to meet, his, her or its obligations under s 110(1) and (2). If a practitioner or firm breaches those obligations, professional conduct consequences may follow.

[18] Section 110(4) establishes criminal liability for a knowing violation of the obligations set out in s 110(1) and (2). The power to commence a prosecution alleging a breach of s 110(4) rests with the NZLS pursuant to s 67(2)(e) of the Act. A conviction under s 110(4) would have to be based on evidence to the criminal standard: beyond reasonable doubt. The LCRO has no jurisdiction over criminal offences.

Practitioner or Incorporated Firm

[19] This review deals with Ms ZE's conduct in her capacity as a lawyer in practice on her own account, and as a director of the firm.

[20] Incorporation does not protect a practitioner from the professional consequences of a breach of s 110(1) or (2), because of the way in which ss 17(2) and 30(2) of the Act operate.

[21] Lawyers in practice on their own account are regulated by s 30(2) which says:

> A lawyer who is a director…of an incorporated law firm is deemed to be practising on his or her own account.

[22] Section 17, which is headed "Liabilities of director or shareholder of incorporated firm", says:

> ...a practitioner who is a director or shareholder of an incorporated firm is subject to all the professional obligations to which he or she would be subject if he or she were in practice on his or her own account.

[23] As a director of the firm, Ms ZE is therefore deemed to be in practice on her own account, and is subject to all of the professional obligations to which she would be subject if she were (in fact) in practice on her own account.

[24] 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. Incorporation would not protect Ms ZE from the professional consequences of a breach of s 110(2). This decision therefore affects both Ms ZE and the firm, and the intituling is modified to include the name of the firm.

Role of the LCRO

[25] The role of the LCRO on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Review Hearing

[26] Both parties attended and participated in a review hearing in Auckland on 18 February 2014, and exchanged further information after the hearing.

Background

[27] In determining the review issue, it is necessary to consider the ARs' instructions to Ms ZE and the firm, and to provide a brief background to the ARs' complaint.

[28] There is no dispute that the ARs instructed the firm in early June 2011 in respect of the sale of their property which was due to settle on 1 July 2011. The instructions also referred to the ARs' proposed purchase (the purchase) which they expected would become unconditional later in June if the sale proceeded as planned.

[29] An email provided by Ms ZE indicates that the firm sent the ARs its terms of engagement for the sale (the sale terms) as an attachment on 13 June 2011. The sale terms incorporated three documents, a letter of engagement, the firm's standard terms of engagement and information for clients. The letter of engagement was addressed to "D AR & BL AR" and bore their postal address of [Address] which was the property they were selling.

[30] The sale became unconditional in mid June 2011 so the ARs were able to proceed with the purchase.

[31] Ms ZE provided an email from the firm to the ARs dated 17 June 2011, confirming the firm had received the agreement for the purchase, advising that matter was currently being processed, and saying that the ARs would receive an initial letter by post confirming the details of the sale and purchase agreement and outlining the services the firm would provide.

[32] Ms ZE provided a copy of an email indicating the firm sent the purchase terms to the ARs at 17:20 on 17 June 2011, and a printout from the firm's system showing that the firm

generated an initial client letter, and an email of the same date saying the firm would send out its terms of engagement for the purchase (the purchase terms) by post.

[33] Ms ZE provided a copy of the purchase terms which again incorporated three documents, a letter of engagement, the firm's standard terms of engagement and information for clients. The letter of engagement was addressed to "D AR & BL AR" and bore their [Address] Street, and email addresses.

[34] The two sets of terms provide for different standard fees for a straight forward sale or purchase, refer to increases to LINZ fees effective from 1 July 2011, and say that fees are to be paid to the firm in cleared funds on or before settlement day. The terms also provide for payment of fees within seven days if the sale or purchase agreement is cancelled, and ask that clients sign and return a copy of the letter. Clients are advised that if they accept the terms orally, or instruct the firm to proceed, the terms will nevertheless be binding.

[35] The firm's standard terms of engagement relating to the sale and the purchase provide for the firm to deduct fees, expenses and disbursements from funds held in the firm's trust account on the client's behalf where the firm has provided an invoice. That provision is reiterated in the "Information for Clients" document.

[36] Between 17 and 23 June various transactional steps occurred, and then on 27 June 2011 a copy of an invoice for the sale was produced for $920, being a fee of $800 plus GST of $120. That invoice was incorrect, and was later amended to show the increased amount of $977, being a fee of $780, a LINZ fee of $80, plus GST of $117. Both versions of the invoice say the fee is to be paid by deduction from the proceeds of sale on settlement and both were sent to the ARs.

[37] At 15:47 on 30 June 2011 the ARs say they emailed the firm requesting account details so they could pay the fee for the sale over the internet. A copy of the ARs' email also indicates the ARs' view, which they confirmed at the review hearing, that the firm's website was misleading in that it claimed the firm had reduced its fees, whereas in fact the ARs' view, having seen both versions of the sale invoice, was that the firm had increased its fees. The ARs say that at this stage they had not received either the sale or the purchase terms so they did not know deductions could be made. They say they had not signed or returned anything authorising Ms ZE or the firm to make deductions from funds held to their account.

[38] The ARs' email of 30 June is relevant on review to the extent that it highlights the beginning of a problem with the relationship between the ARs, the firm and Ms ZE. The email says:

> As a foot note, please stop telling people that you have reduced your fees and added dispursements [sic] on, this is a blatent [sic] lie.
>
> You reduced your "fee" by $20 when dispursenments [sic] were $50.00, and have then added the full $80.00 being the new price on.
>
> So, in fact, you have increased your fees by $30.00.
>
> I'm sure as a legal firm, lies are not a good front line basis for your company?

[39] At 16:09 the person handling the ARs' file at the firm sent an email to the ARs saying "Hi [Mr AR], From now on can you please email [Ms ZE] directly on..."

[40] After sending the email at 15:47, the ARs went to the firm's offices and spoke with Ms ZE that afternoon. Both parties agree the exchange was heated, and that the increase to the sale invoice was discussed.

[41] Ms ZE attributed the increase to the rise in LINZ fees referred to in both the firm's sale terms, and its purchase terms. The ARs said they did not receive either of those documents, and that the increase was not to LINZ fees but was an increase to Ms ZE's fees. The ARs said they told Ms ZE they wanted to uplift their files immediately. Ms ZE said she told the ARs that if they refused to pay, the firm would not complete their sale the next day, which would have left the ARs exposed to the purchaser for late settlement penalties.

[42] The ARs then terminated the purchase retainer, and before leaving the office, agreed with Ms ZE that they would pay the amended 27 June sale invoice to ensure that the sale would settle the next day.

[43] Ms ZE says that she arranged for an invoice to be generated for the purchase on 30 June 2011 for $690 (a fee of $600 plus GST of $90), and that she personally put that invoice in the post to the ARs. The purchase invoice was addressed to "Mr & Mrs AR", did not bear any postal or email address, said that the due date was 30 June 2011, and that "Cleared funds should be deposited into [the firm's] Trust Account".

[44] After their heated discussion on 30 June 2011, the ARs sent two emails to the firm on 1 July 2011 before their sale settled. These emails are crucial to the outcome of this review. The first of the emails was sent at 11:19 and said:

> As yet we still haven't received your bank account details to allow us to pay you – this is the third request.

> We have separate banking arranged to pay the conveyancing fees, and **we expressly forbid you from making any deductions from the proceeds of sale to cover your fees and charges**. If you do not wish to be paid by internet banking we will bring you cash, as you have previously advised that you do not accept cheques (other than bank cheques) or credit card. Again we do not allow you to take your fees from the proceeds of sale.
>
> Awaiting your advisement of account details or preference for cash.
>
> (emphasis added)

[45] It therefore appears that the ARs had either overlooked, or not received, the email recorded by the firm's document management system as being sent to them on 23 June 2011 which attached the firm's deposit slip as the ARs had requested. More significant, however, is the ARs' clear direction expressly forbidding Ms ZE from making any deductions from the proceeds of sale to cover the firm's fees and charges.

[46] It appears that the ARs then received notification of the firm's account details, because at 14:09 on 1 July 2011 they sent the firm an email advising they had transferred $920 by internet to pay the sale invoice, and setting out the details of the internet banking transaction.

[47] After the review hearing Ms ZE provided a copy of the bank's record of the settlement transaction which showed that settlement funds had been paid into the firm's trust account on 1 July 2011 by the purchaser at "15:06:11". The deductions for fees were made after the firm received the settlement funds in the afternoon of 1 July 2011, and more significantly, after the ARs had sent their email to the firm directing it not to make any deductions from the proceeds of sale.

[48] It is clear from the two emails the ARs sent in the morning of 1 July 2011 that they had sent their direction forbidding deductions being made for fees from the proceeds of the sale of their property before the firm received settlement funds from the purchaser at 15:06:11 that day.

[49] At the review hearing the ARs said that the first time they realised the deductions had been made, contrary to their express direction, was when they received correspondence enclosing the firm's trust account statement on 5 July 2011. The statement showed transactions recorded up to 1 July 2011, including receipt of the sale proceeds, deductions made from those for the sale invoice of $977, and the purchase invoice of $690, and the

$500 retention to pay water rates. The balance of the sale proceeds was shown as being paid to the ARs, and they do not dispute receiving that.

[50] The ARs said that they emailed Ms ZE the next day expressing their dissatisfaction with the way she had dealt with their money. They confirmed they had received the firm's trust account statement by post, that it showed Ms ZE had deducted fees for the sale that they had already paid by internet on 1 July, and "a further $690 deducted for reasons unknown, without invoice and without prior advisement".[2] The ARs' commented on the water rates, and asked Ms ZE to return "$1,894.84 (deducted fees plus balance of water account)"[3] to their account, saying:

> We request that this money is returned to our bank account immediately as you were not entitled to deduct this from the trust account.
>
> - The quantum of the fees was in dispute
>
> - You were expressly forbidden from deducting any fees in an email on Friday 1st July.
>
> - You were aware of the intention to pay the account independently of the proceeds of sale, multiple requests for bank account details and an attempted delivery of cheque payment reinforced this intention
>
> - You were paid fees for the sale of the property on the 1st of July, confirmation of payment (bank transaction confirmation) was emailed
>
> - Fees were paid to you as per your invoice dated 27th June 2011, in accordance with the verbal contract into which was entered
>
> - We were not advised of the basis on which any additional fees were to be charged, the charge amount nor your intention to deduct it from the proceeds of sale.
>
> - We have not received an invoice for the additional charges, nor been advised of the availability of such an invoice to view.[4]

[51] There does not appear to have been any response to that email until after the firm paid the final balance to the ARs on 19 July, and issued its final trust account statement. The final statement recorded the amounts received on the sale transaction, showed deductions

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[2] Email ARs to ZE (6 July 2011).
[3] Above n 2.
[4] Above n 2.

of $977 and $690 for two invoices, both described as "Sales Invoices", payment of the water rates and reimbursement of the balance to the ARs. It also shows that the $920 the ARs had paid on 1 July by internet to cover the sale invoice was receipted into the firm's trust account on Friday 8 July 2011, and paid out to the ARs the following Monday, 11 July.

[52] The ARs are adamant that they did not authorise Ms ZE or the firm to make any deductions from their money held in the firm's trust account, and specifically directed Ms ZE and the firm to make no deductions for fees.

[53] Ms ZE's position is that the ARs agreed to her making deductions for the firm's fees from the proceeds of sale because they had continued to instruct the firm after they had received the sale terms and the purchase terms. Her view was that the authority the ARs had given was irrevocable, and they could not change the terms of their agreement with the firm after the firm had acted on the ARs' instructions. She says she has met all of her obligations under the Act and the Rules.

Discussion

[54] The focus of this review is on Ms ZE's compliance, in her capacity as a director of the firm, with s 110, which regulates lawyers' conduct of their trust accounts. Section 110 says:

> **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 summary conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1) or subsection (2).

[55] The obligation imposed on the firm, and Ms ZE, under s 110(1)(b) and (2)(b) was identical: to hold the money, or ensure that the money was held, exclusively for the ARs, to be paid to the ARs or as the ARs directed. Section 110 creates statutory duties with which lawyers must comply, and imposes professional obligations on lawyers. Although Ms ZE says dated invoices had been issued and sent to the ARs in respect of the fees for the sale and the purchase, and that copies of those were available for inspection, that is not where s 110 is directed. Section 110 is directed towards ensuring lawyers lawfully handle other people's money.

[56] The ARs say they specifically instructed Ms ZE initially on 30 June and again on 1 July 2011, in writing, that she was not authorised to deduct fees from their money. The ARs rely on the LCRO decision of *A v Z*,[5] which the Committee referred to but distinguished, in the decision under review. *A v Z* is authority for the proposition that before a lawyer can lawfully make deductions from funds held on trust in the lawyer's trust account the lawyer must do two things: first the lawyer must have given notice of his or her intention to deduct monies from the monies held in trust; and second, the lawyer must have received a direction from the money's owners to make the deduction. *A v Z* says that the lawyer is at risk if he or she assumes a deduction can be made from funds held in trust, but cannot provide evidence by producing a written authority.

[57] The ARs situation is slightly different, because there is clear evidence that the ARs directed Ms ZE and the firm not to make deductions from their sale proceeds for fees only hours before Ms ZE did exactly what the ARs had directed her not to do. Ms ZE received the ARs' sale proceeds into the firm's trust account, then with no regard to the ARs'

[5] *A v Z* LCRO 40/2009.

direction, she made what she considered to be the correct deductions for the firm's fees before reimbursing the balance of the ARs' money to them.

[58] Ms ZE and the firm are therefore in breach of s 110(1)(b) and (2)(b) of the Act because, in the course of her practice, she received money into the firm's trust account for or on behalf of the ARs, and failed to hold their money, or ensure that their money was held, exclusively for them, to be paid to them or as they directed.

Unsatisfactory Conduct – Section 12

[59] Ms ZE's conduct breaches the Act, and falls within the definition of unsatisfactory conduct in s 12(c) of the Act which says:

> In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means-
>
> ...
>
> (c) conduct consisting of a contravention of this Act...

Outcome

[60] In the circumstances the Committee's decision pursuant to s 138(2) of the Act that having regard to all the circumstances of the case, any further action was unnecessary or inappropriate is therefore reversed.

[61] The decision is modified to record, pursuant to s 152(2)(b)(i) and (ii) of the Act, that Ms ZE's breaches of the Act on her own behalf of s 110(1)(b), and as a director of the firm of s 110(2)(b), constitute unsatisfactory conduct under s 12(c).

Orders under s 156

[62] The LCRO has the power on review to make orders that a Standards Committee may make under s 156 of the Act once a determination of unsatisfactory conduct has been made under s 152(2)(b). At this stage I am considering the full range of orders that are available under s 156, and am mindful that the parties have not yet had the opportunity to provide submissions on penalty. The parties are invited to make submissions as to penalty, and to file those with this Office by 21 April 2014.

[63] I am also mindful that I put to Ms ZE at the review hearing on 18 February 2014 that she had apparently deducted money in breach of s 110. Neither party has indicated that Ms ZE or the firm has voluntarily taken any steps since the review hearing to reimburse the ARs for any amount of money. In the circumstances it is appropriate to make an interim

order with immediate effect under s 156(h)(i) to provide the ARs with relief from the consequences of Ms ZE's error in deducting fees in the face of a direction from them to the contrary.

[64] Section 156(h)(i) enables the LCRO to:

> Order the practitioner... or incorporated firm... -
>
> (i) [T]o rectify, at his or her or its own expense, any error or omission; ...

[65] It is possible for Ms ZE and the firm to rectify the error at her or its own expense. The error was deducting fees in contravention of the ARs' direction. That error can be rectified by Ms ZE or the firm promptly refunding the fees to the ARs.

[66] The ARs confirmed at the review hearing that they had agreed with Ms ZE on 30 June that they would pay the fee of $977 to enable the sale to proceed, so there will be no order with respect to the amount of the sale invoice.

[67] The real dispute arose in respect of the invoice for the ARs' purchase, which totalled $690. That sum is therefore specified in the order pursuant to s 156(h)(i) that requires Ms AR and the firm to refund the sum of $690 to the ARs.

[68] To enable Ms ZE and the firm to make this payment as soon as possible, the ARs should provide Ms ZE with details of the account to which the payment can be made on receipt of this decision (the ARs' designated account).

Costs

[69] The LCRO has broad discretion to order costs as she thinks fit under s 210 of the Act. The LCRO's Costs Guidelines[6] will be relevant in making costs orders. As the parties have not yet had the opportunity to make submissions on costs, they are invited to do so by 21 April 2014.

Decision

Pursuant to section 211 of the Lawyers and Conveyancers Act 2006 the Committee's decision is:

a. Reversed;

b. Amended to record a finding under section 152(2)(b)(i) that Ms ZE's conduct in breaching s 110(1)(b) constitutes unsatisfactory conduct under s 12(c);

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[6] LCRO Costs Orders Guidelines June 2009.

c. Amended to record a finding under section 152(2)(b)(ii) that the firm's conduct in breaching s 110(2)(b) constitutes unsatisfactory conduct under s 12(c); and

d. Amended to impose an interim order under section 156(h)(i) requiring Ms ZE and the firm to rectify, at her or its own expense, the error in deducting the purchase fee of $690 by refunding that sum to the ARs' designated account by 14 April 2014.

DATED this 2nd day of April 2014.

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Dorothy Thresher
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 AR as the Applicant
Ms ZE as the Respondent
The ABC Standards Committee
The New Zealand Law Society