

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [City] Standards Committee [X]

BETWEEN

A&B DE

Applicants

AND

FG and JK

Respondents

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

Introduction

[1] Mr and Mrs DE seek a review of the determination by [City] Standards Committee [X] to take no further action in respect of their complaints concerning the conduct of Mr FG and Mr JK, partners in the legal practice MN.

[2] Mr and Mrs DE made a number of complaints about MN. They relate to matters occurring in the first quarter of 2011 and are well described in the Standards Committee decision.

[3] In their application for review, Mr and Mrs DE initially sought a review of all aspects of their complaint but subsequently advised that they withdrew all of their “complaints apart from the section headed ‘debiting of trust account’”.¹

Background

[4] Mr and Mrs DE were sued by a builder who had carried out work for them for payments due under a building contract. They disputed liability and instructed Mr JK to act on their behalf. Mr FG assisted Mr JK on aspects of the file.

¹ Email DE to LCRO (12 August 2014).

[5] On 24 March 2011, the DEs paid the sum of \$10,911.70 into MN's trust account for the purpose of making a settlement offer to the builder. That offer was made, accompanied by a cheque from MN. The offer was not accepted and the cheque was not presented for payment.

[6] On 30 March 2011 and 10 June 2011, MN rendered two bills of costs, the first for \$2,493.75, and the second for \$764.88, both including GST and disbursements. These bills of costs were deducted from the funds held by MN before the balance was transferred to the DEs' new lawyers, QR.

The complaints and the Standards Committee decision

[7] The DEs made several complaints about the conduct of Messrs JK and FG which were summarised by the Committee:

- Unauthorised deduction of client funds held in trust account.
- Fees charged for negligent advice.
- Breaches of rr 2.2 and 2.3 Conduct and Client Care Rules² (acting in a frivolous and vexatious manner in court proceedings and using legal processes to unnecessarily protract proceedings).
- Attempting to use privileged information in court documentation in support of their defence without the consent of the DEs.

[8] In each case, the Committee determined to take no further action and provided its reasons for doing so.

Review

[9] Both parties have consented to this review being conducted on the papers pursuant to s 206 of the Lawyers and Conveyancers Act 2006. This allows the Legal Complaints Review Officer (LCRO) to conduct a review on the basis of all the information available and I consider that the review can be adequately determined in the absence of the parties.

[10] Mr and Mrs DE have advised that they only wish to pursue a review of the determination relating to the deduction of the fees from money held. Although I am not constrained by the applicants' request in this regard, the focus of the review is on the

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

issues raised by them. I have considered the material relating to the remaining issues and confirm the decision of the Standards Committee in that regard. For the sake of completeness I adopt the reasoning of the Standards Committee as my reasons for that decision, subject to the comments below.

Fees

[11] Two bills of account were rendered by MN, one on 30 March 2011 for \$2,125 plus GST and disbursements, and the second on 10 June 2011 for \$650 plus GST and disbursements. The DEs lodged their complaints on 27 March 2013. Issues were raised and discussed by the Committee with regard to reg 29 of the Standards Committees Regulations³ which require some comment.

[12] Reg 29 provides:

If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the complaint is referred determines there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs-

- (a) was rendered more than 2 years prior to the date of the complaint; or
- (b) relates to a fee that does not exceed \$2,000 exclusive of goods and services tax.

[13] Mr and Mrs DE lodged their complaint on 27 March 2013. The complaint form referred to "MN" as the lawyer complained about. The Complaints Service processed this as a complaint against Mr FG who responded to the complaint. In his response, Mr FG noted that Mr JK and another member of the firm were also involved. The Complaints Service then wrote to Mr JK on 30 April 2013 to request his response to the complaint.

[14] Mr JK responded, by noting that the initial complaint related to the complaint against Mr FG, that reg 8 of the Standards Committees Regulations required Mr and Mrs DE to lodge a new complaint against him, and any new complaint would be out of time insofar as the complaint about fees was concerned.

[15] The Standards Committee took the view that the complaint referred to MN, and it was the Complaints Service which processed this initially as a complaint about Mr FG, whereas it should (or could) have processed the complaint about Mr FG and Mr JK.

³ Lawyers and Conveyancers Act (Lawyers:Complaints Service and Standards Committees) Regulations 2008.

Consequently, it took the view that the complaint about the fees rendered in the account dated 30 March 2011 was not affected by reg 29.

[16] I concur with that reasoning. In addition, I note that the complaint was not so much about the quantum of the fee, but the fact that MN had provided incorrect advice, for which the DEs contend they should not have to pay. On this basis, the complaint was about conduct, not the quantum, and was not affected by reg 29.

[17] The Committee however determined that the second account dated 10 June 2011 for \$650 plus GST and disbursements, was caught by reg 29 because it was for less than \$2,000. The Committee therefore declined to consider the complaint relating to that bill.

[18] The same comment is made about this bill, namely that the complaint concerned the quality of the legal advice provided, and was not therefore a complaint about a bill of costs in terms of reg 29. In addition, this Office has on many occasions⁴ taken the view that where bills of costs relate to the same matter, they should be treated as a single bill of costs, and all bills considered. That is the approach that should have been taken in this regard.

[19] Nevertheless, the Standards Committee did consider both bills of costs on the basis of the allegedly negligent advice. Having done so, the Committee determined both bills of costs were fair and reasonable and I do not disagree. In addition, Mr and Mrs DE have indicated they do not wish to pursue this issue, and so it is now dealt with.

The deduction of fees

[20] The one issue that Mr and Mrs DE wish to pursue on review, relates to their complaint that MN deducted costs from funds held by the firm before transferring the balance to QR

[21] 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*.⁵

⁴ See for example *AA v BK, BM and BK* LCRO 264/2012.

⁵ *A v Z* LCRO 40/2009.

[22] It is tempting to try and resolve the uncertainties that exist in this area but because of the specific facts of this case I do not need to do so, and have refrained from perhaps further muddying the waters. However, it is hoped this decision will reinforce the findings of the LCRO in *A v Z* with regard to funds held for a specific purpose.

[23] Mr and Mrs DE were in dispute over a payment claimed by their builder. A strategy adopted at one stage of the dispute was to present the builder with a cheque in settlement of the dispute on a “full and final basis”. To this end Mr and Mrs DE lodged the sum of \$10,911.70 with MN for the express purpose of enabling Mr JK to forward a cheque to the builder on the basis discussed. Mr JK did this, but the cheque was never banked by the builder, and it was ultimately cancelled by MN. However, it is beyond dispute that the funds were paid into MN’s trust account for the purposes of settlement only. The DEs did not ever communicate to MN that the funds were then to be held for general purposes.

[24] A leading case in this regard is *Heslop v Cousins*.⁶ In that case the Heslops paid funds into Mr Cousins’ trust account for the purpose of repaying a mortgage to the BNZ to enable the sale of a property to proceed. However, Mr Cousins refused to settle until his fees were paid in full. The Heslops were unable to do that and the sale collapsed.

[25] The Heslops then instructed Mr Cousins to release all funds held in trust on their behalf to another solicitor. Mr Cousins refused to do so until his fees were paid in full, claiming that he had a lien over or right of set off to the funds held, and also that he was entitled to deduct fees from funds held on trust where an invoice had been issued.

[26] The Court held that the practitioner had not been entitled to retain the trust funds until payment of fees. The funds had been held for the particular purpose of facilitating the sale of the property.⁷

A solicitor had no lien or right of set off if funds had been deposited into the solicitor’s trust account for a particular purpose. In that situation the solicitor was obliged to use the funds for the particular purpose for which the funds had been entrusted to the solicitor.

[27] The Court also held that a solicitor could pay out client funds only to the client or in accordance with a direction from the client pursuant to s 89 of the Law Practitioners Act, the equivalent of which is s 110 of the Lawyers and Conveyancers Act 2006.

⁶ *Heslop v Cousins* [2007] 3 NZLR 679 (HC).

⁷ Above n 6, at [190].

Regulation 8 of the Trust Account Regulations 1998 (now reg 9 Trust Account Regulations 2008) which dealt with the debiting of trust accounts with fees, had to be read subject to that overriding legislative obligation.

[26] That principle has not changed and it is clear that MN were not able to deduct fees held for the specific purpose of settling a dispute with the builder.

[27] In addition, notice of the intention to deduct fees must be communicated to a client before payment is deducted and that had not occurred in this instance.

The undertaking

[28] In his submissions to the Standards Committee Mr FG said:⁸

If either Mr FG or Mr JK is found not to have been entitled to deduct fees for account then we hereby undertake that any deducted fees would forthwith be refunded.

[29] The Committee seemed to rely on this in its determination to take no further action in respect of the complaint.⁹ However, the Committee did not find that MN were not entitled to deduct funds and the undertaking has not been fulfilled. That situation needs to be rectified. I have found that MN were not able to deduct fees from the funds held in its trust account and the undertaking should be fulfilled.

Result

[30] I acknowledge the uncertainty surrounding the right of a lawyer to deduct fees from funds held in trust. MN considered they had fulfilled their obligations by delivering invoices prior to deduction of the fees. However, they have overlooked the requirements of *Heslop v Cousins* and also would not seem to have provided the requisite terms of engagement to Mr and Mrs DE.¹⁰

[31] In the circumstances I consider it would be unreasonable to make a finding of unsatisfactory conduct against either Mr JK or Mr FG given the acknowledged uncertainty which surrounds this issue. The exercise of this discretion is not intended

⁸ Submissions FG, 19 December 2013, at [5.6].

⁹ Standards Committee determination, 13 March 2014, at [61].

¹⁰ A lawyer must be able to prove that terms of engagement have been given to a client. The only conclusive means of doing so is to be able to produce a communication to the client enclosing the terms and conditions. In addition, the practice recommended by the Law Society in its memorandum dated 13 August 2009 is that if fees are to be deducted, the lawyer should have the firms terms and conditions in which the intention to deduct fees is recorded signed by the client.

in any way to lessen or alter the finding in [30] and the precondition attaching to compliance with the undertaking has been met.

[32] I consider that a period of two weeks from the date on which Mr and Mrs DE communicated to MN the means by which payment should be made is sufficient time for the undertaking to be complied with. If it is not I reserve the right to vary this decision to make a finding of unsatisfactory conduct against both practitioners and impose an order pursuant to s 156(1) of the Lawyers and Conveyancers Act 2006 to give effect to this decision.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed but modified as set out in this decision.

DATED this 16th day of March 2015

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 DE as the Applicants
Mr FG and Mr JK as the Respondents
Mr TU as a related Person under s 213
[City] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice