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 Waikato Bay of Plenty Standards Committee 1
BETWEEN	**KEYNES LTD** of Auckland
	Applicant
AND	**SLOUGH** a firm of Tauranga
	Respondent

DECISION

[1] This is a review of a decision of the Waikato Bay of Plenty Standards Committee 1 in respect of a complaint by Keynes Ltd (Keynes) against Slough. Keynes complained in respect of the work undertaken by Slough and the amount charged for it. The work was proposed litigation to recover unpaid debts. It transpired that the debtors were bankrupt. The essence of the complaint is that if Slough had acted diligently they would have discovered the bankruptcy prior to undertaking much of the work. If that had been the case the amount charged would have been considerably less.

Proper Respondent

[2] I note at the outset that this complaint has been dealt with as being against Slough-the law firm which dealt with this matter. G of that firm undertook most of the work. Persons or entities which may be complained against are set out in s 132 of the Lawyers and Conveyancers Act. That section provides that complaints may be made against practitioners, incorporated firms, and employees of practitioners and incorporated firms. It appears that Slough is a partnership and not an incorporated firm and as such the complaint should have been considered as being against one or more lawyer practitioners personally. It appears that in this case the complaint ought to

properly have been considered to be against G. There is, however, little to be gained in seeking to correct this error at this late stage. In any event the complaint was dealt with in a substantive manner and did not rest on any niceties of the identity of the respondent. In substance this complaint was dealt with, as a complaint against the conduct of G. This review will proceed on the same basis as that of the complaint itself.

Background

[3] Keynes was owed money by two individuals T and S in respect of loans made in 2002. They sought advice from Slough as to what recovery steps might be taken. Initial enquiries were made in 2002. In 2006 further enquiries were made and Slough provided a letter of advice outlining prospective steps on 21 March 2006. In that letter under a heading “action to be taken” Slough stated;

> We therefore recommend investigating the financial means of S and T to meet any judgment debt, as a first step.

The letter then outlines steps that Slough could undertake in such an investigation.

[4] It is also clear that Keynes (quite properly) did not want to unnecessarily expend funds. No further instructions were forthcoming until 20 March 2008, at which time firm instructions to proceed were received by Slough. Slough was also aware that the limitation period was running out. Slough advised Keynes to investigate whether the proposed defendants had assets warranting litigation being taken and it appears that Keynes made such inquiries in March 2008. This is evidenced by an email from F (of Keynes) to X (of Slough) of 30 March 2008 outlining the information gathered and instructing that proceedings should be instituted. This appears to follow on from a telephone call of 26 March 2008 between X and F in respect of which a file note exists. That note records that X advised F to investigate “what assets they own”. It was agreed that once the address of the parties had been ascertained Slough would “get title searches, company searches and PPSR searches”.

[5] G of Slough emailed F of Keynes on 20 May 2008. In that email he explained that on making some enquiries he was put on notice that something may be amiss which prompted him to look at the Insolvency Office website. That disclosed that S and T were both bankrupt. He opined that in light of this litigation was futile. On 3 June 2008 an invoice for the work to date was rendered in the sum of $ 3751.88. It was stated that the bill was reduced by 25% to take account of the fact that the proposed defendants were bankrupt.

[6] The Standards Committee considered this primarily to be a costs complaint. A costs assessor was appointed. His view was that the bill in this case could properly be reduced. He was also of the view that it was not incumbent on a lawyer to determine whether a proposed defendant was bankrupt. In the event the Standards Committee exercised its own judgement in the matter (as it was obliged to do) and did not adopt the view of the costs assessor as to the reduction in the fee. I note that it did not depart from the view of the costs assessor lightly and a substantial explanation of why such a course was considered proper was provided to the Committee by one of its members.

[7] It is apparent from the Standards Committee file that it did turn its mind to the question of whether or not it was incumbent on Slough to determine whether or not a proposed defendant was solvent. It reached the conclusion that there was no obligation on a lawyer to determine the solvency of a proposed defendant and as such there had been no negligence by Slough in this regard. I note that this finding was not reflected in the decision of the Committee which focussed on whether the costs were reasonable only. In so far as the decision of the Committee rested on the finding that there had been no negligence and therefore the work undertaken was justified it should have been included in the decision.

[8] The parties 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 the Standards Committee.

[9] I consider that the primary issue for determination on this review is whether the work was justified in light of the failure of Slough to detect that the proposed defendants were bankrupted before they undertook substantial work on the matter. Put another way, did Slough negligently fail to determine the bankruptcy of the proposed defendants? The Standards Committee answered that question in the negative.

Consideration

[10] The costs assessor in his report (which was provided to the parties) was of the view that “it is not incumbent on the law firm, unless asked, to check on the solvent/insolvent status of any particular potential defendant”. The Standards Committee effectively adopted that view as its own.

[11] In so far as the Costs Assessor’s statement was taken to be general application it may have been expressed somewhat too widely. In particular, whether or not a

lawyer should take a particular step is a matter to be determined on the facts of each case. I note also that the step that Keynes alleges Slough should have taken in this case was ascertaining whether or not two named individuals were bankrupt. That is a straightforward administrative task which takes only a few minutes. I observe also that the litigation contemplated was in respect of people whose solvency was clearly in question. Not only was the proposed litigation itself in respect of loan obligations that had been defaulted on, but also the parties were actively discussing whether or not the proposed defendants were worth suing. Had that been the end of the matter there is a strong argument that it was incumbent on Slough to ascertain whether or not the defendants were bankrupt.

[12] However, in this case it appears that it was agreed that Keynes should undertake at least some of the investigative work in respect of the solvency of the proposed defendants. This was for the quite reasonable purpose of ensuring that costs were kept to a minimum. From the email from F to X of 30 March 2008 it appears that Keynes undertook the various electronic searches through the Personal Property Securities Register and Land Information New Zealand. In that email specific instructions were given to Slough to make a further search to ascertain whether the proposed defendants owned any real estate in New Zealand. It was also the case that limitation was running and it was important that proceedings were filed in a timely way to ensure that they were not statute barred.

[13] The question is not whether Slough did an exemplary job. It may be observed that Slough would have done a better job for its client had one of the lawyers involved turned his or her mind to the question of bankruptcy earlier. Rather the question is whether in all of the circumstances in failing to do so it fell short of the standard of competence and diligence that is to be reasonably expected of a lawyer. It was the view of the Costs Assessor and of the members of the Standards Committee this was not negligent. I note that the Standards Committee was comprised of a number of experienced lawyers and was informed by lay membership. It should therefore be with great caution that I depart from the Committee’s opinion about what falls short of reasonable professional standards. In this case I am satisfied that the Standards Committee was correct to conclude that Slough was not negligent in failing to determine that the proposed defendants were bankrupt prior to May 2008.

Transitional provisions

[14] The conclusion of the Standards Committee is reinforced by Section 351(1) of the Lawyers and Conveyancers Act. That section sets out the basis upon which complaints service of the New Zealand Law Society may consider complaints regarding conduct which occurred prior to 1 August 2008 (as in this case). That section provides that:

> If a lawyer or former lawyer or employee or former employee of a lawyer is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

[15] In particular, that section provides that complaints may only be made in respect of "conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982". The standard for disciplinary intervention in cases of negligence under the pre-1 August regime is set out in 106(3)(c) or 112(1)(c) of the Law Practitioners Act 1982. Those sections require any negligence or incompetence to be "of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute". In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514, 533 the High Court considered that for negligence, to reach the disciplinary threshold must be:

> of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

[16] In light of this it was only open to the Standards Committee to make an order against Slough if negligence of a serious kind such that it breached the professional standard outlined above had occurred. In this case, even if the lapse had been considered if negligent or incompetent, it could not be considered to be of such degree

as to reflect on a lawyer's fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute in the eyes of reasonable and responsible members of the public. Accordingly the Standards Committee was correct in its determination that no further action was necessary or appropriate.

Result

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

DATED this 31st day of July 2009

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Duncan Webb

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

Keynes Ltd as applicant
Slough as respondent
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society