IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2008-409-002590
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IN THE MATTER OF	appeals pursuant to s118 Law Practitioners Act 1982 and s360 of the Lawyers and Conveyancers Act 2006
BETWEEN	EDWARD ORAL SULLIVAN Appellant
BETWEEN	JOHN ROBERT MCGLASHAN Appellant
AND	COMPLAINTS COMMITTEE OF THE CANTERBURY DISTRICT LAW SOCIETY Respondent

Hearing: 20 July 2009

Court: Panckhurst J
Gendall J
French J

Counsel: H Rennie QC and M E Parker for Appellants
C A McVeigh QC for Respondent

Judgment: 3 August 2009

JUDGMENT OF THE COURT

The charges

[1] The practitioners are partners in a provincial firm of solicitors. They were each charged with breaching s89(1) of the Law Practitioners Act 1982, which relevantly provides:

> All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, …

The charges also invoked the Solicitors Trust Account Rules 1996, specifically r3 (by which a solicitor must deal with a client's assets only in accordance with the instructions of the client) and r5(7) (by which a solicitor may only make payments from a client's trust money pursuant to the client's instruction or authority).

[2] Each practitioner was charged with "knowingly" causing a payment to be made contrary to the direction of a client or, in the alternative, causing the payment to be made contrary to direction, albeit not knowingly. We shall return to this distinction between the charges in due course.

[3] The client was Cawdor Holdings Limited. The firm received a sum of almost $100,000 into its trust account for the credit of Cawdor. Directors of that company gave instructions as to the disbursement of the fund. Those directions were followed, but in addition a sum of $22,022.15 was paid from the fund to the bank account of the firm in satisfaction of two bills of costs rendered to one of the directors of Cawdor and his wife. It was this payment which gave rise to the alternative charges.

[4] The New Zealand Law Practitioners Disciplinary Tribunal considered the charges at a disciplinary hearing on 3-4 October 2008. At the conclusion of the hearing the Tribunal found the charge of knowingly causing a payment to be made contrary to direction established against both practitioners. The decision was announced, with detailed reasons to follow. Submissions as to penalty were then heard. The Tribunal censured the practitioners, ordered payment of a financial penalty of $5,000 and payment of $5,000 compensation by each, plus payment of costs totalling $28,754 as to a half share each. An application for name suppression was declined.

[5] The present appeals are against the findings of professional misconduct in relation to charge 1 against each practitioner. There is no appeal against penalty, save for the order declining name suppression.

[6] The practitioners' case both before the Tribunal and on appeal was that at the time the $22,022.15 deduction was made they each honestly believed they were

entitled to take the fees and, hence, that they each acted in good faith. In light of subsequent developments, however, the appellants accepted that their interpretation of matters was mistaken, such that s89(1) was breached, but not that they acted knowingly so as to be guilty of professional misconduct.

[7] At least before us this line of defence gave rise to a submission (from Mr McVeigh QC) that it was questionable whether the Complaints Committee was required to negative an honest but mistaken belief in order to establish a knowing contravention of s89(1) and, thereby, professional misconduct. Again, we shall return to this issue in due course.

The primary facts

[8] These facts were not, or little, in dispute. This summary is essentially derived from the decision of the Tribunal.

[9] The practitioners' firm acted for brothers, John and Ross Annand for many years. Mr McGlashan was John Annand's solicitor and Mr Sullivan acted for Ross Annand. The brothers were the majority shareholders in A B Annand & Company Limited (the Company).

[10] In March 1997 the shares in the Company were sold to a third party. At that time a wholly-owned subsidiary of the Company had a claim pending in Fiji against a bank. It was a term of the share sale that the benefit of the legal claim was not included in the sale and purchase of shares.

[11] To that end the subsidiary company assigned its rights and interests in the claim to Cawdor. The deed of assignment was dated 21 March 1997. Mr Sullivan acted for the Annand brothers and the Company in relation to the share sale, and the assignment of the legal claim, which was duly perfected by notice of the assignment being given to the defendant bank pursuant to s130 of the Property Law Act 1952.

[12] Following completion of the sale and assignment transactions, Mr Sullivan passed control of the legal proceeding to Mr McGlashan. The claim was not

resolved until 20 October 2005. That day, a settlement was achieved at mediation. The bank and Cawdor entered into a deed of settlement. Relevant for present purposes is a sum of $100,000, which was paid by the bank to Cawdor through payment into the trust account of the firm of which Messrs Sullivan and McGlashan are partners. Cawdor did not have its own bank account. The deed of settlement was signed by John and Ross Annand as directors of Cawdor, with Mr McGlashan witnessing their signatures. He also acted for Cawdor at the mediation.

[13] The Tribunal found that on the day of the settlement:

> [19] … Ross and John, as directors of Cawdor, gave the following instruction on behalf of Cawdor to [the firm] through Mr McGlashan in relation to the settlement proceeds:
>
> (a) Deduct [the firm's] costs and disbursements in relation to the incorporation of Cawdor which had been previously billed but not paid;
>
> (b) deduct [the firm's] costs and disbursements in respect of the [bank] claim from the NZ$100,000; and
>
> (c) pay the balance into a BNZ joint bank account of John [Annand] and his wife.

John Annand, in the presence of his brother, supplied Mr McGlashan with a BNZ deposit slip.

[14] To backtrack for a moment, when Mr Sullivan incorporated Cawdor in 1997 the original shareholder was a nominee company of the firm, Strathallan Nominee Company Limited. It held the shareholding in trust for the former shareholders in the Company. John and Ross Annand each held 40 per cent of the shares, while two senior employees of the Company each had 10 per cent shareholdings. These interests, however, were subject to options to purchase in favour of the Annand brothers.

[15] Throughout the time that Cawdor's legal claim against the bank was unresolved, Strathallan remained the legal owner of the Cawdor shareholding. However, the beneficial owners of the shares remained the Annand brothers and the two former senior employees of the Company.

[16] In the days following the mediated settlement Mr McGlashan instructed his firm's office manager to disburse the settlement proceeds in terms of the instructions he had received from the Annand brothers. That is, costs owing for the incorporation of Cawdor and in relation to the mediation itself were to be deducted and paid to the firm, with the balance to be paid to the joint bank account of John Annand and his wife.

[17] However, matters changed after a discussion between Mr McGlashan and Mr Sullivan. The latter explained to Mr McGlashan that there were outstanding fees owed to the firm by Ross Annand and his wife. These were rendered in separate invoices dated February 2003 which totalled $22,022.15. Mr Sullivan suggested that these fees should likewise be deducted from the $100,000 fund. Mr McGlashan's immediate response was that this deduction could not be made, since the fund belonged to Cawdor, and its disbursement was the subject of directions already received from the Annand brothers. However, following further discussion with Mr Sullivan (to which we will refer later) Mr McGlashan amended the instructions to the firm's office manager, with the result that an amended statement was prepared in relation to disbursement of the settlement fund. This included a further deduction, being the sum of $22,022.15 shown as "R & D Annand – balance transferred to cover our accounts …". The revised statement was dated 26 October 2005.

[18] On 27 October the firm received, and receipted, a payment of $99,988, being the settlement monies (after deduction of a bank charge of $12). This sum was credited to the trust account ledger of Cawdor. On 28 October (a Friday) payments were made from the Cawdor account to cover a half share of the mediator's costs and the outstanding costs of Ross Annand and his wife.

[19] On 2 November the balance held to the credit of Cawdor in the trust account was paid into the BNZ account of John Annand and his wife, as per the instructions earlier given to Mr McGlashan. That balance was $44,223.69.

[20] On 2 November a statement and covering letter were sent to John Annand confirming the terms of the distribution. The letter did not refer to the $22,022.15

taken in payment of costs incurred by Ross Annand and his wife, but the payment appeared in the statement under the narration referred to above.

[21] There was an immediate response. On 3 November John and Ross Annand wrote to the firm in their capacity as directors of Cawdor, stating "We vehemently object to your action in deducting $22,022.15 as detailed in [the] statement …". The letter continued that "explicit instructions" had been given as to disbursement of the settlement monies and the only authorised deductions were for the Cawdor incorporation fees and the mediation fees, and a half share of the mediator's costs. The letter demanded immediate rectification of the position, failing which a complaint would be made to the New Zealand Law Society.

[22] On 7 November Mr McGlashan wrote to the Annand brothers at their home addresses in response to the 3 November letter. With reference to the $22,022.15 deduction he said this:

> The deduction made from the funds apparently represents costs due to this office by Ross Annand. I do not know precisely what the account refers to or why it has not been paid previously. Be that as it may, the matter will not be rectified today. Mr Sullivan, on whose direction the deduction was made, is absent from the office until 8 November 2005. He can deal with the matter as he thinks fit upon his return.

[23] In essence, the case of professional misconduct was presented on the basis of these facts, upon which counsel for the Complaints Committee relied in submitting to the Tribunal that as summarised at para [32] of the decision:

- the breach involved the unauthorised taking by a fiduciary of the funds of a client, Cawdor;
- the taking of the funds was contrary to express direction by the client, Cawdor;
- the funds were taken without any prior discussion or warning;
- the funds were taken by the practitioners to meet payment of fees allegedly owing by a different client and which that other client had clearly disputed;
- the practitioners' actions abused the confidence of trust of their client, Cawdor.

[24] This brings us to the additional facts, and contentions, which lay at the heart of the practitioners' response to the charges.

Surrounding and subsequent circumstances

[25] In 1997 when the shares in the Company were sold to a third party and the Fijian claim was abstracted and assigned, Mr Sullivan advised the Annand brothers to implement the assignment through a company. The structure he ultimately put in place was a shelf company, Cawdor, of which he was the original director and Strathallan the sole shareholder.

[26] Mr Sullivan considered it was advisable to use a shelf company as the vehicle to prosecute the legal claim. He envisaged that when the claim was resolved the company "would fall away" and the benefit of the claim would accrue to the previous shareholders in the Company, since Strathallan held the Cawdor shares in trust for them.

[27] On 12 March 1998 Mr Sullivan wrote a letter to Ross Annand confirming his advice that the two 10 per cent shareholders should sign a "simple letter" confirming their agreement to meet their share of the litigation expenses, in return for their interests in the claim. The letter also explained that Strathallan presently held the shareholding in Cawdor "in a fiduciary capacity i.e. held on trust for the participants".

[28] It was this background which Mr Sullivan drew to the attention of Mr McGlashan soon after the mediated settlement was reached on 20 October 2005. We shall return to this in a moment.

[29] In February 2003 Mr Sullivan rendered two invoices to Ross Annand and his wife for personal work undertaken for them. The invoices related to a different proceeding, arising from a restraint of trade to which Mr Annand was subject after the sale of the shares in the Company to a third party. Ross Annand questioned the amounts charged in the invoices. He contacted the firm and sought particulars of the fees. From that time he ceased to use Mr Sullivan's services, at least in relation to

his personal affairs. An impasse arose. The outstanding invoices were neither further discussed, nor paid. Monthly accounts rendered were not sent out by the firm. Hence, the fees remained outstanding as at October 2005.

[30] As noted earlier, Mr McGlashan was involved in the mediation process and received the instructions of the Annand brothers as to disbursement of the settlement proceeds. When, a few days later, Mr Sullivan raised the subject of the outstanding fees owed by Ross Annand and his wife, discussion ensued. Mr Sullivan explained his view that Cawdor was a shelf company which received the settlement proceeds as a bare trustee. The original shareholders in the Company were the persons entitled to the benefit of the settlement. Mr Sullivan's affidavit before the Tribunal contained this:

> [42] Cawdor was a bare trustee holding the funds for the Annand brothers, [and the minority shareholders] for their respective proportions. Cawdor did not trade. It was not registered for GST nor with the IRD for tax. It was never contemplated that it was the beneficial owner. All sorts of complications may arise if it were, including the authority for distribution of funds to the former Shareholders of A B Annand & Co Limited.

[31] The affidavit also recorded Mr Sullivan's "understanding" that in the particular factual circumstances it was open to deduct the outstanding costs from Ross Annand's share of the settlement proceeds, indeed that it was "widespread in the profession at the time" to take payment of fees in such circumstances. Mr Sullivan also deposed that he suggested to Mr McGlashan that he verify with John Annand that payment of the net proceeds into the bank account of himself and his wife would be followed by an equitable accounting to the other shareholders.

[32] On 2 November, before the letter and settlement statement were posted, Mr McGlashan rang John Annand and satisfied himself that the net proceeds were to be disbursed between the four shareholders of the Company. He did not mention the deduction from the proceeds of the outstanding fees due from Ross Annand. Before the Tribunal Mr McGlashan said that his principal concern was to protect the firm against any future complaint arising from payment of the proceeds into a bank account of only one of the shareholders.

[33] We have already referred to the letter of protest from the Annand brothers and to Mr McGlashan's reply of 7 November. On 8 November a solicitor acting on behalf of the Cawdor shareholders telephoned Mr McGlashan and demanded immediate repayment of the $22,022.15. A letter sent later that day required repayment of the money and interest by 11 am on 9 November, failing which a complaint alleging professional misconduct would be made. Mr McGlashan immediately responded saying that the firm was to seek an urgent opinion from a Queens Counsel. He asked that the filing of a complaint with the Canterbury District Law Society be deferred in the meantime.

[34] On 9 November Mr McGlashan instructed a Queens Counsel who was provided with documents relevant to the sale of the shares in the original company and the assignment of the Fijian claim to Cawdor. A copy of the deed of settlement from the mediation was not provided to counsel. The letter stressed the writer's view that assignment of the claim to Cawdor was for the benefit of the shareholders in the Company.

[35] Counsel provided an urgent written opinion. It contained at least tentative advice to the effect that Cawdor was a bare trustee, that the original shareholders were the parties entitled to the settlement proceeds and that the firm could be held to account if the proceeds were distributed to one shareholder, should he fail to distribute their entitlements to the other three. The opinion included this:

> On this view of the case, your firm is entitled to retain sufficient monies to meet the two fees owed by Mr Ross Annand, so long as his portion of the settlement monies is in excess of those fees.

The opinion ended with the caveat that this view had been reached on less than complete information and in circumstances of urgency.

[36] A complaint of professional misconduct was laid. In addition, Cawdor commenced proceedings in the District Court against the practitioners' firm, seeking recovery of the $22,022.15. Cawdor applied to strike out the firm's statement of defence. In a judgment dated 2 February 2007 this application was granted. Judge Abbott held that:

(a) Cawdor was a separate legal entity, a client of the firm and that it was to Cawdor the settlement proceeds were paid (not to the four individual shareholders),

(b) that Cawdor was not a bare trustee and, even if it were, a bare trustee could not settle the account of a beneficiary without that beneficiary's authority, and

(c) it was for Cawdor to disperse the sale proceeds, or for its directors to authorise their disbursement.

Cawdor obtained judgment and an order for increased costs.

[37] The firm did not appeal against Judge Abbott's decision. Moreover, in essence the Judge's analysis of the legal position was accepted by the practitioners by the time of the Tribunal hearing in October 2008. Hence, through counsel they argued that, although the view that they were entitled to take the $22,022.15 from the settlement proceeds was mistaken, such mistake did not amount to professional misconduct. In particular, counsel contended there was no knowing breach of s89(1) because the practitioners reasonably believed in their entitlement to take the fees by deduction from Ross Annand's share.

Basis of the Tribunal's decision

[38] The Tribunal considered the case against Mr Sullivan first. It began by setting out s89(1) of the Law Practitioners Act (see para [1]). Then followed reference to Rules 3(1) and 5(7) of the Solicitors Trust Account Rules. Next, the Tribunal referred to r1.01 of the New Zealand Law Society Rules of Professional Conduct which provides that the relationship between the practitioner and client is one of confidence and trust which must never be abused. The Tribunal stated at para [40]:

> These obligations (relating as they do to the treatment of client money held by a solicitor, and to pay such funds to the client or as the client directs), are obviously a fundamental aspect of any solicitor/client relationship.

[39] We read these references to fundamental principle, appearing at this point in the decision, as significant. We shall return to this point shortly.

[40] The Tribunal summarised Mr Sullivan's evidence which was to the effect that Cawdor was a bare trustee for the shareholders in the original Company, who were

the beneficial owners of the settlement fund, rendering it appropriate in his mind to make the deduction for outstanding fees against Ross Annand's share.

[41] The Tribunal continued:

> [42] In the Tribunal's view, Mr Sullivan's actions in authorising the deduction of $22,022.15 from the funds held by [the firm] to the credit of Cawdor was a breach of Mr Sullivan's obligations under s.89 of the Law Practitioners Act 1982 and under the Solicitors Trust Account Rules 1996. Further, his actions constituted professional misconduct on his part. The relationship between Mr Sullivan and Cawdor as a client of [the firm] was clearly fiduciary in nature. The breach involved the unauthorised taking by Mr Sullivan of the funds of his client contrary to the express direction of Cawdor. The fees taken related to a different client and a different matter and in circumstances where, as we find, Mr Sullivan well knew that the actions of Mr Sullivan and [the firm] in relation to that file were in dispute and challenged by Mr and Mrs Ross Annand. Mr Sullivan was obliged to comply with the specific instructions given by the Annand brothers as directors of Cawdor regarding disposition of the settlement funds. The instructions could not have been more specific.
>
> [43] The fact that Cawdor may have been used for the purpose of facilitating the claim against the ANZ Bank instead of the rights in respect of the claim being assigned to the individual shareholders and then being pursued by them is, in the Tribunal's view, irrelevant in the present context.
>
> [44] Cawdor was the legal owner of the claim. Whether it was the beneficial owner is irrelevant. We are not aware of any principles of law or trust accounting which entitle a practitioner to ignore and override the specific instructions of a client which arranges for funds which it legally owns to be paid into its solicitor's trust account. …

[42] The Tribunal then said that the terms of the settlement and the manner in which the funds were received was not consistent with the suggestion Cawdor was a bare trustee. It regarded the practitioners' explanation as an "*ex post facto* justification inconsistent with the reality of what occurred". The Tribunal continued that the "bare trustee" argument did not overcome the basic proposition that even a bare trustee required a beneficiary's agreement to settle an account on the beneficiary's behalf. And, here, there was the added complication that Mr Sullivan (nor Mr McGlashan) knew the financial position as between the shareholders. Accordingly, the beneficial interest of Ross Annand in the settlement fund could not be "sufficiently clearly ascertained" to enable a set-off for costs to be made, even assuming the costs were payable and not in dispute.

[43] The Tribunal then said this:

> [47] The Tribunal also finds that Mr Sullivan's professional misconduct was knowing and that he deliberately authorised the taking of the fees in dispute, contrary to the specific directions which had been given as to how the settlement proceeds were to be handled and to his professional obligations.
>
> [48] The Tribunal considered carefully Mr Sullivan's evidence and his explanation for why he did what he did. It is satisfied that, at the time the funds were taken, he knew his obligations under the Act and in terms of the Rules in connection with the following of instructions and deduction of fees. The key date for present purposes is the date at which the funds were taken, not some later date. At the relevant time, Mr Sullivan knew that there had been a dispute with Ross over the particular file and he knew that that dispute had not been resolved. He did not tell Ross (or John) what he intended to do. He did not ask Ross (or John) for authority to deduct the funds from the settlement moneys received in respect of the ANZ Bank claim. He did not take advice before the funds were deducted.
>
> [49] The Tribunal is obliged to say that it regards what Mr Sullivan did in this case as an opportunistic and knowing move on the basis that if he were challenged by Ross (or John) over the deduction he would have tried to brazen it out. This is confirmed in the Tribunal's opinion, by his conduct subsequently. …

[44] Then followed reference to the "heavily qualified" opinion received from the Queens Counsel, the "closely argued" letter from the solicitor acting for Cawdor and to Mr Sullivan maintaining his stance (that there was an entitlement to deduct the fees) until confronted by the District Court judgment in February 2007.

[45] Finally, the Tribunal held that the first charge of knowingly causing the fees to be taken contrary to the client's directions was established, rendering it unnecessary for the Tribunal to address the second and alternative charge.

[46] With reference to the case against Mr McGlashan the Tribunal reviewed the relevant evidence and continued:

> [55] Mr McGlashan acknowledged in cross-examination that he did not mention to John (nor in his letter to him) his intention to take by way of deduction from the settlement proceeds the outstanding amounts allegedly due by Ross but arranged for the deduction of the outstanding amounts. The Tribunal could not follow the logic of his explanation and how he could properly consider that the clients were the four individual shareholders in question and not Cawdor. Apart from anything else, that was totally inconsistent with the way the

settlement, the receipt of the proceeds, and the net payment out were all structured.

[56] Then, when Mr McGlashan was challenged by John and Ross, he did not attempt to rationalise what he had done, which is what one would have expected had he been comfortable with the actions he had taken. Instead, his only explanation when taxed was to say that he had acted on the instruction of Mr Sullivan. Certainly, it seems plain enough to the Tribunal that had Mr McGlashan opened this issue up for discussion with John or Ross before the deduction was made, he would have immediately found that there was a dispute not only about any claim of bare trustee and trusteeship, but also about whether the fee was payable by this client in any event.

[57] In the circumstances, we are left with the clear view that Mr McGlashan simply went along with what Mr Sullivan suggested, allowed himself to be convinced of the appropriateness of what Mr Sullivan proposed, and without checking on its legality at all.

[47] In the next paragraph of its decision the Tribunal found that Mr McGlashan's involvement in authorising the deduction of $22,022.15 gave rise to a breach of the obligation enshrined in s89(1) and under the Trust Account Rules and also constituted professional misconduct on his part. The Tribunal continued:

[59] That breach was knowing and we find, on the basis that because of the comparatively small amount involved, they thought they might get away with it. In that regard, the Tribunal regards Mr McGlashan's discussions with John on 2 November 2005 (and his subsequent letter to John on the same date), as being carefully limited in what was said and more significant for what they did not say than for what they did. The Tribunal is left with the uncomfortable feeling that Mr McGlashan was basically acting at Mr Sullivan's bidding and in the expectation that Mr Sullivan would deal with any issues which might then arise. That message comes through plainly enough for example from his letter of 7 November 2005 to John and Ross.

The practitioners' grounds of appeal

[48] Both practitioners advanced multiple and detailed points on appeal. In support of Mr Sullivan's appeal, it was said:

(i) On a full consideration of the evidence before the Tribunal by this Court on appeal, the findings of the Tribunal were in error and this Court should differ from the Tribunal and find that the actions of the appellant did not constitute professional misconduct.

(ii) The action by the appellant was taken in the belief (accepted by the complainant to be the appellant's belief – *Transcript page 24 line 43*) that the deduction of fees was a deduction he believed at the time he

was entitled to make and was not an act knowingly in breach of s.89 Law Practitioners Act 1982 or an action of professional misconduct.

(iii) On the information known to him personally, such actions as the appellant took in relation to the monies paid by ANZ to his trust account and later paid out to Mr John Annand were not a knowing breach of s.89 Law Practitioners Act 1982.

(iv) The actions of the appellant in relation to the monies paid by ANZ to his trust account were not proven on the evidence before the Tribunal to be a knowing breach of s.89 Law Practitioners Act 1982.

(v) The Tribunal erred in holding that the appellant acted in breach of a direction given on 20 October 2005 by John and Ross Annand when the evidence before it was that that direction was given by John Annand and was replaced by an authority given by John Annand to John McGlashan on 2 November 2008. The appellant acted in accordance with the later direction which was in accordance with the requirements of s.89 Law Practitioners Act 1982.

(vi) The Tribunal in its decision made inferences as to the intention and motivation of the appellant which were not open to the Tribunal given the uncontroverted and corroborated evidence before the Tribunal of the actual intent and purpose of the appellant.

(vii) The Tribunal failed to identify or correctly interpret the actual knowledge and involvement of the appellant at the time of the action held to constitute knowing misconduct. On a correct analysis of the evidence, such knowledge was not held at that time. The Tribunal conflated the knowledge of each of the two practitioners involved into one body of knowledge when the knowledge of each at the relevant time was materially different.

(viii) The Tribunal gave no weight to the apparently deliberate failure of the prosecutor and the complainant Ross Annand to bring the prior affidavit evidence of the appellant filed with the Tribunal to the attention of John Annand and to ascertain and present his evidence in response. The Tribunal instead made assumptions adverse to the appellant in respect of the evidence of the appellant and the other practitioner to the Tribunal for which there was no credible evidence.

(ix) The Tribunal gave no weight to the open and accurate written accounting by the appellant to Mr John Annand in respect of the funds received from the ANZ Bank and the manner of their disbursement. Such evidence negated any inference of knowing unlawful action.

(x) The Tribunal gave no weight to the fact that at all times prior to the payment out of the monies to John Annand the appellant had no knowledge of the Deed of Settlement between Cawdor and the ANZ Bank and the terms of that Deed and associated payment.

(xi) The Tribunal incorrectly held that the appellant knew that the fees rendered to Mr R and Mrs D Annand were in dispute. The appellant did not know that.

(xii) It is not professional misconduct to make a single error in respect of monies held in a trust account when the action taken, although in fact wrong in fact or law, is believed in good faith to be correct at the time and is carried out in good faith. The appellant acted throughout in

> good faith, albeit under a mistaken knowledge of the relevant matters of fact and law.

[49] The points on appeal provided in support of Mr McGlashan's case were very similar, save that points (x) and (xi) were not included.

[50] Although we have set out the full text of the points on appeal, we note that the submissions of Mr Rennie QC were not developed with close reference to them. No doubt this reflected the circumstance that most of the points are aspects of the general argument that the Tribunal erred in rejecting the evidence of the practitioners that their actions, although mistaken with the benefit of hindsight, reflected an honest belief in their entitlement to deduct the $22,022.15 at the time. Some points, to which we will refer shortly, do require separate consideration.

Was a defence of honest belief available to the practitioners?

[51] At the outset of his submissions Mr McVeigh questioned the validity of this assumption. Counsel referred to s89(3) of the Law Practitioners Act:

> Every solicitor who knowingly acts in contravention of this section commits an offence against this Act.

The present is of course a disciplinary matter, where the word "knowingly" was borrowed and included in the first charge laid against each practitioner in contradistinction to the second charges (which omitted reference to knowingly). This may in turn have prompted the practitioners' reliance upon an honest belief defence.

[52] However, Mr McVeigh submitted that proof of a knowing breach of the obligation to deal with a client's money as he or she directs, required only proof that the unauthorised deduction or payment was made deliberately in the sense that there was a conscious decision to pay/deduct the money in the manner alleged.

[53] Undoubtedly the word "knowingly" can have shades of meaning when used in the context of an offence provision. But, we find it unnecessary to explore this aspect in the present case. Mr McVeigh made only brief submissions on the point

and it was not a matter referred to in Mr Rennie's written argument. Moreover, while Mr McVeigh raised the concern, he eschewed reliance upon it. Counsel explained that the Complaints Committee ran its case before the Tribunal on the footing that it must negative the existence of an honest belief, and he considered it inappropriate to resile from that stance on appeal.

[54] We agree. And, for reasons to which we now turn, the question of the proper definition of knowingly in s89(3) does not, in the event, affect the view we have reached in relation to these appeals.

Evaluation: Did the Tribunal err in its assessment of culpability?

Required approach

[55] In hearing a general appeal we must arrive at our own assessment of the merits of the case. If we reach a view which is different to that of the Tribunal, it must prevail: *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at paras [5] and [16]. That said, it is also necessary to assess whether the Tribunal had a particular advantage, whether in terms of expertise or the opportunity to assess the credibility of witnesses. We are in no doubt that it did, particularly in the latter regard. The Tribunal had the singular advantage of hearing Mr Sullivan and Mr McGlashan being cross-examined upon their affidavits. We would, therefore, be hesitant to differ from conclusions of the Tribunal where credibility was involved.

Some specific points on appeal

[56] In four respects the points on appeal require separate consideration.

[57] Point (v) raised the contention that Mr McGlashan obtained an authority from John Annand on 2 November 2005 which "replaced" the earlier instructions given on 20 October as to disbursement of the settlement fund. We do not consider this argument to be tenable. Mr McGlashan did phone John Annand on 2 November, but

he made no mention of the deduction of fees from Ross Annand's presumed share of the fund. He did not revisit the previous instructions.

[58] Point (viii) raised a related matter, namely that although John Annand did not give evidence, the Tribunal made assumptions adverse to the appellants. Again, we do not accept this contention. Mr McGlashan's version of the 2 November conversation was not the subject of challenge. Importantly, that conversation did not touch upon the essential point – deduction of the outstanding fees from the trust account. Otherwise, it was not explained how the absence of evidence from John Annand was material.

[59] Point (vii) contains the contention that the Tribunal conflated the knowledge of each of the two practitioners into "one body of knowledge", when in fact the knowledge of Mr Sullivan and Mr McGlashan was "materially different". This aspect was further developed further in the course of argument. On the one hand Mr Sullivan possessed first hand knowledge of the sale of the Company, assignment of the Fiji claim to Cawdor and of the rendering of the $22,022.15 fees invoices; while Mr McGlashan had personal knowledge of the mediation settlement and the instructions as to disbursement of the settlement fund, on the other. The argument advanced was that the Tribunal judged both practitioners as if they each had knowledge of all relevant aspects.

[60] There is no evidence that Mr Sullivan saw the deed of settlement concluded at mediation. However, when he first raised the suggestion that the outstanding fees be deducted, Mr McGlashan immediately said that the settlement fund was payable to Cawdor and its disbursement was the subject of express directions from John and Ross Annand. Hence, the actual legal position was brought to Mr Sullivan's attention, regardless of the fact that he elected not to view the deed of settlement for himself. We are satisfied that the Tribunal did not relevantly attribute knowledge to Mr Sullivan which he did not possess.

[61] In relation to Mr McGlashan the submission was that he remained unaware of any dispute concerning payment of the outstanding fees. Again, we do not think the Tribunal wrongly attributed knowledge of this aspect to Mr McGlashan. To the

contrary, at para [56] the Tribunal observed that had Mr McGlashan opened the issue of deduction of the fees up for discussion with John or Ross Annand, he would have immediately found out about the dispute as to payment. This confirms that the Tribunal did not misunderstand the position, let alone that it attributed knowledge to Mr McGlashan which he did not possess.

[62] Finally, point (ix) involved a contention that the Tribunal gave no weight to the "open and accurate written accounting" provided to John Annand. This was a reference to the reporting letter of 2 November 2005 and the statement which accompanied it. The latter revealed that the sum of $22,022.15 had been deducted for outstanding fees. But, there is nothing to the contention that this established honest belief. In short, the firm had no option but to provide a statement which revealed that the fees had been deducted.

Honest belief

[63] We think the remaining points on appeal are aspects of the honest belief/good faith contention. With reference to the rejection of this line of defence we regard paras [35]-[60] of the Tribunal's decision as highly significant. As noted earlier (para [38]) the Tribunal began by referring to s89 of the Law Practitioners Act, rules 3(1) and 5(7) of the Solicitors Trust Account Rules and r1.01 of the Rules of Professional Conduct, from which the Tribunal distilled the fundamental nature of the obligation upon practitioners to deal with a client's money strictly in accordance with the client's instructions. These opening observations, we think, underpin the Tribunal's subsequent conclusions.

[64] The implication to be taken from what the Tribunal said is that the obligations in relation to handling clients' funds are at the core of, or fundamental to, the solicitor/client relationship. So fundamental that all practitioners must be aware of them and equally aware that a deliberate departure from a client's instructions would be viewed seriously.

[65] Correctly, we consider, the Tribunal then approached the case on the footing that unless the practitioners could plausibly explain their actions, a knowing and

serious breach of the fundamental obligation was made out. This inquiry, as to the existence (or not) of a genuinely held belief in an entitlement to deduct the fees, fell to be considered in a context where the Complaints Committee was required to establish its case on the balance of probabilities : *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC). But, the Tribunal also remained alive to the need to pay regard to the gravity, and significance, of the allegation which the practitioners faced (see para [61] of the decision).

[66] Against this background the Tribunal turned to consider the evidence and explanations advanced by the practitioners. For the reasons it gave, the Tribunal rejected their contentions of an honest belief in entitlement to deduct the fees. We have considered all that has been said by way of challenge to the Tribunal's conclusions. We are not persuaded that the Tribunal erred. The primary facts were effectively undisputed. These established a clear obligation to deal with the settlement fund expressly as directed by John and Ross Annand. Having seen and heard them under cross-examination, the Tribunal was unanimous, and satisfied, that neither practitioner genuinely believed he was entitled to make the fees deduction.

[67] At that point the Tribunal went a step further and expressed its views concerning how and why two senior practitioners took the steps which they did. We are not persuaded that good reason has been shown to differ from the Tribunal's evaluation of the factual circumstances. Moreover, an assessment of credibility was required, and we would be hesitant to differ from the Tribunal; not that we can discern any reason for doing so. For these reasons, we uphold the conclusions reached by the Tribunal.

Addendum

[68] We add these observations. We think it is a great pity that the dispute has come to this. A serious error of judgment occurred when the fees were taken and paid into the firm's account. But opportunity for proper reflection existed upon receipt of the letter from John and Ross Annand dated 3 November 2005. The situation was probably retrievable. Had the deduction been reversed at that time, we suspect that there matters would have rested.

[69] Perhaps it was the vehement demand contained in the letter which clouded the practitioners' better judgment. Regrettably, from this point, it seems to us, that positions became entrenched, with the considerable consequences already described.

Name suppression

[70] The Tribunal declined an application for permanent name suppression. In its decision on penalty it said this:

> [7] There is a presumption in favour of publicity and there is a general trend towards openness in court proceedings in the present context. It is in the public interest that clients and potential clients should be aware of charges that have been established. In terms of those indications from the High Court we do not make an order of permanent suppression. …

The reference to the High Court was to a Full Court decision in *Dean v Wellington District Law Society* HC Wellington CIV 2006-485-2961 26 July 2007.

[71] Section 111 of the Law Practitioners Act 1982 relevantly provides:

> **Hearings to be in Public**
>
> (1) Except as provided in this section, every hearing of the New Zealand Disciplinary Tribunal shall be held in public.
>
> (2) If the Tribunal is of the opinion that it is proper to do so, having regard to the interests of any person and to the public interest, it may –
>
> …
>
> (d) Make an order prohibiting publication of the name or any particulars of the affairs of the person charged or any other person.

Dean, and other cases, confirm that a balancing exercise is required. The decision maker must consider both the private interests of the practitioner (or practitioners) on the one hand, and the public interest on the other. There is a legitimate public interest in members of the public having access to information concerning disciplinary proceedings of this kind.

[72] In our view the Tribunal approached the question of suppression in a principled manner. We are not persuaded that reason is shown to interfere with its exercise of discretion. We do not overlook the information provided to us by Mr Rennie in relation to one of the practitioners. Similar information was before the

Tribunal. It is not, we think, sufficient or of a nature to tip the balance in favour of name suppression.

Costs

[73] Only brief reference was made to the issue of costs at the hearing. Memoranda may be filed. The respondent should file first and we allow the applicants 10 working days within which to respond.

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Panckhurst J

_____

Gendall J

_____

French J

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