LCRO 1/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 1
BETWEEN	**IW on behalf of ADD (part of the ADE)** Applicant
AND	**SD of ADF** Respondent

DECISION

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

Introduction

[1] This is an application for review of a decision of the Wellington Standards Committee 1 which considered a complaint by IW on behalf of ADD (part of the ADE) (the Applicant) against SD of ADF (the Practitioner). The Standards Committee resolved to take no further action on the complaint and the Applicant seeks a review of that decision.

Background

[2] The Practitioner's law practice has acted for the Applicant on various matters since 2003. In early March 2008 it was instructed to act in relation to proceedings arising from a property transaction involving the Applicant.

[3] It appears that the Applicant had summary judgement entered against it by the vendor of the property but that this decision was successfully appealed in the Court of Appeal at which the Applicant was represented by senior counsel and another

barrister. It further appears it was decided that for the substantive High Court proceedings senior counsel would be assisted by the Practitioner's firm.

[4] A fairly tight timetable to deal with discovery and interlocutory applications was set in the High Court and immediately thereafter a staff member of the firm began work on the discovery process. A number of documents had to be provided by the Applicant and it seems that, despite one extension to the timetable being agreed between the parties, the documents from the Applicant were received by the Practitioner only one week before the (extended) deadline. This meant that the necessary work was undertaken over a weekend and sometimes until late at night. The Practitioner was aware of the Applicant's concerns over the cost of the proceedings and accordingly used summer clerks (being the most junior legally qualified staff in the office) to do much of the work under supervision.

[5] The discovery work was completed and immediately thereafter an invoice was rendered for the firm's attendances for the period 27 November 2009 to 2 February 2010 in the sum of $25,684.00. With GST and administration costs the account totalled $29,616.86. The Applicant was unhappy with the size of the account and ultimately on 16 March 2010 filed a complaint with the New Zealand Law Society (NZLS) Complaints Service, alleging that the hours of work invoiced were "excessive for the work". Also that "hourly rates (had) increased without notification, some by 33%", and that "administration/secretary hours (had) been charged in addition to lawyers hourly rate". The desired "outcome" was expressed as "a reduction in the amount payable to better reflect the work involved and in line with accepted hourly rates"

[6] The Practitioner responded on 8 April 2010. His response included his understanding that the complaint also covered an invoice for professional services for the period 30 October 2009 to 26 November 2009 for a fee including GST of $7,265.25, which with disbursements totalled $8,365.25.

[7] In summary the Practitioner's position was that "the invoices rendered (were) fair and reasonable in all of the circumstance of the proceeding", that no "additional secretarial or administrative time had been charged to either bill", and that the charge-out rates were appropriate. He explained the make-up of the firm's standard "administration fee" charge, and advised that clients were informed (on the reverse of every invoice) that hourly rates were reviewed and varied "from time to time", thereby implying there was no lack of notification as claimed.

[8] The Applicant took the opportunity to reply to the Practitioner's response, and shortly after a costs assessor was appointed by the Complaints Service to enquire into the two bills of costs.

[9] The costs assessor looked at the overall fee and the charge-out rates and concluded that the overall fee was not excessive, nor did he consider the charge-out rates were excessive. He did however suggest that there may not have been a complaint had the firm specifically brought the increases in charge-out rates to the Applicant's attention.

Standards Committee determination

[10] In its decision dated 16 November 2010 the Committee set out the specific complaints of the Applicant, summarised the Practitioner's response, the Applicant's reply (which had included the allegation that he had received no notification of the hourly rate review), and the costs assessor's report, and decided to take no further action (pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act)). It did so for the following reasons: that the costs had been assessed as reasonable for the work done, that the work had been completed at an appropriate level, and that no dispute was now taken by the Applicant with the secretary/administration hours charged. This latter finding resulted from the costs assessment report noting that the complaint about administration/secretary charges was no longer being pursued by the Applicant. The Committee also noted that the Applicant's instructions were received before the Act came into force so by implication its provisions did not apply. There was no comment on the Practitioner's mode of notification to clients.

Application for review

[11] In his application for review dated 24 December 2010 the Applicant "challenged" the Committee's decision. He maintained his position that the time spent (and therefore the costs charged) were not reasonable, suggesting that the cost assessor and the Committee "(did) not really look at the amount of work that was required..." He submitted that had the process been handled by a "competent lawyer" it would not have "taken as long as it did".

[12] It is observed that the Applicant went on to state that "the Committee noted that their (sic) view on the reasonableness of the bill was influenced by the fact that the job was urgent". The Committee's decision is set out in the second to last paragraph headed "Determination" and summarised in paragraph [10] above. Nowhere in that

summary of the reasons for its decision is “urgency” mentioned. The only reference to “urgency” in the determination appears to be under the heading “Response” where the Practitioner’s position is summarised. In other words there is no evidence that the determination of the Committee “was influenced by the fact that the job was urgent”.

[13] The second issue addressed by the Applicant relates to the alleged lack of notification of the increase in hourly rates. After referring to Rules 3.4, 3.5, 3.6 and 3.10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008) (the Rules) he argued that, while Rules 3.4 and 3.5 do not apply to retainers entered into before 1 August 2008 (Rule 3.10) the provisions of Rule 3.6 (the requirement to update information provided under Rules 3.4 and 3.5) do apply. He went on to argue that each time a law firm’s role changed during the course of proceedings a new retainer began. In support of this argument he submitted that “if there was only one retainer the firm could have simply carried on with (the discovery) process (coming to our offices to get the documents) without waiting for our say so”. He concluded by arguing that a new retainer was entered into “(or at least a varied retainer) for the discovery phase”; he claimed that “this new retainer was entered into after 1 August 2008”... (and) that Rule 3.4 applied to the new situation anyway”.

[14] His final point on this issue was that as the firm “clearly knew that costs (were) an issue of concern for us and that current financial circumstances (were) difficult for all the firm should have notified us of the change in charges”.

[15] The Practitioner responded to the application for review on 9 June 2011. With reasons he submitted that a new retainer did not arise at the commencement of the summary judgement proceedings in August 2008. He argued that “the retainer was always one for a property dispute, as opposed to a single property conveyance”. In the alternative he submitted that if a new retainer did arise at that time it would still have been prior to the commencement of the new Rules. He claimed that the Applicant “was provided with information about the changes to our terms of engagement and was aware that it was our practice to review solicitors charge-out rates annually”.

[16] He rejected the implication that his staff’s performance was less than competent and repeated that the Applicant and his colleague “were expressly and repeatedly told that the discovery process was a time-consuming and expensive process”. He concluded his response on this issue by stating that the fees charged to the Applicant were reviewed internally and by the NZLS cost assessor and found to be reasonable.

[17] Regarding the notification of the increase in hourly rates issue he enclosed a copy of a flyer sent to all existing clients around 1 August 2008 (when the new Rules came into force). The flyer, headed “Changes to our terms of engagement”, invited clients to download the new terms from the firm’s website and to contact the firm’s credit manager with queries. In further support of the contention that the Applicant would have been aware that the firm reviewed its charge-out rates annually he set out the considerable number of matters in which the firm has acted for the Applicant and its approximate total fee expenditure since 2003.

[18] He concluded his response to this second issue by submitting that if there was no information provided to the Applicant pursuant to Rules 3.4 and 3.5 after 1 August 2008 (because the retainer commenced before that date) then Rule 3.10 excluded them, and therefore Rule 3.6 could not apply because no information had been provided in terms of those two Rules.

Review

[19] Both parties have consented pursuant to section 206(2)(b) of the Act for this matter to be dealt with on the basis of the material before me.

[20] The role of the Legal Complaints Review Officer (LCRO) is set out in section 203 of the Act. It is to review the final determination of the Standards Committee and all or any aspects of any enquiry or investigation carried out on behalf of the Committee. As a result all issues considered by the Standards Committee fall within the ambit of this review.

Reasonableness of the hours spent and fees charged

[21] The Applicant agued in essence that excessive hours were spent carrying out the discovery process, that “the amount of discovery documents that was provided was not large” (Applicant’s letter to NZLS dated 27 April 2010), and that the Committee in reaching its decision did not properly appreciate the amount of work that was needed to carry out the discovery task. The Practitioner disputed the Applicant’s arguments and submitted that the bills were reasonable.

[22] I deal first with the following: the Applicant claimed that “the (cost assessor) and the Committee must always end up being influenced by what time the firm has recorded and end up only looking for ‘discrepancies’ ”. On page 3 of the costs assessors report he states that he arrived at his opinion (that the fees were reasonable) after considering the “reasonable fee factors” in Rule 9.1 of the Rules, the

Practitioner's time records, the firms explanation, and also his "own experience in similar assignments".

[23] His conclusion is based on the fact that much of the work was done by summer clerks under supervision, that the supervising partner's time was not charged "despite him undertaking a supervisory role", and that the Practitioner was "mindful" of the need to keep costs to a minimum, while meeting "their client's obligation to carry out discovery in a proper fashion".

[24] He also cited "the volume of documentation required to be listed and considered for relevance and privilege". The Practitioner had advised that there were over three thousand documents requiring examination and classification, that the work had to be completed within one week because of the delay in the Applicant producing to the Practitioner the documents he held, and that accordingly the firm's staff working on the task had to work over a weekend and sometimes until late at night. The costs assessor also found that the charge-out rates were not excessive.

[25] The Practitioner does not appear to be relying on the need for urgency as justification for the fee level (see paragraph 5.2, Practitioner's letter to NZLS dated 8 April 2010) but I note it is a factor that may be taken into consideration by a lawyer under the "reasonable fee factors" in Rule 9.1(d). He made the point that because the firm was able to use summer clerks to carry out a significant amount of the work the actual hourly rate charged was less than $200.00. I also note that perusing and considering three thousand plus documents over one hundred and thirty two hours is approximately twenty two documents per hour, which does not seem unreasonable.

[26] Discovery is central to the litigation process and is governed by strict rules which mean that it is a task that cannot be unreasonably hurried. If a person or company is involved in document-rich litigation then discovery can become a fiscal burden. In this case I am satisfied that the Applicant and his colleague were appropriately advised about the nature of discovery and the fact that it is time-consuming and potentially expensive. I accept that the Practitioner was conscious of the Applicant's concerns, and that costs were able to be kept down somewhat because the task was carried out by summer clerks whose hourly charge-out rate was considerably less than that of more experienced legal staff.

[27] The cost assessor is an experienced litigator whose assessment that the fee charged was reasonable was adopted by the Standards Committee when it determined that "the costs had been assessed as reasonable for the work done". After due

consideration of the parties' submissions, the cost assessor's report and the Committee's determination I am satisfied that the time spent and level of fees charged carrying out the discovery process were not excessive. I now turn to the second ground of complaint: the notification of review of, and increase in, the actual fees charged.

Notification of review of hourly rates charged

[28] The Applicant's original complaint regarding the charge-out rates is as follows:

> "Hourly rates have increased without notification, some by 33%".

[29] The Applicant developed its argument on this second issue in his application for review. It is summarised in [13] and [14] above. The response of the Practitioner is summarised in [15] to [18] above.

[30] This second issue is about whether or not the provisions of the (new) Rules regarding "provision of information" applied in this case. Part of the issue, whether or not the Rules apply, is the adequacy of the actual notification.

[31] Regarding the first part of the Applicant's argument, after carefully considering his views and those of the Practitioner on Rules 3.4, 3.5, 3.6 and 3.10, I have come to the view that the Practitioner's submission is to be preferred. Rule 3.10 is clear-cut: Rules 3.4 and 3.5 do not apply to retainers entered into before 1 August 2008. This must mean that the obligations contained in Rules 3.4 and 3.5 are not required to be met if the retainer is pre 1 August 2008. It follows from this conclusion that if a lawyer is not required to provide that information because the retainer is pre 1 August 2008 then Rule 3.6 does not apply. I accept that the arrangement between the Applicant and the Practitioner, entered into before the Rules came into effect, continued on its previous terms.

[32] The Applicant's second argument was that retainer's change and/or new retainers are entered into at each significant event "as (a) case goes along". The Practitioner responded by submitting that the matter had "always been described as a property dispute...with litigation highly likely" and that "even if it was accepted that a fresh retainer arose at the time ligation was likely, that was still prior to 1 August 2008...". I prefer and accept the submission of the Practitioner that a new retainer, defined in Rule 1.2 as "an agreement under which a lawyer undertakes to provide or does provide legal services to a client...", does not arise with each separate part of the

litigation process, and therefore a new retainer did not arise for the discovery portion of the Applicant's litigation.

[33] The Practitioner's response to the application for review set out the steps taken by the firm on or about 1 August 2008 with existing clients. They were sent a four-line flyer entitled "Changes to our terms of engagement". This notified clients that the firm's terms of engagement had changed, that the new terms were effective from 1 August 2008 and could be downloaded from its named website. It went on to provide the name and contact details of the firm's credit manager if a client had questions.

[34] The Applicant's representative attached to an email dated 15 July 2011 in support of the application for review a copy of both the "Information for Clients" and the "Terms of Engagement" found on the Practitioner's website. He argued that as paragraph 6 ('Client care and service') of the former document stated that "the obligations lawyers owe to clients are described in the (Rules)..." then Rules 3.4 and 3.6 must apply. I read the paragraph 6 quote as a general statement confirming a basic principle of the new regime governing legal practice, and remain of the view that for the reasons set out in [31] above Rules 3.4, 3.5 and 3.6 do not apply in this case.

[35] Section 2 of the "Terms of Engagement" under the heading "Fees and Disbursements" sets out the basis for the firm's charging, and at 2.2 states:

> "Where a fee is calculated in whole or part on the basis of the time involved, the fee will reflect the hourly rates we charge for the lawyers involved. Rates for individual lawyers are varied from time to time to have regard to changes in skill, knowledge and expertise and take account of changes to costs." (Emphasis added)

[33] This is identical to what is apparently on the reverse of every invoice rendered by the firm. The Practitioner submitted that the flyer and its reference to the website was sufficient notification to clients of the new terms. The point was made that the firm has acted over nine years on fifty five separate matters for the Applicant's associated companies and had rendered bills of approximately $300,000.00 in fees so it submitted that the Applicant would have been aware of the firm's practice of reviewing its solicitors' charge-out rates annually.

[34] The costs assessor addressed this issue in his report. He ascertained that the firm did not specifically notify the Applicant "or clients generally" about increased charge-out rates for its fee earners, other than its invoices containing a reference on the front of all invoices to its "terms and conditions on reverse". The Practitioner also advised him that, although undoubtedly there would have been an increase in charge-

out rates over the years it had acted for the Applicant, there would have been no express notification of increases given to him or his associated companies.

[35] The cost assessor advised that the annual adjustment of hourly charge-out rates "(was) a practice undertaken by legal and other professional firms". His experience was that there was "no practice by which firms contact all clients for whom changes are relevant to inform them of individual rate changes unless there are specific fee arrangements in place". To that extent he considered that the firm's practice was not "out of kilter with the practice of other commercial law firms". He went on to suggest that given the sensitivity to costs displayed by the Applicant and his associate as these proceedings progressed it may have been prudent for the firm to notify the Applicant of the (33%) increase in the staff solicitors charge-out rate.

[36] Assuming without evidence to the contrary that the Applicant would have experienced actual fee rises on a regular, possibly annual basis for nearly a decade, and at least in the last few years (if not longer) received invoices with reference to the terms and conditions being on the reverse I can only conclude that some notification of fee increases were made to him. He must have been aware that charge-out rates for legal services kept rising on a regular basis. I find that not directly informing clients of cost increases seems unhelpful to good client relations but it does not breach the professional standards applying in this pre 1 August 2008 matter. As noted by the costs assessor, under the current Rules, the problem which arose in this matter should not be repeated.

[37] In conclusion, I am satisfied that the time spent on the professional services covered by both invoices in question was not excessive, and that the fees rendered were reasonable. Regarding the charge-out rates, it follows that I consider that the increased charge-out rate for the solicitor mostly handling the litigation and directly supervising the discovery work was not excessive. I also find that the Applicant must have been aware of the Practitioner's practice of regularly reviewing and presumably increasing the firm's charge-out rates so there was no breach of the Practitioner's professional obligations in this instance. Therefore I have no reason to take a different view to that of the Standards Committee and accordingly the application for review is declined.

Decision

Pursuant to Section 211 (1) (a) of the Lawyers and Conveyancers Act 2006, the decision of Wellington Standards Committee 1 is confirmed.

DATED this 9th day of March 2012

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Owen 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:

IW as the Applicant
SD as the Respondent
Wellington Standards Committee 1
The New Zealand Law Society