LCRO 103/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**KF**
	Applicant
AND	**WP**
	Respondent

DECISION

Introduction

[1] The Auckland Standards Committee declined to uphold a complaint by KF (the Applicant) against WP (the Practitioner). The Applicant seeks a review of that decision.

Background

[2] The Practitioner's firm acted for certain clients in a proceeding in the Environment Court. The Applicant was engaged by the firm to act as an expert witness in relation to that proceeding. The Practitioner was the supervising partner for the file.

[3] The Applicant's invoices were rendered to the Practitioner's firm and payment was arranged through the firm. At the conclusion of the Applicant's professional services five invoices had been rendered, totalling $53,542.41. It appears that no estimate or quotation for the likely cost had been sought from the Applicant. The clients had paid the first four invoices but towards the end of the matter the size of the total charges rendered by the Applicant became an issue. (The outstanding unpaid balance appears to be $19,791.41).

[4] In the course of discussions between the parties regarding the final account the Applicant raised Rule 12.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). This Rule is headed, "Third party fees" and states:

> "Where a lawyer instructs a third party on behalf of a client to render services in the absence of an arrangement to the contrary, the lawyer is personally responsible for payment of the third party's fees, costs, and expenses."

[5] The Practitioner acknowledged responsibility for payment, but considered this to be subject to resolving the dispute as to the size of the fee. When the Practitioner's efforts to facilitate a resolution were unsuccessful, the Applicant filed a complaint with the New Zealand Law Society Complaints Service, claiming he had done the work he had been engaged to do, that there was no 'contrary agreement' with respect to his fees, and that Rule 12.2 obliged the Practitioner to meet the balance of fees.

[6] In reply the Practitioner agreed that his firm had facilitated the instructions given to the Applicant, and that the firm did not dispute that it was ultimately responsible for payments under Rule 12.2, but considered this to be subject to resolving the dispute about the quantum of the fees.

[7] In the course of the Standards Committee investigation both parties were able to make formal submissions. The Applicant's detailed submission clarified that he was seeking the balance of his fee, interest on the outstanding balance and reimbursement of his legal fees (a total of $28,020.04). He enclosed a copy of *Dunstable v Leighton* (cited on the LCRO website as LCRO 73/2009).

[8] The Practitioner confirmed that the balance of the disputed fee had been paid into the firm's trust account pending resolution of the dispute, but he submitted that Rule 12.2 did not preclude the rights to challenge a fee that was considered to be excessive.

[9] The question for the Standards Committee was whether or not Rule 12.2 establishes a principle of absolute liability, or whether a lawyer facing personal responsibility for payment of a third party's fees, costs and expenses is entitled to challenge the reasonableness of such a bill. In the course of its considerations the Standards Committee noted that the Practitioner had previously raised the issue of costs with the Applicant prior to the issuing of the third invoice.

[10] The Committee had sought to persuade the parties to resolve their dispute by alternative dispute resolution but this was unsuccessful.

[11] After consideration of the submissions from the parties, the Committee decided that the Practitioner's conduct was not unsatisfactory. The Committee concluded that the Rules did not require the Practitioner to pay fees the quantum of which had been disputed by his clients since before they were invoiced, especially in the current context where (the Applicant) had resisted all attempts to resolve the matter to date. The Committee considered that reasonable attempts had been made by (the Practitioner) to resolve the dispute as to quantum.

Application for Review

[12] The Applicant considered that the Standards Committee's reasoning was *"flawed, which had resulted in it reaching the wrong decision"*. He repeated a number of submissions made earlier to the Standards Committee; those most relevant to the central issue included that not only had he reduced his fees before issuing the invoices but he had tried to resolve the situation by negotiating without success.

[13] He expressed concerns about the time (and therefore cost) involved in mediation and stated that it would not have been rational for him to enter into mediation "*when rule 12.2 is completely clear on its face that the lawyers were responsible for payment of my fee because they have instructed me and there is no other arrangement for payment of my fees*".

[14] He added that if the Practitioner had sought an estimate of his fees before confirming its instructions to him it would have better served its clients as well as the Applicant's business: *"It was the lawyers conduct when they instructed me that was not in accordance with the lawyers obligations under rule 12.2*". He submitted that it was the lawyers' role to ensure his position as third party was protected, implying that the Practitioner was obliged to take steps to ensure that his position under the Rule was protected. He suggested this could be achieved by obtaining an up-front estimate, offering to meet the cost of mediation, recognising the value of his contribution, arranged for a capped fee, and/or making arrangement for the client to meet his fee.

[15] The Applicant submitted that there was no authority for the Practitioner's position that the Rule did not preclude a lawyer from raising an issue as to quantum of a third party's fees.

[16] The outcome he sought was a finding of misconduct or unsatisfactory conduct against the Practitioner, an order for payment of his outstanding fees, updated interest and legal fees, now totalling $28,806.06, additional compensation as considered appropriate, and certain determinations regarding the obligations imposed by Rule 12.2 on lawyers, and resulting guidelines.

[17] The Practitioner's argument is simply put in his 8 July 2011 letter as follows:

> "...[T]he fact that a fee is neither agreed nor estimated in advance does not preclude an expert's client (whether or not a solicitor personally responsible for the fees under Rule 12.2) from taking issue with the quantum of the fee if it is not reasonable."

Considerations

[18] It is the role of the Legal Complaints Review Officer (LCRO) to review decisions of Standards Committees. Review includes consideration of how the Standards Committee dealt with the complaint and whether its decision is soundly based on the evidence before the Committee. It recognises that the Committees are made up of experienced lawyers, together with a non-legally qualified representative of the community.

[19] This review has been conducted "on the papers" in accordance with section 206(2)(b) of the Lawyers and Conveyancers Act 2006 with the consent of both parties.

[20] The review issue is whether, in the circumstances arising in this matter, the obligation imposed on lawyers under Rule 12.2 confers an absolute right on the third party to look to the lawyer for payment of the fee for services provided to the lawyer's client, or whether any other rights to challenge the reasonableness of the fee remain intact.

[21] I do not consider it material to this matter that the Practitioner did not seek an estimate or quote in advance.

[22] It is common ground that when the lawyers engaged the Applicant as an expert witness there was no arrangement that would relieve the lawyers from their liability under Rule 12.2. Nor does the Practitioner dispute liability. The question is whether the obligation to pay created by the Rule precludes any challenge of fee considered to be excessive.

[23] Where it applies, the Rule undoubtedly creates a right to the third party to look to the Practitioner for payment of fees. However, I can find nothing in that Rule, or in any

other part of the Lawyers and Conveyancers Act 2006, or its Rules and Regulations, that extinguishes other legal rights available to an affected party and pertinent to the transaction. Particularly relevant is The Consumer Guarantees Act 1993 (the Act) which creates a number of rights for individuals in relation to price and quality of goods and services. The "Guarantee as to price" is created by Section 31 of that Act which is headed" and provides:

> 31 (1) Subject to section 41, where services are supplied to a consumer there is a guarantee that the consumer is not liable to pay the supplier more than a reasonable price for the service in any case where the price for the service in any case where the price for the service is not -
>
> (a) determined by the contract; nor
>
> (b) left to be determined in a manner agreed by the contract; nor
>
> (c) left to be determined by the course of dealing between the parties.
>
> (2) Where there is a failure to comply with the guarantee in this section, the consumer's right of redress is to refuse to pay more than a reasonable price.

[24] The Act defines a "consumer" as including a person who acquires from a supplier services ordinarily acquired for personal use or consumption. The consumer in this case is clearly the Practitioner's client, the Practitioner having engaged the third party 'on behalf of' the client.

[25] There is nothing in the Lawyers and Conveyancers Act 2006, or its Rules and Regulations that deprive the Practitioner's client of the protections afforded by the Consumer Guarantees Act.

[26] I have also considered the LCRO decision referred to me by the Applicant, but I do not see that they have any application to the present circumstances. In the *Dunstable* case the complainant, a valuer, had been instructed to value a painting in connection with a Family Court hearing. The invoice was not paid. It appears that the valuer was initially instructed by the client and later dealt with the practitioner who needed the initial opinion to be presented in a way which was suitable for presentation in court. When the client disputed the fee, the valuer looked to the Practitioner who declined to pay him from the client's funds held in trust. The Standards Committee concluded that the lawyer did not "instruct" the third party valuer and therefore the complainant was not assisted by Rule 12.2. This conclusion was upheld by the LCRO.

The factual situation in the *Dunstable* case is quite different and it is difficult to see how it assists the Applicant in this case.

[27] The Applicant also provided a summary of a decision by a Standards Committee dealing with a lawyer refusing to pay a portion of an experts bill (LawTalk 781 (23 September 2011). This concerned an instructing lawyer refusing to pay that portion of the third party expert's invoice which covered the expert's time spent waiting for several hours at a provincial airport for the next available flight back home. There was clearly insufficient time for her to get from the court to the airport for an earlier flight. The lawyer accepted personal responsibility for the bill pursuant to Rule 12.2 but claimed there was a legitimate dispute over the amount, submitting that the expert had chosen to remain that afternoon at her leisure in the town where the hearing took place.

[28] There the Standards Committee was satisfied that the lawyer had agreed to the expert billing for all of the travel and waiting time, noting that she had booked the later return flight on the basis of an earlier email exchange with the lawyer in which the expert referred to the lawyer "secur[ing] sufficient funds for flights etc and [her] time". Assuming the facts in the summary are correct the expert had no option but to wait for the later flight, although the Committee found that the lawyer could have made an alternative arrangement about flights, presumably when the email exchange above was taking place. Materially, the Standards Committee concluded that the lawyer could not rely on her client's refusal to pay for all of the expert's time as justification for not fulfilling her own obligations under Rule 12.2.

[29] The present case is distinguishable from the above examples which did not involve a disputed bill.

[30] The remedy for a consumer who considers a fee charged for services is excessive and seeks the protection of the Consumer Guarantees Act is to refuse to pay more than what is fair and reasonable. What would amount to a fair and reasonable fee is not for this office to determine, but whatever that eventually proves to be, that will be the fee payable by the Practitioner under Rule 12.2.

[31] The Committee properly noted the Practitioner's efforts to try and reach agreement about the quantum of the fee. It is also important to note that both the Standards Committee, and this office, offered the parties the opportunity to reach agreement with the assistance of a mediator. All the evidence indicates that the Practitioner or his clients have been willing to engage in a disputes resolution process about the fee, efforts which have been unsuccessful largely because of the Applicant's

unwillingness to engage in dialogue due to his particular view of the application of the Rule.

[32] This is not a case of a refusal to pay for no reason. Reasons for non payment have been given to the Applicant. The Practitioner has not refused to pay the Applicant's reasonable fee. The question of what is 'reasonable' is in issue. That this remains unresolved is not for want of effort on the Practitioner's part. For the purpose of this review, and the question of whether a disciplinary finding should be made against the Practitioner, I am unable to see any part of the Practitioner's conduct that raises disciplinary concerns.

[33] Both the Standards Committee and this Office have also sought to assist the parties resolve the dispute through mediation, this being at no cost to the parties where a mediation direction is made by either a Standards Committee or this Office. This, too, has been declined by the Applicant.

[34] The Standards Committee had found the Practitioner's conduct was not unsatisfactory in the circumstances where the Applicant had resisted attempts to resolve the matter and the Practitioner had made reasonable attempts to do so. The evidence supports the Committee's observations.

[35] Having carefully considered the complaint, information, and the submissions of the parties, and for reasons set out above, I can find no part of the Practitioner's actions that raises disciplinary concerns.

Decision

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

DATED this 12th day of April 2012

Hanneke Bouchier
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:

KF as the Applicant
WP as the Respondent
Auckland Standards Committee 3
The New Zealand Law Society