

LCRO 152/2015

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee R

BETWEEN

FR

Applicant

AND

CB AND WT

Respondents

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

Introduction

[1] On [date] Mr Vaughan issued a decision on review of complaints by FR concerning various aspects of the work carried out by WT and CB in conducting litigation on behalf of FR. The determination of the Standards Committee to take no further action in respect of FR's complaints was confirmed on review, but Mr Vaughan directed the Standards Committee to consider and determine FR's complaint about the bills of costs rendered by the lawyers.

[2] The Standards Committee carried out that direction and issued its determination on 9 June 2015 in which is resolved to take no further action in respect of FR's complaint about costs.

Background

[3] On [date] Mr Vaughan issued a decision following application for review of two previous determinations by the Committee on FR's complaints. FR alleged negligence on the part of the respondents, specifically asserting that their conduct of the litigation

was unsatisfactory. He also complained about the fees rendered by them, that complaint including allegations of a failure "... to adequately advise FR of the likely fees for bringing a claim against his sister's estate".¹

[4] In that review, Mr Vaughan:

- (a) Directed the Committee pursuant to s 209 of the Lawyers and Conveyancers Act 2006 (the Act) to consider FR's complaint about costs on the basis that it is a complaint pursuant to s 132(2) of the Act and to issue a determination in respect thereof;
- (b) Reversed a costs order against CB;
- (c) Otherwise confirmed the determinations of the Standards Committee.

[5] The Committee commissioned a report from a costs assessor (LT) and following receipt of that report, and in consideration of the complaint, determined that the fees rendered by WT and CB were fair and reasonable.

LT's report

[6] LT noted that there were:

detailed time transactions supplied showing all work done on the file. The total time amounted to \$95,705 (exl GST). Of that time, the bulk related to CB's time with a lesser amount for WT's time.²

CB's time amounted to \$60,810 of which \$57,315.71 was charged and WT's time amounted to \$32,130 of which \$23,175.29 was charged.³

[7] LT recorded he had received the lawyers' file, the Law Society file and the boxes of documents relating to the litigation.⁴ He reviewed the material received and commented on each of the factors set out in rule 9.1 of the Conduct and Client Care Rules (the rules)⁵ which a lawyer may take into account when fixing a fee. He stated:

WT is an experienced and senior practitioner ... CB is of lesser experience, but by the same token, she appears to have done much of the preliminary work with WT being lead counsel.⁶

¹ LCRO XX/2013, YY/2013 and ZZ/2013 at [20].

² LT report (16 February 2015) at [4].

³ At [4].

⁴ At [5].

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁶ Above n 2, at [8].

I consider the lawyers' hourly rate of \$450/350 per hour to be high, but by the same token, within reasonable parameters.⁷

... I consider that the fee charged was high but not excessively so and therefore reasonable.⁸

I consider the time and labour expended by both lawyers to be reasonable.⁹

I consider that both lawyers had the necessary skill and specialised knowledge to handle this matter.¹⁰

The importance of the matter to the client was high.¹¹

The results achieved were clearly unsatisfactory to FR as his application failed. That does not mean to say that the lawyers have failed in their duty to FR or that the charging regime has been in any way wrong.¹²

There was nothing other than the lodging of the caveat against probate which appeared to be of an urgent nature which warranted an uplift.

[8] LT concluded that the lawyers' bills of costs were fair and reasonable.

The Standards Committee decision

[9] The Standards Committee recorded that:¹³

10. The sole issue for consideration by the Committee is whether the fees charged are fair and reasonable.
11. In this regard the Committee notes that although it has appointed a costs assessor, it is still required to form its own opinion on the fees charged.
12. In doing so the Committee has taken into account the cost assessor's report and all the material provided by the parties to this matter. Having done so, the Committee can see no reason to disagree with the assessment made by the costs assessor. In the Committee's view, the fees charged were fair and reasonable for the work undertaken.
13. Accordingly, the Committee does not consider it necessary to take any further action in relation to this issue.

Review

[10] This review was progressed by way of an applicant-only hearing in [city] on 19 April 2017. Neither WT nor CB were required to attend and did not exercise their right to do so. The hearing was conducted by Mr Vaughan acting as a delegate duly

⁷ At [8].

⁸ At [8].

⁹ At [7].

¹⁰ At [7].

¹¹ At [7].

¹² At [7].

¹³ Standards Committee decision (9 June 2015) at [10]-[13].

appointed pursuant to clause 6 of Schedule 3 of the Act. The final determination of the outcome of this review as set out in this decision is made following full consideration of all matters by myself following discussion with Mr Vaughan.

The bills of costs

[11] In his review application FR asserts that the schedule of invoices provided to the costs assessor and considered by the Committee was inaccurate. The schedule of costs, referred by the Committee to the costs assessor and considered by it, is correct.

[12] I note that the schedule of costs included by FR with his review application differs from the schedule of invoices marked "A" referred to in the complaint dated 1 July 2012. FR's complaint was in respect of the bills included in the schedule marked 'A' and it is to this schedule which I refer for the purposes of this review.

[13] Set out below are the invoices included in FR's schedule but not considered by the Committee. Beside each, I have noted the reason why the amount/bill of costs should not be included in the Committee's consideration and on review:

- (a) \$5,889.38 (31 August 2010) – this is a statement, not a further invoice;
- (b) \$1,840 (18 April 2011) – this is a bill rendered by TE;
- (c) \$920 (25 May 2011) – TE;
- (d) \$2,619.01 (28 October 2011) – included in schedule twice;
- (e) 16 February 2012 – TE;
- (f) 26 July 2012 – postdates complaint;
- (g) 25 August 2012 – postdates complaint.

[14] I also note that FR has expressed the total amounts of MM's¹⁴ bills in his schedule. This includes GST and disbursements which do not form part of a lawyer's fee to be considered.

[15] The total of the fees to be considered is therefore \$83,256 as recorded by the Committee and the costs assessor. FR refers to a total of \$154,450.44 in his review application. His view of fees rendered by MM is therefore coloured by these inaccuracies.

¹⁴ The respondents are employed by MM.

Procedure

[16] One of FR's main issues on review was that the Committee proceeded to determine his complaint without receiving and considering comments which he wished to make on LT's report. In addition, he argued there had been breaches of natural justice in the following ways:

1. LT did not contact or meet with FR to discuss his concerns about the bills of costs;
2. The Standards Committee declined his request for an extension of time to comment on LT's report;
3. FR did not receive any notice of hearing.

Failure to meet

[17] LT makes no reference in his report to contact or meeting with either FR or the respondents. In this regard FR's assertions are accepted and he is correct when he says that LT did not follow the direction from the Standards Committee to him as set out in the letter of instructions.¹⁵ That does not invalidate the report.

[18] The final determination of the complaint about costs is made by the Standards Committee and any defects in a cost assessor's report should be noted and taken into account by the Committee. It is not clear from the determination whether or not the Committee noted that LT had not met with the parties, but the Committee's determination is not invalidated by any omission to do so.

[19] The Committee considered the complaint and determined to take no further action.

No extension of time

[20] FR is not correct when he says the Committee did not confirm an extension of time to comment on LT's report. The Standards Committee sent LT's report to the parties on 18 February 2015 with a request to provide any comments in response by 4 March 2015. Both WT and CB advised they did not wish to comment.

[21] On 24 February 2015 FR requested the Complaints Service to provide him with the cases referred to by LT in his report. These were sent to FR.

¹⁵ Letter from Lawyers Complaints Service to LT (10 October 2014).

[22] On 2 March 2015 FR advised the Complaints Service that “it is impracticable to comment by the 4th March. I will comment as promptly as my commitments permit”. He also requested the Complaints Service to provide the following information:

- (a) Reference to the number of will cases taken to court by WT in the five years prior to 2010 and their outcome i.e. won or lost;
- (b) The Law Society’s survey of lawyer’s charge rates for 2010.

[23] The Complaints Service responded:¹⁶

Dear FR

I refer to your email below and advise that we do not have the information that you seek. I am further unaware of any ‘Law Society’s survey of lawyer’s charge rates for 2010’.

In relation to any comment to have, please provide a response by 13 March 2015.

[24] On 9 June, FR requested the Complaints Service to provide him with a copy of LT’s letter of appointment. This was provided by email on 10 June. No substantive comments were received from FR.

[25] It is not clear from the Standards Committee file when it considered this matter, but on the file there is a report from a Committee member dated 20 April 2015 for consideration by the Committee. The Committee’s determination is dated 9 June 2015 and was provided to the parties under cover of letter dated 11 June. As at the date of issuing its decision, the Standards Committee had not received any substantive comments from FR and it is clear (and acceptable) that the Committee made its determination without receiving any substantive comments from FR.

[26] However, as noted, FR is not correct when he asserts the Standards Committee did not give him any extension of time to respond. He acknowledged at the review hearing that he must have overlooked the extension provided by the Complaints Service in the email dated 3 March 2015. It is also noted that FR did not communicate further to the Standards Committee to advise when he expected to be in the position to provide his comments.

[27] In the absence of any response from FR, either by way of comments or a request for further extensions, or an indication when his comments would be

¹⁶ Email from Complaints Service to FR (3 March 2015).

forthcoming, there was no obligation on the Committee to defer its consideration of the complaint.

[28] Natural justice and s 120(3) of the Act requires the Standards Committee to progress complaints as expeditiously as possible. FR points out that LT had been provided with extensions of time to provide his report but did not extend a similar accommodation to him.

[29] Complainants are expected to pursue complaints with some degree of diligence and as FR had not responded to LT's report in a substantive manner some three and a half months after the report had been received by him it was reasonable for the Committee to proceed. In any event, FR's comments on LT's report have been taken into account on review.

Notice of hearing

[30] Following receipt of the Standards Committee determination, FR requested "a documents copy of the proceedings and the notification to me that it was occurring".¹⁷

[31] The Complaints Service responded:¹⁸

Dear FR

I acknowledge receipt of your email.

Please note that this matter was not conducted as a hearing on the papers as provided for under the Lawyers and Conveyancers Act 2008 [*sic*] (the Act). On consideration of the matter the Committee decided to take no further action in accordance with s138(2) of the Act on the basis that the Committee did not consider that any further action was necessary. This is a procedural step the Committee is entitled to take if it considers the grounds in s138 have been met.

As such, the matter was not set down for a hearing on the papers pursuant to s152 of the Act and there was no requirement to give notice in the manner contemplated by you. I do note that prior to the Committee considering the matter, you were given an opportunity to comment on the costs assessor's report. In particular, you were advised on 3 March 2015 by email to provide any such comments by 13 March 2015. However, no comments were received by that date or at any time before the Committee considered the matter and issued its written decision on 9 June 2015.

In relation to your request for a "documented copy of the proceedings", I advise that there are no recordings or documented copies of the proceedings other than the minutes (which I record the Committee's decision to take no further action), and the written decision dated 9 June 2015, which you have received.

I trust this clarifies matters.

¹⁷ Email from FR to Complaints Service (6 July 2015).

¹⁸ Email from Complaints Service to FR (8 July 2015).

Yours sincerely

MC

[32] Section 152 of the Act is permissive only and there is no requirement for a Standards Committee to conduct a hearing.¹⁹ Mr MC's explanation is a reasonable summary of the Committee's powers and obligations. In addition I observe that s 142(3) of the Act provides that a "Standards Committee may regulate its procedure in such manner as it thinks fit".

[33] In summary, I do not consider any of the matters raised by FR constitute a failure by the Committee to observe the rules of natural justice or breach the requirements of the Act.

FR's submissions

[34] At the review hearing FR handed up two papers entitled "Matters arising from the records of hearing [date] by Deputy LCRO O W J Vaughan" and "Additional matters relating to the appeal hearing by Deputy LCRO O W J Vaughan 19/4/17".

[35] As indicated in the title given by FR to the first paper, he raises various matters dealt with in the decision of [date]. The matters addressed in that decision provide the starting point for this decision concerning costs. The Committee recorded that when it stated that "... the sole issue for consideration by the Committee is whether the fees charged are fair and reasonable".²⁰

[36] FR argued that the fees rendered by a lawyer must reflect the quality of the service provided. He remains of the view that the service provided by WT and CB was substandard and therefore it is necessary to address the quality of the service when determining whether the fees are fair and reasonable.

[37] It was impressed on FR at the review hearing that the starting point for consideration of the fees rendered by the respondents is the decision of [date] in which none of FR's complaints about the conduct of the litigation were upheld. Consequently, none of the matters raised by FR in the first paper are relevant.

[38] The second paper handed up by FR raises the various procedural matters which have been addressed above.

¹⁹ See Lawyers and Conveyancers Act 2006, s 153 – all hearings are "on the papers".

²⁰ Above n 13.

[39] To the extent that any of FR's submissions are not addressed in this decision it does not mean they have been ignored. They have not been specifically addressed because they raise matters that have already been dealt with. That is the case both with FR's comments eventually sent to the Complaints Service²¹ and all material provided during the course of this review.

[40] At the heart of FR's complaint about fees is that he does not accept the judgment of the Court. He blames the respondents for this outcome. In adopting this approach he discounts completely the fact that Judge X reached his decision after hearing all of the evidence, assessing the witnesses, and hearing from counsel for both parties. FR does not accept that the Judge could come to a different view from himself.

[41] FR's option was to appeal the judgment and in this regard there can be no criticism of WT or CB if they declined to carry out any further work for FR while fees remained unpaid.

[42] I endorse LT's comments where he says in his report:²²

The results achieved were barely unsatisfactory to FR as his application failed. That does not mean to say that the lawyers have failed in their duty to FR or that the charging regime was in any way wrong.

[43] There is no doubt that FR was aware of the hourly rates of the lawyers. He noted that at a meeting on 26 November 2011, WT had stated the hourly rates to be charged were \$550 plus GST for himself and \$350 plus GST for CB. In the circumstances, it is not necessary to address the fact that hourly rates were not included in the letter of engagement but I observe that in the absence of evidence that a client is aware of the hourly rate to be charged, how a client would be informed of "the basis on which fees would be charged" as required by rule 3.4(a) of the rules is uncertain.

[44] FR continued to instruct WT and CB and cannot now object to these rates although I note that the rates charged by them were reduced to \$450 and \$300 respectively. There is no explanation for this, but the fact is that reduced rates were charged which in itself amounts to a concession by the lawyers.

[45] It is also noted that FR paid all accounts rendered by WT and CB until the final accounts following the trial. This is an indication that FR accepted the accounts at the time as being fair and reasonable.

²¹ Letter from FR to Complaints Service (17 July 2015).

²² Above n 11.

[46] FR says his "... experience of a successful litigating lawyer capable of sole investigation and promoting in court at a parallel time in the [city] area was \$350 plus GST". That in itself is inconclusive. Lawyers practice in a competitive environment and a range of hourly rates is to be expected. That is acknowledged by LT when he says that rates were high, but still within reasonable parameters. Being within "reasonable parameters" means the fees themselves are fair and reasonable, given there is no criticism by either assessor or the Committee of the work actually undertaken.

[47] Notwithstanding that FR is dismissive of JG report²³ his conclusions are relevant to the issue of fees:

I report that I have reviewed the practitioners' files as instructed and, as a practitioner with some experience of litigation of this kind, report that I could not find fault with or room to criticise the conduct of WT and CB. I have read dozens of letters and email passing between FR and the practitioners. At no stage in the proceeding would my advice have differed significantly from the advice given here.

[48] LT also reviewed the lawyers' files. He considered the matter was "particularly complex" and the time spent by both lawyers was reasonable.

[49] Members of the Standards Committee have experienced litigation and passed no comment on the work undertaken by WT and CB, specifically that the work undertaken was not necessary or the time spent appeared to be excessive. It is not unreasonable to accept the views of all of these people.

Conclusion

[50] In summary, there is no basis on which to come to a view that the fees rendered by WT and CB are other than fair and reasonable. In reaching that view it must be remembered that the assessment of a fair and reasonable fee is not a precise exercise and there must be some degree of latitude applied to a lawyer's bill of costs before an adverse disciplinary finding is made against a practitioner.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

²³ JG report to Complaints Service (17 October 2012).

Comment

In the course of conducting these reviews, it is apparent that MM intend to require payment of interest on the unpaid accounts. That is a matter of contract and the jurisdiction of this Office does not extend to such matters.

DATED this 15TH day of May 2017

D Thresher
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:

FR as the Applicant
CB and WT as the Respondents
PC as a related person
[City] Standards Committee R
The New Zealand Law Society