LCRO 157/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 3
BETWEEN	**BODY CORPORATE AV** Applicant
AND	**ZC Solicitor;** **and** **ZB QC** both of Auckland Respondents

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

DECISION

Background

[1] In early to mid 2007 certain problems with the building known as the XX began to manifest themselves which needed to be addressed. Legal representation was required so that the Body Corporate could ensure that its rights were protected against the various parties that may have been responsible for the building's defects.

[2] Since approximately 2004, AAO, the firm in which the Respondent ZC (ZC) was a partner, had acted as the solicitors for a large number of the Body Corporate members in relation to litigation unrelated to the Body Corporate and the building defects. As a result AAO became aware of the requirement for the Body Corporate to have legal representation in respect of the building defects, and put itself forward as having the required skill and expertise to represent the Body Corporate.

[3] At an Extraordinary General Meeting on 25 June 2007, AAO were instructed to proceed to prepare what was described by Mr AW (the Body Corporate representative in this complaint) as a "holding" statement of claim to be filed by 12 July 2007. The purpose of this was to stop time running and protect the Body Corporate's position vis a vis the defendants, while the specific building issues were investigated.

[4] In the process, and subsequently, members of the Body Corporate became concerned at the billing practices adopted by ZC and the Respondent ZB QC (ZB), and the ability of AAO to effectively prosecute the proceedings.

[5] By mid August 2007, the Body Corporate had become sufficiently concerned as to the quantum of bills received from AAO that it instructed ZC not to take any further steps without specific instructions from the Body Corporate, and ultimately, the firm's instructions were terminated.

Preliminary Comments

[6] This complaint arises because insufficient care was taken by the Respondents at the commencement of their instructions to map out and communicate to the Body Corporate an overall strategy which would meet the objectives of the Body Corporate, and to establish and communicate the role that each person was going to play.

[7] This would have been achieved, or at least the Respondents would have been required to give some thought to the matter, if they had provided the Body Corporate with a letter of engagement, which, although not mandatory at the time, was considered to be best practice.

[8] That this was going to be a significant case was clear from the outset. The building comprised some 250 units and was estimated to be worth $80,000,000. The estimated cost of repairs was $10,000,000.

[9] ZC was a litigator of some 30 years' experience and had been involved in a wide range of commercial work and litigation over that period. This included a number of construction disputes, some of which involved national and international corporations.

[10] However, he acknowledged to the Cost Reviser appointed by the Auckland District Law Society to revise the unpaid pre Lawyers and Conveyancers Act bills, that he did not have any experience in relation to **multi** leaky building claims.

[11] Cognisant of this, he proposed from the outset to form a team comprising of himself, ZB and the building consultants, to conduct the case.

[12] The need to retain ZB reflected his need for support in what has become a specialised area of the law, to the extent that a number of firms have founded their entire business on it. Even then, it was considered necessary to obtain opinions from other persons.

[13] AAO was described by the Costs Reviser as being somewhat unique. It had [XX] fee earners, all being partners, with no associates or junior solicitors to assist.

[14] The question has to be asked, regardless of cost issues, is whether the Respondents were going to be able to provide the level of service that was needed in respect of this claim as it progressed.

[15] I raise this, to query whether the Respondents, and particularly ZC, had themselves addressed the logistics of how this case was going to be managed, much less discussed it with their client. If some time had been taken at the outset to consider these matters, and discuss them with the client, this complaint may very well have not arisen. It may have meant that the Body Corporate did not instruct AAO but that is a consequence that AAO would have needed to face up to, and would have been preferable to the situation which developed.

[16] I have some sympathy with the view of the Applicant, that there was some measure of obligation on the Respondents to point out to the Body Corporate that the personnel available to AAO and the use of ZB, was not going to be a cost effective way to deal with a leaky building claim.

[17] It may very well be, that both parties proceeded on the basis that matters would be reviewed once the "holding" proceedings were issued, but even in that regard, the Respondents' estimate of costs proved to be so inaccurate, that questions must be raised as to how carefully the Respondents considered the matter before providing the estimate, and whether duties which they owed to their client were breached in this regard.

[18] The retention of ZB appears to have only been addressed in a somewhat oblique manner. The Respondents point to the Body Corporate minutes of 16 March 2007 as evidence that the Body Corporate knew that AAO needed to retain the services of ZB as a pre-requisite to the firm accepting the retainer. The minutes state that "[XX] (one of the partners in the firm) will meet with [XX] (the building consultant) and [ZB] in terms of discussion of issuing proceedings …" This gives no indication at all as to the extent of ZB's involvement required.

[19] The other evidence that the Respondents point to is a letter on the same day confirming that ZB had accepted the retainer. Once again, there was no mention of the hourly rates of either Respondent, or what roles each of them were going to play. It could be said with some justification that this represented a complete disregard on the part of the Respondents, of the rights of the people who were going to be paying the bills to know what they were letting themselves in for, and their right to be given the necessary information to enable them to make an informed decision.

[20] There is no indication that the Body Corporate members were aware the result of the "team" approach espoused by ZC was potentially going to result in a charge-out rate of $850 per hour.

[21] All of this lies at the heart of the complaint.

[22] Overall, I have some concerns that ZC was not being realistic in accepting this brief, both in terms of his experience and the firm's capacity.

[23] The commentary to rule 1.02 of the Rules of Professional Conduct for Barristers and Solicitors current at the time, notes that "it would be improper for a practitioner to accept instructions unless the matter could be handled with due competence and without undue interference by the pressure of work or other obligations. Instructions for work which is outside the competence of a practitioner should be either declined or, with the consent of the client, referred to another practitioner".

[24] If, to comply with these obligations, ZC needed to involve ZB to the extent that the cost was going to be $850 per hour, then the Body Corporate members had the right to know that. Again, if that had been explained to them at the outset, and they had chosen to continue to instruct the Respondents, then it is highly likely that this complaint would not have arisen.

The complaint

[25] The conduct complained of, and the bills rendered, all took place before 1 August 2008. That was the date on which the Lawyers and Conveyancers Act 2006 came into force. By that date, all but $73,211.86 of the bills had been paid. Those bills had been referred by the Body Corporate to the Auckland District Law Society for revision.

[26] On 13 October 2008, the Complaints Service of the New Zealand Law Society received a complaint from the Body Corporate in respect of the paid bills which totalled $109,534.16.

[27] The complaint was presented by the Body Corporate as a "costs complaint". In the letter accompanying the complaint, the Body Corporate identified six issues which it considered led to unacceptable costs. These were:-

[i] An unauthorised building site inspection by the Respondents

[ii] The unauthorised request for opinions.

[iii] The quantum of the total legal costs when referred to the services rendered.

[iv] A perceived duplication of services between the Respondents.

[v] Tasks performed by the Respondents which should have been performed by lower level staff.

[vi] That ZC lacked the requisite skill and competence.

[28] Subsequently, two further issues were raised, alleging negligence on behalf of the Respondents. These were:

[i] The possibility of including owners as second plaintiffs had never been raised by the Respondents, and the Body Corporate had only become aware of the importance of this when alternative solicitors were instructed;

[ii] That the Respondents were wrong in their view as to the appropriate limitation period, and that consequently the time restriction advised by the Respondents as the reason for proceeding only with the Body Corporate as plaintiff, was incorrect.

[29] The complaints were treated by the Complaints Service as two separate complaints about the Respondents, but correspondence and submissions received from them and the Body Corporate related to the same issues and a single decision was issued by the Committee.

The Standards Committee decision

[30] The Standards Committee issued its decision in respect of both complaints on 13 July 2010. It noted that all of the allegations related to conduct which occurred before 1 August 2008 and that s351 of the Lawyers and Conveyancers Act precluded complaints against lawyers in respect of conduct prior to that Act unless the alleged conduct was such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982. In respect of costs, it adopted the position that only allegations of gross overcharging or dishonest charging would have resulted in proceedings of a disciplinary nature under that Act (the word used in s351 is

"could" not "would" but I do not think this would result in any different result in the present circumstances.)

[31] With regard to allegations of negligence and/or incompetence, it noted that under the Law Practitioners Act disciplinary proceedings would (again, the word in s351 of the Lawyers and Conveyancers Act is "could") only have resulted if the negligence or incompetence was of such a degree or so frequent as to impact on a practitioner's fitness to practice or would otherwise tend to bring the profession into disrepute.

[32] With regard to the Body Corporate's allegations about costs, the Standards Committee formed the view that there was no evidence to suggest gross or dishonest overcharging, and that consequently, the Committee lacked jurisdiction to consider the bills of costs.

[33] With regard to the other matters, it also formed the view that it lacked jurisdiction to consider the matters, because the threshold required by s351 to enable it to do so, had not been reached.

[34] For these reasons, the Committee determined that it would not take any further action in respect of the complaint.

Application for Review

[35] The Body Corporate applied on 19 August 2010 to this Office for a review of the decision of the Standards Committee. In its application for review, the Body Corporate outlined nine reasons as to why it considers the determination of the Standards Committee should be reversed or modified. These are as follows:

[i] That the Standards Committee has misinterpreted the word "retainer" as it is used to explain the relationship between the Respondents.

[ii] That the Standards Committee had accepted inconsistent submissions made on behalf of ZC as to his experience.

[iii] That the Standards Committee had ignored the economic reality in accepting a limited fiduciary duty owed by the Respondents to the Body Corporate as opposed to the owners.

[iv] That the Standards Committee accepted that the Respondents were entitled to obtain the opinions from third parties.

[v] That the Standards Committee had accepted submissions that time constraints were the reasons for not including owners as second plaintiffs without any enquiry as to the actual applicable limitation period of time.

[vi] The Standards Committee had failed to link each issue of complaint and consider the practicality and cumulative effect globally of the work undertaken by the Respondents.

[vii] The Standards Committee had applied the standards set out in s106 of the Law Practitioners Act too restrictively.

[viii] The Standards Committee had accepted that there was no evidence of gross overcharging notwithstanding the practices engaged in by the Respondents resulting in significantly higher costs.

[ix] That the Standards Committee had accepted without question, submissions made on behalf of the Respondents without inquiring as to the evidence.

Of these, those numbered [i] [ii] [iv] and [viii] relate to the issue of costs. Those numbered [iii] [v] [vi] [vii] and [ix] all contain some criticism of the Standards Committee. I will address these reasons in the course of the review, but not necessarily refer specifically to them.

[36] The review was conducted in the absence of the parties and with their consent on the basis of the information, records, reports and documents available to me.

Jurisdiction

[37] Quite some time was spent by the parties addressing whether the Standards Committee had jurisdiction to consider the bills of costs rendered by the Respondents.

[38] The Respondents asserted that the Standards Committee lacked jurisdiction. They based this submission on an earlier case determined by the LCRO *Client Z and Client Za v Lawyer D LCRO 04/2008.*

[39] The Body Corporate argued that this case was wrongly decided by the LCRO, and that the Standards Committee did have jurisdiction.

[40] The submissions from both parties centred on the effect of section 351(1) of the Lawyers and Conveyancers Act 2006 which contains the transitional provisions in respect of complaints made after 1 August 2008 about conduct or bills of account rendered prior to that date.

[41] The restriction that applied under the Law Practitioners Act 1982 to prevent an application for revision of a bill of costs that had been paid more than six months previously, does not apply to a complaint in respect of costs made pursuant to the Lawyers and Conveyancers Act, and consequently the Body Corporate was able to lodge its complaint in respect of the bills that had been paid. Bills for the balance, namely $73,211.86 had been previously referred to the Auckland District Law Society for revision.

[42] This points out the differences between the two Acts. Under the Law Practitioners Act a person chargeable with a bill of costs was entitled to apply for that bill to be revised, a procedure which the LCRO refers to as an "administrative review of the reasonableness of fee", whereas under the Act, complaints about bills of costs are treated as a disciplinary matter.

[43] Under the Law Practitioners Act, only bills which were considered to be "grossly excessive" were considered to fall within the disciplinary regime by reason of the fact that the conduct of the practitioner issuing same constituted misconduct.

[44] Section 351(1) of the Lawyers and Conveyancers Act provides that "if a lawyer … is alleged to have been guilty before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made to the Complaints Service established by the New Zealand Law Society".

[45] In the Client Z decision the LCRO considered that, as complaints about costs had to be in respect of costs that were grossly excessive before they could be considered to be a disciplinary matter (as distinct from being reviewable) any complaints therefore about costs made after 1 August 2008 in respect of pre 1 August 2008 billing, had to approach this level. The threshold was therefore high.

[46] The LCRO observed that this resulted in a "perverse lacuna," in that (a) bills rendered and complained about prior to 1 August were able to be assessed for reasonableness by the cost revision process; (b) similarly, bills rendered after 1 August were also subject to assessment for reasonableness by virtue of rule 9 of the Client Care Rules; whereas (c) bills which were rendered prior to 1 August 2008, but not complained about until after 1 August 2008, had to approach grossly excessive billing before a complaint could be accepted.

[47] The Body Corporate argued that this was incorrect, and that in fact the threshold was much lower than that identified by the LCRO.

[48] The Body Corporate argued that there was a difference between "proceedings of a disciplinary nature" as referred to in s351, and "disciplinary proceedings".

[49] In its submissions, the Body Corporate argued that the phrase "proceedings of a disciplinary nature" has a much wider application and reach than the phrase "disciplinary proceedings" and extends beyond s106(3) of the Law Practitioners Act to include complaints in respect of bills of cost under Part VIII of that Act.

[50] This view is based on the fact that bills of cost could be adjusted pursuant to s106(4)(f) and s106(6) notwithstanding that there had been no finding against the practitioner pursuant to s106(3), and therefore there were no "disciplinary proceedings" contemplated.

[51] The Standards Committee did not address the Body Corporate argument, but determined that it had no jurisdiction as there was no evidence of gross or dishonest overcharging. Implicitly therefore, it adopted the approach applied by the LCRO in the Client Z decision. This approach has been also applied by Standards Committees and the LCRO in a number of other complaints.

[52] While the Body Corporate submissions have some attraction, in that it would address the "lacuna" identified by the LCRO, I am unable to accept the argument promoted by the Body Corporate.

[53] Support can be found for the approach taken by the Standards Committees and the LCRO in a recent decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, *Name suppressed [2010] 14*. While decisions of the Tribunal do not establish precedent to be followed by this Office, they are nonetheless useful in that the issue has been considered by others whose views are to be respected.

[54] That case involved a consideration of the provisions of s351 insofar as they applied to an employee of a law firm, and whether the conduct of the employee complained of, was such that "proceedings of a disciplinary nature could have been commenced".

[55] The Tribunal first noted at paragraph 9 that

> *"the effect of s351 is to ensure that the complaint made will have no standing for the ongoing process of proceeding with a charge if an initial investigation finds there is a jurisdictional issue. It does not prevent an actual complaint being lodged and the required jurisdictional inquiry being made. There has to be, of course, an actual complaint to start the process that will enable a conclusion to be reached on jurisdictional issues under s351. The reference in s351 to the circumstances in which a complaint may be made is a proxy for the jurisdictional issues noted in that*

> *section, not a bar to any actual complaint being made and an inquiry being iMr Itiated."*

[56] The Tribunal then considered the process that would have been followed under the Law Practitioners Act following the making of a complaint. At paragraph 19 the Tribunal notes that

> *"the process under the Law Practitioners Act following a complaint by a member of the public about the conduct of a non-practitioner employee, would normally have involved a complaints committee of the relevant District Law Society undertaking an initial inquiry into the allegations. The Complaints Committee would have investigated the matter and formed an opinion as to whether the conduct complained of was of "sufficient gravity to warrant the making of a charge … (ss101(1) and (2) Law Practitioners Act 1982."*

[57] The most relevant comments are made in paragraphs 23 and 24 and I include those in full.

> Paragraph 23
>
> *"We have also considered what is meant by "proceedings" being "commenced" in s351 of the Lawyers and Conveyancers Act. In our view, reference to the commencement of proceedings in s351 must refer to dealing with a complaint, after completing the initial investigation under s101(1) Law Practitioners Act, by resolving to lay charges or the actual laying of charges.*
>
> Paragraph 24
>
> *Proceedings are not commenced for the purposes of s351 by a Complaints Committee simply undertaking the preliminary investigation necessary to allow the formation of an opinion as to whether charges would be laid. If that was not the case, s351 would be ineffectual, as it would suggest proceedings were effectively considered to commence as soon as a complaint had been made and an investigation begun as to whether the complaint had any substance and should be the subject of an appropriate charge".*

[58] Reference to "proceedings" is to the phrase "proceedings of a disciplinary nature" in s351. It is to be noted that the Tribunal did not consider that the complaint and investigation stage constituted "proceedings of a disciplinary nature". Rather, it interpreted that phrase as meaning the passing of a resolution to lay charges, or the actual laying of charges.

[59] That interpretation excludes the interpretation suggested by the Body Corporate.

[60] Consequently, the same position is arrived at as in LCRO 04/2008 - namely that a resolution to lay charges, or the actual laying of charges must have occurred before the threshold is reached, and with regard to costs, grossly excessive bills would need to be present before this threshold is reached.

[61] Whether this represents a “lacuna” or not is a matter of opinion. Another way of looking at it, is that it is the result of a shift away from the process in the Law Practitioners Act where bills were scrutinised and adjusted by a cost reviser, to the situation where bills are examined in the context of whether disciplinary sanctions should be imposed in respect of billing practises, which may or may not result in a bill being adjusted.

The bills of costs

[62] Some of the reasons given by the Body Corporate in support of its application for review provide reasons why it considers the quantum of the bills reached the levels they did. However, the question to be decided is whether the bills were grossly excessive.

[63] In the Client Z decision the LCRO canvassed a number of cases in which it was found that the fees rendered were grossly excessive. In these cases, fees which were four or five times what would be considered to be a fair and reasonable fee, were considered to be grossly excessive.

[64] The starting point in making a determination as to whether a fee is grossly excessive is to consider what a fair and reasonable fee would be. This is often determined by a Standards Committee referring the matter to a Costs Assessor for an opinion as to what would constitute a fair and reasonable fee.

[65] In the present case the Standards Committee has not taken that step. In addition, there is nothing in the Committee’s determination to indicate what the members of the Committee considered would be a fair and reasonable fee, and consequently there is no bench mark against which to consider whether the fees charged were grossly excessive.

[66] In the absence of this approach, the alternative is to consider what the fees would have been for the fees charged to be 4 or 5 times a fair and reasonable fee, and therefore grossly excessive.

[67] The fees which are the subject of this review amount to $109,534.16. On the basis of the decisions referred to in the Client Z decision, for these to be considered to be grossly excessive, fees in a range of $21,900 to $27,375 would have to be considered to be what represented a fair and reasonable fee.

[68] This is a range which must be way below the realms of even the most optimistic expectations of the Body Corporate.

[69] On this basis, it cannot be considered that the fees charged are grossly excessive. Without such a finding, the Standards Committee and the LCRO lack jurisdiction to consider the complaint in respect of the bills of costs. The Body Corporate will no doubt continue to be dissatisfied with this, but it must be remembered that this is not a cost revision, nor can it be assumed that even if the charges were considered under the provisions of the Lawyers and Conveyancers Act, that there would necessarily be an adjustment to the bills of costs.

The Estimate

[70] It is hard to reconcile the costs inherent in the approach envisaged by the Respondents with the estimates provided to the Body Corporate. By the time of the Extraordinary General Meeting of the Body Corporate on 25 June 2007, several reports as to the state of the building had been received and the purpose of the meeting was to consider these in a preliminary way and map out the way forward.

[71] A review of the minutes of that meeting gives some indication of what the Body Corporate members anticipated was to occur.

[72] On the basis of the advice provided by the Respondents, it was considered prudent to issue proceedings before 14 July 2007, a date which was less than three weeks after the date of the meeting. This was to ensure that the Body Corporate did not run the risk of being out of time.

[73] ZB addressed the meeting, and the minutes record that he "made the comment, that to make the date safe for 14 July 2007, **rudimentary proceedings** could be issued".

[74] The minutes further record "indicative costs according to [ZB] were $45,000 for building consultants' reports and legal fees of approximately **$50,000**".

[75] AAO was instructed by the meeting to issue proceedings prior to 12 July 2007 with the "intention [being] to issue initial proceedings to protect the Body Corporate from any time limitation."

[76] While the Respondents may have been aware of the issue as to whether individual owners needed to be included as second plaintiffs, there was no discussion about this at that meeting. It is reasonable to assume, that the Body Corporate owners were unaware of the technicalities involved and the possible prejudice to their position, notwithstanding the comment in the report provided by ZB that the claim would be restricted to the affected property controlled by the Body Corporate.

[77] Consequently, for the Body Corporate to describe the proposed proceedings as "holding" proceedings is a fair description of what had been discussed, and there was an estimate given at that meeting of $50,000 to get to that stage.

[78] On 21 June 2007, 4 days prior to that meeting, bills had already been rendered to the extent of $23,693.61. By 14 August 2007, bills totalling $102,634 had been rendered – in excess of double the estimate provided at the 25 June meeting. By the end of August the cost had risen to $182,746.02.

[79] The question immediately presents itself as to what degree of care was given to the estimate of costs provided.

[80] There is no evidence that the Respondents addressed the cost blow-out in any way with the Body Corporate, although I do note the comment by the Cost Reviser at paragraph 35 of his report that "AAO had put before the Body Corporate costs estimates, and for the most part kept the Body Corporate informed". However, I suspect that this was after the Body Corporate had communicated its concern about costs and instructed the Respondents that no further work was to be undertaken without being specifically authorised.

[81] Under the current Client Care Rules, the existence of an estimate is a factor which is to be taken into account when fixing on the quantum of an account. That Rule, however, merely formalises what constituted best practice prior to the Client Care Rules being promulgated. Prior to this, costing guidelines were included in a New Zealand Law Society publication referred to as New Zealand Law Society Property Transactions: Practice Guidelines 2003.

[82] Paragraph 7.2(b) of those Guidelines provided that: "It is generally inappropriate to charge a fee in excess of an estimate given to a client. You should advise your client in writing immediately if it becomes apparent that the original estimate is likely to be exceeded. Give reasons for the increase in revised estimate figures".

[83] An estimate is a representation that costs will be in the vicinity of a given sum and all due care must be exercised when providing same. See J and J Abrams Ltd v Ancliffe [1978] 2 NZLR 420.

[84] The Court of Appeal has also made some pertinent comments concerning estimates in Kirk v Vallant Hooker & Partners [2002] NZLR 156 at para 49. In that case the Court stated:-

> *"Second, the question of loss or otherwise due to excess over estimates arises …If as a result of under estimation a firm is instructed or counsel is briefed in preference to others who would have acted at a similar level for reduced cost, that estimate quite properly could receive added weight. Any question of deliberate under estimation to obtain business, followed by exceeding estimates upward to a realistic level, certainly is to be discouraged. (We do not suggest that happened here). [Weight must be given to the] desirability of adherence to proper standards relating to accuracy of estimation. Clients can reasonably expect that they can place faith in estimates whether or not such in the end produce direct loss."*

[85] The evidence is that AAO had been engaged on 16 March 2007. Consequently, the provision of the estimate would not have been a factor considered by the Body Corporate in instructing them, as it was not provided until by 25 June 2007. However, given the level of fees that had already been incurred by then, it would seem that there was a degree of carelessness about the provision of the estimate, whether in not making it clear that the estimate applied from then on, or by failing to have reference to the level of fees already incurred.

[86] It needs to be considered therefore, whether there was a sufficient degree of carelessness present with regard to the giving of the estimate such as to attract disciplinary sanctions. Any such consideration must however be tempered with a consideration of what circumstances arose after the giving of the estimate, which caused the estimate to be incorrect.

[87] This does not of course detract from the obligation of the Respondents to draw the overrun to the attention of the Body Corporate, but it must be acknowledged that the overrun would have been apparent to the Body Corporate readily enough, and no doubt was the major factor behind the instruction to carry out further work only on an "as instructed" basis.

[88] The test is whether the threshold set by s351 of the Lawyers and Conveyancers Act has been reached. The discussion as to jurisdiction in the following paragraphs in relation to the complaints alleging negligence and/or incompetence apply equally to the considerations in this regard. Applying the matters discussed in those paragraphs to the conduct in relation to the estimate, I have come to the conclusion, that the shortcomings of the Respondents, do not reach the necessary threshold. The outcome may very well have been different if that conduct were to be considered under the provisions of the Lawyers and Conveyancers Act but that is not something which it is appropriate to consider in any detail in this review.

Negligent and/or incompetent

[89] The other allegations raised by the Body Corporate are essentially those of negligence or incompetence. The Body Corporate alleges that the Respondents did not properly advise it in relation to inclusion of the owners as second plaintiffs, and that they were wrong in their calculation of the limitation period, with the result that the owners were not included as plaintiffs. The two allegations are linked.

[90] When considering whether this conduct is conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act, proceedings in the form of charges of misconduct or conduct unbecoming can be readily dismissed.

[91] Misconduct has been described as "reprehensible, inexcusable, disgraceful, deplorable or dishonourable". (*ADLS v Ford* (2001) NZAR 598 at para [5]). Clearly, that is not something to be considered in connection with these allegations.

[92] Conduct unbecoming is more easily recognised in relation to conduct outside of the practice of law – see for example WBOPDLS v Baledokadroka (2002) NZAR 197, 211, where the practitioner was convicted of offensive behaviour and had had repeated convictions for drink driving and driving whilst disqualified.

[93] With regard to conduct involving lapses of professional competence, it was stated in *B v Medical Council (2005) 3 NZLR 810*, that for conduct to be unbecoming in a professional sense, it must be conduct which departs from acceptable professional standards which is significant enough to attract sanction for the purposes of protecting the public.

[94] The conduct complained of by the Body Corporate would, if proven, constitute negligence or incompetence. Section 106(3)(c) of the Law Practitioners Act requires such conduct to be of such a degree or so frequent as to reflect on the fitness of the Respondents to practice. The advice which the Body Corporate said was negligent or incompetent, relates to the establishment of the limitation period and who should be named as plaintiffs in the proceedings. The Body Corporate says that the omission of the owners as plaintiffs was a serious failing with potentially far reaching consequences.

[95] The Respondents say that the decision to draft the proceedings with the Body Corporate alone as the plaintiff was driven by the need to have the proceedings filed by the date which they considered it was prudent to have proceedings filed by.

[96] These are issues which should properly be considered by a Court. In that regard, the provisions of s138(1)(f) of the Lawyers and Conveyancers Act are relevant. That section provides that "a Standards Committee may, in its discretion, decide to take no action on any complaint, if, in the opinion of the Standards Committee there is in all the circumstances an adequate remedy....that it would be reasonable for the person aggrieved to exercise."

[97] If, as a result of Court proceedings, the allegations were proven, then it would be appropriate to refer the matter back to the Complaints Service, at which time the frequency or the degree of the negligence or incompetence would be considered in determining what sanctions should follow. It is not however appropriate for the Standards Committee or the LCRO to operate as a de facto Court in civil jurisdiction to make determinations on these matters.

The conduct considered in totality

[98] The Body Corporate submits that the Standards Committee has failed to link each issue of complaint and consider the totality and cumulative effect of the legal work undertaken by the Respondents.

[99] While I can appreciate the overall feeling of dissatisfaction engendered by the culmination of the significant costs and perceived shortcomings of the Respondents, such an approach is not appropriate with regards to the costs complaint and does not help the Body Corporate get over the threshold required by s351 with regard to the allegations of negligence and/or incompetence.

[100] A number of lesser misdemeanours, do not aggregate to constitute a more serious offence. The only situation where this approach has some relevance, is in considering whether in terms of s106(3)(c) there has been negligence or incompetence of such a degree or so frequent as to reflect on the practitioners' fitness to practice or as to tend to bring the profession into disrepute. As noted above, however, that is a consideration which would take place after decisions as to the validity of the claims are made in a different forum.

Conclusion

[101] The circumstances as presented by this matter highlight the shortcomings of the previous legislation with its lack of service standards and client care provisions. Certain aspects of the service provided by the Respondents, particularly those surrounding the estimate of costs and the undertaking of the brief without consideration

for the ability to provide the service in a cost effective and efficient way, would almost certainly have offended the consumer protection provisions afforded by the Lawyers and Conveyancers Act 2006.

[102] However, the constraints of the previous Act, coupled with the transitional measures in the Lawyers and Conveyancers Act, combine to deny the Body Corporate of any remedy through the complaints process.

Decision

[103] Pursuant to s211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 8th day of March 2011

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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:

Mr AW obo Body Corporate AV as the Applicant
ZC as a Respondent
ZB QC as a Respondent
The Auckland Standards Committee 3
The New Zealand Law Society