LCRO 167 / 2009

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay Of Plenty Standards Committee 1 of the New Zealand Law Society
BETWEEN	**MS HUNSTANTON** Applicant
AND	**MR CAMBORNE and** **MR CHESTER** Respondents

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

DECISION

[1] Mrs Hunstanton complained to the New Zealand Law Society on 31 March 2009 in respect of the conduct of Mr Camborne and Mr Chester (of the law firm XX Lawyers Limited). The main aspects of the complaint related to the amount charged for work done in respect of the estate of D Grimsby of which Ms Hunstanton is a beneficiary. In a brief decision of 23 September 2009 the Waikato Bay of Plenty Standards Committee 1 dismissed the complaint concluding that no further action was appropriate or necessary. The decision of the Committee adopted an opinion of Mr YY (as a costs assessor) which had been provided to the parties. Ms Hunstanton sought a review of that decision.

[2] The application for review raised a number of matters which were not specifically dealt with by the decision of the Committee including a failure to obtain consent of the beneficiaries to the deduction of fees, a failure to provide time records, a discrepancy between the time-costed amount and the amount of the final bill, and raising issues as to what work the bill covered and whether there had been double-billing for some work (although they were touched on in the report of Mr YY). Ms Hunstanton sought a breakdown of the original bills of costs rendered, a determination of a fair and

reasonable fee, and a determination of whether the imposition of an "uplift" over and above the time-cost was appropriate. She also complained that the Committee had not provided reasons for its decision. The time records were provided to Ms Hunstanton in the course of this review.

[3] The respondents provided a response to the application for review on 13 November 2009. That was in turn replied to by the applicant by a letter of 2 December 2009.

[4] I considered that the report of Mr YY raised some particular issues and I invited the New Zealand Law Society to make submissions on those issues. The Law Society provided those submissions on 4 December 2009. I observe that those submissions related to the principles underlying Mr YY's opinion and not the quantum of the bill itself. The parties were invited to comment on those submissions. Ms Hunstanton did so on 29 December 2009.

[5] The parties consented to this matter being determined on the papers and without a hearing in person.

Party Chargeable

[6] Ms Hunstanton is entitled to complain about the bill of costs in accordance with s 132(2) of the Lawyers and Conveyancers Act 2006 by virtue of s160 of the Act which provides:

> If a trustee, executor, or administrator has become chargeable with a bill of costs, any person interested in any property out of which a trustee, executor, or administrator has paid or is entitled to pay the bill may, under section 132(2), complain about the amount of the bill.

It is on this basis that Ms Hunstanton complains about the bill in this matter.

Provision of records / consent to billing

[7] Ms Hunstanton sought a review on the basis that the respondents should have obtained consent prior to billing this matter and ought to have provided to her time records when requested. Those time records were provided to her through this office in the course of the review.

[8] Ms Hunstanton is a beneficiary in the estate of D Grimsby (Ms Hunstanton's mother). Mr Chester is the executor and trustee. As such the reporting obligations of the firm (including Mr Chester and Mr Camborne) in respect of the legal bills are to the executor. In this sense the client of the firm is the estate of D Grimsby which is represented by the executor and trustee, Mr Chester. While a trustee is obliged to

provide information relating to the assets of the trust to beneficiaries (*Re Murphy's Settlements* [1998] 3 All ER 1) this is distinct from any obligation to provide detailed time records in respect of work undertaken in the course of rendering professional services. Given that a beneficiary may complain about a bill of costs there are obvious pragmatic reasons why a lawyer might choose to provide details of a bill of costs to a beneficiary, however, there is no obligation to do so.

[9] Where a lawyer is the sole trustee and executor of an estate (as was the case here) a situation can arise where the lawyer is the only person who receives statements and invoices in respect of the affairs of the estate. This is a situation prudence would suggest is best avoided (and is advised against in the Law Society Trust Accounting Guidelines at para 8.3). One way of avoiding this would be to provide beneficiaries with the estate's invoices and trust account statements. I also note the guidance of the Court to lawyers administering estates in *Jemma Trust Co Ltd v Liptrott* [2004] 1 All ER 510, 522 that it is best practice was for a solicitor to obtain prior agreement as to the basis of his charges not only from the executors but from any residuary beneficiary who was an entitled third party.

[10] There was no obligation on either of the respondents to seek the consent of Ms Hunstanton or any other beneficiary prior to rendering and paying the bill in this matter. It is the duty of the executor and trustee to attend to the payment of the liabilities of an estate and it would be an inappropriate delegation of that duty to seek consent or direction from a beneficiary.

Was the fee fair and reasonable?

[11] The basic question in issue in this complaint was whether the bill was, in all of the circumstances, fair and reasonable. I observe immediately that I am not well placed to make such a judgment in so far as I have modest knowledge of what is an appropriate bill for the work done in this matter in the location the service was delivered. My role is to review the manner in which the Standards Committee reached its decision and consider whether its process was appropriate and whether it proceeded on the basis of correct principle.

[12] The central complaint about the bill in this matter is the fact that a premium was added to the time-costed amount to reflect the value of the estate being administered. It is appropriate therefore to consider whether in the present circumstances it was appropriate for the lawyer to impose an "uplift" over and above the value of the bill calculated on a time-cost basis. In this matter the time-costed value of the bill was $2306. The bill was $4283. This is an increase of approximately 85%. When queried

as to the amount of the bill by Ms Hunstanton Mr Camborne responded that "the value of the estate was taken into account as one of the factors relevant to the fee charged. Our fee represents approximately one third of one percent of the estate assets" (email of Mr Camborne to Ms Hunstanton of 28 January 2009).

[13] The estate itself comprised primarily of two properties and some investments with a total value of approximately $1.2 m. The properties were transferred into the names of the beneficiaries jointly. It appears that this was a relatively straightforward estate to administer.

[14] Mr YY provided a cost assessment report to the Committee in which he reviewed the estate and the work undertaken. Mr YY addressed some of the minor matters raised in respect of the bill before turning to the question of the "uplift". In general all parties agree that the amount of time and hourly rates charged in respect of the work was reasonable (I put to one side for the moment the issues relating to double-billing and errors in the work).

[15] In turning to the question of the quantum of the bill Mr YY based his views heavily on a study he had undertaken of pricing of legal services in respect of wills and estates. The study itself was not provided to the Committee. No details were provided in respect of when that study was undertaken, how many respondents it had, or what methodology was adopted. It is not clear to me without seeing the study that the reliance on this study is appropriate. In his study he found "the largest single group of [practitioner] respondents preferred pricing methodology was recorded time plus a percentage of the value of the estate (20.1%). How practitioners "prefer" to bill does not appear to me to be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances.

[16] Mr YY then turned to the size of the uplift. He expressed it as being 0.16% of the value of the estate. He referred again to his survey in which he had asked what was an appropriate uplift in terms of the percentage value of an estate. He noted that at the 25th percentile of his survey were of the view that 0.1% of the value of the estate was appropriate. I am also cautious about the relevance of this information in light of the fact that it is a question put in the abstract to practitioners. In particular it does not include reference to the amount of time that would be spent on the work, the amount that the bill would be without the uplift, or whether different uplifts would be appropriate for different sized estates.

[17] The recommendation of Mr YY was that the fee be upheld.

[18] That report was provided to the parties to the complaint. Ms Hunstanton objected to the analysis that an uplift was appropriate "as though it were a commission". She also observed that there was no urgency, novelty, or complexity in this matter and in light of that the hourly rates were alone an appropriate basis for billing.

[19] I observe that there were no particular terms of engagement in this matter (the matter having commenced in July 2008 none was required by the professional rules).

[20] The fundamental issue is whether the fee charged was fair and reasonable in terms of r 9 of the Rules of Conduct and Client Care (ROCCC) which provides:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[21] It is also the case that a fair and reasonable fee is not simply an arithmetical calculation based on time. This was noted both by Mr YY in his report, and by the Law Society in their submissions. New Zealand courts have adopted the approach of Donaldson J in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441-442 (adopted in *Gallagher v Dobson* [1993] 3 NZLR 611). The relevant passage warrants reproduction at length:

> The object of the exercise… is to arrive at a sum which is fair and reasonable, having regard to all the circumstances and, in particular, to the matters specified in the numbered paragraphs of part 2 of the order. It is an exercise in assessment, an exercise in balanced judgment - not an arithmetical calculation. It follows that different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow. It also follows that it is wrong always to start by assessing the direct and indirect expense to the solicitor, represented by the time spent on the business. This must always be taken into account, but it is not necessarily, or even usually, a basic factor to which all others are related. Thus, although the labour involved will usually be directly related to, and reflected by, the time spent, the skill and specialised knowledge involved may vary greatly for different parts of that time. Again not all time spent on a transaction necessarily lends itself to being recorded, although the fullest possible records should be kept. This error is compounded if, as an invariable rule, the figure representing the expense of recorded time spent on the transaction is multiplied by another figure to reflect the other factors. The present case provides an illustration of this error. … In my judgment the proper

approach is to start by taking a broad look at 'all the circumstances of the case' and in particular the general nature of the business. This should be followed by a systematic consideration of the factors specified in the paragraphs of art 2 of the order.

[22] There are a number of points which can be drawn from that statement:

[a] Setting a fair and reasonable fee requires a global approach;

[b] What is a reasonable fee may differ between lawyers, but the difference should be “narrow” in most cases;

[c] While time spent must always be taken into account it is not the only factor;

[d] It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[23] The (non exhaustive) factors that a lawyer must take into account are set out in r 9.1 of the ROCCC and are:

> (a) the time and labour expended:
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
> (c) the importance of the matter to the client and the results achieved:
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
> (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
> (f) the complexity of the matter and the difficulty or novelty of the questions involved:
> (g) the experience, reputation, and ability of the lawyer:
> (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
> (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
> (j) any quote or estimate of fees given by the lawyer:
> (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
> (l) the reasonable costs of running a practice:
> (m) the fee customarily charged in the market and locality for similar legal services.

[24] It should be noted that these factors may be reasons for reducing as well as increasing a fee. Mr YY, in his report to the Committee, did not refer to the factors set out in r 9.1. As such it appears that Mr YY (and therefore the Committee) failed to take account of relevant considerations in his deliberations. It is appropriate to consider whether or not the factors are relevant to the matter in hand:

Time and labour expended

[25] This is clearly relevant and was taken into account by the costs assessor when he considered the time records.

Skill, specialised knowledge, and responsibility

[26] The bill should reflect the fact that this was not a matter which required any skill, specialised knowledge or responsibility. This was a straightforward administration of the estate. Mr Chester was the sole trustee and executor of the estate. This is not unusual and could not be considered as imposing any special responsibility which warranted any increase in fee.

Importance of the matter to the client and the results achieved

[27] This was a matter of a normal level of importance. It was a usual transactional matter with no especial importance. The results achieved were also normal in so far as the estate was administered properly and effectively. The bill should reflect this.

[28] I observe that factors such as "the results achieved" will often be more important in matters where the result is in doubt as for example litigation, or commercial negotiations.

Urgency and circumstances / time limitations

[29] The bill should reflect the fact that the circumstances were not urgent and there were no particular time limits placed on the work.

The degree of risk / amount or value of any property involved

[30] There was no particular risk involved in this work other than that which a firm would usually undertake for work of this nature.

[31] However, a central aspect of this review is the relevance of the "value of the property involved" to the amount of the bill. It is worth noting in full r 9.1(e) which provides that it is proper to take into account:

> the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved.

This is in distinction to the previously applicable r 3.01 of the Rules of Professional Conduct for Barristers and Solicitors which stated as a standalone consideration that the "value or amounts of any property or money involved" was a relevant consideration. However the ROCCC link that consideration to the "degree of risk assumed by the lawyer". This is indicative of an approach that the mere fact that the lawyer is undertaking work which concerns some high value asset is not of itself a reason for

increasing the fees. This suggests that the imposition of a premium based on value of the property dealt with should be approached with caution in New Zealand.

[32] The fact that high value property may warrant some increase in fees is better reflected in matters such as the responsibility required to perform the services, the importance to the client, and the complexity of the matter, all of which are referred to elsewhere in r 9.1. It may also be relevant that if very high value work is undertaken existing insurance arrangements may be insufficient and a lawyer may need to make particular insurance arrangements (although this will be rare and the impact unlikely to be large).

[33] It should also be noted that this matter was not one which could be considered a very high value estate. While an estate of $1.2m is certainly financially healthy, it is only that which might be expected of a successful middle class person at the end of their life. It could not be considered that of a very wealthy person. It may therefore be that in light of this no particular adjustment was required.

[34] Even if the value of the estate in this case of itself warranted some increase, I am of the view that this has been approached on the basis of a wrong principle. In particular, the Committee adopted Mr YY's report which was assumed that it was appropriate for a lawyer to impose a flat percentage surcharge on an estate based on the value of the estate. There are considerable difficulties with such an approach both generally and in respect of this matter in particular.

[35] In general terms such an approach places a disproportionate weight on the value of the estate. By way of example, on the methodology approved by Mr YY (and using the uplift applied in this case) one might compare three estates each with similar kinds of assets but of significantly different value, say $100 000, $1m and $5m. It is conceivable that each estate took the same amount of time to administer which might account for a time based fee of $3000. If a surcharge were applied of 0.16% (as was the case here) the fees would be $3 160, $4 600 and $11 000 respectively – all for identical work. While some adjustment may be proper to reflect the different values of the estates a raw "percentage of the estate" approach is inappropriate.

[36] This concern was identified by Donaldson J in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 443 when he stated:

> In taking account of high values, while it is right in principle to apply a value factor this factor will vary according to the particular circumstances and it should be remembered that the burden of responsibility on the solicitor does not

increase in direct proportion to the value. The effect of increased value is regressive and the rate of regression increases with the value.

[37] I observe that another way of looking at the uplift is as a percentage of the time-based fee. In this case that amounts to an 85% increase of the fee. When expressed in this manner the uplift appears very large. It was noted in *Jemma Trust Co Ltd v Liptrott* [2004] 1 All ER 510 at 522 that a useful test for a value based premium on a bill is to calculate the number of hours that would notionally be taken to achieve the amount of the separate charge in order to help determine whether overall the remuneration claimed is fair and reasonable.

[38] The question of whether some uplift for value is appropriate was considered in *Treasury Solicitor v Regester* [1978] 2 All ER 920. In that case it was observed that a percentage uplift approach was appropriate for a number of reasons. The subject matter was a commercial development of uncertain outcome, it was an unusual and complex transaction, it had to be completed by a deadline and there was no margin for error, and the transaction was (applying the standards of the time) a high value one.

[39] A similar approach was taken by the Court in *Jemma Trust Co Ltd v Liptrott* [2004] 1 All ER 510 in respect of fees for the administration of an estate. In that case the estate was worth in the region of £9.5m and therefore properly considered very high value. That case also referred to English Law Society guidance that noted that where an estate comprises largely real estate "a full value factor will be too large in relation to the responsibility involved and to the weight of the matter". The court also considered that it was appropriate to exclude real estate from a value calculation in respect of estates. That appears to be an apposite observation in this case where the conveyancing aspects of this estate were routine.

[40] In *Maltby v DJ Freeman & Co* (*a firm*) [1978] 1 WLR 431 at 436 the Court suggested that if a regressive approach was taken to a value factor that the premium should "dovetail" into charges for lower value estates. From that I take the court to have intended that in lower value estates no particular premium would be necessary, and that the premium would be applied progressively to greater estates up to a particular level and regressively after that.

[41] One feature of these English cases is that the billing procedure which the lawyers sought to defend was transparent and it was clear how the lawyers arrived at the sum in the bill which was under challenge. In *Jemma Trust Co Ltd v Liptrott* [2004] 1 All ER 510, 522 the Court gave guidance that where a premium was added for value it should be apparent from the face of the bill how the value was taken into account.

[42] The forgoing discussion has focussed on a number of English cases. In those cases there is an acceptance of the value element which might be considered to go beyond that generally applied in New Zealand. I have already noted that the New Zealand rules (which used to mirror the applicable English Costs Order) now place less emphasis on value as a stand-alone consideration. Accordingly it may be that the English cases should be viewed with a degree of caution. Certainly the main question will be what is fair and reasonable in the New Zealand context applying standards found in the market and locality in which the legal services in question were provided.

[43] I observe that the Courts have repeatedly criticised an arithmetical approach to time-costed billing. The same criticism can be made to the percentage uplift approach. It should be observed however that the percentage uplift approach was not referred to by the respondents in this matter (although they did acknowledge a value based premium had been applied). Rather it was the standard applied by Mr YY against which he tested whether the fee was reasonable. I consider that that was not a proper standard to adopt by itself.

Complexity of the matter / difficulty or novelty of the questions involved

[44] This matter was not complex or difficult. It contained no novel questions. The bill should reflect the fact that this matter was straightforward.

Experience, reputation, and ability of the lawyer

[45] Work was undertaken on this matter by a number of people within the firm. Their charge-out rates differed from $180 per hour to $250 per hour. These hourly rates were referred to by Mr YY in his report. This was a proper reflection of the attributes of the lawyers who worked on the file and no further adjustment was necessary.

The reasonable costs of running a practice

[46] While this matter will be of relevance to the setting of any fee, it does not require special consideration in this case.

Any fee agreement entered into between the lawyer and client

[47] In the present case there was no fee agreement, nor any provision of fee information. This was not required under the then applicable Rules of Professional Conduct. I also observe that because in the present case Mr Chester was the solicitor and sole trustee/executor the information may well have been provided by Mr Chester as solicitor to himself as trustee and executor. It is proper to be cautious in such a situation. Additionally, where a large premium has been added to a bill, or a billing

methodology other than time-cost is used to justify a bill it is appropriate to expect a lawyer in such a situation to be able to justify the manner in which the bill was set.

[48] Clients generally expect to be charged for legal services primarily on a time and attendance basis. While it is generally accepted that there may be some adjustment for wider matters this is frequently understood to be at the edges and not to comprise a significant element of the fee setting exercise. Such an approach accords with the general practice of many lawyers. The right to impose a fee is a matter of contract which is limited by the professional obligation to charge no more than a fee which is fair and reasonable. Accordingly a time and attendance approach to billing might be regarded as a customary term of the retainer in the absence of specific agreement to the contrary.

[49] A lawyer who intends to impose a premium which would be unexpected to a reasonable client will have to establish as a matter of contract that this is permitted as well as having to establish as a matter of professional conduct that the fee reached is fair and reasonable. It will be difficult to do so if the client was not on notice of a method of billing which is other than the usual time and attendance basis.

[50] In future it is unlikely that such a percentage uplift of the kind contemplated by Mr YY would be permissible in the absence of explicit reference to it prior to the retainer being entered into given the obligation in r 3.4 to provide information on the basis upon which fees will be charged. The purpose of such information is that clients are informed of how fees will be charged, and if desired they can compare this across firms and practitioners and choose accordingly.

[51] While this decision does not rest on it, I observe that in this case the method of charging was not disclosed and there would be difficulty in establishing a contractual right to adopt such a methodology.

The fee customarily charged in the market and locality for similar legal services

[52] Arguably Mr YY's report was premised on the basis that in the market and locality for the services rendered in this case the fee was reasonable in all of the circumstances. However, the information set out by Mr YY does not in fact refer to what fee would be customarily charged for the work. Rather it states that 20% of practitioners had a preferred pricing methodology which involved time plus a percentage of the estate. There was no information as to how often that pricing method was used. Of that 20% of practitioners Mr YY reports that the 25th percentile considered that a 0.1% uplift would be appropriate (here the uplift was 0.16%).

[53] The Law Society in its submissions noted the importance of the "market and locality" principle and stated that where a costing methodology corresponds with that frequently adopted by the profession this will be a factor relevant to the issue of the fairness of a fee. There is considerable merit in this point. However, in this case all that can be said is that on the basis of Mr YY's description of his report 20% of the practitioners who responded to him would prefer such a methodology. It cannot be said on this basis that such an approach is "frequently adopted".

[54] I observe Ms Hunstanton's statement that she sought quotes in respect of estate work from a number of law firms and none of those firms referred to a "time plus percentage of the value of the estate" approach.

[55] While Mr YY is a practitioner from a specific area in the Bay of Plenty and presumably has some knowledge of the market for legal services in that area, there is no discussion of what a reasonable fee would be in another area or the Bay of Plenty generally.

[56] There is a danger that Mr YY, in providing his report, analysed the issue of whether the fee was fair and reasonable on the basis of an approach which he considers ought to be acceptable and adopted, rather than the principles set out in the Rules of Conduct and Client Care.

Factors which were not of relevance

[57] There were a number of factors which were not at all relevant in this matter. In particular the following were not relevant: whether the acceptance of the particular retainer will preclude engagement of the lawyer by other clients; whether the fee was fixed or conditional (whether in litigation or otherwise); any quote or estimate of fees given by the lawyer.

Global consideration

[58] In assessing whether a fee is fair and reasonable it is also necessary to undertake a global assessment of the fee and to "stand back" and determine whether in all of the circumstances the fees are fair and reasonable. In the present case this does not appear to have occurred.

Other matters

[59] Ms Hunstanton had raised in her complaint and application for review the fact that certain work was charged for twice, and that some work was due to the fact that the firm had made errors. The firm accepted that some errors had occurred in undertaking the work. Such errors appear to have required further work to have been

undertaken. However, I do not consider that this matter requires revisiting on review. Because the setting of a reasonable fee is a global matter it would be inappropriate to take into account every aspect of the transaction entered into. While there may have been an oversight which required additional attention, this does not appear to have been at a level which would affect the quantum of the fee.

[60] Ms Hunstanton also complained that there was double billing in that some attendances had already been charged for in the first bill and were charged for again in the second bill. I have examined the billing records and I did not find any evidence of double billing. It may be that in the narrative to the bills reference was made to aspects of the work which was ongoing and therefore appeared duplicative, however, there does not appear to be anything inappropriate in this regard.

[61] Mention should also be made of the complaint that the Committee had not provided adequate reasons (as required by s 158(2) of the Lawyers and Conveyancers Act 2006). The decision of the Committee in this case was very brief. However, in its decision the Committee referred to Mr YY's report and stated that it "resolved to accept the recommendation and uphold the bill of costs in full". From this it can be inferred that the reasons given by Mr YY were adopted by the Committee. There is nothing objectionable in this providing of course that the Committee exercises its own judgment in adopting such a report.

Approach to costs complaints

[62] In *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 Donaldson J observed that in considering the quantum of a bill "different people may reach different conclusions as to what sum is fair and reasonable". It is for this reason that there is a proper reluctance to "tinker" with bills by adjusting them by small amounts. His honour however further noted that the quantum of a bills for similar matters "should fall within a bracket which, in the vast majority of cases, will be narrow". It is therefore appropriate for Standard's Committees not to be unduly timid when considering what a fair and reasonable fee is.

[63] There is a real danger that a Committee (or costs assessor) approaching this question will take as a starting place the fee actually charged and consider whether it is justifiable in all of the circumstances. This appears to be putting the cart before the horse. In adopting the amount charged as a starting place there is a risk that there is an unconscious presumption that the bill is appropriate. Where there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable.

[64] The task of the Standards Committee (with the assistance of a costs assessor if appointed) is to determine what is a fair and reasonable fee in the circumstances. This should be addressed first. This approach of determining first what a reasonable fee is was approved by Justice Ipp in *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 where he noted at p 214 that "The inquiry into what amounts to grossly excessive or unreasonable costs would ordinarily involve, first, a determination of what, in the particular circumstances, would be a reasonable sum to charge". That approach is widely adopted in Australia (see recently for example *Mijatovic v Legal Practitioners Complaints Committee* (2008) WASCA 115). Only when the matter of what is a fair and reasonable fee is determined can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged.

Conclusion

[65] While I consider that the costs assessment was not appropriate in this case it is important to make clear that this does not mean that a billing method which expressly took account of the value of the property involved would never be appropriate. Where such a basis of charging is properly disclosed to a client who is independent of the lawyer and has the opportunity to "shop around" for other lawyers such an approach may be unobjectionable. Obviously the fact that a fee agreement outlining such an approach was entered into between the lawyer and client will be a highly relevant factor. However in all cases, whatever the agreement of the client, the bill must still be "fair and reasonable for the services provided" as required by r 9 of the ROCCC.

[66] I have concluded that the costs assessment in this matter proceeded on a wrong principle. I do not propose to replace the view of the costs assessor with my own view as to what would be a reasonable fee. I note in particular that I have not found that the fee in this case was unreasonable, rather that the procedure before the Committee and the principles it adopted were flawed meaning that its conclusion is unsafe.

[67] While it is regrettable that this matter has been ongoing for some months I am not qualified to make the assessment required to determent whether the fee is fair and reasonable. I consider that it is appropriate to return this matter to the Standards Committee so that it may reconsider it in light of the observations in this review, and if necessary obtain a report from another costs assessor.

Decision

The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Waikato Bay of Plenty Standards Committee 1 is reversed and the Standards Committee is directed to reconsider the matter pursuant to s 209 of the Lawyers and Conveyancers Act 2006.

DATED this 10th day of February 2010

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Duncan Webb
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:

Ms Hunstanton as Applicant
Mr Camborne and Mr Chester as Respondents
XX Lawyers Limited as a related party
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society