IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DICIPLINARY TRIBUNAL

[2011] NZLCDT 9

LCDT 007/10

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of a lawyer

TRIBUNAL
Chair:
Mr D J Mackenzie

Members:
Mr M Gough
Mr A Lamont
Mr C Lucas
Mr C Rickit

COUNSEL
Mr H D P van Schreven for the Canterbury Standards Committee No. 1
Mr J Brandts-Giesen for the respondent

HEARING at Christchurch on 15 December 2010

DECISION OF THE TRIBUNAL ON CHARGES

Introduction

[1] On 15 December 2010 the Tribunal convened in Christchurch to hear a charge of professional misconduct and, in the alternative, conduct unbecoming a solicitor, laid against the respondent. The charges were laid by the Canterbury Lawyers Standards Committee. At the end of the hearing the Tribunal reserved its decision.

[2] The Tribunal's decision on the charges was originally intended to be finalised in late February 2011. The earthquake which struck Christchurch on 22nd February 2011 has resulted in delay in completing this decision, as two of the Tribunal members live in the region affected, as do counsel and the respondent himself.

[3] The charges related to the charging and deduction of fees by the respondent in respect of the estate of a deceased person, Mrs W, ("W Estate"). The conduct was alleged to have occurred over a period from April 2004 until September 2007. Because the conduct complained of occurred before 1 August 2008, the date the Lawyers and Conveyancers Act 2006 came into force, certain transitional provisions of that Act apply.

[4] Prior to 1 August 2008, professional conduct in the legal profession was governed by the Law Practitioners Act 1982, and associated regulatory instruments. S.351 Lawyers and Conveyancers Act 2006 provides that where a solicitor is alleged to have been guilty of conduct of the type for which disciplinary proceedings could have been commenced under the Law Practitioners Act, a matter may proceed under the Lawyers and Conveyancers Act, subject to certain other conditions set out in that section.[1] Where a solicitor is found guilty under the Lawyers and Conveyancers Act of a charge relating to pre 1 August 2008 conduct, any penalty is required to be a penalty that could have been imposed at the time the conduct occurred.[2]

[5] In the circumstances of the respondent's alleged conduct, the charge of misconduct, and the alternative charge of conduct unbecoming, may proceed under the Lawyers and Conveyancers Act pursuant to S.351. They are charges that could have been brought pre 1 August 2008 under the Law Practitioners Act, and the conduct is alleged to have occurred within the permissible period.[3]

Charges

[6] The Charges are set out with more particularity in the Amended Charge filed in this matter with the Tribunal. In essence the Standards Committee has charged the respondent with breaches of the Law Practitioners Act 1982 and the Solicitors Trust Account Regulations 1998, alleging he deducted fees from the W Estate without authority, and did not deliver a fees invoice to anyone following deduction of fees. The charges also allege that fees rendered and taken in September 2007 were not justifiable or reasonable.

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[1] For example, S.351 also requires that the conduct have occurred within 6 years prior to 1 August 2008.
[2] S.352(1) Lawyers and Conveyancers Act 2006
[3] Footnote 1, ibid

[7] In particular the Standards Committee alleges a breach of S.89 Law Practitioners Act 1982, and R.8 Solicitors' Trust Account Regulations 1998.

[8] S. 89(1) provides;

> *"All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such monies shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor."*

[9] R.8 provides;

> "(1) *No trust account may be debited with any fees of a solicitor (except commission properly chargeable on the collection of money and disbursements), unless,*
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> *(a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or,*
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> *(b) An authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.*
>
> (2) *If fees are debited under subclause (1)(a) before an invoice is delivered or posted to the person liable for payment or to that person's solicitor, an invoice must be delivered or posted to that person or to that person's solicitor immediately after the fees are debited."*

[10] The Standards Committee alleged that the respondent had deducted fees from funds held in the W Estate's trust account with his firm, without delivering or posting an invoice as required by R.8(2). It also alleged that he had deducted fees from a Mr S who was the sole executor of the W Estate, for personal work undertaken for Mr S, in a similar way. As a consequence of these deductions, the committee said the respondent was also in breach of S.89.

[11] The fees deducted by the respondent from the W Estate trust account which are the subject of the charges, were; invoice of 8th April 2004 for $6,000 plus GST; invoice of 7th February 2006 for $750 plus GST and disbursements; and, invoice of 14 September 2007 for $21,000 plus GST and disbursements. The respondent also deducted fees from Mr S's trust account by invoice of 8th April 2004 for $850 plus GST and disbursements. This deduction is also a matter included in the charges.

[12] The respondent did not claim he had any written authority permitting the debiting of fees. He said he had posted his fee invoices to Mr S (as executor for the estate work the respondent had undertaken, and in his personal capacity for the separate work undertaken for Mr S by the respondent), as required by R8(2). Accordingly, the respondent said, he had breached neither R.8 nor S.89.

[13] At this point we should note that S.89 appears directed at protection of client money by ensuring it is held in a trust account entirely for the benefit of the person for whom it is received, and is to be paid to that person or as that person directs, so that it is

unassailable by a solicitor's creditors.[4] As far as the taking of fees is concerned, the direction of the person on whose behalf money in a trust account is held is not necessary under S.89(1) [5], as shown by the operation of the provisions of S.89(4) and Rr.8(1)(a) and (2)[6].

[14] It could be said that failure to comply with the notification requirements of R.8 meant that X had to have a direction in the form of an authority under R.8(1)(b), otherwise there is a breach of S.89, but the key finding to reach that point would be that there was no notification under R.8(2). As a consequence, our focus is on whether X complied with R.8(2) when he took fees from the estate's trust account and from Mr S's trust account, and whether the fee of September 2007 for $21,000 plus GST and disbursements to the W Estate was justifiable and reasonable.

[15] The purpose of R.8 is to ensure that legal fees are not debited to client trust accounts with a law firm without either a specific authority, or full transparency around any deduction of fees. That transparency may be obtained by posting the relevant invoice for the fees deducted to the person liable for the fees.

[16] The Standards Committee claimed that there was no person with standing to authorise fee deduction, or to receive notification of such deduction, as required by R.8, as Mr S had died during the course of administration of the W Estate and was not replaced. X was not free to prepare invoices and deduct fees in the way he did, it said. X submitted that he did comply with his obligations under R.8, because he prepared and posted invoices to Mr S, unaware that he was deceased.

[17] It was common ground between the committee and X, that Mr S was deceased at the relevant times. The key issue for the Tribunal is whether X knew that Mr S was deceased. If he did, not only would there be non-compliance with R.8, but it would also raise questions as to X's honesty in sending invoices to someone he knew was deceased.

Evidence

[18] The Tribunal received a range of evidence on the question of whether X knew that Mr S, the sole executor of the W Estate, was deceased at the relevant times. In our view that evidence indicated that X must have been aware that Mr S was deceased.

[19] There was a letter dated 8 March 2004, from X to Mr P Cunningham,[7] a relation of one of the residual beneficiaries, in which X wrote;

> "*I write to advise that JW and BS have both died*".

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[4] See particularly S.89(2) Law Practitioners Act 1982

[5] We accept that breach of a direction not to take fees would raise separate issues of professional responsibility to a client under S.89, but that is not a relevant issue in the present charges.

[6] S.89(4) preserves fee rights in respect of such trust account money for a solicitor, and the regulations noted show that client direction is not required before taking fees, notification is sufficient.

[7] Complainant's Bundle of Documents ("CBOD") 47 B

[20] The evidence before us was that the executor of the W Estate, Mr S, had died some 3 months earlier, on 5 December 2003. X confirmed his knowledge of Mr S's death in his letter. The letter also stated that as a consequence of the life tenant's death (a Mr W was the life tenant), a sale of the estate's partially owned property at W Road, Christchurch, had been completed, and that the estate's share of the sale price was available for distribution as a consequence.

[21] While Mr W was very unwell in hospital, the evidence was that Mr W had not died as at March 2004, surviving until August 2005, so the letter was incorrect in that regard. Nevertheless, the property had been sold, as it was no longer required, Mr W having been placed in permanent care, and funds had been released by that sale.

[22] In response to this evidence regarding his knowledge of Mr S's death, X denied that he was the author of the letter, which had been taken from his file relating to the W Estate. He did not satisfactorily explain how the letter came to be on the file and written in his name. X had indicated in his first affidavit of 15 October 2010 filed in this matter[8] that he would adduce evidence from his secretary in support of his position that despite the letter being in his name and on his file it was not his letter. X did not adduce any such evidence, and we find that it was most likely that X was the author of this letter.

[23] There was another letter in evidence, taken from X's files, which also confirmed that X would have known about Mr S's death at the relevant times. This was a letter dated 26 March 2004, from a Michael Cunningham to X,[9] referring to an email from X. In that letter to X, Mr Cunningham wrote;

> "*As promised please find some previous correspondence I have had with the late Mr S………………I trust this is of some help you (*sic*) with regard to the mislaid files you mentioned in your email to me.*"

[24] This letter is noteworthy in a number of respects when considering X's denial of knowledge of the death of the executor Mr S. In the letter Mr Cunningham is responding to an email from X, and he has clearly been advised of the death of the executor, as he refers to the "late" Mr S.

[25] We note that X has again been referred to the fact of such death by the use of the descriptor "late" in the letter he has received from Mr Cunningham in response to an email X had sent him regarding the matter.

[26] X offered no explanation regarding his lack of knowledge of the information contained in this letter regarding the death of Mr S, and we consider it most unlikely that X had not received this letter, which was found in his files during the Law Society investigation.

[27] X said in a memorandum to the Standards Committee[10] during its investigation into his administration of the W Estate, regarding possible intestacy issues[11], that he had;

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[8] Paragraph 22 of that affidavit

[9] CBOD 41

[10] CBOD 21 at paragraph 7

[11] X had become aware of such intestacy issues as a result of a letter dated 11 November 2002 from Michael Cunningham which confirmed the deaths of his parents – see COBD 44

> "*…discussed the situation fully with the trustee, Mr S, whom we were in very regular contact with during that year 2002.*"

[28] That serves to confirm in our view that it would be unlikely that after complete cessation of contact, following Mr S's death in 2003, X would not notice that the sole executor of the estate he was administering, Mr S, was no longer available for any discussion or instructions.

[29] Mr S, as the sole executor of the W Estate, was reliant on X to assist and advise him of his estate responsibilities. In his affidavit of 15 October 2010, X said that Mr S;

> "*…was inexperienced as an executor/trustee. He relied heavily on me and my firm to assist him in his obligations.*" [12]

[30] That again increases the likelihood that X would have noticed Mr S's absence, especially as X would be obliged to report estate progress to, and liaise on any issues with, Mr S from time to time. X's claim that he did not know of Mr S's death from the time of its occurrence in December 2003, until early 2008 at the earliest, is implausible. It would require X to have continued to administer and finalise the estate without noting there was no contact with or instruction from the sole executor for over four years, and we think that highly unlikely.

[31] X said he discussed with Mr S locating two beneficiaries who were entitled to bequests of $2000 each. His evidence was that Mr S authorised the use by X of the intestate share of the estate in respect of cost to locate those beneficiaries. X said that this was discussed with Mr S on a number of occasions and that Mr S considered it important that they be located.

[32] If locating the two beneficiaries was specifically requested and approved by Mr S, we would have thought that X would have kept Mr S advised of a matter which X said was important to Mr S. Obviously, that did not occur.

[33] X said there were significant issues in the estate to resolve. A file note of 17 October 2005 was in evidence,[13] noting some of these issues. It is unusual that X made no attempt to brief Mr S as the sole executor, and obtain his instructions on these matters. There was no correspondence from X to Mr S at all from the end of 2003, in fact the invoices were the only items that were found addressed to Mr S, and, according to X, sent, despite what appeared to be originals still on the file. X explained that latter point by noting it was his practice to produce multiple "originals". We note the absence from his files of any covering letter with any of the invoice said to have been sent.

[34] From evidence of a review of his file, there was no attempt by X to communicate with Mr S after December 2003, apart from the invoices the subject of the charges which X claimed to have sent. The view of the Tribunal is that there was no such attempt because X knew Mr S had died. There was no evidence of any covering letter with any of the invoices. X claimed he had posted them, explaining the fact of originals still being on

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[12] Paragraph 6 of that affidavit
[13] CBOD 63 - 65

file as resulting from a practice of producing more than one in original format. He did not explain the absence of covering letters with any account said to have been posted. It seems highly unusual that invoices and accounts would be sent with no covering advice regarding the position of Estate's administration or comment on invoices. We note also that X claimed that despite posting invoices to Mr S over a period of some years following his death, a death about which X said he was unaware, there was no evidence of any mail being returned unclaimed at any time during the four year period 2004 - 2008.

[35] When X charged legal fees to Mr S in April 2004, for personal legal work he had completed for Mr S some time earlier, he used funds of $1000 which were available to Mr S from the W Estate by way of bequest. X generated a fees invoice and deducted $1,000 from Mr S's trust account. To cover that debit, he then transferred the $1,000 bequest from the estate trust account to Mr S's trust account. X made no effort to confirm to Mr S what he had done, except, he says, to post an invoice to Mr S showing the amount owing.

[36] That invoice[14] does not show how it was to be paid and there was no covering letter explaining how the fee would be met from a transfer of bequest due from the W Estate. A copy of Mr S's trust account ledger with X's firm, showed that the fee, debited to Mr S's trust account on 8 April 2004, was paid by transferring $1,000 to that account from the estate trust account a week later, on 15 April 2004.[15] We find the fact of no covering letter with this invoice to Mr S in his personal capacity surprising, especially as the account was to be paid by deduction from the estate bequest X intended to transfer a week later. A letter with some explanation was something that would be expected to accompany the fee invoice showing $1,000 owing by Mr S.

[37] X stated in his affidavit of 15 October 2010,[16] that Mr S "*was in hospital very sick*" when the estate house sale was imminent. The sale was due for settlement in January 2004, so X said he got a transfer signed in anticipation of the sale. He said;

> "*If he was alive at the time of the sale we could use the transfer. If he was dead we couldn't use the transfer*".

[38] That indicates X would have stayed in close touch with Mr S to monitor the situation he described. Mr S died on 5 December 2003 and the property transaction went through in January 2004. It is most unlikely that in those circumstances X did not know Mr S had died.

[39] X has been equivocal about his state of knowledge regarding Mr S's death, certainly at the outset of the investigation by the Law Society. X originally said that he "*ought to have remembered that S was dead but I did not*",[17] and that as mail (the invoices he said he had sent) was never returned to him, he was not alerted to that fact. We find X's description of his lack of knowledge of Mr S's death, saying he may have known, but had forgotten, unusual in the circumstances of his current position that he had no idea that Mr S had died. In his affidavit of 22 October 2010 filed in this matter, X continued that equivocal theme, saying "*Mr S died in December 2003. I did not know this or at least have no recollection of ever having known this.*" On its own, this lack of certainty of his view

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[14] CBOD 54
[15] CBOD 55
[16] Paragraph 12 of that affidavit
[17] Paragraph 2 in his letter of 3 March 2009 to the Complaints Officer investigating – CBOD 6

regarding his state of knowledge regarding Mr S's death would be nothing more than unusual, but when added to all the other evidence it is a matter which warrants comment. We consider it reflects on X's credibility which we consider doubtful, based on various implausible explanations he gave in evidence about not knowing of Mr S's death.

[40] In our view; the letter of 4 March 2004, in which X wrote of Mr S's death; the letter of 26 March 2004 from Mr Cunningham to X, noting Mr S was deceased; the sudden cessation of Mr S's regular contact with X; the suggestion that the estate was administered for over four years from December 2003, without any contact with the sole executor, a person who relied heavily on X for advice regarding the estate, being noticed by X; the failure to attempt to raise matters of importance with Mr S, such as progress on the beneficiary search or the significant legal issues regarding the estate administration; the issue of invoices debiting fees to the estate with no covering letters explaining the various debits or reporting progress in administration of the estate; the way $1,000 was deducted from Mr S's trust account in payment of personal accounts after transferring a bequest without any explanation to Mr S; the close monitoring of Mr S's health and well-being when in hospital in late 2003 by X, in case Mr S should die; and X's equivocal early statements regarding his knowledge of Mr S's death which we found unusual; all support a view that X knew that Mr S was deceased at the times he generated invoices, deducted fees, and, he says, posted invoices to Mr S. The weight of the evidence makes it highly unlikely that X did not know for a period of over four years, during which he was administering the estate that Mr S, the sole executor, had died at the end of 2003.

[41] A will for Mr S remained in X's law firm's safe, unopened, X said. He claimed this supported his position that he did not know Mr S had died. We consider that this evidence does not necessarily support that position. Quite apart from the fact that there may have been a later will held by another lawyer, or some other reason the will he held was not proven, it would also support a suggestion that X wanted to maintain the sole control he had over the W Estate, and did not seek to change that position by proving Mr S's will. We cannot resolve this issue one way or the other, as there was insufficient evidence on the point, but in any event we do not consider that it is a matter that could displace the weight of the other evidence we received indicating X knew, at the relevant times, that Mr S had died in 2003.

[42] Dealing now with the allegation in support of the misconduct charge that the quantum of the invoice of 14 September 2007 was not justifiable either in relation to work actually performed and/or as a reasonable fee incurred in the administration of the estate.

[43] The invoice was for $21,000 plus GST and disbursements. It was said to arise as a result of time spent (175 hours) trying to locate two bequest beneficiaries entitled to $2,000 each.

[44] We find it remarkable that such an amount would be expended looking for two beneficiaries entitled to a small bequest of $2,000 each. Even if it could be justified, and we do not think it can for the reasons we shall note, there is no rational relationship between the value of the work done, the small value of bequests involved, and the fee of $21,000 plus GST and disbursements charged.

[45] The extent of those services (175 hours endeavouring to locate the bequest recipients), and the fee itself, are excessive. They are disproportionate to the value of the services said to have been undertaken.

[46] X said he had no supporting time records for these 175 hours, because he had destroyed the records while overseas, once he had completed his investigations and before embarking on a holiday he planned on his way back to New Zealand. When asked why he had done that, he said he had not wanted to be burdened by travelling with the file, and as a consequence he had destroyed evidence of time he said he had spent, when he disposed of the file.

[47] At the beginning of 2006, when shares of the W Estate were paid to two beneficiaries, a third intestate share was noted in X's trust account narration as being for the Crown. That share, amounting to $22,572 grew with interest to $23,569 over the next fifteen months to September 2007. At that point it was used towards meeting X's September 2007 invoice of $21,000 plus GST and disbursements, a total invoiced amount of $23,737.97.[18]

[48] In his affidavit of 15 November 2010 filed in this matter, X said that he had an arrangement with Mr S that legal fees for the W Estate would be charged at final distribution. This agreement was said to have been made at the conclusion of court proceedings involving the estate in March 1990. There was evidence of fees being charged to the estate periodically after that date and before final distribution, so, if there was any such agreement, it did not appear to have been observed.

[49] X seemed to be claiming, so far as this invoice for $21,000 plus GST and disbursements was concerned, that Mr S would have found the quantum acceptable having regard to earlier work for the W Estate that X said had not been invoiced. Apart from there being no evidence to support this claim, and it not answering questions raised about X's knowledge of Mr S's death, we do not accept that any such a belief by X would validate an invoice that he could not justify on the basis of either work done or time spent. Such a claim also does not sit well with the fact that other invoices had previously been rendered to the W Estate.

Decision

[50] It is the view of the Tribunal that the evidence shows that X knew that Mr S was deceased when X debited the fee invoices to the estate's trust account with his firm, in particular the September 2007 invoice for $21,000 plus GST and disbursements, and when he debited Mr S's trust account with his firm in respect of his personal fees invoice. The totality of the evidence weighs heavily against X's claim that he was unaware of the death of the sole executor for a period of over four years while he continued to administer and bill the estate, and the executor personally. X had no plausible explanation for his claimed lack of knowledge that the sole executor of the W Estate, Mr S, had died.

[51] X submitted a letter to the Tribunal from Dr Williams, a psychiatrist, in support of his evidence that he suffered from depression that was not diagnosed until 2003 – 2004.

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[18] CBOD 51,52

This depression was said by X to be connected with difficult family circumstances, as well as some professional problems related to his legal practice. The Tribunal acknowledges that X appears to have had some mental health issues in the past, for which he received treatment, but there was no evidence that these issues affected X's behaviour and would explain the conduct which we have found in deciding the charge against him.

[52] We note that Dr W, who did not first see X until 28 August 2008, formed the view that X had been suffered a "*fluctuating depressive illness".* There was no evidence to suggest that all the detail regarding the W Estate and its administration, which X was fully conversant with as shown in the way he covered the detail in his submissions to the Law Society investigation, and in his evidence to this Tribunal, was affected by that illness. To the contrary, he had a good recollection of all issues that had arisen. The only matter he claimed confusion on was his knowledge of Mr S's death. As noted, the weight of evidence indicated that he did know, and we do not accept that X was unaware of the fact of Mr S's death at the relevant times. We do not consider that anything in Dr W letter changes that position.

[53] We find that X did not comply with R.8 Solicitors Trust Account Regulations 1998. X either did not post invoices to Mr S, as the Standards Committee suggested because of the originals found on the file, or, he did post them (as X claimed he did, claiming there were multiple originals), knowing the recipient was deceased. In either case there is no proper compliance with R.8.

[54] The reason for the requirements of R.8 must be to ensure clients are informed about fees they have incurred and which are being paid by deduction. That gives a client oversight regarding such fees. It acts to protect clients against inappropriate or excessive fees, as the transparency required empowers a client to query or even complain. In this case, where Mr S was deceased, there was no-one who would see X's invoices and query them if necessary, as X would have been aware.

[55] We believe the evidence indicates that X knew Mr S had died, and that he has been calculating in the way he has managed the estate following Mr S's death. X would have been aware that he was effectively in sole charge of dealing with W Estate funds on hand in his trust account. As there was no-one he needed to report to, he was unlikely to be held accountable for charging and taking the fees he decided to charge. Those fees were set by X at a level we find unjustifiable, and were sufficient to take the amount otherwise to be paid to the IRD as unclaimed money.

[56] There was no executor, and what family there was, lived in the United Kingdom, which meant that estate funds were not due to or expected by any person. That is, such funds would not be missed if applied to pay legal fees, as they were destined for the IRD as unclaimed monies. There was nobody to receive any advice regarding X's claim for legal fees and their payment.

[57] The fees of September 2007 were significant, and not justifiable in terms of the value of work done (a fee of $21,000 plus GST and disbursements is disproportionate to the outcome sought – the location of two beneficiaries entitled to $2,000 each), and no time records were available in any event, justifying 175 hours, with X saying he destroyed the records.

[58] In the circumstances in which X found himself, completing invoices and debiting fees to the estate account was able to be achieved with no external review of the appropriateness of fee, including quantum. There is a troubling coincidence between the unjustifiable value of the September 2007 invoice and the value of the intestate share otherwise due to be paid to IRD as unclaimed monies.

[59] The evidence relating to the state of X's knowledge of Mr S's death, which supports a view that he did know of that death, and the generation of an invoice, based on work said to have been undertaken, which is disproportionate and unsupported by evidence, leads us to the inescapable conclusion that X has taken advantage of the situation in which he found himself. In those circumstances he has taken fees of $21,000 plus GST and disbursements that we find were excessive, and inappropriate. He has either not posted invoices as required, or if he did, he did so knowing that the posting was meaningless. In those circumstances R.8 could not operate to ensure there was transparency in what X was doing and, as noted in paragraph 54, its protective purpose was lost.

[60] There has been non-compliance with R.8 of the Solicitors Trust Account Regulations 1998. Even if there had been a posting of invoices, as claimed by X, it was to a person he knew to be deceased, and that could never constitute compliance. The fee of September 2007 is unjustifiable. These factors form the basis of what appears to be a dishonest approach by X in charging and taking excessive fees. We find that the charge of misconduct has been proven. It is a serious matter which we consider has been proven to the required evidential standard.[19]

[61] The Standards Committee is to file submissions on penalty and costs within three weeks of the date of this decision, and serve a copy on X. X is to file submissions in reply, with a copy to the Standards Committee within three weeks after he receives the committee's submissions.

[62] Once submissions are received a date for a penalty and costs hearing will be set down. For the purposes of S.257 Lawyers and Conveyancers Act 2006, costs to date are noted as $11,000.00. A final figure will be certified on completion of the penalty hearing.

Dated at Auckland this 19th day of April 2011

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D J Mackenzie
Chair

[19] The balance of probabilities, applied flexibly having regard to the seriousness of matters and the consequences that may flow, the more serious the charge and possible consequences the greater the evidential burden. – Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1 (Supreme Court)