LCRO 226/2010

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 3
BETWEEN	**IX on behalf of ADG**
	Applicant
AND	**SC**
	Respondent

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

DECISION

Background

[1] ADG is the tenant of a building owned by Mr SC's client.

[2] In 2009, the lease of the premises occupied by ADG terminated. The company continued in occupation on a monthly basis, and then commenced negotiations for a new lease of its existing three units. Whilst negotiations were underway, a fourth unit became available and negotiations continued for a lease of all four units.

[3] An agreement to lease was prepared by a real estate agent, and whilst this formed the basis of the continuing negotiations, the agreement was not signed. Instead, the parties continued to negotiate by way of email and ultimately the terms of the lease were encapsulated in the agreement and the numerous (42) emails between the parties.

[4] Mr SC prepared a draft lease which reflected the terms agreed on, and after approval by his client, the document was sent on 16 December 2009 to ADH who acted for ADG. The company took possession of the premises over the Christmas break.

[5] Following enquiry of ADH as to when the lease would be signed, that firm sent a letter to Mr SC in which amendments to the draft lease were requested. Significant correspondence then ensued between Mr SC and ADH and after some amendments to the document, the lease was executed by ADG, largely in the form as prepared by Mr SC.

[6] Mr SC rendered an account for $3,792.00 plus GST and disbursements on 20 May 2010, but offered a discount of $500.00 if the account was paid by the end of the month.

[7] On 3 June, Ms IX, on behalf of ADG, lodged a complaint with the Complaints Service of the New Zealand Law Society, requesting that the "bill be reviewed by a costs reviser".

[8] Mr SC produced his time sheets to the Committee, and also noted that he had offered a discount for prompt payment.

[9] Having considered all of the material the Committee came to the view that Mr SC's costs and charging policy were reasonable, and that his conduct was not such as to raise any professional standards issues. The Committee resolved to take no further action in respect of the complaint pursuant to section 138 (2) of the Lawyers and Conveyancers Act 2006.

[10] Ms IX has sought a review of that determination.

Review

[11] I initially referred Mr SC to rulings 6.18 and 6.21 of the Property Disputes Sub Committee of the Auckland District Law Society, which related to what costs could be charged to a tenant under clause 6.1 of the Society's Deed of Lease. This is the form used as the base document by Mr SC in preparing the Deed of Lease. I then invited the parties to endeavour to resolve their dispute by negotiation, mediation or conciliation.

[12] I also provided Mr SC with a copy of a letter dated 9 August 2010 from Ms IX to the Complaints Service which had not been sent to him by the Complaints Service.

[13] Mr SC responded with comments on the content of that letter. He also advised that he considered that the tenant was liable for costs on the basis of clause 9 of the Agreement to Lease which had been prepared by the real estate agent which in his view had a wider application than the terms of clause 6.1 of the lease.

[14] Mr SC then invited me to proceed to a decision, from which I inferred that he was not amenable to endeavouring to negotiate a settlement.

[15] On 2 June 2011, this Office wrote to Ms IX observing "that the matter now rests on a legal issue as to liability for costs. This is not a matter on which the LCRO will rule". Ms IX was asked whether in these circumstances she wished to continue with the review.

[16] On 8 June 2011 she replied, confirming that she wished the review to continue but that "if the landlord still wishes to pursue a claim based on the draft agreement to lease, which was never signed or agreed to by us, then we acknowledge that that is a separate issue and that we cannot stop such action being taken."

[17] I was somewhat puzzled by this response, given the indication in the letter of 2 June.

[18] Nevertheless, as required by the Act, the review continued and a hearing was held on 8 March 2012. Ms IX was represented by Mr IY, but she herself was unable to attend through illness. Mr SC attended in person.

Complaints about costs

[19] Ms IX asked that the Complaints Service conduct a "costs revision" in her letter of complaint. At the hearing, Mr IY requested that I make a ruling as to what constituted a fair fee based on the provisions of clause 6.1 of the lease.

[20] It seems to me that Ms IX may have proceeded with her complaint, and this review, on the understanding that the costs revision process that existed under the previous legislation remained in place. Under the Law Practitioners Act 1982, a party chargeable with a lawyer's bill of costs, could apply to have that bill revised by costs revisers appointed by the Law Society. In the process, bills of costs were adjusted, sometimes by modest amounts. This has been described by a leading commentator on costs issues, as "tinkering".

[21] The costs revision process was abolished when the Law Practitioners Act 1982 was repealed by the Lawyers and Conveyancers Act 2006. Complaints about bills of

costs are now treated in the same manner as any other complaint about a lawyer's conduct. In some cases, the Standards Committee will refer the bill to a costs assessor to provide a report to the Committee, but before a lawyer's bill can be adjusted the Standards Committee must first make a finding of unsatisfactory conduct pursuant to section 12 (c) of the Act by reason of a breach of rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[22] Rule 9 provides as follows:

> "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"

[23] Consequently, the manner in which a lawyer's bill may be adjusted has changed, and can only follow a finding of unsatisfactory conduct. This requires some degree of certainty that a lawyer's bill is demonstrably too high.

[24] Given the terminology used by Ms IX and Mr IY, I perceive that they may have been labouring under the impression that the "costs revision" process may still be in force. If that is the case, that is unfortunate, as it has contributed towards a situation where this matter has been unduly extended, rather than being settled between the parties in a pragmatic way.

A matter of law

[25] As signalled in the letter to Ms IX on 2 June 2011, and again at the review hearing to Mr IY, the complaints process is not the proper forum in which disputes as to liability will be determined. There are clearly differences of opinion between Mr SC and Ms IX as to what provisions govern the tenant's liability to pay costs, and having determined that, the interpretation of those provisions.

[26] The Standards Committee seemed to consider that, even applying the provisions of clause 6.1 of the lease as the basis for determining liability, the fee charged was fair and reasonable. There is no indication in the determination that the Standards Committee considered the rulings referred to by me or that the Committee engaged in any examination of the terminology used in clause 6.1. That clause refers to liability for "preparation of the lease" which in my view would not allow the costs relating to negotiating the terms of the lease to be charged to the tenant.

[27] Mr SC however, takes the view that he is entitled to include those charges because the terms of the Agreement to lease include those attendances, and/or the

negotiations after he had prepared and forwarded the draft lease, amounted to variations for which he was entitled to charge in terms of clause 6.1.

[28] The basis on which costs are to be paid by the tenant are therefore in dispute, and that is not a matter which is properly addressed in a disciplinary forum as previously advised by me

[29] Whilst therefore I intend to confirm the decision of the Standards Committee to take no further action, the reasons for that determination will be modified in that consideration of the matter by the Standards Committee and myself is "inappropriate" for the reason that the issue of liability needs to be determined in a different forum. Once liability is determined, it is to be hoped that the parties can agree quantum in a reasonably pragmatic manner.

Decision

[30] Pursuant to section 211 (1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee to take no further action is confirmed but modified as provided in this decision.

Publication

[31] Pursuant to section 206 (3) of the Lawyers and Conveyancers Act 2006, I direct that the comments made in [19] to [24] of this decision, or a summary of these, be published after all identifying details are removed, to enhance awareness of the public and the profession as to the manner in which complaints about lawyers' bills of costs are processed under the Lawyers and Conveyancers Act 2006.

DATED this 13th day of March 2012

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O W J 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:

IX as the Applicant
SC as the Respondent

IY as Representative of the Applicant
The Auckland Standards Committee 3
The New Zealand Law Society