LCRO 230/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [A North Island] Standards Committee of the New Zealand Law Society
BETWEEN	**MR AW** Applicant
AND	**MR ZK** Respondent/Practitioner

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

DECISION

Introduction

[1] The applicant has applied for a review of the determination of [A North Island] Standards Committee dated 31 July 2012. That was a determination of the applicant's complaint of overcharging by the Practitioner in the administration of the estate of [Mrs AW Senior], who died on [date], in which the applicant was a beneficiary.

[2] This matter has a difficult background. The applicant originally complained to the Lawyers Complaints Service by letter dated 11 August 2009, complaining about overcharging by the Practitioner in circumstances of fee invoices, all of which were paid by deduction, in the sum of $140,644 plus GST and disbursements (total $161,067.92) in relation to an estate which had net assets of approximately $285,000.[1]

[3] The complaint was investigated by [North Island] Standards Committee which initially decided to take no further action, by notice dated 4 May 2010. That decision was explained in jurisdictional terms, where the complaint related to 14 fee invoices

issued between 31 March 2008 and 25 March 2009, of which ten – approximately 80 per cent of the overall billing in value – were issued prior to the commencement of the Lawyers and Conveyancers Act 2006, on 1 August 2008 (LCA). I will refer to this issue in terms of "pre-LCA" bills and "LCA-era" bills. The Standards Committee expressed itself as declining to exercise its jurisdiction to consider any of the pre-LCA bills, with reference to the threshold in s 351(1) and, so far as the four LCA-era bills were concerned, the Standards Committee decided to take no further action because it did not consider that the fees in those invoices were unreasonable.

[4] The applicant applied for a review of that decision. The decision[2] was delivered on 25 November 2010, in which the Review Officer decided that:

> (a) The application for a review was upheld pursuant to s 211(1)(a) of the Act.
> (b) The decision of the [North Island] Standards Committee was reversed; and
> (c) The Standards Committee was directed pursuant to s 209 of the Act to reconsider the complaint generally and with specific reference to:
> (i) The cost assessor's report; and
> (ii) Deducting fees without authority.

[5] The Standards Committee undertook the reconsideration and delivered its decision, which is now the subject of this review, on 31 July 2012. The Standards Committee again expressed itself in jurisdictional terms in declining to consider the ten pre-LCA bills, finding that the threshold in s 351(1) had not been reached and, in relation to the four LCA-era bills it determined to take no further action under s 152(2)(c) because it was satisfied that the fees were fair and reasonable.

[6] The applicant applied for review of that determination, again asserting overcharging. The opening words of his application summarised the grounds upon which he sought this review:[3]

> There seems to be complete lack of any sense of proportion here. Mr ZK knew this estate was valued at approx. $285,000 but he

[1] The value of the estate, and its relevance to the level of fees, has been the subject of some debate in the analysis of the complaint and I will comment on that later.
[2] LCRO 99/2010.

> charged $161,000. Whilst acting for the estate as the executor and solicitor he had a higher duty than normal that surely included not dissipating the estate in his fees.

[7] For convenience, I refer here to a table listing the fee invoices which are the subject of the complaint and of this review:

Number	Date	Fee	GST	Other	Total
3171	31/03/2008	$19,540.00	$2,442.50	$365.90	$22,348.40
3170	31/03/2008	$3,534.00	$441.75	$133.20	$4,108.95
1833	31/03/2008	$1,250.00	$156.25	$153.00	$1,559.25
3189	30/04/2008	$33,000.00	$4,125.00	$557.00	$37,682.00
3187	30/04/2008	$5,250.00	$656.25	$47.92	$5,954.17
3198	30/05/2008	$35,699.50	$4,462.44	$516.84	$40,678.78
3195	30/05/2008	$2,305.00	$288.13	$46.48	$2,639.61
1861	30/06/2008	$8,500.00	$1,062.50	$184.30	$9,746.80
3200	30/06/2008	$4,500.00	$562.50	$125.64	$5,188.14
3210	31/07/2008	$3,485.00	$435.63	$68.11	$3,988.74
3204	01/08/2008	$750.00	$93.75	$84.82	$928.57
1875	30/09/2008	$4,450.00	$556.25	$168.66	$5,174.91
3231	20/10/2008	$9,000.00	$1,125.00	$195.99	$10,320.99
3271	25/03/2009	$9,385.00	$1,173.13	$190.50	$10,748.63
				Total	**$161,067.92**

Costs Assessors' Reports

[8] It is also important for the purpose of this review to explain that at the time of the first LCRO review[4], one costs assessor's report had been provided as part of the investigation of the complaint by the Standards Committee. That was a report provided by Mr TL, lawyer, of Auckland, dated 4 February 2010. The Review Officer in that decision expressed some dissatisfaction with that report because it concentrated largely on time recording and rates charged and did not examine the necessity for the work to have been undertaken, and because it lacked analysis of the fee-charging factors in Rule 3.01 of the Rules of Professional Conduct for Barrister and Solicitors

[3] Application for Review dated 1 September 2012.
[4] Above n 2.

(RPC) and 9.01 of the Conduct and Client Care Rules.[5] The Review Officer also found that the decision of the Standards Committee lacked an objective appraisal and an element of "standing back" to consider fees in the round.

[9] Following the referral back to the Standards Committee, two additional costs assessments were undertaken at the direction of the Standards Committee. Reports were furnished to the Standards Committee by Mr PT, an experienced Auckland lawyer, and by Mr CX, a specialist in legal costing matters (and whose costs assessment advice to the New Zealand Law Society had been discussed in LCRO 99/2010). Although Mr CX's appointment was pursuant to s. 144 of the LCA (power to appoint an investigator) I did not accept the Practitioner's submission that the resulting report was essentially anything other than another costs assessment, albeit having reference to prior costs assessments.[6]

[10] Consequently, it is a feature of this case that by the time this review application came before me, there were three separate costs assessors' reports, two of which found the fees to be fair and reasonable (TL and CX), and one (PT) found substantial overcharging and expressed the view that net fees of $141,648.50 should be reduced to $29,300.

Scope of this review

[11] Against the background of the difficult pathway this matter has followed to date, I have approached this second review on the basis that I am considering the substance of the complaint afresh, and that I may take into account all the evidence and submissions provided to date. That includes the three costs assessors' reports and, of course, the submissions that were provided to me in the context of the hearing of this review on 6 November 2013.

[12] In undertaking this review I have focused on three key issues:

(a) Whether there has been overcharging at a level warranting discipline, both in relation to pre-LCA and LCA-era bills.

[5] Lawyers & Conveyancers Act (Lawyers:Conduct and Client Care) Rules 2008.
[6] The difference in appointment may be explained by Mr CX having been professionally engaged by the Standards Committee.

(b) On a related matter, whether the Practitioner's attendances in the administration of this estate amounted to "over-servicing" which was in turn reflected in excessive fees. I use the term "over-servicing" to refer to the situation where a lawyer has provided services, or purported services, which were excessive in their scope by any reasonable measure or by reference to the instructions given, and did not materially serve the client's interests, but were nevertheless the subject of substantial fees. I regard this concept as being implied in the "reasonable fee factors" in Rules 3.01 RPC and 9.1 of the Conduct and Client Care Rules, with reference to the concepts of "time and labour expended", "the skill, specialised knowledge, and responsibility required to perform the services properly" and "the complexity of the matter and the difficulty or novelty of the question involved"; and

(c) A further issue, which was a particular focus in the decision of this Office in LCRO 99/2010, concerns the question whether the Practitioner wrongly deducted fees without authority. This arose out of a letter from the firm [Firm 1], on behalf of the Practitioner's non-lawyer co-trustee, Mr YF, on 18 July 2008, in which the Practitioner was told that no costs payments were to be "…made out of the house sale proceeds without our client's approval, through us". Although this was not ultimately pursed further in this review, in the later part of this review decision I have commented about the need for there to be a record of an authority to deduct.

[13] In considering the scope of this review it is relevant for me to refer to the written submissions by the Practitioner's counsel, for the review hearing before me, where he said:

> The LCRO is **not** a costs reviser. The LCRO's function is to review the Committee's decision to determine whether on the evidence before it, it was correct in declining jurisdiction.

[14] While I agree that the functions of this Office are not those of a costs reviser, or a costs assessor, I do not agree that the scope of this review is limited to deciding whether the Standards Committee was "correct in declining jurisdiction". I have a broad statutory function to review a final determination of a Standards Committee.

That includes the power to review all aspects of the inquiry carried out by the Standards Committee in relation to the complaint to which the final determination relates,[7] and to exercise all the powers of a Standards Committee in addition to the particular powers available to this Office.[8]

[15] Although the Standards Committee expressed itself as declining jurisdiction to review the pre-LCA fees, that was in substance a decision on the merits, because there was an express preference for the TL and CX reports and the findings by those two costs assessors that the fee invoices did not amount to overcharging.[9]

[16] I am not constrained or limited in the scope of my review by the decision of the Standards Committee. The review jurisdiction of this Office is broader than an appeal and it gives the Review Officer a discretion concerning the approach to be taken on any particular review. The Review Officer must come to his or her own decision.[10]

Review jurisdiction – complaints concerning fee invoices pre-LCA bills

[17] I need to address this issue because the Practitioner's counsel submitted to me that I had no jurisdiction to conduct a review of the pre-LCA fee invoices, with reference to s 150 of the Law Practitioners Act 1982 (LPA) which he said "…imposes a prohibition on revision of bills of costs after the expiration of 1 year from the date of payment of a bill paid by deduction or set off".

[18] It is true that the applicant made his complaint to the Complaints Service on 11 August 2009 and that all the pre-LCA invoices were dated over a year earlier, from 31 March to 31 July 2008. However, I do not agree with the submission on behalf of the Practitioner on this point, asserting that I lack jurisdiction to inquire into those fee invoices. Neither the Standards Committee (on two occasions) nor this Office (in LCRO 99/2010) felt constrained from inquiring into the pre-LCA bills on the jurisdictional grounds arising under s 150 LPA and I consider that I have jurisdiction to conduct my review in relation to the pre-LCA bills for the following reasons:

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[7] Lawyers and Conveyancers Act 2006, s 203.
[8] Above n 7 ss 209 and 211.
[9] Determination of Auckland Standards Committee No. 1, No. 1624 (31 July 2012), at [39]–[41].
[10] *Deliu v Hong* [2012] NZHC 158 at [40]–[41].

(a) The LCA repealed the LPA except to the extent reflected in the transitional provisions of the LCA.[11] The jurisdiction of a Standards Committee, or this Office, to inquire into a fee complaint is determined by the LCA, including any relevant transitional provisions.

(b) With reference to s 351(1) LCA, the threshold for a complaint about pre-LCA conduct (which may include a complaint of overcharging) is that it must be concerned with conduct in respect of which proceedings of a disciplinary nature could have been commenced under the LPA; and

(c) Section 351(2)(iii) specifically addresses the entitlement of a person to complain about a pre-LCA bill of costs. It states that no person is entitled to make a complaint in respect of "a bill of costs that was rendered more than six years before the commencement of this section". Section 351 commenced on 1 August 2008 and, accordingly, no person is entitled to make a complaint about a bill of costs which was rendered before 1 August 2002. The ten pre-LCA bills in this case were all rendered in 2008.

[19] In terms of the timing of the fee invoices, I have jurisdiction to conduct a review of all the fee invoices in this case. As to the question whether I have jurisdiction because the complaint reaches the conduct-related threshold, being conduct "in respect of which proceedings of a disciplinary nature could have been commenced under the [LPA]", that issue is addressed in my substantive decision on this review.

Review

[20] As was correctly identified in LCRO 99/2010, the factors to be taken into account when assessing a fair and reasonable fee were set out in Rule 3.01 of the RPC and are now set out in in Rule 9.01 of the Conduct and Client Care Rules. Those factors are:

RPC 3.01

(a) The skill, specialised knowledge and responsibility required;

[11] Above n 7 ,schedule 7 and the transitional provisions in respect of complaints and disciplinary proceedings in ss 350–361.

(b) The importance of the matter to the client and the results achieved;
(c) The urgency and circumstances in which the business is transacted;
(d) The value or amount of any property or money involved;
(e) The complexity of the matter and the difficulty or novelty of the questions involved;
(f) The number and importance of the documents prepared or perused;
(g) The time and labour expended;
(h) The reasonable costs of running a practice.

[21] The fee factors in Rule 9.01 largely reproduce the earlier factors in RPC 3.01 and I make the following observations about the separate factors in this case, applicable to both pre-LCA and LCA-era fees, following my own review of the Practitioner's estate administration activities.

(a) For reasons I will explain, I consider that the time and labour expended was excessive in the context of a relatively routine estate administration, which I find this to have been;

(b) I do not consider that there was any significant element of specialist skill, knowledge or responsibility beyond that which would normally be expected in the administration of an estate. The only unusual features were concerned with the alleged abuse of an enduring power of attorney by the beneficiary Ms AW, some difficulties in ascertaining the investment assets of the estate, and the fact that the estate property was in a run-down state and had to be sold in a relatively poor residential property market (and where there was some difficulty in consultation with the beneficiaries). In my view, those were not particularly burdensome, complex or unusual matters warranting specialist expertise beyond that of a reasonably experienced and competent estate lawyer.

(c) The importance of the matter to the client, and the results achieved were unexceptional, again, in the context of a relatively routine estate administration.

(d) There was no particular urgency, complexity or novelty.

(e) It was not an especially document intensive administration; and

(f) I am satisfied that the hourly rates were unexceptional for [city] practice providing regulated legal services of this type, bearing in mind the reasonable costs of running such a practice.

[22] There is no evidence that there was any quote or estimate of fees, or that the fees were fixed or conditional. The absence of any written terms of engagement specifically addressing the level of fees was not unusual at the time, prior to the more demanding standard under Rule 3.4 of the Conduct and Client Care Rules which requires the provision of information in advance.

[23] I am conscious that the exercise of my review function in this case should not simply be undertaken as a "battle of the costs assessors" in the sense of critiquing the three costs assessments and deciding which one is to be preferred. The functions of my Office require me to arrive at an independent view about the subject-matter of the review.

[24] Having considered the matter carefully, and having exercised my own judgement, I have come to the view that the level of the Practitioner's fees was grossly excessive, seen both in terms of individual fee invoices and by "standing back" and viewing the fees overall. I agree with the approach of Mr PT in considering a fair and reasonable fee for an estate administration with the basic characteristics of this one, which he estimated at $18,000, and then factoring in the particular features of this case making the administration more difficult. That includes such matters as the problems encountered in communicating with the beneficiaries, the relative lack of support from the non-lawyer executor, the investigation into the allegations of abuse of a power of attorney by Ms AW, and the difficult market in which the house had to be sold. With those matters taken into account, Mr PT considered that the estate administration warranted fees in the order of $29,300.

[25] On my own analysis I am satisfied that there was substantial overcharging. I consider that the Standards Committee was in error when it found that the ten pre-LCA bills did not indicate overcharging of such a nature as could have been the subject of disciplinary proceedings under the LPA, and in expressing itself as being "uncomfortable with the amount charged" after 1 August 2008 but being persuaded by the "combined weight of Mr TL and Mr CX's findings".

[26] Overcharging is established both by a process of considering individual fee invoices, and by reference to some more general concerns where I consider the concept of over-servicing has occurred (as I described that term earlier).

[27] I turn first to an analysis of the more substantial fee invoices, which include those covering the more intense periods of attendance, as examples of instances where I find over-charging to have occurred:

(a) The first fee invoice (3171), dated 31 March 2008, for a fee of $19,540 plus GST and disbursements (total: $22,348.40). This invoice provides a comprehensive narration but in substance covers the preliminary attendances in establishing the terms of the will, the content of the estate and the issues needing to be addressed in the administration of the estate. The corresponding time records disclose 58.5 hours spent on these matters over a period of about five weeks, most of which was spent by Mr ZK. I consider that this is grossly excessive, both in terms of the time spent on essentially preliminary matters in a relatively routine estate administration and bearing in mind that most of the work was done by the senior partner, Mr ZK, at his hourly rate of $390 plus GST. Two smaller invoices were also issued for that same month, for the application and grant of probate (fee of $3,543 plus GST- invoice number 3170) which, while not altogether straightforward, recorded 109 units, and transmissions in relation to which a considerable amount of time was spent on “research” and “miscellaneous”. While some of this was reduced as ‘non-chargeable time’, no explanation has been made as to the necessity of research.

(b) Fee invoice 3189 dated 30 April 2008 for $33,000 plus GST and disbursements (total: $37,682). This fee invoice covers attendances for the month of April 2008 and a total of 143 hours of work of which the majority was undertaken by an employed solicitor, Mr OP, at $180 per hour plus GST (60 hours) and approximately 56 hours by Mr ZK at his higher hourly rate. The total value of time was approximately $44,000 but that was discounted to $33,000 for the bill in its final form. Again this is a very comprehensively narrated fee invoice but the substance of the attendances was concerned with inquiries into the estate assets and the early stage of enquiry into matter of the alleged abuse of a power of

attorney by Ms AW. This went as far as making enquiry into the deceased's mental capacity when she signed the power of attorney, extending to enquiry with [Hospital] about events as far back as between 2001 and 2004. I agree with Mr PT's observation that such an investigation was hardly useful to the fundamental difficulty of tracing dissipated funds from the deceased's account and the likelihood of these being recovered. In any event, the time consumed during this period, in what I have repeatedly described as a relatively routine estate administration file, was undoubtedly excessive even at the discounted amount.

(c) Fee invoice 3198 dated 30 May 2008 for $35,699.50 plus GST and disbursements (total: $40,678.78). This invoice covers attendances during the month of May 2008 and is concerned with matters which in my view are fairly described as routine estate administration attendances, except with the additional matter of the inquiry into the conduct of Ms AW. The total time expended in this period was approximately 144 hours, the majority of which was incurred by Mr OP but there was also a substantial amount of Mr ZK's time. It includes approximately 95 hours spent on matters described as "research and preparation" and "miscellaneous". Again, the very detailed fee narration (running to two pages), seen objectively, is concerned with routine administration attendances and I consider that the time expended, and the fee charged, is grossly excessive.

(d) Fee invoice 1861 dated 30 June 2008, for $8,500 plus GST and disbursements (total: $9,746.80). This fee invoice covered attendances during the period 2 June to 30 June 2008. The total value of lawyers' time recorded during this period was said to be $13,942 but the fee was discounted to $8,500. I regard this as a further example of disproportionate and unnecessary focus on the issue of Ms AW's alleged abuse of the power of attorney, and also "undertaking investigation of [land and transfer of title]" which, in the event, was eventually resolved simply by assigning the estate's interest in that land to the relevant beneficiary. Although not on the same scale as the fee invoices mentioned previously, I consider that this too was an example of excessive billing.

(e) Fee invoice 3231 dated 20 October 2008 for $9,000 plus GST and disbursements (total: $10,320). This fee invoice refers to time recorded in the sum of $12,870 but charges a discounted fee of $9,000 plus GST and disbursements. It is concerned almost entirely with attendances in relation to Ms AW and the allegations of misuse of the power of attorney and represents a disproportionate focus on that issue. I consider that it discloses substantial overcharging; and

(f) Fee invoice 3271 dated 25 March 2009 for $9,385 plus GST and disbursements (total: $10,748.63). This fee invoice refers to time recorded in the sum of $9,726 but the fee is discounted slightly to $9,385. The time expended is approximately 25 hours and the narration discloses matters of a routine administrative nature. It also included attendances in relation to the deed of disclaimer which was eventually signed by Ms AW. I consider that the fees charged for this period are excessive by acceptable standards in estate administration work.

[28] I have referred to these invoices as instances where I consider that the amount charged is substantially out of proportion to the attendances actually required during the billing period. I am also satisfied that the combined effect of the 14 invoices is that there was gross overcharging, to the extent that the estate was charged about three times the amount which I consider would have represented a fee coming within a band of acceptable fees which would have been fair and reasonable for the completed administration, even taking into account the more difficult issues arising in this case.

[29] I turn now to the matter of over-servicing which, in substance, is a finding that the lawyer charged fees for attendances which were unnecessary, excessive, and beyond the scope of a credible retainer for the administration of an estate by a solicitor in the circumstances of this one. I find over-servicing to have occurred in three areas in particular; concerning the investigation of the alleged power of attorney abuse by Ms AW, in relation to the transmission and sale of the home, and more generally where substantial time has been incurred on “research”, “preparation” or similar.

Investigation into use of Power of Attorney

[30] The investigation into the alleged abuse of the power of attorney formed a substantial part of fee invoices 3189 (30 April 2008), 3198 (30 May 2008), 1861 (30 June 2008), and 3231 (20 October 2008). Although it is not possible to determine with exactness the amount of time devoted to that issue, a conservative estimate with reference to the narrations and time records is 70 hours and I am driven to the same conclusion as Mr PT on this point, that it was an unnecessary and disproportionate exercise by comparison to its importance in the responsible administration of the estate.

[31] A central concern here must be the scope of the enquiry and whether it extended well beyond what might have been considered reasonable in the circumstances. A legal opinion prepared in March 2008 by Mr LS for the Executors about their duties opined that the Executors must make a genuine attempt to collect information and make enquiry in relation to dissipated assets. The Practitioner's 2 April file note of his meeting with his co-executor recorded that Mr YF had received the legal opinion and understood what his duties and obligations were as an executor. Surprisingly the Practitioner then recorded, "His instructions to the writer were that the executors, notwithstanding the cost involved, were to undertake a full investigation into the affairs of the late Mrs AW Senior". There is no hint of any explanation having been made by the Practitioner as to the limits of an executor's duty as regards to missing asserts, and in particular that it was not an open-ended duty. In an 8 May letter the Practitioner wrote to the Executors that the exact amount of misappropriated assets was moot, proof would be difficult to obtain, further expenditure would be unproductive, and further enquiry was neither necessary nor justified. Despite this, significant further fees were incurred in relation to this matter subsequently, all of which resulted in the estate incurring significant costs in relation to the enquiry, and I agree with Mr PT's observation that the investigation became grossly disproportionate to its financial significance in the administration of the estate.

[32] The Practitioner justifies the extent of legal services by saying that he acted on the instruction of the executors, although I noted that there are a number of instances where the Practitioner sought to distance himself from having given those instructions, when he referred to having received instructions from the complainant or his lawyer, or from his co-executor, Mr YF acting in conjunction with the complainant. It is clear from his counsel's submissions and the evidence on the file that the Practitioner also acted on instructions from one or two of the beneficiaries who "… demanded the investigation

so they well knew even then it could be very expensive"[12] and that on the 9 May the Practitioner met with Mr AX and Mr YF respectively regarding costs and "…both had instructed [Firm 2] to continue with the investigations…".[13] However, a lawyer who is acting as both executor and as estate administrator cannot be heard to say that he is obliged to act on instructions from the executors that he knows (or ought to know) as a lawyer, extend beyond the executors duties or are inconsistent with those duties, or that he is acting on instructions from persons who are not executors. The Practitioner's instructions can come only from the executors. As he himself was one of those executors it was incumbent upon him in his lawyer role to ensure that he followed instructions that he knew accorded with the duties of executors.

[33] A lawyer who is also the client in his or her trustee status is not at liberty to determine the scope of the retainer beyond what is objectively reasonable in the circumstances of the case and by the standards of the profession. To justify an excessive or disproportionate level of service by saying that it was in accordance with the client's instructions, when the lawyer and client are the same person, is to bring the profession into disrepute. There is an element of that in this case, where it was submitted to me by Mr JG that "The scope of [Firm 2]'s duties depended upon the instructions of the executors".[14] This is particularly so where the lawyer-trustee is largely in control of the administration, as was the case here.

House sale

[34] As to the transmission and sale of the estate home, activity on that matter predominated fee invoices 1833, 3187, 3195, 3200, and 3204 (total net fees approximately $14,000), but there were attendances in other invoices. There were some difficulties in that the property was in a poor condition, some of the beneficiaries were uncooperative and the housing market was falling, but the property was unencumbered, and I am satisfied that this was a routine property transmission and sale transaction in the context of a deceased estate.

[35] I have considered the Practitioner's explanations of the attendances, noting that the property was listed with a real estate agency and that three offers were considered and rejected before a fourth offer was accepted. I am unconvinced that

[12] Mr JG's Post Review Hearing submissions dated 29 November 2013 at 7(g).
[13] Above n 12 at 7(i).
[14] Above n 12 at 8(b).

these were anything other than routine activities which did not require the extent of attendances (e.g. on the co-executor, the real estate agent and the valuer) described with such detail in the Practitioner's accounts. An example of the overcharging approach is recorded in Mr PT's report who noted that on two occasions the Practitioner made charges for three-hour meetings with the real estate agent. The Practitioner has not explained to my satisfaction why six hours of discussion were needed with the real estate agent. A further example was the extensive time recorded for perusing valuations. These are standard reports and there was nothing exceptional in this case which justified the excessive time spent – and charged - on perusal of them.

[36] I accept Mr PT's estimate of reasonable fees in the sum of $3,500 for these attendances, but with a modest increase to reflect the difficulties in communicating with the individual beneficiaries and the adverse property market. Even taking those matters into account, I am satisfied that this was gross over-charging.

Charges for "research", "preparation" and "miscellaneous"

[37] Finally on the matter of over-servicing, I also find that charging for attendances such as "research", "preparation" and "miscellaneous" was excessive. Substantial fees were attributed to attendances of this nature and an example is invoice 3198 in which approximately 16 hours was spent on "research" and "preparation" and approximately 80 hours on "miscellaneous". Similarly, invoice 1833, which covered activity relating to the transmission by survivorship from the estate of the late Mr AW and then to the executors themselves, which was unexceptional, some $1,800 in time was charged for "research" and "miscellaneous" (but billed at $1,250) where the availability of standard forms should have made this a straight forward exercise. At the review hearing the Practitioner was invited to explain a particular charge of $10,000 for "miscellaneous" , but his subsequent submissions made no mention of it. I find the charging for these imprecisely described areas of activity to be excessive and unjustified. This estate administration did not give rise to particularly complex issues of law or fact.

Uplift

[38] I turn now to a further important issue, which was referred to in the submissions by the Practitioner's counsel for the review hearing and in the costs assessment report by Mr CX, in which the level of fees is said to be justified by the

Practitioner's joint status as a trustee and executor and as the solicitor in the administration. I understand counsel's submissions under his heading "Duty of Executor to Beneficiaries" to be suggesting that the executor-solicitor has a responsibility to go further in matters of careful estate administration than might be required of a solicitor acting without the additional responsibilities of executorship. Similarly, in his costs assessment report, Mr CX was critical of Mr PT's report in the following terms:[15]

> The significance of my opinion that a solicitor who is also acting as executor and trustee is entitled to make a charge materially higher than if they were merely acting as solicitor for the estate, lies in the fact that even if Mr ZK (sic) charges are susceptible to criticism, any such criticisms are more than offset by [Mr PT's] failure to take this fact into account when determining his final charges.

[39] The starting point on this issue is the principle that the functions of a trustee are distinct from the functions of a lawyer advising the trustees, and the entitlement of the lawyer-adviser to charge fees is determined by the scope of the retainer entered into between the lawyer and the trustees.[16] The entitlement of a lawyer-trustee to charge fees for the performance of his or her trustee duties (which are chiefly concerned with obtaining possession or control of trust property and preserving that property in a secure manner in enable the terms of the Trust to be carried out)[17] must be provided for in the terms of the engagement. In the absence of an agreement authorising the lawyer-trustee to charge fees for purely trustee-related activity, no fee can be charged because "equity requires a trustee to act gratuitously".[18] It follows that a lawyer cannot charge additional fees, or a higher hourly rate or "uplift", because of his or her status as a trustee, unless the terms of the retainer provide for it.

[40] Importantly, in this case, the charging clause in the will (clause 7(b)) provided:

> Notwithstanding that any Solicitor shall be an Executor and Trustee of this my will he shall be entitled to make all the usual professional charges in connection with my estate as if he were not an Executor and Trustee.

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[15] Costs assessment report by Mr CX, 17 February 2012, at [63].
[16] Young v Hansen [2004] 1 NZLR 37 (CA) at [27]–[36].
[17] Above n 16 at [29].
[18] Above n 16 at [4].

[41] The effect of this was to authorise the solicitor to charge for his attendances "in connection with [the] estate" without reference to his corresponding status as executor and trustee. In my view, there are three consequences:

(a) The lawyer is subject to professional scrutiny in all of his attendances on behalf of the estate, since he is authorised to act "as if he were not an executor and trustee";

(b) The lawyer cannot simultaneously purport to be entitled to a higher level of fees because of the burdens and responsibilities he bears as an executor and trustee while also being entitled to charge fees as if he were not an executor and trustee; and

(c) Similarly, the lawyer cannot say that he is entitled to charge more for purely trustee work when he is reimbursed as if he was not a trustee.

[42] So far as the trustee-solicitor issue is concerned, I do not consider that Mr ZK's status as solicitor trustee diminished his professional responsibilities, which are subject to scrutiny in this review, including his responsibility to charge fees only on the basis that they are fair and reasonable.

Unauthorised fee deductions

[43] Concerns had been expressed by the first reviewer about unauthorised deductions, and this issue was revisited in this present review. On this matter I refer to the letters from [Firm 1] on 5 July 2008 and the response from [Firm 2], on 18 July 2008. The relevant exchange between the lawyers was as follows:

> [[Firm 1] on behalf of Mr YF]
> Mr YF is concerned that upon the sale of the family home, the balance of costs claimed by your firm will be deducted from the sale proceeds. Mr YF advises that no current or future bills are to be paid out of estate funds without his prior approval. The house sale proceeds and any other funds recovered to be retained undisbursed pending resolution of the costs issue. We ask that you provide your undertaking by return that no further bills will be paid unilaterally by deduction…

> We reiterate that no payment for costs is to be made out of the house sale proceeds without our client's approval, through us.
>
> [Reply by Firm 1]
> As we have advised Mr YF and as each bill of costs records, we will be deducting from the net any TT proceeds of sale after payment of all outstanding accounts or all outstanding fees and disbursements.

[44] A lawyer cannot simply brush aside concerns such as this, which were clearly articulated by his co-trustee through his lawyers, [Firm 1]. Mr YF was a client of the Practitioner's firm in his trustee capacity and his views should have been taken into account, consistently with principles in *Heslop v Cousins*[19] and the decision of this Office in *Abbot v Macclesfield.*[20] The proceeds of the sale of the house were trust moneys subject to s 110(1)(b) LCA by which a lawyer holding money on trust may only deal with the money as the client directs. The Practitioner's response was inappropriate, and it is important to again make it clear that deductions for fees must be authorised by the clients. It is not a question of the lawyer simply telling the client how fees will be taken.

[45] In the event, five further fee invoices were paid by deduction after that letter, amounting to net fees of approximately $27,000, without reference to Mr YF in the manner requested. The Practitioner's evidence was that he did thereafter meet with his co-trustee and discuss the issue of fee deductions, and that Mr YF was satisfied about the approach and that no further concerns were then raised. In these circumstances I considered (and informed the Practitioner) that I would not take this matter further. This decision was largely based on practical considerations because other major concerns ultimately dominated this enquiry.

[46] However, the residual concern remains that there is no record of a fees deduction authority. I need to record my strong disagreement with the opinion expressed by Mr CX that lawyers are entitled to continue with an existing practice of taking fees even without express authority. This is patently contrary to a lawyer's professional obligation to act in accordance with the Lawyers and Conveyancers Act 2006 and its Regulations, which require the prior written authority of the client.

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[19] *Heslop v Cousins* [2007] 3 NZLR 679 (HC).
[20] *Abbot v Macclesfield* LCRO 40/2009.

Findings

[47] Pursuant to s 211 (1) of the Lawyers and Conveyancers Act 2006, for the reasons explained in this decision:

(a) In relation to the LCA-era fees I find the Practitioner to have engaged in unsatisfactory conduct under s 12(b) and (c) LCA in respect of overcharging which was so excessive as to constitute conduct that would be regarded by lawyers of good standing as being unacceptable; and

(b) So far as the pre-LCA fees are concerned, I find the Practitioner to have engaged in unsatisfactory conduct under s 12(b)(i) LCA, being conduct that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming. This was conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982 (for the purpose of s 351(1)), under s 106(3)(b) LPA. Conduct unbecoming is determined by reference to the "acceptable discharge of…professional obligations" as measured by"…the standards applied by competent, ethical and responsible practitioners".[21]

[48] I find that the conduct in this case was a serious departure from acceptable professional standards. But for the Practitioner's striking off by the Disciplinary Tribunal in separate proceedings, on [date], I would have decided to refer this matter to the Disciplinary Tribunal under ss 152(2)(a) and 212 LCA. I have refrained from doing so because there is an element of futility in circumstances where the Practitioner has already suffered the ultimate professional sanction, and out of concern about wastefulness of resources.

[49] I nevertheless find that this was unsatisfactory conduct at a very high level and I therefore impose the following penalties:

(a) In light of my findings at [28] above, that the estate was charged about three time the amount at which I consider would have come within a

[21] *B v Medical Council* of New Zealand [2005] 3 NZLR 810 (HC).

band of acceptable fees, I make orders that the fee be reduced by two-thirds of the amount set out at paragraph seven (that is, a reduction of ($93,677.89 excluding GST or ($107,271.23 including GST) and that the fees be refunded to the estate to that extent. I make these orders under s 156(1)(e) & (g) LCA so far as the LCA-era fee invoices are concerned and under s 352(1) LCA and s 106(4)(f) of the Law Practitioners Act 1982 so far as the pre-LCA fee invoices are concerned.

(b) I impose a fine under s 156(1)(i) LCA, payable to the New Zealand Law Society, in the sum of $5,000 in relation to the LCA-era fees and $2,000 in relation to the pre-LCA fees, under s 106(4)(a) LPA and s 352(1) LCA; and

(c) I make an order censuring the Practitioner under s 156(1)(b).

[50] In making monetary orders, I am aware that the Practitioner was adjudicated bankrupt on [date]. That does not prevent me from making monetary orders of this sort, but it is a matter for the party in favour of whom the orders have been made to inquire with the Official Assignee as that party thinks fit.

DATED this 28th day of March 2014

Hanneke Bouchier
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 as the Applicant
Mr ZK as the Respondent
[A North Island] Standards Committee
New Zealand Law Society