LCRO 243/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the ABC Standards Committee
BETWEEN	**MR & MRS AQ** Applicants
AND	**MS ZF** Respondent

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

DECISION

Introduction

[1] Between 2006 and 2009 Mr and Mrs AQ took their granddaughter, T, into their care. In 2009 T laid a complaint to the police, as a result of which T was removed from the AQs' care, and the police investigated her complaint. The Department of XXX was also involved.

[2] The AQs had initially sought advice on guardianship matters from Ms ZF when they first took T into their care, and when they became aware of T's complaint in 2009, they went back to her. Ms ZF delegated the AQs' matter to Ms RW, who provided advice and representation with respect to the police investigation into T's allegations. Ms ZF said that she and Ms RW advised the AQs, although the legal services were primarily provided by Ms RW because her expertise better suited the AQs' needs.

[3] After the police investigation concluded with no charges being laid, Ms RW sent the AQs an invoice. The AQs paid part of the fee, but became reluctant to pay the balance saying they were not satisfied with the advice they had received from Ms RW. Mr AQ wrote to Ms ZF, criticising Ms RW's handling of the matter. Mr AQ was particularly aggrieved at the way in which he says Ms RW had relayed the outcome of the police investigation to him, which he says left him with the impression that T had

made serious criminal allegations against him. The AQs say Ms RW's liaison with police resulted in the police prolonging their investigation, causing Mr AQ in particular a great deal of added stress, and increasing the AQs' legal costs.

[4] The AQs discussed their concerns with Ms ZF, but they were unable to resolve the situation. Although the AQs said they were not refusing to pay Ms ZF's fees, they said they remained disappointed in the advice and representation they had received.

[5] The AQs laid their complaint to the New Zealand Law Society (NZLS), criticising the advice and representation they had received, and saying Ms ZF should reduce her fee because they received poor service from Ms RW.

Standards Committee Process

[6] NZLS recorded the AQs' complaint as a complaint against Ms ZF, and sent a copy of the complaint to her. An exchange of correspondence followed, during which it became apparent that the AQs complaint related to Ms RW's representation of them.

[7] In the meantime, Ms ZF continued her debt recovery proceeding, and obtained judgment by default against the AQs. The AQs expanded their initial complaint to include a complaint that Ms ZF was taking recovery action in Court for her fees although their complaint had not been resolved.

[8] When the complaints first came before the Committee, it directed the parties to consider mediation. The AQs agreed to mediation, but Ms ZF declined.

[9] The Standards Committee then appointed a costs assessor who considered Ms ZF's fee of $2,680 and found it was fair and reasonable.

[10] The Committee issued a Notice of Hearing on 30 April 2012 and considered both aspects of the complaints. The Committee considered the Costs Assessor's report and recorded that it had independently concluded Ms ZF's fee was fair and reasonable, and that no conduct issues arose with respect to the AQs' complaints about Ms RW's conduct of their file. In the circumstances the Committee decided that any further action was unnecessary or inappropriate in respect of those aspects of the AQs' complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[11] The Committee also considered the AQs' extended complaint relating to Ms ZF continuing her debt recovery proceeding knowing that the Committee had not determined the complaint about her. The decision records that the Committee discussed the effect of s 161 of the Act, and found it was inappropriate for Ms ZF to have "forced the matter" of fee recovery. The Committee was also of the view that it

had been embarrassing for Mr AQ to have had his name published in the XYZ. In the circumstances the Committee determined that Ms ZF's conduct had been unsatisfactory pursuant to s 12 of the Act and made orders under s 156. The Orders required Ms ZF to apply to the Court to set aside the default judgment, to timetable steps to progress the debt recovery, and to pay costs to NZLS of $500 in respect of the Committee's costs and expenses of and incidental to its inquiry and hearing.

[12] Ms ZF was dissatisfied with the Committee's finding that her conduct in pursuing recovery of her fees had been unsatisfactory, and wrote informally to this Office registering her protest. Although Ms ZF did not formalise an application for review, the AQs, who were also dissatisfied with the determination, did apply formally for a review.

[13] On review the AQs' concerns about Ms RW's conduct and its effect on their fees, and the unsatisfactory conduct finding against Ms ZF have been considered. For the reasons set out below, the decision to take no further action in respect of the complaint against Ms RW has been confirmed, whereas the unsatisfactory conduct finding against Ms ZF is reversed and the Committee is directed to reconsider that aspect of the AQs' complaint.

Grounds for Review

[14] Although their complaint contains a number of more general criticisms of Ms RW's advice, the focus of the AQs' application for review was that the Committee wrongly concluded that her advice to them had been adequate. In their review application the AQs repeated that Ms RW had misled Mr AQ over T's criminal allegation, and had not clarified the position when Mr AQ had specifically asked her to.

[15] The AQs firmly hold the view that Ms RW misled Mr AQ, causing them added stress and cost. They are also of the view that Ms RW had not followed their instructions in key respects, and had not acted in their best interests.

[16] The AQs consider that the Committee did not go far enough and ask that penalties be imposed on Ms RW under s 156 of the Act.

Scope of Review

[17] The Legal Complaints Review Officer (LCRO) has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to

the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review.

Role of the LCRO

[18] The Act contemplates the Review Officer reaching her own view on the evidence before her. Where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise particular caution before substituting her own judgement without good reason.

Review Hearing

[19] The AQs, Ms ZF and Ms RW attended and participated in a review hearing in Dunedin on 10 February 2014.

Review Issues

[20] The AQs were concerned about Ms RW's handling of their matter in a number of respects. They were particularly concerned that Ms RW had ignored an instruction from them to communicate with XXX.

[21] Ms RW says the AQs instructed her not to communicate with XXX because they were not supposed to know about the allegations T had made, but had heard about them from a third party.

[22] The AQs say that T's allegations have resulted in the AQs having no contact with her since XXX removed her from their care immediately before the police began their investigation into T's claims.

[23] XXX role was to ensure T received proper care after she was removed from the AQs' care. The AQs say they instructed Ms RW to communicate with XXX over T's care. Ms RW says those were not her instructions. In either case that aspect of the AQs complaint is unlikely to have had any real impact on the police investigation. In the circumstances it is not necessary to consider that aspect of the complaint further on review.

[24] The AQs were also critical of Ms RW's decision not to provide police with a copy of a letter they say T had written, that they believe would have affected the outcome of the police investigation.

[25] Ms RW's evidence was that the letter may have been evidentially useful if charges had been laid against the AQs, but there was no advantage to be gained by the AQs in providing it to police for the purposes of the investigation. Ms RW said the

letter remained with the rest of the materials the AQs had given her, and that her primary focus had been to ensure the AQs made written statements, so that if the police wanted an account from them, they may be able to avoid having to attend and be interviewed by police. As the investigating officer had confirmed that no charges would be laid arising from the allegations T had made, it did not become necessary for Ms RW to give any further consideration to the letter.

[26] The letter in question was headed "Planned Disobedience Campaign", and may have been useful to undermine T's credibility if she had ever become the subject of cross examination in a criminal prosecution arising from the allegations she had made. There is no reason to believe it would have assisted police in deciding whether any criminal offence had been committed, and there is no reason to criticise Ms RW for not providing that information to police. It is not necessary to consider that aspect of the AQs' complaint further on review, because no professional conduct issue arises.

[27] The two particular issues that have emerged as requiring consideration and determination on review are:

a. Whether Ms RW promptly disclosed to the AQs all information that she had or acquired that was relevant to the matter in respect of which she was engaged by the AQs pursuant to Rule 7 of the Conduct and Client Care Rules;[1] and

b. Whether Ms ZF's conduct in entering judgment against the AQs before the Committee had issued a Notice of Hearing under s 141 of the Act fell below the standard required by s 12 of the Act.

Provision of Information

[28] The first issue on review is whether Ms RW failed to promptly disclose to the AQs all information that she had or acquired that was relevant to the matter in respect of which she was engaged by the AQs, pursuant to Rule 7, which says:

> A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[29] Rule 7 is further informed by the authority of the High Court in *McKaskell v Benseman*[2] in which Jeffries J said:

> ...A primary obligation of the fiduciary is to reveal all material information that comes into his possession concerned with his client's affairs. The emphasis is on what is material, or essential. That is a matter of judgment by the solicitor on the facts of each case, for certainly he is not obliged to pass on trifling and insignificant detail.
>
> ...The fiduciary must, in dealing with those to whom he owes such an obligation reveal fully all circumstances that might affect their affairs, and is thus under a duty of disclosure not imposed on others…

[30] There was no criticism by the AQs of Ms RW's timeliness in reporting, only that her reporting lacked detail, and misinformed them. The AQs' complaint focuses on Ms RW's report of her conversation with the investigating officer of his interview with T, which was precipitated by T making allegations of sexual abuse to a counsellor at her school.

[31] The substance of Mr AQ's complaint is that when he and Ms RW discussed what T had told the police at interview, Ms RW misled him over a rape allegation the police had told her that T had made. Mr AQ says that when Ms RW told him T had made an allegation of rape he expressed shock, then asked her "did [T] name me?". He says Ms RW did not answer, and that he had also asked if T had named Mrs AQ, to which he says Ms RW replied "no".

[32] Mr AQ says he took from that conversation that T had said he was the perpetrator of the alleged rape.

[33] Mrs AQ also referred to details of the interview that had been disclosed to her by a third party who had not been present at the interview. Mrs AQ said that person had contacted her, and at the review hearing she related details of the account the third party had given her of T's police interview. That account included detailed references, for example to T's demeanour and her singing when the investigating officer left the interview room. Mrs AQ was indignant that Ms RW had not provided the AQs with a similar level of detail after the investigating officer had spoken to her about the interview.

[34] In her substantive response to NZLS,[3] and at the review hearing, Ms RW referred to a file note she had made on 9 September 2009, which she said recorded a summary

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[2] *McKaskell v Benseman* [1989] 3 NZLR 75.

of the police officer's report to her of what he considered to have been the salient points of the interview.

[35] Ms RW said she reported to Mr AQ what the investigating officer had told her, which was that T had alleged Mr AQ had touched and kissed her inappropriately, that the investigating officer did not consider her credible because of her demeanour, and because she had alleged to the school counsellor that she had been raped when she was eight years old but had not made that allegation to police when she was interviewed. Ms RW said she was not told who T alleged had raped her, and her recollections and file note did not contain the level of detail apparently reported by the third party to Mrs AQ.

[36] Ms RW said she had relayed the investigating officer's comments to Mr AQ to reassure him that the investigating officer had told her his perception was that T was not credible, and that the police investigation would not result in charges being laid against him. Ms RW said Mr AQ had not asked her if he had been named as the perpetrator of the rape, nor did he tell her he assumed he was the alleged perpetrator.

[37] Ms RW said that it had not occurred to her that Mr AQ would make the assumption that T had named him. She said that T was not in the AQs' care when she was eight, and she had not been living on the same Island as Mr AQ at the time. Ms RW said she reported what the police had told her accurately to Mr AQ, and said she found it difficult to reconcile what she had told him with the reaction he reported her comments had on him. Ms RW said Mr AQ had indicated to her at the time that he was reassured.

[38] At the review hearing Mr AQ confirmed that he had found Ms RW's report of her conversation with police reassuring at the time they spoke, but that sensation quickly wore off, and he became extremely stressed about the allegations he believed T had made against him when she was interviewed by police.

[39] Mrs AQ also mentioned that her sister had been her confidante, and the only family member the AQs' felt they could turn to for support, throughout the police investigation. Mrs AQ says that Mr AQ's stress became increasingly apparent after his conversation with Ms RW. Mrs AQ says her sister had then contacted police, and accepted that it could have been that contact which reignited police concerns. Although the investigating officer then made further enquiries over about a fortnight, still no charges were laid against Mr AQ.

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[3] Letter RW to NZLS (4 April 2011).

Discussion

[40] The issue is whether Ms RW, who had conduct of the file, failed to promptly disclose to the AQs all information that she had or acquired that was relevant to the matter in respect of which she was engaged by the AQs, pursuant to Rule 7.

[41] In deciding whether a lawyer has met their obligations under Rule 7 it is important to consider what information may be material, and what information the lawyer has received.

[42] Ms RW's job was to represent the AQs, and particularly Mr AQ, in respect of the police investigation into T's serious criminal allegations. Ms RW had an obligation to disclose to Mr or Mrs AQ information that was relevant to that matter.

[43] Ms RW's evidence at the review hearing was that the investigating officer did not provide her with the level of detail that Mrs AQ appeared to have received.

[44] Mrs AQ's evidence at the review hearing was that she had received detailed information from a third party after Ms RW had spoken with Mr AQ.

[45] There is no reason to expect that the investigating officer would have gone into great detail with Ms RW, who, from the investigating officer's perspective, was the lawyer acting for a potential defendant. If charges had been laid, police would have provided a disclosure copy of T's interview. As no charges were laid, the police were not obliged to disclose anything. It was only out of courtesy that the investigating officer gave Ms RW a summary of the reasons for his view that T was not credible, which enabled her to report the reasons and outcome of the police investigation to her client.

[46] It was apparent at the review hearing that T's behaviour has caused the AQs a great deal of stress and emotional turmoil, and that at the time of the police investigation they were receiving information from at least one source other than Ms RW. It appears from the AQs' evidence that the third party whispers did nothing to alleviate their concerns about T's behaviour.

[47] Given all the circumstances, it is likely that the AQs' ability to be objective about T's behaviour, and the allegations she was making, was compromised. It is also likely that Mr AQ's anxiety caused him to read more into Ms RW's words and silences than she could have intended.

[48] There is insufficient evidence to support the AQs' assertion that Ms RW misled Mr AQ, or that she failed to promptly disclose information that she acquired that was

relevant to her representation of the AQs in respect of the police investigation into allegations made by T. The evidence is that Ms RW reported what she had been told. She did not have an obligation to deliver a verbatim report of her conversation with the investigating officer. Naturally, she could not report information that she did not have.

[49] There is also no evidence that Ms RW protracted the police investigation, or attracted added cost for the AQs.

[50] In all the circumstances I am satisfied that Ms RW complied with Rule 7. She promptly and accurately disclosed the information she considered relevant to the police investigation to Mr AQ.

[51] That aspect of the Committee's determination is therefore confirmed on review.

Proceeding with recovery action

[52] The second review issue is whether Ms ZF's conduct in entering judgment against the AQs, before the Committee had issued a Notice of Hearing under s 141 of the Act, fell below the standard required by s 12 of the Act.

[53] The Committee recorded its reasons for the finding of unsatisfactory conduct as follows:

> Mrs ZF issued proceedings against the AQs for payment of the difference between what had been charged and what had been paid ($1,590). She obtained judgment on 29 April 2011 in full knowledge of the fact that the AQs had made a complaint against her and that the investigation into the complaint had not yet been completed. Judgment has resulted in Mr AQ's name being published in the XYZ, to his embarrassment.[4]
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> The Committee, having regard to the High Court judgment in *Wilkinson Adams v Bethune* [2012] NZHC 781 decided that Section 161 Lawyers and Conveyancers Act 2006 is triggered by the practitioner receiving notification of a complaint. It concludes that it is inappropriate on the part of a practitioner to obtain judgment against a client when there is an unresolved complaint in respect of the relevant matter. The AQs had made it clear that they were not disputing the fees as such; rather they were concerned about the legal process followed and wished to discuss it and arrive at a conclusion before attending to payment of the balance of the fee. Unfortunately Mrs ZF chose to force the matter. This was inappropriate.[5]

[4] Standards Committee decision dated 10 August 2012 at [22].
[5] Above n 4 at [23].

[54] The Committee then concluded:

> …that Mrs ZF's action in entering judgment against Mr AQ at a time when his complaint against her had not yet been resolved was inappropriate and was unsatisfactory conduct in terms of Section 12.[6]

[55] The Committee's finding appears to be based on a misapprehension about the way s 161 works. Section 161 is not triggered by a practitioner receiving notice of a complaint. Section 161 is triggered by a party in a recovery proceeding applying to a Court for a stay on the basis of a Notice issued by a Standards Committee under s 141 of the Act.

[56] This is the Notice the Standards Committee sends to the person who is the subject of the complaint after it has decided it will enquire into the complaint, commonly referred to as a Notice of Hearing. A Notice of Hearing provides the person with particulars of the complaint, invites a written explanation, and may require the person to attend at a hearing, or request particular information.

[57] After Notice is given under s 141 it is possible for a person to put the Notice of Hearing before a Court and apply for a stay under s 161. Whether or not a stay is granted is a matter for the Court in which the recovery proceeding is to be commenced, or continued.

Stay under Section 161

[58] Section 161 of the Act relevantly says:

> (1) If, under section 141, a Standards Committee gives notice to a practitioner... that it has received a complaint under section 132(2) about the amount of a bill of costs rendered by that practitioner..., no proceedings for the recovery of the amount of the bill may be commenced or proceeded with until after the complaint has been finally disposed of...

[59] Section 161 has been considered by the High Court in a number of decisions where there had been a complaint about the amount of a bill of costs. The purpose of s 161 in the context of a recovery process running parallel to the complaint process was explained by Stevens J in *Simpson Grierson v Gilmour*[7] as being:

> ...to prevent a party such as a practitioner taking any steps in relation to the recovery of the amount of a bill that might prejudice any of the issues that will be

[6] Above n 4 at [25].
[7] *Simpson Grierson v Gilmour* HC Auckland CIV-2008-404-008674 27 August 2009 at [66].

> determined by a Standards Committee in the context of a complaint about the amount of a bill of costs. This is not an inflexible rule; much may depend upon the circumstances of the particular case. There may be situations where some steps can be taken preliminary to the recovery of the amount of the bill that will not in any way prejudice the issues to be determined by a Standards Committee.

[60] As the Notice of Hearing particularises the complaint or matter, it may also be of assistance in informing the Court about "the circumstances of the particular case", and might assist the Court in considering what, if any, "steps can be taken preliminary to the recovery of the amount of the bill that will not in any way prejudice the issues to be determined by a Standards Committee".

[61] Section 161 may not prevent a Court determining the issue of liability in a recovery proceeding,[8] because it only applies to an unresolved question of quantum, ie. the amount of a practitioner's bill. As Clifford J says in *Wilkinson Adams v Bethune:*[9]

> ...Section 161(1) is clear: once the Standards Committee gives notice under s 141, no proceedings for the recovery of a practitioner's bill may be "proceeded with until after the complaint has been finally disposed of". By thus providing for proceedings for the recovery of legal costs to be stayed where a client complains to the Law Society, s 161 in my view prevails over time limits that would otherwise run under the District Court, or indeed the High Court, Rules. To hold otherwise would be to render s 161 of no effect...

Notice under Section 141

[62] For a stay under s 161 to be available, the Standards Committee must have given notice of the complaint under s 141 which says:

> The Standards Committee—
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> (a) must send particulars of the complaint or matter to the person to whom the complaint or inquiry relates, and invite that person to make a written explanation in relation to the complaint or matter:
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> (b) may require the person complained against to appear before it to make an explanation in relation to the complaint or matter:

[8] *Henderson Reeves Connell Rishworth Lawyers Limited v Busch* [2013] NZHC 2521 (26 September 2013), 11, 12.
[9] *Wilkinson Adams v R J Bethune* HC Dunedin CIV-2011-412-000860 26 April 2012 at [30].

> (c) may, by written notice served on the person complained against, request that specified information be supplied to the Standards Committee in writing.

[63] Section 141 was recently the subject of discussion in an unpublished decision[10] of the LCRO which says that the:

> ...Standards Committee will have complied with its obligations in terms of the Act and natural justice if all of the material on which it intends to rely is put before the lawyer.

[64] Although a practitioner may choose to postpone recovery action pending determination of a complaint, receiving notice of the complaint from the NZLS Complaints Service does not constitute Notice from the Standards Committee for the purposes of s 141.

[65] The sequence of events that are relevant to the decision begins with Ms ZF filing debt recovery proceedings against the AQs on 7 February 2011. NZLS processed the complaint about Ms RW's conduct, and Ms ZF kept NZLS appraised of the progress of her debt recovery proceeding against the AQs throughout the complaints process.

[66] Ms ZF served debt recovery proceedings on the AQs on 9 March 2011 and NZLS subsequently drew Ms ZF's attention to s 161. Ms ZF applied for judgment against the AQs, and the Court entered judgment by default on 29 April 2011.

[67] The Committee first met on 31 May 2011 to decide what action it would take under s 137. It did not decide to inquire into the complaint at that stage, but decided instead to refer the parties to mediation "to address all issues, including the lawyer's bill".

[68] The NZLS file contains two handwritten notes dated 17 June 2011. The first indicates that Mr AQ had phoned NZLS and left a message saying Ms ZF had "published legal judgment against" him causing "irreparable harm in process". The second note records that Mr AQ had spoken with the Standards Officer later that day saying how shocked and upset he was that the default judgment had been published in the XYZ. Mr AQ then sent a copy of the proceedings Ms ZF had served on him to NZLS, and those were passed on to the Convenor of the Committee.

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[10] LCRO 295/2013 at [37].

[69] On 23 June 2011 Ms ZF's office wrote to NZLS saying that judgment had been entered against the AQs, and that the firm would proceed to enforce it, presuming NZLS had no objection to them doing so, unless they heard back by 8 July 2011.

[70] NZLS wrote to Mr AQ on 24 June 2011 confirming the default judgment complaint would be put before the Committee.

[71] On 28 June 2011 Mr AQ emailed NZLS complaining that Ms ZF was enforcing judgment against the AQs, that he was not refusing to pay her account but was holding "part in lieu of discussion" with her, referring to his desire to negotiate a reduction in her fee because of his concerns about the service he had received. Mr AQ said he had been advised that Ms ZF's recovery action would be stayed by him making his complaint, that he had not had notice of her recovery proceeding and that he was suffering serious harm as a result. He urged NZLS to "restrain" Ms ZF from doing him any further harm.

[72] The Committee met on 28 June 2011 and considered Mr AQ's further complaint, decided to seek further information from the Court, to write to Ms ZF advising her that she was precluded from enforcing her judgment under s 161(1) and inviting her to consider mediation. The same offer of mediation was extended to the AQs, and the Committee adjourned the matter for a month.

[73] The Committee's direction to explore the possibility of mediation was an action on receipt of a complaint for the purposes of s 137. At that stage, as the Committee had not decided that it intended to inquire into the complaint so it had not moved to the stage of giving Notice under s 141.

[74] After its meeting on 28 June 2011, the Committee wrote to Ms ZF on 1 July 2011 inviting her to consider mediation and saying "you are precluded from enforcing the judgment obtained against Mr and Mrs AQ by s 161(1) of the Act". The timing of that letter in relation to the Committee's process indicates it was not a Notice issued under s 141. Even if it was, for the reasons discussed in paragraphs 56 to 65 above, the Committee could not stay Ms ZF's enforcement of the judgment she had obtained in April 2011; that was a matter for a Court.

[75] In any event, Ms ZF responded on 7 July 2011 acknowledging the advice that she was precluded from continuing enforcement, confirming that she had stopped enforcement action, and declining the invitation to mediation.

[76] The Committee then considered all of the AQs' complaints, resolved to appoint a costs assessor, and asked Ms ZF to provide her file to the costs assessor, which she

promptly did. When the Costs Assessor later provided her report it expressed the opinion that the fee was fair and reasonable, and observed that there appeared to be no grounds for the complaint that anything Ms RW had done had attracted added cost for the AQs.

[77] On 30 April 2012 the Committee issued a Notice of Hearing which appears to meet the requirements of s 141 and to have been issued at the appropriate point in the Committee's process. The Notice of Hearing indicated the Committee would consider the complaints about conduct and fees, and "Mrs ZF's actions in entering judgment against Mr and Mrs AQ in the knowledge of this complaint in light of section 161" of the Act, and referred to the hearing's possible outcomes.

[78] From 30 April 2012, the AQs could have applied to the Court for a stay of any recovery proceeding commenced by Ms ZF, and may have succeeded on the basis of the Notice of Hearing. There was no need for them to take that step though, because Ms ZF had already agreed some months before not to enforce the judgment she had obtained on 29 April 2011.

[79] On 5 June 2012 the Committee considered the AQs' complaints and decided to take no further action other than with respect to Ms ZF having obtained judgment after being notified of the AQs complaint. The Minutes of the Committee's Meeting record:

> There was discussion regarding the application of sections 141 and 161. The Committee had regard to the recent High Court judgment of *Bethune v Wilkinson Adams* and decided that section 161 is triggered by the practitioner receiving notification of the complaint. It was agreed that the obtaining of judgment after the complaint had been notified was a breach of section 161 and constituted unsatisfactory conduct.

[80] The discussion recorded in the minutes was included in the decision, and the Committee went on to make orders under s 156(1)(h) requiring Ms ZF to rectify her error in obtaining judgment in the face of the s 161 stay by applying to the Court to set aside the judgment and set a new timetable for the appropriate steps. The Committee also ordered Ms ZF to pay costs under s 156(1)(n) to NZLS in respect of the inquiry.

[81] It is clear that the Committee's decision was based on a misapprehension as to the operation of s 161. That misapprehension was significant in the Committee finding that Ms ZF's conduct had been unsatisfactory, and fell below the standards required by s 12 of the Act.

[82] The Committee did not record which subsection of s 12 it considered Ms ZF's was in breach of by her conduct. The three parts of s 12 that could be relevant say:

> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
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> (a) conduct of the lawyer…that occurs at a time when…she…is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
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> (b) conduct of the lawyer...that occurs at a time when…she…is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
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> (i) conduct unbecoming a lawyer or an incorporated law firm; or
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> (ii) unprofessional conduct; or
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> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
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> …

[83] For Ms ZF's conduct to have fallen below the standards required by s 12(a) or (b) it would have had to occur when she was providing regulated services. Ms ZF was recovering unpaid fees from former clients. Her retainer had ended. She was not providing the AQs with regulated services, so it is unlikely that the Committee would have considered her conduct fell short of either of the standards in s 12(a) or (b).

[84] It is likely that the Committee's focus was on s 12(c) of the Act, because the Committee's view was that Ms ZF had continued her debt recovery proceeding in the face of a statutory stay. That conclusion is reinforced by the fact that the penalties the Committee imposed were intended to put the AQs into the position they would have been in if the AQs had applied for a stay and the Court had granted one. For the reasons discussed that reasoning is flawed, and brings the focus back to the issue on review, which is whether Ms ZF's conduct in entering judgment against the AQs before the Committee had issued a Notice of Hearing under s 141 of the Act fell below the standard required by s 12 of the Act.

[85] For the reasons set out above, Ms ZF did not contravene s 161 of the Act. She corresponded with the AQs, NZLS and the Committee. At various times she gave notice that she intended to commence proceedings, that she had commenced proceedings, that judgment had been entered and that she intended to enforce it. As soon as the Committee told her to stop, she did so without argument.

[86] The question now is how this matter should proceed. Based on the comments of the Court of Appeal in *Q v LCRO*,[11] the proper course of action is for this Office to refer the matter back to the Standards Committee. The Court of Appeal said:

> The error made by the Complaints Officer is important. [The LCRO's] finding that the Standards Committee's decision was based on a mistaken perception is advanced as a justification for interfering in the decision and substituting her own views. We pause here to interpolate that even if the finding of a mistake had been well-founded, it is arguable that the proper course of action was for the Complaints Officer to have referred the matter back to the Standards Committee for reconsideration, or to have at least turned her mind to that possibility, her failure to do so amounting to a failure to take into account a relevant factor.

[87] In another unpublished decision[12] the LCRO indicated his view that the Court was:

> ...giving a strong direction to this Office that where a Standards Committee has proceeded on the basis of a mistake (as to fact or law) then the proper course of action is for this Office to refer the matter back to the Standards Committee, and if it does not do so, then there must be sound reasons for not doing so.

[88] Part of the Committee's reasoning in the present matter was that s 161 is triggered by the practitioner receiving notification of a complaint. On the facts, Ms ZF was aware of a complaint about Ms RW's conduct, and that by extension the AQs were unhappy about the fees. It has been observed elsewhere[13] that:

> In almost every case in which a client expresses dissatisfaction with the service provided by the lawyer…that dissatisfaction will also be expressed with the fee. That is simply a logical extension of the assertion that work was undertaken incompetently because the lawyer ought not to charge (or ought not to charge so much) for services which have been incompetently provided.

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[11] *Q v LCRO* [2013] NZCA 570 (CA).
[12] LCRO 126/2010 at [14].
[13] LCRO 62/2011 at [67].

[89] A service complaint that includes dissatisfaction about fees is not necessarily a complaint about fees. If there is no fee complaint for the purposes of s 132(2), there can be no s 161 stay.

[90] The Committee also noted in the decision "Mr AQ's name being published in the XYZ, to his embarrassment",[14] and that "[u]nfortunately Mrs ZF chose to force the matter. This was inappropriate.[15] It is not clear whether those matters influenced the Committee's exercise of its discretion.

[91] It is important that the Committee reconsider this aspect of the AQs' complaint, and its finding that Ms ZF's conduct was unsatisfactory, and exercise its discretion in light of this decision.

[92] The finding of unsatisfactory conduct against Ms ZF is therefore reversed and the Committee is directed to reconsider this aspect of the complaint.

Orders under s 156

[93] The Committee's power to make orders under s 156 relies on there first being a finding of unsatisfactory conduct under s 152(2)(b). As the finding of unsatisfactory conduct has been reversed on review, the orders made under s 156 are also reversed.

Costs

[94] Section 210 provides a broad discretion for the LCRO to award costs. This review application was not brought by Ms ZF. The unsatisfactory conduct finding made against her has been reversed. Ms ZF has done nothing to add to the costs of this review, and there is no other reason to order her to pay costs on review.

[95] There is also no evidence that the AQs have acted other than in good faith.

[96] In the circumstances no orders for costs are made on review.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision is reversed in respect of the:

a. Unsatisfactory conduct finding against Ms ZF; and

b. Orders under s 156(1)(h) and 156(1)(n).

[14] Above n 4 at [22].
[15] Above n 4 at [23].

Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee is directed to reconsider and determine whether Ms ZF's conduct in entering judgment against the AQs before the Committee had issued a Notice of Hearing under s 141 of the Act was unsatisfactory.

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision is confirmed in respect of the finding that having regard to all the circumstances of the case, any further action is unnecessary or inappropriate, pursuant to s 138(2) in relation to the conduct allegations against Ms RW.

DATED this 26th day of March 2014

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Dorothy Thresher
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 & Mrs AQ as the Applicants
Ms ZF as the Respondent
The ABC Standards Committee
The New Zealand Law Society