

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of Auckland Standards Committee 2

BETWEEN

Mr JG

Applicant

AND

Ms RS

Respondent

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

DECISION

Background

[1] Mr JG was instructed by ADJ the secretary for the Body Corporate in which Ms RS owned an apartment, to recover outstanding levies due by her.

[2] In September 2008, summary judgment proceedings were issued for \$1,736.48, being outstanding levies, interest, debt collection and search charges. In addition, the Body Corporate claimed Body Corporate secretarial costs of \$500.00 plus legal fees on a solicitor/client basis.

[3] The service agents were unable to serve Ms RS at the address provided to Mr JG by ADJ and he applied for substituted service by way of newspaper advertisement.

[4] When these proceedings were brought to her notice, Ms RS paid (on 30 December 2008) the sum of \$2,294.66 to ADJ. This amount was in payment of the outstanding levy (\$1,100.95) plus a further levy which had been raised in September 2008. She declined to pay any other costs as she stated that although she had notified ADJ of a change of address, the invoices for the outstanding levies were sent by ADJ to a previous address in Wellington.

[5] The proceedings were scheduled for call over on 24 February 2009. On 18 February, Mr JG received a letter from ADK who Ms RS had instructed. ADK sought discontinuance of the proceedings with no costs orders.

[6] Mr JG sought instructions from ADJ. Mr L, the owner and director of ADJ replied by advising that his firm had not received any notification of a change of address, they had not received any returned mail from the Wellington address, and that as Ms RS had owned the apartment for some time, she would have been aware that levies were to be invoiced. He contended that Ms RS had a duty to communicate with the Body Corporate secretary if she did not receive the expected invoices. Even though he did not say so, Mr L's instructions were essentially that Ms RS should be obliged to pay the costs involved.

[7] Mr JG responded to ADK accordingly. On 23 February, whilst continuing to dispute liability, ADK made an offer on their client's behalf to pay the sum of \$1,000.00, which they described as "one half of the costs outstanding". The intent was that the payment represented the portion of the costs attributable to the summary judgment proceedings, but not the substituted service which Ms RS contended was unnecessary.

[8] This offer was not seen by Mr JG before he appeared in Court on the following day. Having been notified of it, he sought an adjournment of the matter. The hearing was then adjourned to 10 March and Mr JG reported to Mr L.

[9] With his report, Mr JG enclosed a memorandum of the costs outstanding. Including his costs of \$2,636.88, the total amount required was \$5,297.91.

[10] Mr JG sought instructions again. He pointed out to Mr L what could develop and the consequential increase in costs. He also recorded the basis on which he considered Ms RS was liable for costs on a solicitor/client basis, although he recognised that ultimately it would be the Court which would make that decision.

[11] Mr L responded directly to Ms RS on 3 March. Having received Mr JG's up to date costs, Mr L observed to Ms RS that:-

"to accept your offer will involve the Body Corporate and your fellow owners carrying nearly \$3,000.00 of costs which would, we suggest, be inappropriate. Clearly for this issue to settle there will need to be some compromise by all parties but we are not in a position to recommend acceptance by the Body Corporate as clearly the Body Corporate has not done anything wrong."

[12] On 4 March, ADK wrote to Mr JG seeking a response to their letter of 23 February in which the settlement offer was made. They also sought details of the

grounds on which Mr JG considered his client was entitled to solicitor/client costs. Mr JG replied on 5 March noting that their respective clients had been liaising directly.

[13] ADK wrote again on 9 March, noting that they did not consider their client would be liable for the costs of the substituted service or formal proof, given that in their view, both were unnecessary.

[14] On 10 March, being the date of the next hearing, a Notice of Opposition and affidavit were served by fax at Mr JG's office. This resulted in a further adjournment of the matter to 21 April for a defended hearing.

[15] With a Notice of Opposition having been filed, it was necessary for the Body Corporate to prepare and file a reply affidavit. Mr JG sought instructions from Mr L who responded on 16 March. He canvassed the facts as he saw them with regard to the non receipt by Ms RS of the levy notices, and concluded that his office was not at fault. He finished his email in the following way: -

“Something is not adding up in this whole situation; however I have no wish to incur the Body Corporate any further costs. I can however confirm that I cannot locate the correspondence of 1 December 2007 which Ms [RS] indicates was sent to us and if it had been received it would as noted, be included in the minutes of the December meeting.”

[16] Mr JG then drafted the Body Corporate reply affidavit and forwarded it to Mr L for comment. Mr JG also prepared comprehensive submissions and completed and filed Mr L's affidavit.

[17] The matter did not proceed on 21 April and a new date was set for 11 June. At 6.51pm on the evening before the hearing, ADK filed a memorandum in the Court. This resulted in the Court staff removing the file from the list as they understood there was to be an adjournment by consent. This was incorrect, and Mr JG appeared. Upon finding that the matter had been taken out of the list, he arranged for it to be reinstated and appeared before Judge Hubble. That incurred further costs. Notwithstanding the issues raised by Ms RS's solicitor in the memorandum, the matter was set down for hearing scheduled for 2 September.

[18] It subsequently became apparent, that Ms RS had on 9 June, paid the sum of \$4,955.56 to ADJ, on the basis that it was in full and final settlement of the matter of costs. Mr L responded to Ms RS directly by email in which he advised:

“unfortunately there are considerable costs which the solicitors have incurred as a result of the Notice of Opposition and these will need to be met by you.

Please confirm your agreement failing which the B[ody] C[orporate] will need to continue with the proceedings to resolve this matter”.

[19] The payment made by Mr RS had not taken account of the further costs that had been incurred in preparing for the defended hearing. Mr JG prepared his account for these costs which totalled \$5,473.13. Ms RS paid this amount to her solicitors and lodged a complaint with the Complaints Service of the New Zealand Law Society seeking a “costs revision” of Mr JG’s accounts.

[20] The matter finally came to a hearing before Judge Cunningham. By this time Ms RS’s counsel had conceded liability and the hearing concerned quantum only. In her decision, Judge Cunningham left the issue of quantum to be determined by what she referred to as the “Law Society costs revision process”.

The Complaint and the Standards Committee determination

[21] Ms RS complained to the Complaints Service of the New Zealand Law Society that she considered the fees charged by Mr JG to be unduly excessive. She provided comprehensive details of all of the events which have been set out above. In addition to disputing the quantum, she also disputed liability to pay on a solicitor/client basis. In part, she questioned the actions of ADJ for its role in the proceedings.

[22] Ms RS provides reasons why she considers it was not necessary to apply for substituted service and other details which she considered should affect the quantum of Mr JG’s accounts. A large part of her responses take issue in effect with statements or information that Mr JG’s client had provided to him.

[23] The basis of the complaint was clarified by ADK in their letter to the Complaints Service on 25 August 2009 in which they note as follows:

“Ms [RS] sought review on the grounds, inter alia, that the fees are disproportionate to the underlying debt and the Body Corporate itself prepared a portion of the documents filed and served.”

[24] They further noted that “Ms [RS] does not contest liability. Therefore the only issue outstanding is Ms [RS]’s request for revision of the costs charged by [JH]” (Mr JG’s employer ...).

[25] Notwithstanding that the Complaints Service had earlier indicated that it intended to appoint a costs assessor to report on the matter, it did not do so and proceeded with a hearing on the papers.

[26] The issues noted by the Standards Committee in its Notice of Hearing were as follows:

- a) The allegation that Mr [JG] relentlessly pursued the litigation against Ms [RS] and refused to enter into any constructive negotiation;
- b) The manner in which Mr [JG] conducted the litigation and whether this conduct amounted to the use of legal processes for an improper purpose;
- c) Mr [JG]'s conduct in incurring costs of \$11,516.26 in relation to a debt of \$1,736.48;
- d) Whether the costs incurred were fair and reasonable in the circumstances.

[27] The Standards Committee reviewed all of the material and the comprehensive submissions provided by both parties. Having done so, it came to the view that Mr JG had breached rules 2.3 and 13.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[28] In respect of the breach of rule 2.3 the Committee had this to say: -

“[17] The Committee considered that the relentless pursuit of this matter, with complete disregard to the costs being incurred, brought the profession into disrepute”

[29] In respect of the breach of rule 13.4 the Committee had this to say: -

“[15] Having due regard to the above rule, the Committee was of the view that Mr [JG] has a clear obligation to advise his client of alternatives to litigation in a matter where the outstanding debt was relatively small. The Committee was of the view that the matter could easily have been settled through means other than litigation. Settlement discussions, mediation or even referral of the costs complaint to the Law Society were just some of the options. The Committee could find no evidence on Mr [JG]'s file (called for by the Complaints Service) that he had taken any steps to advise his client of any sensible cost effective alternatives to litigation. The Committee was of the view that had Mr [JG] advised his client of such alternatives, the excessive fees would not have been incurred.”

[30] As a result of these breaches, the Committee came to the view that Mr JG's conduct constituted unsatisfactory conduct as defined in section 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) and made the following orders: -

- 1) Mr JG was censured.

- 2) Mr JG was ordered to reduce his fees from \$11,516.26 to \$2,000.00 plus GST.
- 3) Mr JG was ordered to pay the New Zealand Law Society an amount of \$2,000.00 in respect of costs and expenses.

Application for review

[31] Mr JG has applied for a review of this determination. While addressing the issues in the Standards Committee determination, he also notes that the Notice of Hearing did not specifically refer to or call for submissions on Rules 2.3 and 13.4. Consequently, Mr JG submits that he was not alerted to the fact that the Committee was considering the complaint on the basis of breaches of these rules.

[32] He also submits that the Standards Committee lacked jurisdiction to consider the matter. In support of this he refers to the decision of *Hannam v Heard* CIV 2008-404-5195 which he notes is on all fours with the present matter.

[33] He considers that the Committee's suggestion that the matter could have been resolved by other means was unrealistic and has provided extensive submissions in support of his application. The brief summary above does not purport to refer to all of the matters included in his application for review and neither will this decision. However, I record that I have considered all of the matters raised by him and assessed whether they need to be specifically referred to or not.

Review

[34] In addition to the Standards Committee file I have received Mr JG's files which were provided to the Standards Committee.

[35] The parties have consented pursuant to section 206(2) of the Act to this review being determined in the absence of the parties and on the basis of the material provided to me.

Jurisdiction

[36] Mr JG argues that Ms RS is not a party chargeable in terms of section 132(2) of the Lawyers and Conveyancers Act and is not therefore in a position to make a complaint about costs. His submission is that the amount payable by Ms RS is an amount that is to be fixed by the Court. He argues that therefore the Law Society had no jurisdiction to consider Ms RS's complaint. In support of this Mr JG refers to the

decision of *Hannam v Heard* (ibid). That decision related to the liability of a defendant to pay indemnity costs. Justice White notes at [11] that “the power to award indemnity costs is conferred on the Court by what is now rule 14.6 of the High Court Rules.”

[37] At [12], His Honour notes that indemnity costs are determined with reference to actual costs, but may be less than the actual costs if the Court considers that they were not reasonably incurred.

[38] Based on this, Mr JG submits that the Law Society does not have jurisdiction because no Costs Order has been made by the Court. This submission effectively denies the validity of Judge Cunningham’s decision.

[39] In Judge Cunningham’s decision, she considers whether Ms RS could be considered to be a “party chargeable” as that term is referred to in section 132(2) of the Act. At [33] of her decision she notes as follows:-

“[33] The predecessor of the Lawyer and Conveyancers Act was the Law Practitioners Act 1982. Section 139 said:

139 Interpretation

Party chargeable, in relation to a practitioner’s bill of costs includes any person who had paid or is liable to pay the bill either to the practitioner or to any other party chargeable with the bill; but does not include an instructing solicitor who has paid or is liable to pay a barrister’s bill rendered to him.”

[40] At [34] of her decision Judge Cunningham notes as follows: -

“[34] Section 132(2) talks about any person chargeable with a bill of costs. Because the predecessor section defines a party chargeable more widely to include “...any other party chargeable with the bill...” it could be argued that the ambit of persons who can avail themselves of the cost revision process has been narrowed.

[35] The purposes of the Lawyers and Conveyancers Act is set out in section 3 of the Act. They include to maintain public confidence in the provision of legal services and to protect the consumers of legal services. There are in my view good policy grounds that the current section 132(2) should not be interpreted narrowly.”

[41] For this reason, Judge Cunningham therefore considered that Ms RS was a “party chargeable” with Mr JG’s accounts and therefore had the necessary status to lodge a complaint about the bills.

[42] Judge Cunningham then considered sections 34 and 34(a) of the Unit Titles Act 1972, which enables a Body Corporate to recover costs incurred by the wilful or

negligent Act or omission on the part of any proprietor. Whilst Ms RS herself disputes liability on this basis, Judge Cunningham considered that Ms RS was in a “contractual relationship with the plaintiff” ([38]), although she was of course placed in this position by virtue of the statute.

[43] Mr JG argues that Judge Cunningham’s decision is invalid in purporting to confer jurisdiction on the Law Society when in his view, no such jurisdiction exists. In his review application he submits that:

“the Committee had no jurisdiction to consider Ms [RS]’s “costs complaint” because at this juncture no amount of costs has been determined by the Court (or by anyone else) as payable by Ms [RS] to the Plaintiff. The bill of costs rendered by us to our client, the plaintiff, were irrelevant to that process and should not have been taken into consideration in the Committee’s overall determination”

[44] If Mr JG took issue with Judge Cunningham’s decision, he should have appealed it to the High Court. The complaints process and this review is no substitute for an appeal and both the Standards Committee and myself must proceed on the basis of the Judge’s decision.

[45] That decision was that the Court should not determine quantum but allow Ms RS to pursue the Law Society cost revision path (applying *Simpson Grierson v Gilmour* CIV 2008-404-008674).

[46] I do not therefore accept Mr JG’s submission that the Standards Committee does not have jurisdiction.

[47] Notwithstanding my rejection of Mr JG’s submission in this regard, the decision of Judge Cunningham presents something of a conundrum. The difference between the case of *Simpson Grierson v Gilmour* and the present case, is that Mr Gilmour was ADK’s client. In this case, Ms RS is not Mr JG’s client. She is only the party chargeable by reason of the fact that the Body Corporate is able to pass on Mr JG’s cost to Ms RS as the defaulting owner.

[48] Mr JG received his instructions from ADJ. His instructions were to pursue recovery of the outstanding levy. He achieved that, but Ms RS then contested that she should not have to pay anything on account of the costs of recovery. Mr JG’s client approved of his continued action to recover these costs so that the other Body Corporate owners did not incur any cost by reason of her default.

[49] Mr JGs' obligations are to his client. His client did not contest his fees. Mr JG has achieved what his client requested. Ms RS's actions were at least partially responsible for the significant amount of work that Mr JG was required to undertake to achieve this result. Is it reasonable therefore, that Mr JG's fees should be judged in relation to the amount at stake or by reference to any perceived obligations to Ms RS?

Costs revision

[50] Judge Cunningham ruled on the question of liability (or alternatively liability was accepted by Ms RS), but left quantum to be determined by the "Law Society's costs revision process." Costs revision was a process that took place under the Law Practitioners Act 1982. Under that Act, Law Society cost revisers scrutinised bills of costs and either adjusted or confirmed the same. Often, bills of costs were adjusted by small amounts. There was no other negative outcome for the lawyer.

[51] That process was abolished by the Lawyer and Conveyancers Act. Under the current legislation, complaints about bills of costs are treated as a complaint about a lawyer's conduct. If a lawyer's conduct is considered to constitute unsatisfactory conduct, then pursuant to section 156(1) of the Act various orders may be made either reducing or cancelling the lawyer's fees.

[52] Pursuant to section 12(c) of the Act, a breach of the Conduct and Client Care Rules constitutes unsatisfactory conduct. In the present instance, the Standards Committee has found breaches of rule 2.3 and 13.4 and as a result adjusted Mr JG's fees. Those rules do not relate to conduct with regard to fees. They relate to the use of legal processes and to a requirement to inform the client about the use of alternative processes.

[53] The closest rule that would be applicable to achieve a "cost revision" as referred to by Judge Cunningham is rule 9. That rule 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"

[54] The Committee did not however find that this rule had been breached. Its finding of unsatisfactory conduct was founded on breaches of rules 2.3 and 13.4. The outcome of this review includes a finding that there has been no breach of those rules and the result of that is that the Standards Committee decision should be reversed.

[55] However, if the matter were to be left there, the intention of Judge Cunningham's judgment would not be fulfilled and that would be of little assistance to either of the parties. In the circumstances, I consider that the only way to achieve the intent of Judge Cunningham's decision, is for the matter to be returned to the Standards Committee for reconsideration by a costs assessor.

The Standards Committees findings

[56] The Standards Committee found breaches of rules 2.3 and 13.4. As noted above, the Standards Committee considered that Mr JG had engaged in a relentless pursuit of the matter with complete disregard to the costs being incurred.

[57] Mr JG's instructions came from Mr L. Mr L was the owner and director of ADJ. Mr L was a well qualified and experienced Body Corporate administrator. He held an LLB, Bcom and a Diploma in Business (property). He had also practiced as a solicitor. His firm, ADJ, administered a large number of Body Corporate developments and had undertaken (or presumably had been involved with) extensive litigation in both the High and District Courts as well as the collection of general and special levies.

[58] His instructions were that he did not consider it was appropriate for other Body Corporate members to bear any part of the costs of collecting unpaid levies. That must almost be a matter of principle for any Body Corporate administrator unless there are special circumstances which the Body Corporate owners would feel compelled to take into account.

[59] In response to the initial settlement offer in March 2009, Mr L advised Ms RS directly that he could not recommend it be accepted as it would mean that the other owners would thereby be obliged to carry nearly \$3,000.00 in costs. Again on 10 June 2009, Mr L advised Ms RS that the considerable legal costs incurred by the Body Corporate as a result of the need to respond to the Notice of Opposition filed by her would need to be met by her. This email concludes by noting that if she did not agree to meet same, then the Body Corporate would need to continue with the proceedings to resolve the matter. This is clearly an endorsement of the approach being taken by Mr JG that Ms RS was liable to meet all of the legal fees associated with the recovery process.

[60] The finding of a breach of rule 2.3 therefore proceeds on a basis that disregards the instructions received by Mr JG from his client. Mr JG had no duty to Ms RS. His duty was to his client and his instructions were to recover the outstanding levies and all costs associated with that recovery. This is incompatible with a subsequent finding that

he pursued Ms RS relentlessly with complete disregard to the costs involved. Resolution of the matter lay with Ms RS.

[61] The Committee also found a breach of rule 13.4 in that Mr JG had a clear obligation to advise his client of alternatives to litigation. I have already noted Mr L's qualifications above. Mr L himself was aware that the issue could not be addressed by the Disputes Tribunal and having been involved in extensive litigation, he would have been no stranger to the art of negotiation and mediation. His instructions to Mr JG were to proceed to collect the outstanding levies and to avoid any costs being imposed on the other Body Corporate owners. These instructions were no doubt given with the expectation that all costs would be borne by Ms RS. Imposing a duty on Mr JG to encourage settlement by mediation or other means would have resulted in an impost on the other Body Corporate owners which was directly contrary to Mr L's instructions.

[62] I therefore consider that this finding of the Standards Committee does not take into account the particular circumstances of this case and should not stand.

Result

[63] Overall, I am left with the impression that the Standards Committee has proceeded on the basis that Ms RS was in effect Mr JG's client and has not taken note of the fact that Ms RS became the party chargeable with Mr JG's costs by reason of the litigation. Mr JG's instructions from Mr L were to obtain payment of the outstanding levies and avoid any impost on the other Body Corporate owners. These instructions are largely responsible for the result where, as observed by the Standards Committee, costs are out of proportion to the amounts involved. Nevertheless, Mr JG was complying with his client's instructions.

[64] I do however consider that there is merit in Ms RS's contentions where for example, she asserts that the action taken by Mr JG in applying for substituted service was unnecessary and inappropriate. She also asserts that in other instances, Mr JG has engaged in an unnecessary process which has resulted in costs being accumulated unnecessarily.

[65] A careful scrutiny of the file and a detailed examination of the work carried out by Mr JG needs to be undertaken. This exercise needs particularly to take note of the instructions Mr JG was receiving from his client but also needs to examine carefully all of the steps taken by him with a view to considering whether such action was necessary to fulfil those instructions, but at the same time taking into account the actions of Ms RS and her solicitors.

[66] Whilst I am mindful of the time that has elapsed from the date of the complaint, and acknowledge the somewhat longer period of time than is desirable for this review to be completed, this is an exercise that requires to be carried out by a costs assessor with the appropriate experience and expertise.

Decision

[67] Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee and the orders made therein are reversed.

[68] Pursued to section 209(1) of the Lawyers and Conveyancers Act 2006 the Standards Committee is directed to appoint a costs assessor to review Mr JG's bills of costs taking into account the comments made in this decision. The reason for this direction is provided in the body of the decision above.

DATED this 15th day of March 2012

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:

Mr JG as the Applicant
Ms RS as the Respondent
JH principal of the Applicant's firm
The Auckland Standards Committee 2
The New Zealand Law Society