

LCRO 254/2012

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee

**BETWEEN**

**RF**

Applicant

**AND**

**CN**

Respondent

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

**DECISION**

**Introduction**

[1] Mr RF has applied for a review of the decision of [Area] Standards Committee to take no further action in respect of his complaint concerning the conduct of Ms CN.

[2] At commencement, I must acknowledge that there has been considerable delay in this review being progressed to resolution. I apologise to the parties for that regrettable delay.

**Background**

[3] Mr RF engaged Ms CN to act for him in 2010 in relation to a District Court civil claim he wished to file concerning an agreement for sale and purchase relating to a leaky home. Ms CN is a sole practitioner practising as Law Firm 1.

[4] On receiving instructions Ms CN sent Mr RF a copy of Law Firm 1's standard terms and conditions. They did not specify Law Firm 1's hourly rates but referred to the factors in rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The terms and conditions also provided, among other things, that:

- (a) Terms of payment were within seven days from the date the bill was rendered unless alternative business arrangements had been made.
- (b) If the fees were not paid by the due date default interest would be charged at 15 per cent per annum.
- (c) The client would be liable for legal and debt collection costs incurred, including solicitor/client costs, in enforcing, or attempting to enforce, their rights.

[5] Included in the information capsule filed with the District Court in support of Mr RF claim was a statement from a Mr and Mrs DS, the neighbours of the property at the centre of the dispute. Mr DS's evidence was that he spoke to a real estate agent at an open home about the property being a leaky home. Mr RF considers this was to be the key evidence in support of his claim against the real estate agency.

[6] On [Date] Mr QW, the lawyer for the real estate agency, emailed Ms CN asking her to obtain instructions from Mr DS as to whether he could identify the agent with whom he says he discussed the property.

[7] Mr RF was never advised that this request had been made. There is no evidence that Ms CN contacted Mr DS, nor is there any evidence of her having replied to Mr QW.

[8] Mr RF had difficulty in paying the legal fees charged. On [Date] he entered into a deed of acknowledgement of debt in relation to \$11,935.60 fees and interest then outstanding. A payment plan was agreed but Mr RF did not make the payments agreed.

[9] Mr RF decided to change lawyers. He instructed Mr BL of Law Firm 2 to act for him. On [Date] Mr BL advised Ms CN he had received instructions and requested Ms CN to forward him Mr RF's file.

[10] On [Date] Law Firm 1 replied to Law Firm 2 and advised it had a lien over Mr RF's files and stated they would be provided on receipt of an undertaking by Law

Firm 2 pursuant to rule 4.4.2 of the Conduct and Client Care Rules. Law Firm 2 did not provide the undertaking. The files were not provided.

[11] Ms CN applied to the District Court for leave to be removed as solicitor on the record. She also commenced recovery action for her outstanding fees.

[12] In a judgment dated [Date] [Judge] determined that Ms CN was entitled to rely on the solicitor's lien and any other property rights she had over the file pursuant to arrangements made between her firm and Mr RF.

[13] In the same judgment, Ms CN was awarded costs on her application for leave to withdraw, including her attendance at the settlement conference on [Date]. Costs were awarded on a category 2 band B basis and totalled \$975.

[14] Ms CN then commenced separate enforcement action against Mr RF for the court costs awarded. She forwarded an account to Mr RF for the work done on the application for leave to withdraw and associated documents, her costs calculated on a time and attendance basis.

[15] In [Date] Mr RF filed his complaint with the Law Society. On receipt of the complaint Ms CN stepped back from pursuing recovery of her outstanding fees but continued to pursue payment of the costs awarded by the District Court.

[16] The Standards Committee decision was released on [Date]. On [Date] Ms CN contracted Company 1 to assist with the collection of outstanding fees.

[17] These invoices included an invoice for \$6,457.37 which was rendered after Ms CN ceased acting for Mr RF. That invoice covered time spent in seeking enforcement of the fees owing and the costs award and also Ms CN's time in filing submissions and dealing with communications in relation to Mr RF' complaint to the Law Society.

### **The complaint and the Standards Committee decision**

[18] Mr RF made complaint that:

- (a) The fees charged by Ms CN were excessive.
- (b) Ms CN refused to provide his files when requested.
- (c) Ms CN was unjustified in claiming a solicitor's lien over Mr RF' files and in declining to provide them to Mr BL until her fees were paid.

[19] In correspondence to the Complaints Service dated [Date], Mr RF expanded further on his grounds of complaint. He submitted that:

- (a) Ms CN had failed to respond to requests from opposing counsel to clarify the identity of a witness who was able to provide material evidence for his claim.
- (b) Ms CN had failed to advise him of the request that had been made, which had resulted in prejudice to his case.
- (c) He had been served with court proceedings issued by Ms CN immediately after leaving the settlement conference on [Date].
- (d) Ms CN had been asked to clarify concerns regarding her accounts but had failed to do so.

[20] The Standards Committee distilled the issues to be considered as follows:

- (a) Were the costs charged by Ms CN fair and reasonable?
- (b) Did Ms CN withhold information from Mr RF and his new solicitor, Mr BL?
- (c) Was Ms CN justified in claiming a solicitor's lien over Mr RF's files and declining to provide them to Mr BL until her fees were paid?

[21] In its decision delivered on [Date], the Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on the complaint.

[22] In reaching that decision, the Committee concluded that the costs charged by Ms CN appeared to be fair and reasonable and that she had kept Mr RF advised as the matter progressed. The Standards Committee also considered that Ms CN was entitled to claim a solicitor's lien over Mr RF's file noting that the District Court had determined that to be the case.

[23] The Standards Committee did not make a specific finding in relation to Mr RF's complaint that Ms CN failed to keep him informed by failing to provide key information. It noted that the details of this part of the complaint were not particularly clear. Nor did the Committee directly address complaint that Ms CN had breached her professional obligations, by arranging for proceedings to be served on Mr RF within the court precinct.

**Application for review**

[24] Mr RF filed an application for review on [Date]. He seeks a review on all aspects of the Standards Committee decision other than the complaint in relation to Ms CN claiming a lien over the file. Mr RF also seeks a reduction in fees and a reimbursement of fees paid.

[25] Mr RF also requests that the Legal Complaints Review Officer (LCRO) consider the invoice rendered after the Standards Committee decision when considering his costs complaint. He also seeks a finding that Ms CN is in breach of s 161 of the Act as she recommenced proceedings for the recovery of a disputed bill before the complaint had finally been disposed of.

[26] Mr RF submits that:

- (a) Ms CN withheld key information from him by failing to inform him of Mr QW's request that his key witness provide information as to whether he could identify the real estate agent he had spoken to. Mr RF submits that this was a critical part of his case and if he had known about this earlier he would have been more prepared for the settlement conference and the case most likely would have settled.
- (b) Ms CN significantly overcharged him by doing work that was not necessary. For example Mr RF submits that significant charges were incurred in endeavouring to identify and serve a respondent whose contact details were clearly contained in the tenancy agreement which had been provided to Ms CN. He considers he should be reimbursed for all fees incurred after Ms CN failed to inform him of the request by Mr QW to identify the real estate agent, as work completed after this point was unnecessary.
- (c) Ms CN breached rule 6 of the Conduct Rules when she continually brought up the outstanding accounts at the judicial settlement conference despite being reprimanded by the Judge, and when she arranged for him to be served with enforcement papers at the settlement conference.
- (d) Ms CN breached s 161 of the Act by recommencing enforcement action in relation to outstanding fees following the release of the Standards Committee decision, before the time permitted for filing a review had

expired. He also submits that drafting bankruptcy proceedings and taking other steps to enforce the costs awarded against him by the District Court is in breach of s 161.

- (e) He should not have to pay the invoice rendered for work done after Ms CN ceased acting for him. This invoice includes work done in relation to enforcement action regarding the costs awarded by the Court and Ms CN's time spent in responding to his complaint made to the Law Society.

[27] In response, Ms CN provided a chronology, detailing the sequence of events which followed Mr RF lodging his complaint with the NZLS, with focus on her endeavours to recover from Mr RF, the costs awarded by the Court on her application to be removed as counsel on the record. Ms CN contends that Mr RF is deliberately pursuing complaint, in order to avoid paying his legal fees. She notes that Mr RF's complaint was commenced, after she had initiated action for recovery of the outstanding fees.

#### **The role of the LCRO on review**

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>1</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[29] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[30] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

### **The Hearing**

[31] An applicant only hearing took place on [Date]. Ms CN had requested that she not be required to attend the hearing.

[32] Subsequent to the hearing, I made request of Ms CN to clarify:

- (a) Whether her account of 31 May 2011 included work which was compensated for by the Court awarded costs.
- (b) The nature of the proceedings that were served on Mr RF at the conclusion of the settlement conference.
- (c) If the proceedings served on the day of the settlement conference were filed before Ms CN obtained the consent of the Court to be removed as counsel on the record.
- (d) Her response to complaint that serving proceedings on Mr RF in the Court constituted unprofessional conduct.

[33] In response to that request, Ms CN:

- (a) Provided clarification on issues relating to release of the file.
- (b) Advised that Mr RF had been served with the application to be removed as counsel on the day of the conference, that application having previously been served on his new counsel.

- (c) Conceded that there was a degree of overlap in the costs awarded by the Court, and the costs charged in her invoice of 31 May 2011.
- (d) Considered it appropriate in the circumstances, to serve the application to be removed as counsel on Mr RF at the Court.

### **The Issues**

[34] The issues I need to decide are:

- (a) Did Ms CN breach any of her professional obligations owed to Mr RF by failing to inform him of Mr QW's request to obtain further information from Mr DS?
- (b) Were the fees charged by Ms CN fair and reasonable?
- (c) Has Ms CN breached s 161 of the Act by commencing or proceeding with recovery proceedings before Mr RF' complaint had been finally disposed of?
- (d) Has Ms CN breached her professional obligations in other actions taken to enforce payment of outstanding fees?
- (e) Should the invoice rendered by Ms CN after delivery of the Standards Committee decision be considered on review?

### **Preliminary Comments**

[35] The jurisdiction of the LCRO is confined to reviewing Standards Committee decisions.<sup>3</sup>

[36] It is not the role of the LCRO to consider fresh complaints that were not put before the Committee. If however the Committee has failed or neglected to consider any issues raised by the complainant, that oversight can be cured on review.

[37] Mr RF raises two new issues on review. He requests that Ms CN's invoice of [Date] be considered as part of the review. That invoice was rendered after the Committee had delivered its decision. The invoice rendered in the sum of \$6,457.37, from the notation provided, is primarily billed for work that has engaged Ms CN in

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<sup>3</sup> Lawyers and Conveyancers Act 2006, s 192.



pursuing enforcement proceedings against Mr RF (an order for examination) and time expended in responding to the Complaints Service.

[38] I am not prepared to consider the invoice of 13 September 2012, but would note that a practitioner cannot seek to recover costs from a client in respect to time spent responding to a conduct complaint pursued by the client. Further, costs incurred by a practitioner in progressing enforcement proceedings in the Court against a former client, would appropriately be dealt with by way of a costs application.

[39] I note that Ms CN's terms of engagement provide that Mr RF is to be liable for all legal and debt collection costs incurred by Ms CN in enforcing her rights.

[40] A further issue raised on review, is complaint that Ms CN breached s 161 of the Act by commencing legal action for recovery of her fees, when she was aware that her fees were being challenged. This issue was not raised by Mr RF in his initial complaint or in further correspondence forwarded to the Complaints Service.

[41] Ms CN's affidavit in support of her application to be removed as counsel on the record, records that approximately \$11,000 in fees were owed at the time of making the application. Action was taken whilst the complaints process was on foot to recover the costs awarded by the District Court on Ms CN's application to withdraw as counsel. Section 161 of the Act does not stay enforcement of such costs but only bills of costs rendered by a practitioner.

[42] On [Date], a debt collection company instructed by Ms CN, wrote to Mr RF making demand for payment of outstanding fees, including payment of the final invoice of \$6,457.37 being the invoice referred to in paragraph [17] above.

[43] I do not consider that I am able to address this further complaint, as the issue was not put before the Standards Committee for consideration.

[44] Two matters were raised by Mr RF in his initial complaint which were not addressed by the Standards Committee, those being complaint that it had been inappropriate to serve him with proceedings in the precinct of the Court, and complaint that Ms CN had inappropriately raised the issue of outstanding fees at the settlement conference. That oversight can be cured on review.

## Analysis

*Did Ms CN breach any of her professional obligations by failing to inform Mr RF of Mr QW's request for further information?*

[45] There is no dispute between Ms CN and Mr RF as to the factual background to this complaint. It is clear that the request for further information was made in an email Mr QW sent to Ms CN. It is also accepted that Ms CN neither followed up on the request nor advised Mr RF that the request was made.

[46] What is in dispute is whether Ms CN was in breach of her professional obligations by failing to pass on the details of this request to Mr RF or by failing to seek further evidence from Mr DS. Mr RF submits that the request by Mr QW was of the utmost importance and that his whole case was based on Mr DS's evidence. He considers that failure to provide the requested information meant that the judicial settlement conference was a waste of time and money and was the key reason why settlement was not achieved.

[47] It is appropriate at first step to consider which provisions of the Act or Conduct Rules would need to be considered when addressing complaint that a lawyer, in the course of conducting a case, failed to advise their client that opposing counsel had made request for particular information.

[48] 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.<sup>4</sup> A lawyer must keep their client informed about progress on the retainer.<sup>5</sup>

[49] Conduct that is considered to fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, may attract a disciplinary finding of unsatisfactory conduct.

[50] Whilst it is the case that a lawyer must keep their client informed, in the course of progressing a case, a lawyer will be frequently required to make decisions and respond to situations without need for consultation with their client, or indeed in many cases, opportunity to do so.

[51] Nor is a lawyer under a duty to respond to every request made by opposing counsel during the progression of a case. They are entitled to make decisions on the

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<sup>4</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 7.

<sup>5</sup> Rule 7.1.

progression of a case and decide what issues need to be followed up and what do not. In this case Ms CN decided the request from Mr QW did not need to be actioned.

[52] Whilst I accept that Mr RF is genuine in his views I am not satisfied that Ms CN's failure to respond to the inquiry from counsel was as critical to the progression of the case as Mr RF submits. Nor is it established, as Mr RF suggests, that the failure to achieve a settlement at the conference was a direct consequence of Ms CN not following up on Mr QW's request. Mr BL's email to Mr RF following the settlement conference makes no reference to any adverse consequences arising as a result of Ms CN's failure to pass the relevant request on to Mr RF. It states:<sup>6</sup>

It is unfortunate that the defendant was not prepared to enter into negotiation in an attempt to resolve the matter despite the spirit of compromise expressed by you ... As you appreciate it is simply not possible to force a party to engage in constructive negotiation.

[53] With the benefit of hindsight it could be said that Ms CN's decision not to respond to the request was a litigation decision that could have been made differently, but it is not established on the evidence provided with Mr RF's complaint, that the failure to respond significantly affected the course of the litigation in the manner that Mr RF suggests it did.

[54] A lawyer is not under a duty to be right all the time. A lawyer has a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. The fact that a decision they make turns out to be wrong does not in itself mean that they have been negligent or that the lawyer is guilty of unsatisfactory conduct as defined in s 12(a) of the Act.

[55] Criticism of Ms CN's failure to respond to an enquiry from counsel is not complaint that is generated within a context of allegation that Ms CN failed to provide competent representation. Mr RF is critical of the fees charged, and aspects of Ms CN's conduct subsequent to her terminating the retainer, but his complaints do not reflect that he had concerns about the competency of the representation he received during the course of the retainer.

[56] In *Auckland Standards Committee No 3 v Castles*, the Lawyers and Conveyancers Disciplinary Tribunal noted that it was not the role of a disciplinary body

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<sup>6</sup> Email BL to RF ([Date]).

to closely analyse and second guess every move of counsel made during each piece of litigation.<sup>7</sup>

[57] I conclude that Ms CN has not committed any breach of her professional obligations in deciding not to advise Mr RF of the request for further evidence from Mr DS.

*Were the fees charged by Ms CN reasonable?*

[58] Ms CN issued 12 invoices for the period of time encompassed by the fees complaint, the first issued on 9 August 2010, the last issued on 31 May 2011. On [Date], Mr RF signed a deed of acknowledgement of debt, recording the fees owing at that date, and his agreement to a payment plan to settle the outstanding fees. Mr RF had received regular invoices throughout, and there was no indication from him prior to lodging his complaint, that he had any issues with the fees.

[59] Mr RF does not challenge the hourly rates upon which fees were calculated or that the time for which he was charged was actually spent. His allegation is that he has been charged for unnecessary work and for items that he considers should not have incurred a charge. In particular he notes:

- (a) He was billed for doing company searches and other work in trying to locate and serve a named respondent when he had already provided Ms CN with a copy of a tenancy agreement which had the address and phone contact for that respondent.
- (b) Ms CN caused 12 months of unnecessary work and cost by failing to get Mr DS to identify the relevant real estate agent prior to the settlement conference.
- (c) Ms CN unreasonably charged \$31 on a time and attendance basis for depositing a cheque he paid towards fees.
- (d) Ms CN has charged various amounts for calculating interest.

[60] The issue in relation to (b) relates to the initial part of Mr RF' complaint which I have already dealt with. The amounts in dispute in relation to the other three items are relatively small.

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<sup>7</sup> *Auckland Standards Committee No 3 v Castles* [2013] NZLCDT 53 at [177].

[61] Considering carefully the invoices rendered from 9 August 2010 to 6 May 2011, I do not consider that the arguments advanced by Mr RF are sufficiently persuasive to allow me to arrive at a view different to the Committee. It is significant that Mr RF executed a deed of acknowledgement of debt for a significant component of the total account without apparent objection, and there is nothing to suggest that Mr RF was under pressure to do so. To the contrary, there is evidence that Ms CN was regularly liaising with Mr RF over his outstanding accounts, and endeavouring to put in place workable arrangements which would allow her to continue to represent Mr RF.

[62] I do have concerns with Ms CN's invoice dated 31 May 2011. Those relate to:

- (a) Repetitive work.
- (b) The application to be removed as counsel on the record.
- (c) Work charged that does not appear to properly relate to the retainer.

*Repetitive work*

[63] Ms CN met with Mr RF on the morning of 5 May 2011 to discuss ongoing problems with fees. Later that morning she advised Mr RF of her intention to advise the parties and the Court that she was no longer acting. She terminates the retainer, and was, in the face of Mr RF's inability to pay his fees, entitled to do so.

[64] Immediately on terminating the retainer, Ms CN renders an invoice to Mr RF in the sum of \$479.16. That invoice, rendered on 6 May 2011, is for work completed over a period of two days (2 and 5 May) with the bulk of the account relating to time spent on May 5, work on that day engaging discussions and correspondence regarding outstanding fees.

[65] It appears to be the case that time engaged with Mr RF, discussing problems with payment of his accounts, and Ms CN's understandable reluctance to continue working for him if the fee problems could not be resolved, incurred costs to Mr RF of \$479.16.

[66] The 31 May 2011 invoice covers work, as recorded in the timesheets, from 5 May 2011 to 31 May 2011.

[67] I note that whilst the 6 May invoice records work completed to that date, the first notation to the 31 May 2011 invoice, records time for work completed on 5 May, work which presumably would have been covered by the 6 May account.

[68] Close analysis of the 31 May account indicates a degree of repetition in the work done.

[69] It is reasonable to assume that the work involved in the accruing of an account totalling \$479.16 would have left Mr RF comprehensively informed as to the consequences that flowed from this termination of the retainer, and the steps that would follow.

[70] The 31 May account makes frequent reference to work engaged in what is described in the notations to account as “notice of ceasing to act”.

[71] Work completed under the description of “ceasing to act” includes:

- (a) Notice of ceasing to act, phone call from client, email to client.
- (b) Notice of ceasing to act.
- (c) Various emails in drafting letter including email to client regarding ceasing to act.
- (d) Research on ceasing to act, notice of change of representation.

[72] Whilst there may be a degree of overlap in the work described under the umbrella of “ceasing to act” with the work engaged in preparing the notice to be removed as lawyer on the record, there is significant time recorded separately under description specifically relating to work preparing the application to withdraw as counsel.

[73] Looked at in its totality, I have a sense that there was an overly vigorous approach adopted to billing for time spent dealing with issues arising directly from the termination of the retainer, particularly when Ms CN had charged a fee of \$479.16 for work solely related to bringing the retainer to an end.

*The application to be removed as counsel on the record*

[74] Costs for work incurred, after the retainer is terminated, amounts to \$4,356.00, inclusive of GST and disbursements. This work is recorded in the invoice rendered on 31 May 2011. A further account for costs incurred in pursuing recovery of fees, and for time engaged in responding to the disciplinary process was, as previously noted, rendered on 13 September 2012 in the sum of \$6,457.37. Consideration of that invoice does not form part of this review.

[75] Whilst I am acutely mindful of the need for caution in drawing of complete conclusions as to work completed by simple reference to the notations made in a lawyer's account, and of the need to avoid a nit picking approach to the analysis of an account, it is clear that a significant component of the GST inclusive account of \$4,356.00 rendered on May 31 2011, related to work preparing the application for leave to withdraw.

[76] Specific references to work engaged under the "ceasing to act" banner, include:

05.05.11	Notice of ceasing to act	198.00
17.05.11	research, notice change of representation	72.00
18.05.11	draft application to cease as solicitor	429.00
19.0 5.11	prepare application and affidavit	990.00
23.05 .11	emails and phone calls regarding JSC	99.00
25.0 5.11	prepare for and attend court	231.00
25.0 5.11	update JSC time	18.00

[77] I note that work billed engaging "notice of ceasing to act" is recorded having been carried out on May 5 when, as noted, an account had been rendered for work to 6 May. There are two separate references to "notice of ceasing to act" for May 5, together engaging costs of \$306. The first includes reference to a phone call and email, but the bulk of work falls under the label of notice of ceasing to act.

[78] Ms CN's account would indicate that costs in the vicinity of \$2,037.00 were spent on work relating to the application to withdraw as counsel.

[79] I hasten to emphasise that Ms CN was required to lodge this application, and indeed would not have had to, if Mr RF' counsel had filed a notice of change of representation.

[80] The first issue to consider is whether it was appropriate for Ms CN to charge for costs incurred in formalising her removal as counsel on the record.

[81] Ms CN's decision to charge Mr RF for time expended in preparing, filing and appearing on the application to be removed as lawyer on the record, raises question as

to the extent to which she was able to continue to charge Mr RF for services, after she had terminated the retainer.

[82] A lawyer's overriding duty is as an officer of the court.<sup>8</sup> A lawyer's obligation to protect the interests of his or her client is subject to their overriding duties as an officer of the High Court.

[83] The Conduct and Client Care Rules direct that, when undertaking litigation, a lawyer's overriding duty is to the court concerned.<sup>9</sup>

[84] Once a lawyer is on the court record, their obligations as counsel continue in respect to the proceedings until the proceedings are concluded, unless the lawyer's client has effected a change of solicitor, or the court has made an order that the lawyer no longer stands in the position of lawyer on the record.<sup>10</sup>

[85] A lawyer's obligations to the court arise independently of their obligations to their client, though in practice, those obligations travel a similar path. The trigger for the application was the obligation owed to the court and not the instructions of the client. As such it is an incident of being a professional and not a service delivered for which a fee can be charged.

[86] In my view, the costs incurred in attending to the application to be removed from the record, are costs which should not properly have been charged to Mr RF, but were costs that arose from Ms CN's obligations as an officer of the court.

[87] Ms CN, quite reasonably, advised Mr RF that she could no longer continue to represent him. On termination of the retainer, Ms CN was required, in the absence of what could have been a more cooperative approach from Mr RF' new lawyer, to fulfil her professional obligations to the Court, and any cost incurred in attending to those obligations arose from her continuing obligations as an officer of the court, not from any residual termination of the retainer.

[88] If I am wrong on that, and Ms CN was entitled as a condition of the contract of retainer, to charge for work involved in having herself removed as lawyer on the record, that does not address all of the concerns.

[89] It was not the case that Ms CN was in a position where she was out of pocket for costs involved in proceeding the application. She was able to seek a costs order

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<sup>8</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rule 2008. r 2.1.

<sup>9</sup> Rule 13.

<sup>10</sup> High Court Rules, r 5.41.



from the Court, and her expectation that she would be entitled to costs, is evidenced by indication in the application that she would be seeking a costs order.

[90] She sought costs of \$512. Costs were subsequently awarded in the sum of \$975. The costs order records that costs were directed in respect to reimbursing for time spent preparing the application, and attending at Court.

[91] This resulted in what can only be described as an unsatisfactory outcome, in that Mr RF has been charged by Ms CN for costs incurred in proceeding the application, and has also incurred court ordered costs arising from the application.

[92] Ms CN was invited to respond to concern that there appeared to be possibility of Mr RF being asked to pay twice for the court application. She conceded that there was a possibility of overlap between the invoice of 31 May 2011, and the costs order, and suggested that the overlap may be in the vicinity of one quarter of the 31 May invoice.<sup>11</sup> She submits that the costs awarded of \$975 met only a fraction of her costs on a time basis. That submission, whilst addressing her view on quantum, does not address the question as to whether it was appropriate to charge Mr RF for an application to the Court which allowed opportunity for recovery of the costs involved in advancing the application.

[93] Putting aside for one moment issue as to whether Ms CN was entitled to charge for work involved in the Court application, I have reservations as to whether the account rendered reflects an appropriate amount of time spent for the work involved.

[94] An interlocutory application seeking leave to be removed as counsel is a basic and straightforward application which should not customarily involve a significant amount of the practitioner's time. A standard application is supported by an affidavit which sets out the reasons as to why the practitioner seeks leave to be excused.

[95] There is no particular complexity in the application and examination of the application filed reveals that to be the case. Examination of Ms CN's time records indicated that she spent approximately \$2,037.00, (and I think that to likely be a conservative estimate) on the preparation of a straightforward interlocutory application, supported by a non contentious narrative affidavit. A component of the account relates to the Court appearance (\$231.00) which is reasonable.

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<sup>11</sup> Letter Law Firm 1 to LCRO ([Date]).

[96] In my view, the fee charged for the application is excessive, but not sufficiently so to in itself to merit a conduct sanction. I am mindful of the cautionary advice provided by the practice note provided by the New Zealand Law Society to Standards Committee members, which cautions that:<sup>12</sup>

Standards committee members must bear in mind that an adverse finding against a lawyer in the context of a fee complaint is a finding of unsatisfactory conduct, and therefore has a significant stigma associated with it in addition to the penal consequences and the reduction of the fee itself. It follows that there should be an adverse finding on a fee complaint only where the fee is found to be significantly excessive and is beyond tolerable limits suggesting only a minor adjustment.

*Work charged that does not appear to properly relate to the retainer*

[97] Work completed after the retainer is not confined to preparing and advancing the Court application. If calculation of just over \$2,000 presents as a reasonable estimate of work completed on the application, that leaves almost half of the GST inclusive account of \$4,356.00 to account for.

[98] Some of this remaining work appears to relate to charges for further time spent engaging with Mr RF and his lawyer, this within the context of a fee being rendered for work preceding the decision to terminate the retainer. An examination of the file indicates that this work included Ms CN corresponding with Mr RF' counsel over matters relating to the release of the file, and attempts by her to obtain confirmation from Mr RF that he would arrange for a notice of change of solicitor to be filed with the Court.

[99] I do not consider that Ms CN is able to charge Mr RF for time involved in engaging with his new lawyer over matters relating to release of the file. Ms CN was entitled to insist on payment of her fees before agreeing to release the file, and entitled to insist that she would only do so on receipt of an undertaking from Mr RF' lawyer that payment of her fees would be prioritised. But time engaged in protecting her professional interests are, in my view, not properly matters which can be legitimately charged to her client. The retainer was terminated. Ms CN no longer had instructions from her client.

[100] On 10 May Mr RF is charged \$108 for cost of "working out interest". That presumably must have engaged work which involved an employee of Ms CN's (the

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<sup>12</sup> Practice Note concerning the functions and operations of Lawyers Standards Committees at [10.9].

charge out rate recorded being less than that of Ms CN) calculating interest claimable on Mr RF's outstanding fees. That work likely relates to work also completed on that day and described as "notice of claim". This is work of an administrative nature relating to Ms CN's management of her practice, and not work which should properly have been charged to Mr RF on the basis of a continuing retainer.

[101] That is not to say that Ms CN could not subsequently have sought costs of recovering outstanding fees including interest as provided by the retainer, but costs incurred in debt recovery would need to be established as a provable debt, likely before the Court, in the absence of agreement from Mr RF.

[102] On 24 May 2011, Ms CN records time spent on amending a notice of claim, preparing a notice of proceedings and notice of claim, and filing those documents in Court. The costs decision delivered by the Court, records that Ms CN filed her application to be removed as counsel on the record on 19 May 2011.<sup>13</sup> The proceedings that Ms CN was preparing and filing on 24 May, must have been debt recovery proceedings. A total of \$366.00 was spent on that work. I do not consider that a lawyer can invoice fees in debt recovery against a former client as if they were services delivered to the client. Rather, the lawyer's firm ought to calculate the costs as if the firm were its own client and then seek to recover them on that basis. This would be by way of demand, not invoice.

[103] Ms CN's accounts for work completed from 2 May 2011 to 31 May 2011 total, GST inclusive, \$4,835.16. This is for work that involves discussion around ending the retainer, discussion concerning release of files, filing an application to be removed as counsel on the record, and the initiating and filing of further proceedings.

[104] I have given very careful consideration to Ms CN's account of 31 May 2011, and in doing so, I am mindful that consideration of the reasonableness of an account is not an exact science. It has been recognised that determining a reasonable fee "is an exercise in assessment, an exercise in balanced judgement, not an arithmetical calculation".<sup>14</sup>

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<sup>13</sup> [High Court case].

<sup>14</sup> *Property and Reversionary Investment Corporation Ltd v The Secretary of State for the Environment* [1975] 2 All ER 436, [1975] 1 WLR 1504 (QB).

[105] In *Chean v Kensington Swan*, the Court emphasised the importance for practitioners of not placing an overreliance on time records when constructing their account, and the need to consider when doing so, a broad range of factors:<sup>15</sup>

... a practitioner who is using time and attendance records to construct a bill [must] take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[106] In considering my obligations when conducting a review of a Committee decision, I remind myself of the direction the High Court has provided to Review Officers as to the approach they are to adopt when conducting a review:<sup>16</sup>

[107] I am required then to bring to an assessment of Ms CN's final account (being the account with which I have identified concerns) a robust and independent assessment as to whether I consider the fee charged to be fair and reasonable, that being the yardstick required by rule 9 of the Conduct and Client Care Rules.

[108] I do not consider the fee charged to be fair or reasonable.

[109] In reaching that view I have considered, as I am required to do, the factors to be taken into account by reference to rule 9.1 of the Conduct Rules.

[110] I have avoided an assessment based on a rigidity of focus on arithmetical calculation, and carefully considered the final account within the context of circumstances where the fee is incurred for work completed after the retainer has been terminated.

[111] In my view, too much is charged for bringing the retainer to an end. Ms CN adopts, in my view, overly attentive approach to recording every issue arising from the termination of the retainer. She seems to disregard the fact that when a retainer is terminated, there is inevitably work that the practitioner must attend to which falls within the parameters of administrative work which is part and parcel of operating a professional office.

[112] Some of the work presents as repetitive, particularly when the final account is considered by reference to the account that precedes it.

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<sup>15</sup> *Chean v Kensington Swan* HC Auckland CIV-2006-404-1047, 7 June 2006 at [23].

<sup>16</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

[113] I do not consider it appropriate that Mr RF was charged for work in advancing the application to cease acting. My view is that her obligations as an officer of the court required her to pursue the application and to seek recovery of costs on that application (which she did) from the Court.

[114] If I am wrong in that analysis, I nevertheless consider that the fee charged for the application was excessive.

[115] Charging her client for preparing proceedings for recovery of outstanding fees, whilst allowed for by her contract of retainer, does not present as appropriate. Those costs were almost certainly recoverable in the proceedings that were intended to be pursued.

[116] I do not consider that the Committee's conclusion that the fees rendered were fair and reasonable took proper account of the issues raised by the final account.

[117] I conclude that Ms CN's account of 31 May 2011 was not fair and reasonable. In reaching that view I have taken into careful consideration the interest of both lawyer and client, and the factors to be considered under rule 9.1 of the Conduct and Client Care Rules.

[118] I consider that the factors described above bring the fee into the range where a determination that the fee is neither fair nor reasonable merits an unsatisfactory conduct finding. In reaching that view I am mindful of the consequence of an unsatisfactory conduct finding, and of the cautionary approach to making such findings in the context of analysis as to whether a fee was fair and reasonable.

[119] My view is that the components of the fee recorded in the invoice of 31 May 2011, were neither fair, nor reasonable. A breach of Rule 9 is established.

[120] Section 12 (c) of the Act, provides that unsatisfactory conduct comprises conduct that consists of a contravention of any practice rules.

[121] In my view, Ms CN's failure to charge a fee that was fair and reasonable, constitutes unsatisfactory conduct.

[122] I consider it reasonable that the invoice of 31 May 2011 be cancelled. Ms CN has received appropriate remuneration for costs involved in filing the application to be removed, through the Court costs order.

***Raising the issue of outstanding fees at the settlement conference***

[123] It is not possible to accurately conclude what may or may not have been said at the settlement conference.

[124] It could be expected that the Presiding Judge would have intervened if Ms CN's conduct fell below an acceptable standard. Mr RF' recollection that the Judge remonstrated with Ms CN for raising the issue of her outstanding fees, may be accurate, but if that was the case, simply raising an issue as to fees outstanding is not conduct which could reasonably attract a disciplinary response.

***Serving documents in the Court precinct***

[125] Mr RF complained that Ms CN served proceedings for recovery of fees on him at the District Court on [Date].

[126] Ms CN contends that the application served on Mr RF was not an application for recovery of her fees, but a copy of the application to be removed as counsel on the record, that application including a claim for costs. Her affidavit in support of the application understandably explains the background to her decision to terminate the retainer, and records the costs outstanding.

[127] There was some uncertainty as to whether the proceedings served on Mr RF at Court on [Date], were separate proceedings for recovery of fees, or simply the application to be removed as counsel.

[128] It is necessary to clarify which enforcement proceedings are being referred to. Mr RF complains that he was served with proceedings after attending the settlement conference on [Date] seeking recovery of \$11,000 of legal costs. Ms CN advised the Complaints Service in correspondence of [Date], that her firm had not issued proceedings on Mr RF to recover outstanding fees, but had pursued recovery of costs awarded by the Court.

[129] Ms CN confirms in her response to the minute from this Office seeking clarification as to the nature of the proceedings served on Mr RF, that the application served was the application to be removed as counsel on the record.

[130] I accept Ms CN's evidence that the proceedings served on Mr RF were proceedings relating to the application that was to be heard before the Court on that day. Whilst Ms CN had served the proceedings on Mr RF' new counsel, his counsel's reluctance to file a change of representation and his decision to do so at last moment,

prompted Ms CN to exercise a degree of caution and ensure that Mr RF was personally served with the application. In that context, I see no disciplinary issues arising from the decision to personally serve Mr RF.

### **Costs**

[131] Where a finding has been made against a practitioner it is appropriate that a costs order in respect of the expenses of conducting a review be made. Such orders are made in accordance with the LCRO Costs Orders Guidelines.

[132] Not all of the matters complained of have been sustained. I consider a costs award of \$900.00 is appropriate.

### **Decision**

[133] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is modified in the following way.

[134] By reason of a breach of rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006, Ms CN's conduct in respect of the matters addressed in paragraphs [58] to [122] constitutes unsatisfactory conduct.

### **Orders**

[135] The following orders are made:

1. Pursuant to s 156(1)(f) of the Act, the Respondent is to cancel the fee for work rendered in the sum of \$4,356.00, being account numbered [###] rendered on 31 May 2011.
2. The Respondent is to pay \$900.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.
3. In all other respects, the decision of the Standards Committee is confirmed.

**DATED** this 3<sup>rd</sup> day of November 2016

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**R Maidment**  
**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 RF as the Applicant  
Ms CN as the Respondent  
[Area] Standards Committee  
The New Zealand Law Society