LCRO 258/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury/Westland Standards Committee
BETWEEN	**MR AJ** Practitioner
AND	**BJ** Respondent

DECISION

[1] Mr AJ (the Practitioner) was found guilty of unsatisfactory conduct for failing to have provided a Letter of Engagement to his client, the Respondent company, in circumstances where the client eventually filed a complaint alleging overcharging by the Practitioner. The Committee also ordered the Practitioner to reduce his fees, imposed a censure, a fine and costs Order. The Practitioner sought a review of that decision.

Background

[2] The Practitioner acted for the Respondent company in relation to a loan from the [BANK] to enable the purchase of a dairy farm. The initial approach to the Practitioner was made on or about 28 April 2010, the bank's loan offer needing to be accepted by 30 April, and the bank documents followed on 7 May, for a draw-down of the loan on 24 May. The directors of the company resided [overseas], and the documents needed to be couriered there for signing.

[3] The Practitioner completed the documentation within the timeframe. The Practitioner's report to the client, which included his invoice, led to the Respondent raising questions with the Practitioner about his fee.

[4] Both parties agree that there was no discussion about fees at the time of the commencement of the retainer. The Practitioner contended that he had sent the Letter of Engagement at the same time as the bank documents being couriered to [overseas] but the Respondent denied having received it until a much later date, after much (if not most) of the work had been completed. The Respondent was thus unaware of the Practitioner's hourly charge out rate of $400.

[5] The complaint arose because the Respondent had budgeted a sum of between $2,000 and $3,000 for the legal work. It was said for the Respondent that the enquiries he made (from family, friends and other people around his neighbourhood) indicated that the legal costs for the work should be in the order of $500 to $1,200 and the Respondent had assumed that the budgeted amount should be enough to cover the Practitioner's fees.

[6] The Practitioner charged a fee of $8,400 plus GST and disbursements, calculated on the basis of 21 hours at an hourly rate of $400. The Letter of Engagement had indicated that the work would be undertaken by both the Practitioner and a Legal Executive (whose rate was not mentioned). The Practitioner had not, however, kept any time records, but his final invoice has calculated the fee on the basis of 21 hours, based only on the Practitioner's time.

[7] The Respondent queried the invoice. In the course of discussion the Practitioner offered to reduce the fee by $1,500 but this was rejected by the Respondent. Thereafter a formal complaint was made to the New Zealand Law Society.

The complaint

[8] The complaint was essentially about the quantum of fees, with a related complaint that the Respondent had not been informed of the likely cost of the legal services. The Respondent also questioned whether the Practitioner had personally spent 21 hours on the file, having also noted that all work had been charged at the Practitioner's rate, and none of the work had been charged at the rate for the Legal Executive.

Standards Committee decision

[9] The Committee mainly focused on the Practitioner's obligation to provide a Letter of Engagement prior to work being undertaken, and the basis upon which fees were charged in the absence of any time records. The Committee concluded that the Practitioner had failed to comply with his obligations under Rule 3, which sets out the

extent of information that must be given to the client in advance of services being provided, and also provides for further information to be given to a client when there are any changes in the work as originally anticipated. Having concluded that there had been a breach of Rules 3.4, 3.5, and 3.6[1] the Committee found the Practitioner guilty of unsatisfactory conduct as defined in s 12(a) of the Lawyers and Conveyancers Act 2006 (the Act).

[10] The Committee also found that the Practitioner had breached Rule 7 and 7.1. The obligations covered by Rule 7 requires a lawyer to disclose to a client all information that the lawyer acquires and which is relevant to the retainer, and also to take all reasonable steps to ensure that a client understands the nature of the retainer and is kept informed of progress. The Committee's decision was based on the view that the Practitioner had failed to inform the client of the extent of the bank documentation that the instruction had generated. The Committee noted that the Practitioner appeared to have recognised his obligation to inform the client about the extensive nature of the work but had made a deliberate decision not to inform the client because he did not want to jeopardise the transaction. The Committee was critical of the Practitioner's approach to his obligation to keep the client informed.

[11] The Standards Committee also regarded the Practitioner's fee as being "excessive given the value of the nature of the instructions."[2] The Committee had appointed a Costs Assessor who, after examining the Practitioner's files, concluded the fee of $8,400 was fair and reasonable. However, the Committee cast doubt on the Practitioner's explanations concerning the fee. Despite making no disciplinary finding, the Committee reduced the fee to $6000.

[12] The Practitioner was censured, and ordered to pay a fine of $750 and costs of $500 to the New Zealand Law Society.

Review application

[13] The Practitioner sought a review of the Committee's decision, his main reason being his concern about the Committee's adverse findings against him in relation to his credibility. He wrote that the Committee had not heard from him personally before reaching its conclusions, which he viewed as a breach of natural justice. He contended that the Committee had made significant errors of both law and fact, resulting in a determination that was untenable as a matter of law.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] Standards Committee Decision dated 4 October 2011 at para [44].

[14] The Practitioner wrote that he had provided a full explanation to the Committee to specific questions that had been asked of him, and that the Committee had not addressed any part of the evidence he had provided. In particular, he contended that the Committee ought to have taken into account his explanation that he, and not his Legal Executive, had done the (charged) work on the file. He also noted the Committee's reliance on advice from the [bank] that documentation was "nothing out of the ordinary" for transactions of this type, and submitted that the Costs Assessor's report had not been appropriately assessed by the Committee.

[15] With regard to the Committee's findings in relation to the timing of the Letter of Engagement, the Practitioner questioned whether the Committee had erroneously interpreted the meaning of "in advance",[3] as he could not have provided costs information until he knew the nature and extent of the work involved.

[16] The Practitioner further stated that the Committee had also failed to provide reasons for the penalties that were imposed. The outcome sought was removal of the findings of unsatisfactory conduct and the penalties.

[17] On the matter of the Committee having reduced his fee, the Practitioner confirmed that the Respondent had in fact paid the lower fee, adding that although he did not resile from the view that the fee was fair and reasonable, commercial reality dictated that no further time or resources ought to be spent on that matter.

[18] A review hearing was held on 23 August 2012, attended by the Practitioner and by the Respondent. I explained to the parties that the review process offered the opportunity for all aspects of the complaint to be revisited, and that any perceived procedural defects by the Standards Committee could be cured on review. It was particularly explained that the review process is not confined only to matters raised by the review applicant, but that the LCRO has the power, and indeed the responsibility, to review the manner in which the Standards Committee dealt with the complaint.

Considerations

[19] Although the Practitioner's concerns mainly relate to the Standards Committee's comments about his credibility (which he took as questioning his honesty), I have not confined this review to only those matters and have considered more widely the manner in which the Standards Committee dealt with the complaint.

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[3] Rule 3.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Letter of Engagement / provision of information - Rules3.4, 3.5 & 3.6

[20] The Practitioner was found guilty of unsatisfactory conduct by reason of a breach of Rules 3.4, 3.5 and 3.6 of the Conduct and Client Care Rules 2008 (RCCC). Together these rules require that lawyers provide clients with Terms of Engagement in advance of any work being undertaken, which must include information about the principle aspects of the service to be provided, the nature of the work, and the basis upon which fees will be charged, and those who will be involved in undertaking the work, and to update the client with due expedition if any information become inaccurate in a material respect.

[21] The Practitioner had explained that when first contacted by the Respondent he was given what he described a letter of offer from the [bank] which contained "only scant detail of the security which would be required for the lending facilities."[4] He informed the Standards Committee that it was not possible to have undertaken a full assessment of the scope of the work until he received the documents from the [bank]'s lending Department, which was on 7 May 2010.

[22] The Practitioner added that he had assessed the Respondent's Director, Mr BR, as well educated and versed in commercial transactions, and that it was a reasonable expectation that Mr BR would have raised any issues of concern about fees or the transaction itself. The Practitioner also referred to further delay having been the result of courier services to [overseas] being suspended at that time.

[23] The Standards Committee noted that the documents were ready for signing by 11 May 2010, and these had to be sent to the Directors in [overseas], and that the Terms of Engagement were sent by a separate posting the following day. The bank documents were returned to the Practitioner by 21 May. The transaction was completed by the 27th, and the Respondent reported to his client the next day on 28 May, enclosing his invoice.

[24] On the above information the Committee properly concluded that the Letter of Engagement was not prepared until the substantial part of the work had been done. The Committee noted that the professional obligation requires lawyers to provide certain information (including information about fees) in advance of work being done and it was clear that the Practitioner had not provided the required information "in

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[4] Letter from Mr AJ to NZLS (30 May 2011).

advance”.[5]

[25] This is a case where the significance of such information being provided in advance becomes apparent. The Respondent explained that had they been given this information in advance, and particularly the information about the Practitioner’s hourly rate of $400, steps would have been taken to negotiate with the Practitioner as to the amount of work likely to be done by him, and the amount of work likely to have been done by the legal executive. The Respondent’s position was that being unaware of this information prior to the work having been substantially completed meant that it could not then avail itself of the opportunity to engage another lawyer.

[26] The Practitioner questioned the meaning of “in advance” and thus identified the review issue as the meaning of “in advance”. In his view it was not possible to assess his fee rate before knowing what would be involved in the work, which would be on receipt of the bank documents.

[27] The words “in advance” are not defined in Rule 3.4, nor does it define in advance of *what,* although this has been taken by this Standards Committee (and others before it) to mean in advance of the services being provided to the client. Rule 3.5 is more explicit in identifying what information must be provided “prior to undertaking significant work under a retainer”,[6] although it provides no assistance as to the meaning of “significant work”.

[28] Whether it was reasonable for the Practitioner to have delayed providing the necessary information on 29 April, when the scope of the work was not yet clear, is arguable. However, this becomes less arguable after the bank documents had been received, at which time the Practitioner could have contacted the client by email in relation to the scope of the work and likely costs. It is difficult to see why he could not have alerted the client to the volume of the bank’s documents and requirements before he started working on the file. This could have been achieved by email. Had he done so it is unlikely that a complaint would have arisen as the client would then have been able to explore options for costings for the legal work to be done.

[29] Whether this would have ultimately resulted in lower fees is speculative as it is by no means certain that the Respondent could have obtained legal services for this kind of transaction for a materially lesser fee (this seems to be a reasonable assumption given the Costs Assessor’s observation about complexity and the somewhat large

[5] Rule 3.4 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[6] Above n4 at Rule 3.5.

volume of documentation). However, the overall affect was that the Respondent did not have the opportunity to explore other options.

[30] Given the Practitioner's acknowledgement that he did not provide the Letter of Engagement in advance of providing the services I can find no error on the part of the Standards Committee in making a finding of unsatisfactory conduct. The Practitioner accepted he did not comply with the requirements set out in Rule 3 and admitted that he could have sent it via email. There is a solid basis for the Committee's finding.

Rules 7 and 7.1

[31] Less clear is the basis of the Standards Committee finding that there was a breach of Rules 7 and 7.1. These Rules impose an obligation on lawyers to disclose to a client all information that the lawyer acquires that is relevant to the retainer, and to ensure the client understands the nature of the retainer and is kept informed of progress. The Standards Committee may have misunderstood the application of these obligations which essentially ensures that lawyers inform their client of information that the lawyer acquires and which would not otherwise be known to the client, and to ensure that the client is kept abreast with what is going on. These obligations should not be confused with those imposed by the Rules contained in Chapter 3 of the RCCC. In my view the Practitioner's failures to communicate to the client the information required by the Chapter 3 Rules covers the Practitioner's omissions. I am unable to see any failure on the part of the Practitioner in relation to Rules 7 and 7.1, and I therefore question the appropriateness of the finding that there was a breach of these Rules.

Fees

[32] The complaint about the level of fees was the central matter of concern to the Respondent. The fee was higher than had been expected.

[33] The Standards Committee's finding that the fee was excessive related to the Practitioner having charged all 21 hours at his own hourly rate of $400. The Letter of Engagement had indicated that a Legal Executive would assist with the work. In its decision the Committee wrote:[7]

> [t]he resolution of the [fees] complaint centres on the charging of 21 hours of time at a rate of $400 per hour plus GST for the completion of and advice in regard to certain loan documentation.

[7] Above n1 at [23].

[34] The Committee appointed a Costs Assessor who's Report to the Committee concluded that the fee was fair and reasonable. The Assessor reported that the work involved a large facility with attendant complexities, was carried out with commendable efficiency, and could only have been done by a senior experienced lawyer who could deal with the size of the loan and attendant risks of the documents not withstanding scrutiny, especially given the short time-frame for completion of the work. The Assessor noted that the absence of a time sheet was unusual, but given his analysis of the file he did not consider this to be a problem (referring to *Maltby v Freeman & Co* [1978] 2 All ER 913).

[35] A copy of the Assessor's Report was on the file. It is clear from that Report that the Assessor took into account the Rule 9.1 factors when assessing a fair and reasonable fee. The Assessor set out 5 reasons for his conclusion being; the significant volume of documents (these were listed), that it required the attention of a senior commercial lawyer and was satisfactorily completed, it was of critical importance to the client, that it was done within a short timeframe, and the client's directors were off shore at the time. The Report was thorough, and written after the Assessor had spent some time undertaking a full assessment of the Practitioner's files. The Assessor provided a reasoned basis for accepting that the Practitioner's charges assessed at 21 hours despite the absence of time records, taking into account that a time sheet does not necessarily reflect time spent on a matter.

[36] The Committee rejected the Report mainly because of (a) the absence of time records (none had been kept by the Practitioner) which caused the Committee to question how the Practitioner could have assessed 21 hours, and (b) the discrepancy between the Letter of Engagement (which indicated that some of the work would be done by a Legal Executive) and all 21 hours being charged at the Practitioner's hourly rate of $400. The Committee accepted the Practitioner's charge-out rate as reasonable but said that the absence of time records precluded any check of precisely what each of the Practitioner and the Legal Executive had done. The Committee noted that the Costs Assessor did not have the complaint file when considering the Practitioner's file for the purpose of his Report.

[37] The Practitioner had informed the Standards Committee that he had personally undertaken all of the work on the file and that the legal executive only assisted as a scribe for his emails, and that time had not been charged.

[38] However, the Committee recorded its "disquiet", and concluded that the absence

of time records "suggests that the fee was not in fact calculated simply on time spent."[8] The Committee wrote that the fee charged was excessive given the value of the nature of the instructions, adding that it was "difficult to escape the conclusion"[9] that the Legal Executive must have been instrumental in the preparation of the documents and correspondence, and took a guess at her charge out rate, concluding that "at best" it might be two-thirds of the Practitioner's rate. Its final words on the matter were, "[i]n the absence of time costing records the Committee is fixing a fee which it regards to be reasonable in all the circumstances."[10]

[39] The Committee's doubts about the Practitioner's explanations are essentially the reason why he sought a review.

[40] Having considered the complaint, the Practitioner's explanations, the Assessor's Report, and all information that has been provided in the course of this review, I do not find the Committee's reasons for rejecting the Costs Assessor's Report convincing. The Assessor's job was simply to value the work done against the fee charged. Time is one of those factors. The Assessor was aware that there were no time records, but he nevertheless concluded that the fee was fair and reasonable.

[41] There is nothing to suggest that the Assessor would have come to a different conclusion had he had the complaint file in his possession. To suggest otherwise is to say that the nature of the complaint should be a relevant factor in assessing the reasonableness of a fee. The overall conclusion of the Assessor was that the fee was fair and reasonable for the work done. Clearly this was irrespective of the number of hours charged for as shown in the invoice.

[42] The Committee's conclusions, and its "disquiet" appear to have been based on the absence of time records, which prevented "checking precisely"[11] on what each of the Practitioner and the Legal Executive had done on the file. The Committee had concluded that the absence of time records "suggests that the fee was not in fact calculated simply on time spent",[12] and that it was "difficult to escape the conclusion"[13] that the Legal Executive must have been instrumental in the preparation of the documents and correspondence. However, this flies in the face of the Assessor's Report. His description of the work and his comments that it required the attention of a

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[8] Above n1 at [30].
[9] Above n1 at [27].
[10] Above n1 at [44].
[11] Above n1 at [29].
[12] Above n8.
[13] Above n9.

senior commercial lawyer, involved a large volume of complex documents, and all requirements needing to be completed within a short time frame, provided solid support for the Practitioner's explanation that all of the work charged for was done by himself, and that the Legal Executive's contribution had not been charged. I do not see that there was a sufficient basis for making negative assumptions about the Practitioner's honesty as to his charges.

[43] There is a further difficulty for the Standards Committee in reducing the fee. While the Committee "regarded the fee as being excessive"[14] and ordered that there be a reduction in the Practitioner's fee, the Committee made no finding that there had been a breach of Rule 9 of the RCCC. That Rule states:[15]

> 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 the client and lawyer and having regard also to the factors set out in [R]ule 9.1.

[44] No part of the Standards Committee's reasoning, nor any part of its decision to reduce the Practitioner's invoice, referred to the fee factors set out in Rule 9.1; the Committee's conclusion about excessive charges ultimately turned on its doubts about the Practitioner's explanation. Nor was any reference made to s 156(1)(e) of the Act, which is the empowering section given to Standards Committees to reduce a fee. The overall result is, therefore, that the Practitioner's fee was reduced despite no disciplinary finding having been made in relation to the fee, and no apparent exercise by the Committee of its powers under s 156(1)(e).

[45] I observe that no orders can be made under s 156 of the Act unless there has been a finding of unsatisfactory conduct. The Committee did in fact make a finding of unsatisfactory conduct but this was in relation to a breach of obligations found in Chapter 3 of the RCCC. That is to say, the disciplinary finding was unrelated to overcharging, and this has resulted in discord by the Committee imposing a remedial order that is unrelated to the stated breach.

[46] While it might be argued for the Committee that taking a view that the fee was excessive amounted to an implicit finding that the Practitioner had breached Rule 9, I do not consider that the observation alone is sufficient to count as a finding of unsatisfactory conduct. Not infrequently do Standards Committees make observations about a professional failure or shortcoming, but exercise a discretion to take no further

[14] Above n1.
[15] Lawyers and Conveyancers Act (Lawyers: Conduct & Client Care) Rules 2008.

action.

[47] To make these matters clear, it is my view that if a Standards Committee intends to impose a particular remedial Order to address a perceived professional failing, there needs to be a prior disciplinary finding that there is a breach of that professional obligation, and any resulting Order should relate to that finding. On that basis the Committee should either have made a disciplinary finding that the Practitioner had breached Rule 9 before reducing his fee pursuant to an Order made under s 156(1)(e), or not have made the Order at all.

Questions concerning the Practitioner's credibility

[48] I now turn to the Practitioner's concerns about the Standards Committee's comments about his credibility, which he saw as a challenge to his honesty. The Practitioner's major concern in pursuing the review was to have removed what he perceived to be a mark on his reputation.

[49] Professional reputation is a highly valued asset and lawyers (indeed all professionals) work hard to create and protect their professional reputation. Credibility should not be quickly challenged where a reasonable explanation has been proffered in respect of a matter. Such was the case here, with the Assessor's Report providing ample support for the Practitioner's explanation (that he charged only for his own hours). It was open to the Assessor to have questioned whether all of the hours charged had been undertaken, or needed to be undertaken, at the Practitioner's level of seniority, but clearly the Assessor accepted that the level of the work required the attention of an experienced lawyer.

[50] If a Standards Committee forms a view that a lawyer's response to a complaint is not altogether honest, and given the professional seriousness of such a view, I would expect to find a solid basis for such a conclusion. In this case I do not see any sound basis for the Committee's questions about the Practitioner's credibility, and it is regrettable that his explanation was discounted so readily when, despite the obvious inability to prove the hours involved, there was no evidence of excessive charging.

[51] Of course the Practitioner did not help matters by issuing an invoice that indicated the charges were based on a certain number of hours that he could not verify. However, the absence of such a record was not necessarily fatal to undertaking an assessment about whether the overall charge was fair and reasonable. But given that the Costs Assessor's Report provided solid support for the explanations offered by the Practitioner, it is difficult to find a reason to doubt the Practitioner's explanation about

having done the substantive work himself and not charging for the administration-related work done by his Legal Executive which, he explained, was at an administrative level.

[52] The Practitioner explained that he has found it very difficult to convert to modern electronic time costing, but considered himself well able to make an assessment of the time taken to peruse and prepare complex documentation which in this case he had assessed (and charged for) at 21 hours. Clearly this was not helpful to his client, nor, as has been seen, to the Standards Committee which was required to assess whether there had in fact been excessive charging for the work done.

[53] In my view the Standards Committee took into account irrelevant factors, and failed to take into account the relevant factors set out in Rule 9, when reducing the Practitioner's fee. I conclude that the Committee did not justify the basis for reducing the Practitioner's fee in this case.

[54] Despite this conclusion I have taken into account the Practitioner's preparedness to let the matter remain where it presently stands, which is that the Respondent has paid the reduced amount as assessed by the Committee.

Remedial Orders

[55] In the light of my conclusions it is appropriate to revisit the remedial Orders imposed by the Standards Committee. First, an Order of Censure marks out a professional failure of a most serious kind. This is shown by the fact that a Censure Order must be made before there can be publication of the lawyer's name following a disciplinary finding. I can find no proper basis for the Committee's Order that the Practitioner be censured.

[56] The fine was not excessive for the various failings found by the Committee, but given my conclusions, it is appropriate that the fine is reduced to reflect a lesser degree of professional failure.

[57] The Costs Order should remain, as the complaint was properly made and the Practitioner should bear a contribution towards the costs of the Standards Committee's enquiry.

[58] The Practitioner has been largely successful in this review but given that there has been one professional failing upheld I propose to make an Order for Costs for the review in a sum that I consider appropriate in all of the circumstances.

Outcome

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act:

- the Standards Committee's finding that there was a breach of Rules 3.4 and 3.5 is confirmed;
- the Committee's finding that there was a breach of Rule 7 and 7.1 is reversed;
- The Committee's Order of Censure, pursuant to s 156(1)(b), is reversed.
- The Committee's Order reducing the Practitioner's fee, pursuant to s 156(1)(e), is reversed (I record that there is no practical outcome for the Respondent);
- The fine imposed by the Committee is reduced, and replaced by an Order to pay a fine of $250. This sum should be paid to the New Zealand Law Society within 30 days of the date of this decision;
- The Costs Order of $400 imposed by the Standards Committee is confirmed. This sum should be paid to the New Zealand Law Society within 30 days of the date of this decision.
- Pursuant to s 210 of the Act the Practitioner is ordered to pay $200 towards the costs of the review. This sum should be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 18th day of July 2013

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Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr AJ as the Applicant
[Name removed] as a related person or entity
Mr BS & Ms BT as the Respondents
The Canterbury/Westland Standards Committee
The New Zealand Law Society