LCRO 263/2011

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| CONCERNING | An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006 |
| AND | |
| CONCERNING | a determination of a [North Island] Standards Committee |
| BETWEEN | **MR VG**<br>Applicant |
| AND | **MS AB**<br>Respondent |

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

DECISION

**Background**

[1] Mr VG seeks a review of [a North Island] Standards Committee. The Committee considered a complaint by Ms AB in respect of a bill rendered by Mr VG. The Committee found the bill to be too high and ordered that it be reduced.

[2] Mr VG acted as solicitor to Ms AB's mother's estate. Ms AB was the main beneficiary of the estate (and therefore any costs charged by Mr VG reduced the share of the estate to which she was entitled). The facts surrounding the complaint are that:

a. On reaching [a certain age], Ms AB would be entitled to receive assets from her deceased mother's estate. Mr VG was one of two trustees of the estate, the other being his business partner, Mr VH.

b. On 17 June 2010, Ms AB was advised by the Law Society that [Law Firm 1], for whom Mr VG and Mr VH worked, was being investigated by the Hawkes Bay Standards Committee. By that time, the funds that were becoming due to Ms AB had been in the firm's trust account for eight years. As part of the intervention by the Committee the funds were taken into the control of the New Zealand Law Society (NZLS).

c. Some time later Ms AB received her funds in September 2010, directly from the NZLS.

d. In February 2011, Ms AB received a bill from Mr VG for the sum of $1148.75, for legal services provided by Mr VG in relation to the final administration of the trust fund.

**The Complaint**

[3] Ms AB believes that if [Law Firm 1] had not been investigated, the work covered by the bill would not have been carried out. Ms AB sought waiver of the bill, on the basis that [Law Firm 1]'s alleged misconduct had caused her stress. She also commented in later correspondence that for the duration that [Law Firm 1] held the estate funds, they were taxed at the incorrect rate of 39%. Ms AB maintained that Mr VG had previously been given her IRD details and she sought a rebate of the sum taxed in error.

**Mr VG's response**

[4] Mr VG denied the grounds of Ms AB's complaints, stating that all work done by him was done after the intervention of the NZLS, and was appropriate and necessary. Mr VG stated that he had reduced the bill by 20 % in light of Ms AB voicing concerns about delay in her obtaining her funds.

[5] Mr VG said that the file showed attendances necessary to preserve the funds for distribution and also to ensure their safe distribution to Ms AB, and in particular that as Ms AB was confused by her communication with the NZLS it was his attendances with the NZLS that cleared the way for her to receive her funds.

[6] Mr VG denied that he had ever received Ms AB's tax number although he had asked for it.

**Standards Committee Decision**

[7] The Standards Committee considered the complaint and the responses of Mr VG and Ms AB in detail, and it issued its decision on 18 October 2011.

[8] The Committee's views were as follows:

a. Although the bill sent by Mr VG to Ms AB was for less than $2000, the Committee decided that there were special circumstances that enabled it to exercise its discretion to inquire into the bill in accordance with the exception to the general rule that bills below that amount would not be inquired into.[1]

b. There were two aspects to Ms AB's complaint:

i. The interest earned on Ms AB's account was taxed at a much higher rate than it needed to be. The Committee concluded that as Mr VG had acknowledged that [Law Firm 1] were partly to blame for this situation, it was not appropriate to charge for attendances related to the taxation of Ms AB's fund; and

ii. The bill sent to Ms AB in relation to charges for attendances by Mr VG after the Committee had taken control of the estate's funds. The Committee concluded that Mr VG had failed to give due consideration to all of the relevant considerations surrounding the rendering of the account and that his fee was in Breach of Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[9] The Committee noted:[2]

> It is not appropriate for the practitioner to seek payment from the complainant for the time he spent in assisting her to recover the money she was entitled to and which would have been paid to her but for the necessity of the committee's intervention in the practitioner's firm.

and determined that there was unsatisfactory conduct as defined by s 12(c) of the Act on the part of Mr VG. The Committee ordered that Mr VG's account be reduced from $975.00 to $325.00 and a certificate be issued pursuant to s 161(2) of the Act for $325.00 (plus GST and Disbursements).

[10] Finally, the Committee decided not to publish details of the parties or the matter.

**Application for Review**

[1] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008) regulation 29.
[2] Hawkes Bay Standards Committee decision dated 18 October 2011 at [4.1].

[11] On 23 November 2011, this Office received an application from Mr VG for a review of the Standards Committee's decision. The stated grounds for the application related to the following:

a. the jurisdictional issues regarding the fee for Mr VG's legal services (for $975);

b. the fee for work done by Mr VG after the intervention by the Standards Committee and when Mr VG was employed by [Law Firm 2]. Mr VG maintained that the fee was appropriate in light of the work he did on behalf of Ms AB in relation to both the taxation matter and his obligations as trustee of Ms AB's estate;

c. that the decision by the Committee to exercise its discretion to deal with the complaint, and the language it used in correspondence, indicated prejudgment and a lack of impartiality; and

d. that the committee misinterpreted or misunderstood the factual matrix, or simply made the wrong decision.

[12] On 18 January 2012, Ms AB responded to the application for review. She reiterated that the work charged for would not have been necessary had the NZLS not intervened in the affairs of [Law Firm 1]. Ms AB said with regard to the taxation matter, merely because Mr VG had no record of her IRD number did not mean that she did not provide it to him.

[13] Mr VG, in a letter dated 2 February 2012 commented:

a. that he had provided Ms AB with information relating to the steps necessary to wind up the estate, that the legal work he did was justified and that the process was not necessarily a simple one;

b. the Committee took into account the taxation issue, when Ms AB indicated that she had decided not to pursue it;

c. that even if the funds had been appropriately taxed, the active management of them would have resulted in annual accounts and the expense associated with them; and

d. Ms AB's losses, if any, were minimal.

## Analysis and review

### Jurisdictional issue

[14] Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides:

> If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs—
>
> > (a) was rendered more than 2 years prior to the date of the complaint; or
> >
> > (b) relates to a fee that does not exceed $2,000, exclusive of goods and services tax.

[15] Mr VG argues, in effect, that:

a. as the fee for his legal services was under $2000, the Committee should have declined jurisdiction; and

b. the Committee elected to deal with the complaint as an "own motion" matter because previously Mr VG had been a partner in [Law Firm 1], which was the subject of a NZLS intervention in June 2010.

[16] The question is whether special circumstances existed for the Committee to deal with the complaint. The term 'special circumstances' is not defined, but the leading authority on what constitutes special circumstances is the case of *Cortez Investments v Olphert and Collins*[3]. The case involved an application to the court under s 151 of the Law Practitioners Act 1982 for an order that a bill of costs be referred for revision, where the bill had already been subject to revision. Section 151 of the Act provided that the court shall not make an order for the reference of a bill for revision *except in special circumstances* (emphasis added).

[17] The Court of Appeal rejected the trial judge's finding that a serious risk of injustice was required. Although the three members of the court produced three different tests, they do provide some guidance in ascertaining the meaning of 'special circumstances'. Woodhouse P, at 437, said that "if the issue is to be related to perceived injustice then the simple risk of injustice should be sufficient". Richardson J, at 439, considered that "it is a question of where the interests of justice lie in all the circumstances." McMullin J's view, at 441, was that "All that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary" and "if there is a perceived risk of injustice I do not think that anything more is required".

[18] Applying the tests above, it is my conclusion is that in the current matter there are special circumstances that are abnormal, uncommon or out of the ordinary, and that there is a perceived

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[3] *Cortez Investments v Olphert and Collins* [1984] 2 NZLR 434 (CA).

risk of injustice. Consideration of the basis for Mr VG's legal fees of $975 is appropriate for the following reasons:

a. before Ms AB attained the age of 25 years and became eligible for her inheritance, [A north Island] Standards Committee investigated the practices of [Law Firm 1];

b. in particular, the assets in the firm's trust fund were transferred to the Committee's account. These assets included those of Ms AB; and

c. Ms AB liaised directly with the NZLS in relation to her assets, and received final payment from them rather than from Mr VG.

[19] There is clearly a complex set of facts where it is not immediately clear what work was necessary due to the intervention of the Law Society and what related to the normal incidents of the administration of the estate. Given the fact that assets of the firm had been frozen due to concerns about improper conduct, there was a strong public interest in the Society stepping in and ensuring that all matters in relation to the affairs of the firm are properly conducted including billing practices.

[20] Mr VG complains that the Committee conducted an inquiry on its own motion. This is clearly not the case. The inquiry of the Committee was prompted by the complaint of Ms AB (made in accordance with s 132 of the Lawyers and Conveyancers Act). The Committee inquired into the complaint in accordance with its powers under s 137. It may be that as the matter progressed the Committee expanded its enquiries to take into account additional issues that arose. This is entirely appropriate.

[21] Mr VG has suggested that there has been a degree of predetermination and impartiality because the Committee exercised its discretion to review the complaint about the bill he issued, and because of some of the language it used in correspondence.

[22] The question in respect of predetermination is as stated by Gallen J in *Loveridge v Eltham County Council* (1985) 5 NZAR 257 at 264:

> Whether or not it appears from all the evidence that all or any of the bodies or individuals involved had so conducted themselves that an informed objective observer would consider that they had closed their minds and were no longer giving genuine consideration to the live issues before them.

[23] The holding of a preliminary view is a natural consequence of having read the relevant material submitted by the parties and is unobjectionable: *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78. Even where judicial officers have expressed a view about the possible final outcome

of a case, a number of decisions have held that this did not amount to bias: *Turner and Others v Allison and Others* [1971] NZLR 833.

[24] The Committee has an inquisitorial role and as such it is proper for it to follow lines of inquiry and to seek comment from the parties on the inquiries it is making. There is no indication from the correspondence provided by Mr VG or Ms AB (or on the file of the Standards Committee with which I have been provided) that the Committee had prejudged the issues, or been impartial about them. Replies were sought from both parties, and considered carefully by the Committee with an open mind.

[25] Furthermore, as discussed previously, Regulation 29(b) of the Lawyers and Conveyancers Act (Lawyers Complaints Services and Standards Committee) Regulations 2008 provided the Committee with the power to investigate Mr VG's bill, should special circumstances exist. Such circumstances did exist, therefore the decision to exercise its discretion by the Committee did not indicate any predetermination of the matter, or lack of impartiality on its part.

[26] Finally on this issue, it is my opinion that neither the acts nor the language used by the Committee indicate that the Committee prejudged, or was impartial about, the matters being considered.

**Whether Mr VG's bill for legal fees is reasonable**

[27] Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interest of both client and lawyer and having regard also to the factors set out in Rule 9.1.

[28] Rule 9.1(d) requires the practitioner to take into account when determining the reasonableness of the fee "the urgency and circumstances in which the matter is undertaken".

[29] Mr VG maintains that Ms AB was always going to receive a bill from him acting as trustee in relation to her receiving her inheritance, and that the work he did in relation to this and the taxation issues, was reasonable. Ms AB argues that the bill represents work done by Mr VG that was unnecessary and arose only because the NZLS became involved in the control of her funds due to the way in which [Law Firm 1] was being operated.

[30] In Mr VG's file, there is evidence of his communications with both Ms AB and the BNZ, in relation to the taxation of her funds. There is also evidence of Mr VG's communication with the NZLS in relation to Ms AB's assets.

**Fees relating to RWT matter**

[31] The bill presented to Ms AB stated that part of it arose in relation to Mr VG's management of the trust fund on interest bearing deposit. It is unarguable that Ms AB's funds, whilst held in trust by [Law Firm 1], were incorrectly taxed. For a period of eight years, the funds were subject to a default tax rate of 39%. This error went unnoticed or at least unattended to by Mr VG. I consider that a diligent lawyer would not allow tax to be deducted at this rate for many years without ascertaining that this was the proper rate. This would be especially the case where the taxpayer is a relatively young person and therefore the likelihood of a lower tax rate being appropriate is increased.

[32] There is a disagreement between Ms AB and Mr VG as to whether Ms AB ever provided [Law Firm 1] with her IRD number. This cannot be resolved as it is Ms AB's word that she did, against Mr VG's that there is no record of the IRD number in the file.

[33] Mr VG has submitted that the difference in tax paid based upon the actual charged rate of 39% and the rate at which it should have been charged was such that it would not be financially viable to seek its return. This argument appears to miss the point that if Mr VG had recognised that the assets were being taxed at the incorrect rate when the funds were first placed with [Law Firm 1], Ms AB's loss would have been minimal. As it was, Mr VG concluded that it was not financially viable to assist Ms AB to apply for a rebate of the incorrectly paid tax; this argument is, presumably, based upon the fact that further legal fees would have been charged. As those fees would not have arisen if the funds had been correctly taxed, it seems unfair for Mr VG to argue those potential fees as a reason to not seek repayment of the over-payment of tax.

[34] I consider that the Standards Committee was correct to conclude that in these circumstances it is unreasonable for Mr VG to charge his full legal fees for the work that he did in relation to the taxation issue in 2010.

**Fee relating to distribution of assets**

[35] Irrespective of the intervention of the NZLS in the practice of [Law Firm 1], Ms AB would have been presented with a bill from Mr VG for work done in relation to the distribution of her assets.

[36] However, it is undeniable that much of the work that Mr VG did on this matter, after the NZLS intervention, was the result of Ms AB's assets being in the control of the NZLS. This situation was in no way the fault of Ms AB but related to matters internal to the practice of Mr VG.

[37] Mr VG's bill also refers to attendances with the NZLS to preserve Ms AB's funds. As pointed out by Ms AB, these attendances would have been unnecessary were it not for the intervention of the NZLS in the operation of the law firm in which Mr VG was a partner. I conclude that the Standards Committee was correct to conclude that Ms AB should not be expected to pay increased fees due to the Law Society, as regulator, intervening in the practice of Mr VG.

**Misinterpretation or misunderstanding by the Committee, or the making of a wrong decision**

[38] Mr VG also argues that the Committee must have misunderstood or misinterpreted the matters before them and that its decision was wrong. As Mr VG noted in his letter of 1 November 2011, the Committee had the benefit of his file and submissions made by him in defence of the complaint. These documents were read and carefully considered by the Committee, along with evidence from Ms AB.

[39] The fact that the decision of the Committee does not accord with Mr VG's view of what the outcome should have been does not mean that the Committee misinterpreted or misunderstood the information provided by all parties. It is clear that the conclusions reached by the Committee were well-considered, rational and reasonable. For the reasons given above I consider the decision of the Committee to be correct.

**Conclusion**

[40] The Committee determined that Mr VG's legal advice and his conduct of the case were such that, pursuant to s 152(2)(b) of the Act, there was unsatisfactory conduct as defined in s 12(c) of the Act in that he breached Rule 9 of the Rules of Conduct and Client Care in charging an amount which, in all of the circumstances was more than is fair and reasonable. It is my view that the Committee's order that Mr VG's account be reduced (pursuant to s156(1)(e) of the Act) from the amount of the practitioner's fee of $975, by two thirds to $325 was also reasonable and is upheld.

**Decision**

Pursuant to s.211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

**Costs**

[41] An award of costs against Mr VG in respect of this review would appear to be appropriate. It is of note that the amount at stake in this review was very modest and Mr VG has been unsuccessful in his application. With reference to the costs guidelines of this office, bearing in mind that the review was conducted on the papers, I consider it appropriate that Mr VG should contribute to the costs of this review.

[42] Pursuant to section 210 of the Lawyers and Conveyancers Act 2006 Mr VG is ordered to pay $800 towards the costs of the review. This sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

**DATED** this 10th day of May 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:

Ms AB as the Applicant
Mr VG as the Respondent
Mr VF as a related person or entity
[A North Island] Standards Committee
The New Zealand Law Society