LCRO 264/2012

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 AA** Applicant
AND	**MR BL, MR BM, AND MS BK** Respondents

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

DECISION

Introduction

[1] Mr AA has applied for a review of the determination by [A North Island] Standards Committee to take no further action in respect of his complaints against [Law Firm A]. The Standards Committee had identified the lawyers involved in Mr AA's complaints as Mr BL, Mr BM and Ms BK, and they were the persons named in the Standards Committee determination and in respect of whom the review application was brought.

Background

[2] Mr and Mrs AA entered into a relationship in 1986 and married in 1989. Mr AA had built up significant business and personal assets which were described by the Court as being "held in a complex web of interrelated companies and trusts in New Zealand and the United States"[1] having a value in the vicinity of $28 million.[2]

[3] Mr and Mrs AA separated in December 2006 and in August 2007 Mrs AA made an application for Orders pursuant to the Property (Relationships) Act which included

[1] *M A C v M A C* FAM Rotorua 2007-063-000652 2 December 2011 at [2].
[2] Above n1 at [4].

as a preliminary matter, an Order setting aside a relationship property Agreement entered into by Mr and Mrs AA prior to their marriage. Mrs AA claimed half of all the assets held through the various companies and trusts.

[4] Mr BM had previously acted for Mr BL in respect of commercial matters with which Mr AA was involved and introduced him to Mr BL. Mr AA was concerned to ensure that he was well represented, and Mrs AC QC was briefed at an early stage.

[5] [Law Firm A]'s instructions were terminated in December 2010. The work undertaken by the firm during this time is well documented but proceedings had not reached the stage of a hearing before the Court.

[6] During that time [Law Firm A] had rendered 25 bills of costs totalling $476,828.81 (including GST and disbursements) of which $208,164.80 has been paid.

Mr AA's complaints and the Standards Committee determination

[7] On 25 March 2011 Mr AA lodged his complaint with the New Zealand Law Society Complaints Service. These were:-

1. That [Law Firm A] had undertaken to the solicitors acting for Mrs AA that they would hold the net proceeds of sale of an apartment in [Auckland] pending agreement or a Court Order, without instructions from Mr AA.

2. That [Law Firm A] had charged fees which were more than fair and reasonable.

3. That [Law Firm A] had failed to release files following a request by Mr AA.

[8] The Standards Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of each of these complaints:-

1. With regard to the undertaking, it noted that [Law Firm A] was acting for the trustee of the property and not Mr AA, and the trustee had approved the form of the undertaking. In any event, Mr BM had discussed the nature of the undertaking with Mr AA and the sole beneficiary of the trust (Mr AD) had approved the form of the undertaking.

2. The Standards Committee commissioned a report from a costs assessor (Mr XX) as to the quantum of [Law Firm A]'s bills of costs, who provided a report in which he recommended that [Law Firm A]'s fees be reduced by $14,450 (plus

GST). The Committee noted that this represented only 3% of the total fees which "did not meet the required degree of certainty that the lawyers' bills were demonstrably too high and therefore no finding of unsatisfactory conduct was justified".[3]

3. Finally, the Committee accepted that [Law Firm A] had a right to exercise a lien over files pending payment of their fees.

Parties to the review

[9] As noted in the introduction to this decision, Mr AA complained about the services provided and fees charged by [Law Firm A]. [Law Firm A] is not an incorporated firm and the Standards Committee therefore identified the lawyers involved as Mr BL and Mr BM (partners in the firm) and Ms BK (an employed solicitor). During the course of the review hearing, Ms AB (Mr AA's representative) accepted that the issues involved in Mr AA's complaints were all addressed in the context of the complaint against Mr BL, and agreed that the review application in respect of Mr BM and Ms BK could be treated as being withdrawn. The Standards Committee determination is therefore confirmed in respect of those two persons.

Review

[10] A review hearing took place in Wellington on 26 June 2013 attended by Mr AA who was represented by Ms AB. Mr AE also attended as Mr AA's support person.

[11] Mr BL attended for himself, Mr BM and Ms BK, and was supported by another partner from [Law Firm A].

Jurisdiction

[12] [Law Firm A] rendered 25 bills of costs to Mr AA. Two of these were rendered before 1 August 2008 being the commencement date of the Lawyers and Conveyancers Act 2006. Different considerations apply to complaints about conduct prior to this date.

[13] Three bills of costs were rendered more than two years prior to the complaint by Mr AA and were therefore *prima facie* excluded from consideration by virtue of Regulation 29 of the Complaints Service and Standards Committees Regulations.[4]

---

[3] Standards Committee determination dated 27 August 2012, para [44].
[4] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[14] The series of invoices all related to the instructions to [Law Firm A] to act for Mr AA in respect of the breakdown of his marriage and the division of relationship property. Ms AB submitted that the bills of costs had been rendered in respect of essentially a single legal service and that it would be artificial to separate out the three invoices rendered more than two years prior to the date of the complaint. This argument was put forward by her in support of her contention that there existed "special circumstances" in terms of Regulation 29 to enable those three bills of costs to be considered by the Standards Committee.

[15] Such an approach has been adopted by this Office on a number of occasions.[5] The question was also considered by Priestley J in *Chean v Kensington Swan*[6] in relation to a consideration of whether "special circumstances" existed in terms of s 151 of the Law Practitioners Act 1982 which enabled bills of costs paid more than 12 months prior to a complaint to be revised. His Honour referred to "a certain artificiality in carrying out an *intra vires* revision" of some bills but not others because of the time limits imposed by that Act.[7] The same principle applies in this instance.

[16] It would be artificial to exclude any of the bills of costs rendered prior to 1 August 2008. Indeed, if all bills of costs are to be aggregated and considered together (being the approach adopted by this Office) then it is not necessarily conduct pre 1 August 2008 that is being considered when looking at the overall costs rendered. The overall assessment of costs can take place at any time, either as each individual bill of costs is rendered, or at the end of the instructions. There is therefore no logic to exclude from consideration any of the bills of costs rendered prior to 1 August 2008 and this was indicated by the Standards Committee in a letter to Mr XX dated 28 October 2011. In that letter, the Standards Committee requested Mr XX to undertake a costs assessment of all bills of costs from 31 May 2007 to 23 December 2011.

[17] Consequently, all of the bills of costs rendered by [Law Firm A] are to be considered in relation to Mr AA's complaint. This differs from the approach taken by Mr XX the Costs Assessor appointed by the Standards Committee, and I feel constrained to make some comment in this regard, as a significant amount of attention has been directed to a consideration of whether or not the two bills of costs rendered prior to 1 August 2008 were such that proceedings could have been issued pursuant to the Law Practitioners Act 1982.

---

[5] See for example *GO v TQ* LCRO 61/2011 at [42].
[6] *Chean & Luvit Foods International Limited v Kensington Swan* HC Auckland CIV 2006-404-1047 7 June 2006.
[7] Above n6 at [29].

[18] On 28 October 2011, the Standards Committee sent three letters to Mr XX. The first letter confirmed Mr XX's agreement to act as the Costs Assessor. The second letter was a standard delegation pursuant to s 184(1) of the Lawyers and Conveyancers Act to carry out a costs assessment of the bills of costs rendered by [Law Firm A] and to report back to the Committee. The third letter advised Mr XX that at a meeting on the previous day, the Committee had deliberated and discussed the provisions of s 351(1) of the Lawyers and Conveyancers Act 2006 and Regulation 29 of the Complaints Service and Standard Committees Regulations. The letter then recorded that "the Committee directed that all the invoices as from 31 May 2007 to 23 December 2010 be assessed."[8]

[19] There is no indication on the Standards Committee file that this determination was communicated in any way to the parties although it is apparent that Ms AB at least, was aware of the Standards Committee determination, as she referred to this in her submissions to Mr XX.

[20] Somewhat oddly, the third letter went on to say:[9]

> The Committee also directed that you consider and report whether there are any special circumstances pursuant to Regulation 29 and any issues arising from s 351(1) of the LCA in relation to the invoices that had been issued within those respective time-frames.

[21] Mr XX followed these instructions and when Ms AB referred to the determination of the Standards Committee on 27 October, he referred to the direction in the third letter to him, requesting him to comment on the jurisdictional issues. Consequently the parties were invited to make submissions to him on these two jurisdictional issues and his report included sections dealing with these.

[22] At paragraph 9 of his report he concluded:[10]

> I do not consider the first two invoices being of such a nature or seriousness that could justify disciplinary proceedings under the Law Practitioners Act 1982, and therefore there is no jurisdiction to consider the complaint in respect of the first two invoices.

[23] At paragraph 15 he concluded:[11]

---

[8] Third letter from NZLS to Mr XX (28 October 2011).
[9] Above n8.
[10] Costs Assessor's report (10 April 2012) at para [9].
[11] Above n10.

> Thus I am of the view that there is jurisdiction to consider all of the invoices dated from 31 August 2008 through to 23 December 2010.

[24] In its decision, the Standards Committee referred to this process in the following way:[12]

> The Committee assisted Mr XX with jurisdictional points relating to two invoices issued prior to 1 August 2008 as well as the three invoices issued after 1 August 2008 but more than two years before the date of the complaint to the Lawyers Complaints Service. On 3 August 2011 Mr XX accepted the appointment as costs assessor.
>
> …
>
> Mr XX concluded that the costs rendered prior to 1 August 2008 did not constitute gross overcharging, such as to justify disciplinary proceedings.
>
> Mr XX then considered the 3 invoices issued prior to 25 March 2009 (i.e. more than 2 years before the date of the complaint). Mr XX concluded that in terms of Regulation 29 of the [Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008] special circumstances existed, despite Mr BL's assertion to the contrary. Mr XX agreed with Ms AB that all the invoices related to the same set of proceedings; a continuum of events and activities between one married couple whose marriage lasted many years. These factors in Mr XX's view amounted to special circumstances to justify consideration of bills of costs that fell outside the two year time limit.

[25] If the Standards Committee at its meeting on 27 October 2011 had already come to the conclusion that all bills of costs should be considered, there would seem to be no reason for Mr XX to have been asked to consider the jurisdictional issues at all. In addition, it does not seem to me that these are decisions which should be delegated to a costs assessor, and indeed, that is not what would appear from the first part of the third letter to Mr XX on 28 October 2011. In addition, I note that the Minute of the meeting on 27 October 2011 does not include any reference to seeking comment from Mr XX, and I wonder whether or not the letter sent to him properly reflected the Committee's instructions.

[26] What resulted from this however was that the parties made submissions on those issues in its meetings with Mr XX and he then proceeded to pronounce on those issues as recorded above. His decision was to exclude the two bills of costs which pre-dated

---

[12] Above n3 at [6], [8]-[9].

1 August 2008 whereas the Committee had directed that all bills of costs from 31 May 2007 to 23 December 2010 be assessed.

[27] It was also apparent at the review hearing that the parties considered that Mr XX was the arbiter of these issues, and the Standards Committee determination records only Mr XX's decisions. There is no reference to the determination made on 27 October.

[28] The two bills of costs excluded from consideration by the Costs Assessor, and then the Committee, totalled $41,286.92, a sum which can not be excluded when considering the overall fees charged by [Law Firm A]. In addition, it is important that both Standards Committees and costs assessors are very clear as to their respective roles and adhere to these. In the present instance, the apparent contradiction within the Committee's letter, and the contradiction between the letter and Mr XX's decision, accepted by the Standards Committee, all add to the uncertainties that I hold with respect to this matter.

The undertaking

[29] [Law Firm A] acted on the sale of an apartment [in Auckland]. The registered proprietor of that property was the [Trust 1]. The trustee of that trust was New Zealand Trustee Services Limited (NZTS) and the sole beneficiary was Mr AD.

[30] The need to provide an undertaking arose because Mrs AA had lodged a notice of claim over the title of the property which had to be withdrawn to enable settlement to be effected. It would seem that NZTS was itself acting on the sale initially, as a senior trust manager wrote to Mrs AA's lawyer on 12 October 2010 in the following terms:

> We confirm that the Trust has entered into an agreement for sale and purchase in respect of the above property. Settlement of the sale is due on 18 October 2010. In order that the sale can be completed, the notice of claim pursuant to the Property (Relationships) Act 1976 registered by your client against the title to the Trust's property must be withdrawn. In this regard we undertake to hold the full net proceeds of sale on trust and to not disburse the same until instructed to do so by both you and by [Law Firm A], or further order of the Court.
>
> Please kindly confirm by return that your client will withdraw her notice on the above basis so that settlement of the sale can proceed.

[31] Mrs AA's lawyers responded:[13]

> We have no difficulty, in principle, with the property being sold, however to ensure that our client's interests are protected we require full disclosure of the following:
>
> 1. Sale Price
>
> 2. Conditions of Sale
>
> 3. Purchasers name
>
> 4. Details of amount to be repaid pursuant to the **mortgage**. [Emphasis added by LCRO.]
>
> In such circumstances and with all due respect we would normally require a solicitor's undertaking to hold the funds in their trust account undisbursed.
>
> We suggest that the funds are paid into our trust account or [Law Firm A's] trust account following sale to be held undisbursed supported by appropriate undertakings of the firm. The alternative is into an independent solicitor's trust account to be held again with appropriate undertakings.
>
> We await your response in due course.

[32] [Law Firm A] then provided the following undertaking:[14]

> We refer to your previous correspondence in relation to the sale by [Trust 1] of the apartment at [Auckland].
>
> In consideration of Mrs AA withdrawing her notice of claim from the title to enable settlement to proceed, we undertake to:
>
> 1. hold the full net sale proceeds (including the liability of the trust to the [Trust 2]) less:
>
> (a) repayment of BNZ's mortgage;
>
> (b) deduction of our fees and disbursements relating to this transaction; and
>
> (c) deduction of the annual trust administration fees of New Zealand Trustee Services Limited),
>
> on interest bearing deposit in our trust account following the completion of settlement of this sale; and

[13] Letter from [Law Firm B]to NZTS (14 October 2010).
[14] Letter from [Law Firm A] to [Law Firm B](15 October 2010).

2. not disburse the same until receipt of:

(a) your mutual instructions; or

(b) a direction of the Court.

> We attach our draft settlement statement showing the approximate figure for the net sale proceeds to be retained on trust pursuant to this undertaking.
>
> Would you please kindly confirm when the notice of claim has been withdrawn from the title so that settlement of the sale can take place on Monday 18 October 2010.

[33] The draft statement attached to that letter allowed for the following deductions from the sale price:-

- agent's commission;
- repayment of secured advance from BNZ;
- fee for s 36 certificate;
- payment for annual trustees' fees;
- the firm's costs and disbursements relating to sale;
- local authority rates; and
- Body Corporate levy.

[34] Critically, the statement did not allow for retention of an advance by the [Trust 2] to [Trust 1] when the property was purchased, albeit that the funds advanced were not secured in any way. This became relevant when the Court made the following order in December 2011:[15]

> Pending final orders being made, the proceeds of sale of the apartment owned by [Trust 1] are to be immediately disbursed to Mrs AA as an interim distribution of relationship property.

[35] In addition, the Court also made an order that the assets of the [Trust 2] were to vest in Mr AA personally and that Mrs AA was entitled to be compensated for one half of the net value of the assets as at 31 March 2011.[16]

[36] It seems to be accepted that Mr AD held his beneficial interest in the trust on trust

---

[15] Above n1 at [142].

for Mr AA, and that [Law Firm A] were aware of this. Mr AA argues that he should have been consulted over the wording of the undertaking as his position was altered by the fact that the [Trust 2] had not been repaid from the proceeds of the sale.

[37] [Law Firm A] have advanced a number of responses to that allegation:-

- the firm was not aware of the fact that the [Trust 2] had advanced funds for the purchase of the property;
- [Law Firm A] was not acting for Mr AA in relation to the sale of the property but instead was acting for [Trust 1] from which they took instructions with regard to the undertaking;
- [Law Firm A] had obtained approval from Mr AD, the sole beneficiary of the trust as to the form of the undertaking; and
- Mr BM had discussed the nature of the undertaking with Mr AA.

[38] It is clear from the email correspondence that Ms BK consulted Mr BL as to the proposed undertaking and that he gave his approval to same.[17] I acknowledge [Law Firm A] were not acting for Mr AA in relation to the sale but for the trustee. It was the trustee, in consultation with the beneficiary, who was required to make the decision as to the terms of the undertaking. The trustee no doubt took note of the approval from Mr AD.

[39] However, it is noted in this regard that Mr AD gave his approval to the form of the undertaking proposed initially by NZTS.[18] That undertaking was to hold "the full net proceeds of sale on trust".[19] The undertaking ultimately given by [Law Firm A] was "to hold the full net sale proceeds (including the liability of the trust to the [Trust 2]) less" the BNZ mortgage and other deductions.[20]

[40] The primary responsibility for consulting with Mr AA rested with Mr AD. However, it must not be overlooked that [Law Firm A] were acting for Mr AA with regard to relationship property matters and it was his interests in this regard that [Law Firm A] had a duty to protect. It was in their capacity as solicitors for Mr AA that the firm had established the Trust to purchase the property and it was because of the connection

---

[16] Above n1 at [139(h)].
[17] Email from Mr BL to Ms BK (12 October 2010).
[18] Email from Mr AD to Senior Trust Manager approving draft letter of undertaking (12 October 2010).
[19] Above n12.
[20] Above n14.

with Mr AA that the firm was acting on the sale. This connection was evidenced by the fact that it was he who first signed the Agreement for the sale of the property.

[41] It could in fact be suggested that [Law Firm A] were conflicted in acting for both the trustee and for Mr AA. The trustee needed to have the notice of claim removed from the title to enable settlement to proceed. If it was not, the trustee would have been in default under the Agreement. The undertaking approved by the trustee was not in Mr AA's interests. There was therefore a conflict in [Law Firm A] acting for the trustee on the sale of the property.

[42] The form of the undertaking proposed by NZTS was to retain "the full net proceeds of sale". NZTS has not been asked to confirm what it intended by this undertaking, but a conveyancing lawyer would understand this to mean the balance of the sale proceeds after payment of all borrowings secured against the title to the property, as well as payment of the costs associated with the sale and any obligations arising from ownership of the property.

[43] The form of the undertaking specifically excluded the advance from the [Trust 2] and so Mrs AA and her lawyers were satisfied that no funds were passing to an entity controlled by Mr AA. That was the purpose of the undertaking.

[44] Having considered this matter from all angles, I have come to the view that [Law Firm A] acted properly in their capacity as solicitors for the vendor on the sale and followed the vendor's instructions. However, I consider that Mr BL did not represent Mr AA's interests when giving his approval to the form of the undertaking.

[45] In its response to the Complaints Service, [Law Firm A] advised that it was not aware of the source of the equity provided for the purchase.[21] They advised that it was not until a long time after the purchase had been completed that the firm became aware that the source of funds was the [Trust 2]. They noted that there was no charge on the property and that the firm had no details at all of the nature of the advance from the Trust. However, it is clear from [Law Firm A]'s statements, that the firm was ultimately aware of the fact that the [Trust 2] had provided funds for the purchase, and from this statement, it is also clear that this state of knowledge must have existed by the time the property was sold. This is reinforced by the fact that the undertaking given by [Law Firm A] specifically refers to the advance from the [Trust 2] being excluded from any repayment.

---

[21] Letter from [Law Firm A] to NZ Law Society Complaints Service 2 May 2011.

[46] The firm was also aware that Mr AA was the sole trustee and beneficiary of the [Trust 2]. It could therefore be argued that in his capacity as the lawyer for Mr AA, Mr BL did not protect or promote Mr AA's interests when he gave his approval to the form of the undertaking.

[47] However, it is necessary to examine the context in which this issue arose and the consequences of the undertaking. The undertaking was necessary to enable the sale to proceed. The usual form of an undertaking in these circumstances is to enable all secured borrowings and costs associated with the sale to be paid and the balance of the sale proceeds held until the ultimate payee can be determined.

[48] Ownership of the balance of the sale proceeds was in dispute. In the course of the dispute being determined it was not unreasonable to expect that Mr AA would have the opportunity to argue his case. Similarly, whether or not the proceeds were released to the [Trust 2], that payment would be taken into consideration when division of the proceeds of the sale was considered, and it was reasonable for Mr BL to proceed on this basis.

[49] The Order of the Family Court was an interim Order pending final orders being made.[22] Leave was reserved to the parties to bring the matter back before the Court if agreement could not be reached as to how Mrs AA's entitlement was to be met.

[50] It is difficult to see how Mr AA has therefore been disadvantaged. If the funds had in fact been paid to the [Trust 2], that payment would need to be taken into account when determining Mrs AA's entitlement. On this basis it cannot be said that Mr BL has failed to protect and promote Mr AA's interests as it was reasonable to expect that the issue would be argued and addressed subsequently. The imperative in the meantime was to enable the sale to proceed.

[51] Having examined this matter from various perspectives, I have reached the view that whilst an initial consideration could lead one to conclude that Mr BL did not protect and promote Mr AA's interests, nevertheless, when the issue is examined further, it was reasonable for Mr BL to concur with the proposed form of undertaking without seeking formal approval from Mr AA.

Interest on invoices

[52] [Law Firm A] has claimed interest on its outstanding invoices and rely on the terms of engagement to establish their right to this. Mr XX considered this claim, and

came to the view that "it is not appropriate that interest be charged."[23] Interest claimed by a lawyer for outstanding accounts does not form part of the lawyer's fee and does not come within the matters that a costs assessor is requested to consider.

[53] The Standards Committee determined that "it did not have the jurisdiction to deal with the issue as it relates to a contractual arrangement and not to professional conduct."[24] In her submissions for the review hearing, Ms AB merely stated that Mr AA agrees with the position taken by the Standards Committee."[25]

[54] The imposition of interest on an unpaid account is a contractual term between the lawyer and the client. Whether or not a term has been agreed or not is a legal matter to be determined by the Court. It is not the role of the Standards Committee or myself, or a costs assessor, to make pronouncements on matters of law, and I concur with the Standards Committee that whether or not interest is payable is beyond its jurisdiction and the jurisdiction of this Office.

Lien on files

[55] Ms AB did not refer to Mr AA's complaint about [Law Firm A] declining to release files until payment of its account, in either the review application or her submissions at the hearing. Although I am not confined to considering only matters raised by a review application, the existence of a solicitor's lien over files pending payment of an account is well established, and as this issue has not been pursued by Mr AA or Ms AB, I do not propose to include any further discussion on that point in this decision.

Were the bills fair and reasonable?

[56] Priestley J in *Chean v Kensington Swan* had a number of things to say about the assessment of whether or not a bill of costs is fair and reasonable as required by Rule 9.1 of the Conduct and Client Care Rules.[26] In that case, the lawyer rendered invoices on a periodic basis which were noted by His Honour as being "quantified from the time costing sheets of the practitioners involved".[27]

[57] His Honour then went on to say:[28]

---

[22] Above n1.
[23] Above n10.
[24] Above n3 at para [11].
[25] Ms AB's submissions for review hearing (26 June 2013) at para [5].
[26] Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2006.
[27] Above n6 at [22].
[28] Above n6 at [23] and [24].

> [23] ...one potent circumstance is already apparent, and that is the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to 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. It is very clear that for most of the bills this independent assessment has not been carried out.
>
> [24] A related problem which is recognised in some of the authorities cited to me by counsel is that, where bills are being rendered regularly on an interim basis, it is difficult if not impossible for the client in particular and possibly for the practitioner to make the type of assessment to which I have just referred.

[58] In the present instance, Mr BL has acknowledged that "[a]ll fees have been incurred on a time and attendance basis with a small amount of rounding."[29] At the review hearing, Mr BL submitted that even though the bills were largely rendered in accordance with the time recorded, an assessment of the costing factors set out in Rule 9.1 of the Conduct and Client Care Rules had been undertaken in each case, but other than the small amount of rounding referred to, it had been determined that the bills calculated on this basis produced a fair and reasonable fee.

[59] Mr AA does not think so. The primary reason for this view is that whilst the fees rendered by Mrs AA's lawyers up to 29 July 2010 were $40,878.99 (GST inclusive), the fees rendered by [Law Firm A] to him for the comparable period were $360,295.07 (GST inclusive). As at 25 February 2011, Mrs AA's total legal fees were $220,295.07 (GST inclusive) whilst at 23 December 2010, [Law Firm A]'s fees to Mr AA were $476,828.80 (GST inclusive).[30]

[60] Both Mr AA and his wife engaged barristers whose costs are not in question.

[61] There are obvious differences between the firms engaged by Mr and Mrs AA. Mrs AA engaged a [small North Island city] firm,[31] while Mr AA engaged the services of a national law firm. The requirements of the work to be carried out for each party was also different, notwithstanding that they were both engaged with the same set of proceedings.

[29] Letter from [Law Firm A] to NZLS (2 May 2011) at para [26].

[30] The figures for [Law Firm A]'s costs are drawn from Ms AB's submissions made at the review hearing and differ from those recorded in the Standards Committee determination. The difference is minimal, however, and the essence of Ms AB's submission is not affected by this.

[31] The firm dissolved during the period of instructions so in fact Mrs AA engaged the services of two firms, both of which were in [the same North Island city].

[62] I place no more weight on this submission other than to acknowledge that the difference is marked and that Mr AA's reaction is a legitimate response to the information ascertained from the affidavits filed by Mrs AA.

[63] Having noted the significant disparity in the fees, Mr AA questioned why this should be. He makes several allegations as to the advice provided and as to why [Law Firm A]'s fees have been unnecessarily high. These include:-

- wasted fees;
- an incorrect approach;
- lack of results; and
- a failure to investigate his wife's entitlement to spousal maintenance.

These complaints are referred to in paragraphs 19 - 23 of Mr XX's report.

[64] At paragraph 23 of his report, Mr XX states:

> Suffice to say the complaint is generally against legal advice given which is claimed to be of poor quality, quite apart from the costs of the same being allegedly excessive.

It is important to note Mr XX's comment here that these are matters which are **quite apart from** the allegation of excessive costs.

[65] The real question to be asked in this situation is whether or not all of the work billed for by the firm was necessary and carried out properly and efficiently. This leads to an examination of the basis on which the bills of costs have been quantified, which, as acknowledged by Mr BL, were based on the time recorded.

[66] I must make it clear at this stage that I do not necessarily disagree with Mr BL when he submitted that a fair and reasonable fee in each instance was a fee that was based on the time recorded. In many situations that will be the case.

[67] In addition, the obvious opportunity to assess the overall fees charged to achieve the end result did not arise, as Mr AA withdrew his instructions before that occurred. That is not to say, however, that the process could not have been undertaken when the firm's instructions were terminated, but there is limited reason to undertake this when instructions are being withdrawn.

[68] However, again, it is an understandable reaction from Mr AA to the level of fees incurred before the dispute had even reached Court, as clearly there was a considerable amount of work still to do at the time he withdrew his instructions.

Mr XX's report

[69] The question to be considered in conducting this review is whether there are any aspects of the report by Mr XX which give rise to the view that his conclusions should be reconsidered. I have already noted that I consider that he exceeded what would usually be expected of a costs assessor in reaching conclusions as to the jurisdictional issues, but this does not affect his conclusions as to the level of charging, other than the fact that some considerable time was clearly spent by him and the parties in addressing these issues when the focus should have been on the quantum of the fees charged. In addition, the first two bills of costs were excluded from consideration by him.

[70] I have considered Mr XX's report carefully. He inspected the 23 files held by the firm. He was also provided with an index of emails which comprised some 87 pages, and concluded from this material that it was plain that the attendances covered a number of complex issues over a lengthy period.[32]

[71] One of the documents provided by Mr BL to Mr XX was the judgment of Judge Munro[33] as to relationship property in which he describes the property built up by Mr AA as being held in a "complex web of interrelated companies and trusts in New Zealand and the United States."[34] Included in the judgment was a diagram of all of the entities in which the parties held interests.

[72] Ms AB disputes however that the matters were complex at the time [Law Firm A] were involved in that only some of the trusts identified in the diagram were in existence, and the relationship property was limited. Mr AA notes also that an application by his wife to have the proceedings transferred to the High Court on the grounds that the proceedings were complex was dismissed.

[73] Inherent in these comments by Ms AB and Mr AA is an allegation that the work carried out by [Law Firm A] was unnecessarily complicated by [Law Firm A] by bringing all property, including the trusts and companies established by Mr AA before and after separation, into the mix at that stage of the proceedings. This has been referred to by

[32] Above n10 at para [4].
[33] Delivered in December 2011 when Mr AA was represented by Ms AB.
[34] Above n1.

the parties as a "pooling of assets" which Mr AA alleges was an incorrect approach at that point in time.

[74] The starting point for Mr XX's investigation was [Law Firm A]'s time records.[35] He met with Mr AA, Ms AB and Mr AA's accountant and separately met with Mr BL. He then convened a meeting with all parties where a "robust" exchange took place. He described this exercise as helpful and useful in clarifying some of the factual background to the complaint.[36] Mr XX has also taken note of the fact that a "fair and reasonable fee is not simply an arithmetical exercise"[37] and notes the points to be drawn from the authorities:[38]

- Setting a fair and reasonable fee requires a global approach;
- What is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases;
- While time spent must always be taken into account it is not the only factor.

[75] He also refers to the (non-exhaustive) costing factors set out in Rule 9.1 of the Conduct and Client Care Rules and underlined those relevant to the assessment he was undertaking. Finally, he referred to the need to "step back and look at the fee in the round".[39]

[76] Mr XX then considered the various complaints with regard to Mr BL's conduct:-

- the allegation that the strategy of delaying matters followed by Mr BL was not in accordance with Mr AA's instructions;
- criticism by Ms AB of a narrative affidavit filed by Mr BL;
- the allegation that Mr BL had failed to comply with Court directions;
- the allegation that Mr BL had failed to enquire whether Mrs AA was in a de facto relationship before reaching settlement as to spousal maintenance;
- criticism of the "pool of assets" approach as opposed to dealing with relationship property assets only;
- Mr BL's advice with regard to a settlement proposal;

[35] Above n10 at para [18].
[36] Above n10 at para [24].
[37] Above n10 at para [28].

- Mr BL's advice in relation to establishment of trusts post separation;
- conveyancing errors; and
- criticism by Ms AB of incomplete work.

[77] Mr XX then expressed concern over some nine accounts which he states were not fair and reasonable:[40]

> either because of the total costs incurred for the main attendances during the relevant period and/or elements of duplication on legal matters or whether the end result achieved for Mr AA can be justified by the overall cost.

[78] In each of these cases Mr XX referred to the time recorded as the starting point, and then made some adjustments for the matters which have caused him concern. As a result of that process, he recommended that the bills of costs be reduced by $14,450 which represents some three percent of the total fees charged.

Reservations as to the methodology of the Costs Assessor's report and the Standards Committee determination

[79] I have some reservations both as to the methodology utilised by Mr XX in his report and the Standards Committee's consideration of it.

[80] Determining what constitutes a fair and reasonable bill of costs is a difficult and, some would argue, subjective task. It is for that reason that guidelines for Standards Committees indicate that there should be a range of allowable fees before any adverse finding is made.

[81] It is tempting for practitioners to rely heavily, if not solely, on the time records for a particular task when setting the fee. This is the simplest piece of data to ascertain and in many cases it is reasonable to rely on this data to set the fee.

[82] However, caution must be exercised in simply adopting the time recorded as representing the fee to be charged, and in this regard it is helpful to refer to several comments made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in *Auckland Standards Committee No.1 v Hart.*[41] The Tribunal compared the different

---

[38] Above n10 at para [29].
[39] Above n10 at para [33].
[40] Above n10 at para [54].
[41] *Auckland Standards Committee No.1 v Hart* [2012] NZLCDT 20.

approaches of the expert witnesses for each of Mr Hart (Mr XY) and the Standards Committee (Mr XZ):[42]

> [88] Mr XY's starting point for analysis of what constitutes a reasonable fee was the amount of time and labour expended at the established hourly rate for Mr Hart and other practitioners. He had then offered his opinion on the various factors to be given weight in accordance with the Principles of Charging referred to at paragraph [85].
>
> [89] Mr XZ's approach was somewhat different. While agreeing with Mr XY that the time spent on a job at the relevant hourly rate would tell you what the job cost you, he argued that it does not tell you what the job is actually worth. To find that out, he said you need to assess the value of what you are doing for the client, and that relates to your charge-out rate and what the client requires of you.
>
> …
>
> [95] In approaching his task Mr XZ worked backwards, not simply from time records of Mr Hart and other practitioners, but from what was actually done in the Mr A case. This approach led him to acquire records of relevant Court sitting times, which were compared with the time charged, and the level of experience of the person charging.
>
> …
>
> [121] What Mr XY did not say was whether the time expended was reasonable having regard to the type of work undertaken. No doubt that might have proved difficult for a practitioner lacking experience in this field, and may have been omitted because it was beyond his expertise. Unfortunately, that is a serious omission because that is one of the central issues to be determined in this case.

[83] In this regard I also refer to comments by Donaldson J in *Property and Reversionary Investment Corporation v Secretary of State for the Environment*:[43]

> It [the exercise of assessing a fair and reasonable fee] is an exercise in assessment, an exercise in balanced judgement – it is not an arithmetical calculation ... It also follows that it is wrong always to start by assessing the direct and indirect expense to the solicitor, represented by the time spent on the business ... This error is compounded if, as an invariable rule, the figure representing the expense of recorded time spent on the transaction is multiplied by another figure to reflect the other factors.

---

[42] Above n41.

[84] It is reasonable to assume that Mr XX was appointed by the Standards Committee because of his experience in the area of law with which Mr AA's case was concerned. However, it seems to me that he has adopted an approach which is similar to that of Mr XY, and the process criticised by Donaldson J, when carrying out his costs assessment, by adopting as a starting point the time records provided by [Law Firm A]. Although he refers to the other factors set out in Rule 9.1 to be taken into account when assessing the overall fee, there is no evidence in his report of that process being undertaken. I acknowledge that in the paragraphs addressing the individual bills which he has adjusted, he does in one instance refer to an unsuccessful result and in others as having conducted a consideration of the fees "in the round". However, there is no general discussion as to each of the factors underlined by him as being relevant to this matter and how they impact on the fees charged.

[85] The adjustment to the fees starts with the fee produced by [Law Firm A] based on the time records. This is to be contrasted with the approach of Mr XZ where he examines what work was done and then comes to a view of what would constitute a fair and reasonable fee for completing that work.

[86] In the present instance, the task may be somewhat more involved. In addition to ascertaining what work was done, a decision needs to be made as to whether or not the work done was appropriate and/or necessary, and then whether it was carried out competently. It seems to me that these decisions need to be made by the Standards Committee prior to referral to a costs assessor and it may be necessary, for this purpose, for the Standards Committee to engage a separate investigator to consider these aspects.

[87] In this regard I have concerns as to the use which the Standards Committee has made of Mr XX's report. In recording its deliberations, the Standards Committee said:[44]

> 48. The Committee noted the Costs Assessor's analysis of the applicable legislation to be applied to the costs assessment, and was satisfied with the contents and recommendations set out in the report. The Committee accepted and endorsed the findings of the Costs Assessor, with the following exception.
>
> 49. The Committee considered that the reduction Mr XX recommended was such a small percentage of the overall costs that it did not justify a finding of unsatisfactory conduct on the part of any of the three lawyers.

---

[43] *Property and Reversionary Investment Corporation v Secretary of State for the Environment* [1975] 2 All ER 436.
[44] Above n3.

[88] The Committee has seemingly adopted all of the conclusions as to conduct issues which Mr XX reached without further discussion (or at least a record of that discussion). In doing so, it seems to me that the Committee has deferred to Mr XX's view on matters of conduct, reached in the process of carrying out his costs assessment.

[89] As an aside to this, I am not at all certain that the Standards Committee received copies of all of the material provided to Mr XX. This became evident at the review hearing when Ms AB referred to the material which had been provided to Mr XX which had not been provided to me by the Standards Committee.

[90] It is the role of the Standards Committee to itself consider the evidence provided and reach a view on matters of conduct. A Standards Committee is not able to delegate the task of reaching a final determination[45] and on the record provided, this is what has occurred here.

Conclusion

[91] The fees charged by [Law Firm A] are considerable, and it is difficult to escape the comparison with the fees charged by the lawyers for Mrs AA. Mr AA has certainly made that comparison.

[92] Section 3 of the Lawyers and Conveyancers Act provides:

> (1) The purposes of this Act are –
>
> (a) to maintain public confidence in the provision of legal services and conveyancing services;
>
> (b) to protect the consumers of legal services and conveyancing services.

Having reference to these purposes, it is not unreasonable that Mr AA should be given the opportunity to be absolutely satisfied that the service provided to him has been appropriate, competent and timely, and that the fees charged by [Law Firm A] are fair and reasonable. There are sufficient areas of concern to me in the process to date to dictate that there should be a second look at Mr AA's complaints and the costs charged to him.

[93] In the circumstances, I intend to return this matter to the Standards Committee[46] to be dealt with in the following way:-

---

[45] Section 184(3)(c) Lawyers and Conveyancers Act 2006.

1. The Standards Committee is to first identify all of the allegations relating to conduct (other than the complaints relating to the undertaking, interest on the bills of costs, and the claimed lien, referred to in this decision) made by Mr AA and Ms AB and to make a determination on each of those allegations. In conducting this process, I consider it unlikely that any further submissions will be necessary from the parties. No determination as to penalty is to be made at this stage.

2. The Committee will also need to make a determination as to the jurisdictional issues referred to in this decision.

3. The complaint as to fees is then to be referred to a second costs assessor who is to be supplied with a copy of this decision, as well as all of the material provided to Mr XX. In this regard, I have provided to the Standards Committee the bound material provided to me by Mr BL at the review hearing, and by Ms AB recently. The second costs assessor is however **not** to be provided with a copy of Mr XX's report.

4. The Costs Assessor is also to be provided with the determinations of the Standards Committee previously reached in accordance with points 1 & 2 above.

5. The report by the second costs assessor is to be provided to the parties for comment, although I would encourage that those comments be limited, given the considerable volume of material that has already been provided.

6. The Standards Committee is to then review that report together with Mr XX's report and all other material that has been provided in connection with this complaint, inasmuch as it has not already been considered by the Committee in reaching its determination referred to in point 1 above.

7. The Standards Committee is then to issue a second determination in respect of the costs complaints and include in this determination any determination as to penalty in respect of any adverse finding in the first determination.

Decision

---

[46] The Complaints Service should give consideration as to whether a different Standards Committee should undertake this reconsideration.

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee inasmuch as it refers to Mr BM and Ms BK is confirmed.

2. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act the determination of the Standards Committee with regard to the undertaking, the lien and interest on the bills of account, is confirmed.

2. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act, the remainder of the determination is reversed.

3. Pursuant to s 209(1) of the Act, the Standards Committee is directed to reconsider and determine the complaint as to conduct and fees on the part of Mr BL as set out in [93] above.

DATED this 25th day of July 2013

____

O W J Vaughan
Legal Complaints Review Officer

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

Mr AA as the Applicant
Ms AB as the Representative of the Applicant
Messrs BL and BM, and Ms BK as the Respondents
Mr ZZ as a related person or entity under s 213
Auckland Standards Committee 5
The New Zealand Law Society