LCRO 272/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City]Standards Committee [X]
BETWEEN	**CD** Applicant
AND	**EF** Respondent

DECISION

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

Introduction

[1] Mr CD has applied for a review of a decision by [City] Standards Committee [X], in which the Committee decided to take no further action on his complaints about Ms EF's conduct and fee.

Background

[2] Mr CD was involved in relationship property proceedings and contacted a QC specialising in the area asking her to act for him. The QC put him in touch with Ms EF and suggested he instructed her to retain the QC as counsel. Ms EF then contacted Mr CD to confirm his instructions, and followed up with a letter of engagement on 10 November 2011.

Terms of Engagement

[3] The letter confirming the terms of Ms EF's engagement relevantly say:

> (a) You have instructed us to act for you in connection with your relationship property matters.
>
> (b) We confirm your advice that you have retained or wish us to retain on your behalf the services of GH, QC, barrister. GH will have written to you setting out her terms of engagement.

> (c) This letter serves to confirm our engagement and your instructions to us. We attach our Terms of Engagement and Information for Clients sheet.
>
> (d) By instructing us you are deemed to have accepted the terms set out in this letter and our Terms of Engagement.
>
> (e) Our engagement is with you. Any advice applies to you only and is not intended to be relied on or provided to any third party.
>
> (f) Kindly note that you will be directly responsible for GH's fees and that it is not [MN's] policy to meet those fees.
>
> (g) It is anticipated that GH will be attending to most of the work in your matter. However, if we are required to undertake any work we will charge at the rates set out in paragraph 3 below. Any work undertaken by this firm will be done in consultation with GH.

[4] Ms EF was to have primary responsibility for Mr CD's matter. Her charge out rate was specified, and the letter advised that it was "difficult in family matters to give an accurate estimate of fees", but that Mr CD would be kept informed on a regular basis as to the time spent on his matter. Accounts would generally be sent monthly. Payment would be due within 14 days of the account being rendered, and "no further work will be undertaken by any lawyer of the firm until appropriate arrangements are made to bring the account back into good standing."

[5] The terms of engagement attached cover a range of matters and say they will apply "whenever you ask us to act for you unless they are varied by us in writing" and signed by partner of the firm.

[6] The scope of the engagement refers to the provision of "advice and legal services that properly fall within your instructions to us".

Receipt of terms of engagement

[7] Mr CD says he received the letter of engagement from Ms EF, but did not sign it, and did not agree that Ms EF would do work for him.

Performance of the terms of engagement

[8] Ms EF says Mr CD rang her to clarify the position with respect to her fees, and she explained to him that:[1]

> …at times it may be to his advantage cost-wise for her to assist in research and drafting documentation but this was a matter for him to discuss directly with Ms GH QC.

[1] Letter [IJs] to LCRO (20 May 2015) at [6].

[9] Ms GH's position appears to be that she told Mr CD she would need research and drafting assistance, that she would need to actively involve Ms EF, and that Mr CD agreed to that.[2] She makes no reference to having had any discussions with Mr CD that might have modified any terms on which Mr CD may have agreed to pay Ms EF.

[10] Ms EF says she is not aware of Mr CD raising any questions about her involvement in the appeal with Ms GH. There is no reason to believe Ms GH was authorised to renegotiate the terms of Ms EF's engagement with Mr CD, or that she did so.

Acceptance of terms

[11] Mr CD says the QC and Ms EF "have been my counsels with respect to PRA matters from the beginning of November 2011" until he terminated the retainer on 10 September 2012.

[12] Ms EF refers to taking an active role in assisting Ms GH QC in preparing for the appeal, corresponding with Mr CD directly, advising him, carrying out research, drafting documents and responding to Mr CD's queries of her. She refers to Ms GH QC being away for a period, during which time she was responsible for conduct of the appeal.

[13] Ms EF says that she received instructions directly from Mr CD, and through Ms GH, who conveyed Mr CD's approval to her active involvement in assisting Ms GH.

[14] When the appeal proceeding came on for hearing in the High Court, Ms EF appeared as second counsel, and then billed Mr CD for her attendance. Mr CD says that because the Judge did not consider it appropriate to order the other party to the proceeding to pay costs with respect to Ms EF's appearance as second counsel, he should not have to pay for her having been there either. More generally, he says Ms EF's fees were unfair and unreasonable. His view of the proper fees is based primarily on costs that can be ordered under the schedule of costs in the High Court Rules.

[15] Ms EF relies on her letter of engagement to Mr CD dated 10 November 2011, and his subsequent instructions to her. She says her fees accord with the terms of engagement, reflect the actual time she spent, much of which was outside usual business hours under urgency, billed without a premium, and are fair and reasonable for the services she provided. Ms EF refers to an expert report provided by an independent QC who had reviewed the fees charged both by Ms EF and the QC, for the purposes of the debt recovery proceeding. The expert report concluded that,

[2] Will Say Statement, GH QC, Undated, Unsigned.

although the research component could have been reduced by five or six hours to address "issues of reasonability", Ms EF's fees were justified.[3]

[16] Ms EF's firm commenced a debt recovery proceeding against Mr CD to recover her fees and those of the QC (the debt recovery proceeding) in 2013, which Mr CD defends. He also laid a complaint to the New Zealand Law Society (NZLS) in February 2014.

Standards Committee

[17] The Committee considered the information provided by the parties, identified the three areas of complaint, and determined them on the basis that further action was unnecessary or inappropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) because Mr CD had instructed Ms EF, and she had not breached her duty of confidentiality to him.

[18] With respect to the fee complaint, the Committee decided that the debt recovery proceeding was an adequate remedy that would be reasonable for Mr CD to exercise, and decided to take no further action on his complaint under s 138(1)(f) of the Act.

Application for review

[19] Mr CD was dissatisfied with the way in which the Committee determined his complaint about the fees, and the alleged breach of confidentiality, so applied for a review.

Role of LCRO on Review

[20] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgment for that of the Standards Committee, without good reason.[4]

Scope of Review

[21] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken

[3] Will Say Statement, MW, undated, at [42].
[4] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

on any particular review and the extent of the investigations necessary to conduct that review.

Review Hearing

[22] Mr CD attended a review hearing in [City] on 4 May 2015. Ms EF was not required to attend, and the hearing proceeded in her absence.

Further information

[23] After the review hearing a request was made of Ms EF for further information about Mr CD's instructions to her, which has been provided, passed on to Mr CD for comment, and considered in the course of this review along with his comments.

Review Issue

[24] I have carefully considered all of the information available on review, including the materials presented by Mr CD at the review hearing, and the further information provided after the hearing. I have been unable to identify any evidence that supports his allegation that Ms EF breached his confidentiality.

[25] The essence of Mr CD's argument is that he is not liable to pay for some or all of the work Ms EF charged him for. There is ample evidence to support the proposition that Mr CD instructed Ms EF to carry out work. Any liability issues Mr CD wishes to raise are better resolved in the debt recovery proceeding.

[26] The key issue on review relates to the scope of Mr CD's instructions to Ms EF, which is a liability question and also relevant to Mr CD's complaint that her fees were not fair and reasonable.

[27] The question is whether there is good reason to depart from the Committee's decision. For the reasons discussed below, the answer to that question is no.

Discussion

[28] As mentioned above, the Committee decided to take no further action on the fees aspect of Mr CD's complaint because, in the exercise of its discretion, it considered that the debt recovery proceeding was an adequate remedy that would be reasonable for Mr CD to exercise.

[29] The overlap between the roles of Courts where debt recovery proceedings are in progress, and the role of Committees where a complaint has been laid about the

quantum of lawyer's fees, has been considered by the Courts on a number of occasions.

[30] Gallen J in *Erwood v Glasgow Harley*[5] considered the preferable course if a bill were to be challenged after judgment had been entered would be to set aside judgment in its entirety and restrain the lawyer from continuing debt recovery proceedings until the Law Society's process was exhausted. This would avoid "any suggestion the Court is foreclosing the scope of challenge to the bill of costs under the Law Practitioners Act",[6] which was in effect at the time.

[31] In *Simpson Grierson v Gilmour* the plaintiff law firm had applied for summary judgment against the defendant in respect of liability for and the quantum of its fees. The High Court gave judgment for liability summarily, but declined to determine quantum saying:[7]

> …the issue of liability is a matter which is appropriate for the courts to decide, particularly where in a given case it can do so without in any way prejudicing the role of the Standards Committee or causing injustice to the defendant. Whether there was a risk of prejudice or injustice would depend entirely on the facts of a given case…
>
> …issues of quantum…are within the purview of the Standards Committee.

Stevens J also said:[8]

> I accept that any such determination should not trench on the jurisdiction and powers of the Standards Committee. Normally the focus of the inquiry into the complaint will be on the reasonableness or otherwise of a bill of costs. It may be that other issues arise indirectly, for example, with regard to the scope and terms of a contract of retainer. This possibility was contemplated by the Court of Appeal in *Erwood* at [45]. Therefore, where such an issue could arise, a Court should be careful to ensure that nothing it did in the course of a judicial proceeding should cut across the jurisdiction and powers of the Standards Committee.

[32] In *Wilkinson Adams v Bethune*[9] the High Court set aside a judgment irregularly obtained by the law firm, and was not called upon "to consider the substance of the issues that would be raised by" Mr Bethune's application if the judgment had been regularly obtained, and not set aside. In that case Mr Bethune's complaint to NZLS had included concerns over the quantum of the lawyers' fees, and the Committee had decided to take no further action on that aspect of the complaint because it considered

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[5] *Erwood v Glasgow Harley* [2002] 1 NZLR 251 (CA).
[6] At [48].
[7] *Simpson Grierson v Gilmour* HC Auckland CIV-2008-404-8674, 27 August 2009 at [65-[68].
[8] At [65].
[9] *Wilkinson Adams v Bethune* [2012] NZHC 781, [2012] NZAR 640.

the civil proceeding he was defending provided an opportunity for the substance of the fees complaint to be investigated. His Honour said he would:[10]

> …have needed to consider very carefully the overall justice of the position as it affects Mr Bethune if the default judgment, which meant that the substance of the complaint he originally referred to the Law Society would not be considered, was to be maintained".

[33] In *Law Firm B v AP*[11] the High Court considered Mrs AP's position as judgment debtor in the context of an application by the lawyers that she be declared bankrupt for failing to meet a judgment in their favour. Mrs AP laid a complaint to NZLS after the lawyers had obtained judgment in the District Court, and when that judgment was under appeal to the High Court. The High Court determined liability, and left the question of quantum to be determined by this Office on review, Mrs AP having applied for a review after the Standards Committee decided to take no further action on her complaint because of her involvement in Court processes, where the dispute over the lawyers' fees was under consideration.

[34] His Honour explained how Mrs AP's dispute over liability for the lawyers' fees presented her with a quandary. She could not dispute liability and challenge quantum without running the risk that her quantum challenge may be taken as an admission of liability. This is because only a "person who is chargeable with a bill of costs" can lay a complaint about those costs under s 132 of the Act. His Honour suggested Mrs AP could have:[12]

> …managed the matter by defending the District Court claim as she did but also telling the Court that she did not accept the amounts of the bills and reserving the right to complain under s 132. On the court finding that there was a contract of retainer she could have advised of her intention to complain and asked that judgment not be entered until she had exhausted her rights under the Lawyers and Conveyancers Act. A stay under s 161 could have taken effect on her making a complaint before judgment was entered. She did not raise the matter with the District Court. She appeared without a lawyer…and without any assistance in the High Court. I do not think that a layperson such as Mrs AP can be expected to be alive to the best way to preserve different rights of objection to be considered by separate bodies. The matter is not straight forward.

[35] His Honour went on to consider whether, judgment having been entered, Mrs AP had missed her chance to complain, saying:[13]

> Ordinarily a judgment is conclusive as to matters that it has decided and also as to matters that could have been put in issue but were not. When the District Court gave Law Firm B judgment against Mrs AP it established her liability for fees in the amount of $149,795.13 plus interest and costs. The judgment

[10] At [47].
[11] *Law Firm B, ex parte v AP* [2013] NZHC 2521.
[12] At [27].
[13] At [28].

> stands in the way of her contending that the fees are excessive. Two decisions seem to recognise that a judgment as to the amount of fees may prevent the Law Society inquiring into a complaint as to fees…

[36] His Honour referred to *Erwood* and *Simpson Grierson v Gilmour* and observed:[14]

> These warnings that the courts should arrange matters so that the jurisdiction and powers of those authorised to review lawyers' bills are not affected recognise that otherwise a court judgment may leave the person charged without effective recourse to have their bills investigated because liability for a given amount has already been established. That therefore suggests that no useful purpose would be served by Mrs AP continuing with her application to the Legal Complaints Review Officer.

[37] His Honour referred to "rare cases" where a Court in the bankruptcy jurisdiction can go behind a judgment, and considered whether there may be a miscarriage of justice if Mrs AP were deprived of her opportunity to challenge the amount of the lawyers' fees.[15] Although Mrs AP had failed to take the opportunity to challenge the quantum of the fee in the course of the District Court process, it remained open to her to challenge quantum because Law Firm B had effectively consented to the review process concluding.

[38] The Court considered that review by the LCRO:[16]

> …could arguably result in an adjustment to Law Firm B's fees. The policy that the courts should not allow their proceedings to impinge on the procedures under the Lawyers and Conveyancers Act for investigating the amounts payable for lawyers' bills and the need to avoid a miscarriage of justice mean that the judgment of the District Court should not be relied on as finally establishing the amount of Mrs AP's liability under Law Firm B's bills.

[39] The debt recovery proceeding in this matter is in its very early stages. No judgment has been entered.

[40] The terms of Ms EF's engagement refer to the provision of "advice and legal services that properly fall within your instructions to us", and say that they apply "whenever you ask us to act for you unless they are varied by us in writing" and signed by partner of the firm.

[41] Ms EF says that Mr CD did not specifically instruct her to appear in the appeal to the High Court, and that she did so "on instructions from Ms GH QC".

[42] Ms GH has provided a "will say" statement containing her evidence in the debt recovery proceeding.

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[14] At [29].
[15] At [30]-[31].
[16] At [36].

[43] The Committee did not consider whether Ms EF's appearance in the High Court fell within the general scope of Mr CD's instructions to her, whether Ms GH's intervention made any difference to Mr CD's liability, or whether the quantum of Ms EF's fees in general were fair and reasonable for the purposes of rr 9 and 9.1.[17] Any decision on quantum necessarily follows consideration of liability and scope which does not appear to have occurred, and may require cross examination to determine. The private process of review between lawyer and client within the framework of the Act is not well suited to that task in this instance, given the QC's involvement which complicates the liability and scope issues.

[44] The Courts' preference for Committees to deal with complaints about the quantum of fees made promptly can be discerned from the decisions referred to above. However, although there is no hard and fast rule, in the present circumstances the Committee had good grounds for its decision to take no further action on the basis of s 138(1)(f). There is no good reason to depart from that decision, and good reasons to confirm it.

Decision

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

DATED this 24th day of September 2015

D Thresher
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 CD as the Applicant
Ms EF as the Respondent
Ms KL as the Representative for the Respondent
The [City] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice

[17] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.