LCRO 299/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee
BETWEEN	**RV** Applicant
AND	**AUCKLAND STANDARDS COMMITTEE** Respondent

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

Introduction

[1] In a determination dated 10 November 2011 Auckland Standards Committee determined to lay charges against RV with the Lawyers and Conveyancers Disciplinary Tribunal. RV has applied for a review of that determination.

Background

[2] RV acted for RX and RY and the CBF Trust ("the Trust") in three separate sets of proceedings.

1) The first set of proceedings (known as the "CBG proceedings") were issued by MBT and named RX and RY as plaintiffs. In the proceedings, they sought remedies against various parties in respect of their leaky home. After the ten year limitation period had expired, one of the defendants raised the defence that the wrong party had issued proceedings as the home was owned by the Trust. Following identification of this issue MBT were unable to continue acting for RX and RY due to the potential for a claim in negligence against

them and on 16 November 2005 RX and RY instructed RV to continue to act on their behalf in relation to their proceedings. In addition, they instructed RV to pursue remedies against MBT.

2) The second set of proceedings (known as the "CBH proceedings") was issued by RX and RY against MBT and HU who was the lawyer who had issued the proceedings. By this stage HU had left the employ of MBT. These proceedings sought to recover wasted expenditure incurred in the faulty CBG proceedings. These proceedings were issued as summary judgment proceedings.

3) The third set of proceedings (known as the "CBI proceedings") was a claim by the Trust against MBT and HU for the lost opportunity to recover leaky home compensation and associated costs and losses.

[3] A Judicial Settlement Conference was scheduled for the CBG proceedings on 22 November 2005. In the face of opposition from the defendants for any settlement based on the fact that the proceedings had not been brought by the registered proprietor of the property, the settlement conference was abandoned. The focus of those proceedings became how to extricate RX and RY at no cost.

[4] As no response had been received from MBT or HU's insurers to RV's allegations of negligence, an application to amend the statement of claim in the CBG proceedings was prepared alleging a duty of care to RX and RY. The purpose of this was to keep those proceedings extant pending a response. These proceedings were filed on 22 December 2005. In conjunction with that, RV sought an admission of liability from MBT and HU. However, the solicitor for the insurer took the view that an application to amend the plaintiffs in the CBG proceedings would be successful, and declined to acknowledge liability. Thereafter, and until the solicitor acting for the insurers was replaced, the insurer refused to accept liability and negotiate any settlement.

[5] Consequently, RV was obliged to continue with the various sets of proceedings. The application to replace the plaintiffs on the CBG proceedings was unsuccessful but ultimately RV was able to negotiate a discontinuance of these proceedings without costs or expenses being awarded against RX and RY.

[6] The CBH and CBI proceedings were then issued. MBT filed a statement of defence and joined RV's firm as a third party. An application to set aside those third

party notices was opposed and the insurers continued to refuse to accept that there had been any negligence on the part of MBT. This position adopted by the insurer added greatly to the costs involved in each set of proceedings.

[7] Ultimately, the CBH and CBI proceedings were settled for $630,000, whilst an additional sum of $25,000 had been recovered from HU.

[8] During the time when he acted for RX and RY and the Trust, RV rendered regular accounts. At the conclusion of the proceedings in November 2008, RV had rendered accounts totalling $1,039,851.71, while the total cost including counsel and mediation fees came to $1,084,333.39.[1]

[9] In addition to this cost, RX and RY had also incurred the cost of remediating their leaky home, which had been originally estimated at $250,000 in the CBG proceedings.

[10] RX and RY were dismayed and lodged a complaint with the New Zealand Law Society Complaints Service.

The Complaints

[11] On 23 November 2009 RX and RY wrote to the New Zealand Law Society Complaints Service to complain about RV's costs and related conduct. They did not complain about the quality of RV's work, but about the level of costs, the lack of advice in relation to the costs to which they were exposed, and the cost/benefit of the litigation.

[12] The complaint about fees was straightforward. They had incurred legal costs in excess of $1m to recover $655,000. As noted in their complaint they were "astounded and appalled that [they] could be $400,000 worse off having brought the claims and "won" than if they had not brought the claims at all".

[13] Their complaints with regard to RV's conduct were summarised in his substantive response to the Complaints Service dated 10 March 2010.

1) That they were not kept informed of (a) the likely overall level of fees; and (b) what could possibly have been recovered compared to the costs incurred.

2) That they did not receive any written advice as to (a) how costs were calculated; and (b) the cost effectiveness of each stage of the proceedings.

[1] The figures referred to by the costs assessors were $1,031,224.90 for RV's fees and disbursements and $1,081,454.70 including counsel and mediation fees.

3) That they had concerns about (a) not being kept informed of the fees; (b) the likely ongoing fees; (c) the cost/benefit comparison of fees compared to likely recovery; (d) the lack of advice to enable them to assess whether to continue with the proceedings.

The costs assessors' report

[14] The Standards Committee appointed costs assessors. Their instructions were to:

1) Review RV's files and costing records;

2) Request such further information from the complainants or the lawyer as may be necessary for the purpose of their assessment;

3) Contact the complainants and the lawyer to discuss the complaint and the lawyer's response to it; and if they considered it necessary or appropriate to do so, meet with the parties, either jointly or separately;

4) Prepare a report for the Standards Committee which was to include:

(a) comments on the fees and whether they considered them to be fair and reasonable for the services provided;

(b) if they formed the view that the fee was not fair and reasonable, they were to specify what they considered to be a fair and reasonable fee, or provide a range within which they considered the fees would be fair and reasonable; and

(c) to comment about any other matter arising out of their inquiry which might assist the Standards Committee to reach a properly informed decision about the costs complaint.

[15] The assessors reviewed all of the material and met with RX and RY and RV separately. They then held a lengthy informal meeting with both parties present at which statements were provided by each party. Each party was then provided an opportunity to ask and answer questions in the presence of each other. At the conclusion of this hearing RV was asked to provide further information. There were some delays in receiving this information which was described by the assessors as

"still being forwarded somewhat on a piecemeal and limited basis down to 29 April 2011 when copies of the Trust account printouts were provided."

[16] The assessors inspected RV's files and invoices and issued their report.

[17] In considering what a reasonable fee should be, the assessors had regard to judicial comment in *Property and Reversionary Investment Corporation Limited v Secretary of State for the Environment*[2] which was adopted in *Gallagher v Dobson.*[3] They also referred to *Chean v Kensington Swan.*[4]

[18] They described themselves as "experienced in handling leaky home and professional negligence cases both for plaintiffs and defendants" and as being "familiar with the work required of such cases and fees in Auckland".

[19] Having regard to all of the material and the cases referred to, the assessors came to the view that a reasonable fee for the CBG proceedings was no more than $112,000 (including GST and disbursements) and no more than $350,000 (inclusive of GST and disbursements) for the CBH and CBI proceedings combined.

[20] In general terms they were critical of the strategies adopted by RV and what they considered to be excessive attendances on his part.

[21] RV objected to the report being issued at that stage and in a letter dated 10 May 2011 to the Complaints Service he noted that receipt of the report "came as a complete surprise given that the review process agreed at the preliminary meeting of the parties on 15 December 2010 had not concluded." He noted that "it was agreed that following provision by CBJ of the information sought by the reviser, the parties would reconvene prior to any report or decision". He further noted that information requested of him remained outstanding and that questions asked of RX remained unanswered.

[22] In response, the costs assessors refuted the suggestion that the review process as suggested by RV had been agreed. They also made the following comment:-

> It should be noted that the essence of the revisors' decision, as recorded in it, has been by way of making an assessment "in the round" and having regard to issues, the amounts of the bills, the services rendered, the apparent time taken as recorded and the end result achieved. That is common when making an objective assessment of what is fair and reasonable.

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[2] [1975] 2 All ER 436.
[3] [1993] 3 NZLR 611.
[4] [2006] BCL 962.

The Standards Committee determination

[23] A Notice of Hearing was issued by the Standards Committee on 11 August 2011 and the parties were invited to file submissions.

[24] In their response dated 13 September 2011 RX and RY raised a new issue with regard to contact which RV had had with RX's brother-in-law (RZ) to seek funding for the proceedings without their knowledge or consent.

[25] SA of CBK, who had been instructed to act for RV, provided extensive submissions.

[26] The matter was considered by the Standards Committee at a meeting on 13 October 2011 and a further Notice of Hearing was sent to the parties. This notice included reference to the contact with RZ.

[27] RX and RY were somewhat puzzled as to why this second Notice of Hearing had been issued, but responded with further comments on 26 October 2011, and included a letter dated 30 August 2011 provided by RZ.

[28] Further submissions were provided by SA together with a supplementary statement by RV in which the letter from RZ was addressed.

[29] The Standards Committee issued its decision on 10 November 2011. It recorded its deliberations in the following way:-

> [18] The Committee found the alleged conduct to be of a serious nature for various reasons and was concerned at [RV's] practice of litigation and strategies pursued. In the various matters.
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> [19] The Committee was concerned at the charging policy of [RV]. In light of the costs assessors' report, prepared by two litigators experienced in the specialist fields concerned, the Committee was seriously concerned at the level of [RV's] costs.
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> [20] The Committee also considered [RV's] liaison with and reporting to [RX and RY] could be seen as inadequate in view of his obligations, the importance to the clients of the litigation and the amount of time he was spending on the various matters.
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> [21] The Committee was particularly concerned at the letter from [RZ] dated 30 August 2010, which was submitted by [RX and RY] with their submissions on 26 October 2011. The Committee considered that [RV's] meeting with [RZ], and the subject matter of those discussions as recounted by [RZ], warranted serious concern. Each aspect of the complaint, if found to be proven, was capable of reaching a threshold of misconduct, a finding that only the Disciplinary Tribunal can make. If this view of the Committee was wrong it

considered that the issues were closely interwoven and together, if found to be proven, were capable of reaching a threshold of misconduct.

[22] For the above reasons, the Committee considered that the conduct of [RV] and the costs charged to [RX and RY] and the Trust were sufficiently serious to justify charges being laid and the matter being considered by the Lawyers and Conveyancers Disciplinary Tribunal.

Outcome

[23] The Committee determined that the matter be considered by the Lawyers and Conveyancers Disciplinary Tribunal pursuant to s152(2)(a) LCAct.

The Review

[30] RV applied for a review of the Standards Committee determination and with his application included reasons for the review. These have been superceded to some extent by the submissions filed by the parties during the course of the review and I will refer to those grounds subsequently.

[31] The Standards Committee elected to participate in the review and was represented by MV and MU. A review hearing took place on 17 April 2012.

[32] In his submissions, SA raised issues as to the information considered by the costs assessors in completing their report. In particular, he submitted that they did not appear to have seen the detailed time recording information contained in two Esselte folders and had spent only approximately two hours reviewing RV's files. He submitted that this was inadequate to properly form a view as to what constituted a fair and reasonable fee for the work carried out by RV. He submitted that if the costs assessors had seen this information then they could not reasonably have come to the conclusions they did in their reports. He also noted that the determination of the Standards Committee did not identify what the Committee considered to be the "special circumstances" in terms of regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 ("reg 29").

[33] MV argued that the time recording information was largely irrelevant to the task undertaken by the costs assessors.

[34] I considered that it was relevant to the review to have a response from the assessors to the matters raised by SA, and it was agreed that the hearing would be adjourned to enable this to occur.

[35] On 25 May 2012 MV provided a memorandum together with a supplementary report from the costs assessors. In his memorandum, MV advised that it was proposed to refer the supplementary report to the Standards Committee to make a further determination.

[36] On 28 June 2012 the Standards Committee made a further determination that the alleged conduct was of a serious nature for various reasons and also expressed its concern at RV's charging policy. It largely repeated the determination of 10 November 2011, but also recorded what it considered constituted the special circumstances that would justify the Committee dealing with the complaint about costs rendered more than two years prior to the date of the complaint, as required by reg 29.

[37] The form of the response from the Standards Committee was somewhat unexpected in that it took the form of a new determination. However, all parties agreed that the second determination was to be treated as part of the first determination and there was therefore no requirement to file a fresh application for review. Inasmuch as it is necessary to do so, I confirm that procedure under the authority vested in me to regulate procedure as I see fit pursuant to section 206(5) of the Lawyers and Conveyancers Act 2006 ("LC Act").

[38] On 25 July 2012 CBK New Zealand confirmed that the firm had instructions to continue the review. As required, SA filed a memorandum on 8 August 2012 in which he confirmed that the grounds of review remained as set out in the applicant's submissions dated 10 April 2012.

[39] MV filed a further memorandum in which he submitted that SA's memorandum of 8 August 2012 was not what was contemplated, helpful or informative. He noted that the purpose of the memorandum required from SA was to identify which matters remained outstanding for determination at the resumed review hearing.

[40] A further memorandum dated 10 September 2012 was provided by SA in which he submitted that, notwithstanding the supplementary report by the costs assessors and the further determination by the Standards Committee, the grounds of review remained as set out in his submissions of 10 April 2012.

[41] Both parties then filed further submissions in readiness for the resumed hearing which took place on 28 September.

[42] SA succinctly identified the review issues in paragraph 2 of his submissions of 20 September 2012. The issues are:-

1) Does the LCRO have jurisdiction to conduct a review of a Standards Committee determination to lay charges?

2) Did the Standards Committee have jurisdiction to consider the complaints? This requires a consideration of both section 351(1) LC Act and reg 29.

3) The costs assessors' reports contained manifest flaws such that the Committee's reliance on them constituted irrelevant considerations and/or rendered the Standards Committee's determinations unreasonable.

4) The Standards Committee had exceeded its jurisdiction in determining to lay charges against RV before the Lawyers and Conveyancers Disciplinary Tribunal (LCDT) by reason of the fact that there was not a real risk that RV could be suspended or struck off the Roll of Barristers and Solicitors.

5) The Standards Committee had erred by not providing adequate reasons for its determinations.

6) The Standards Committee had erred by failing to acknowledge that RX and RY were estopped from bringing their complaints.

Is a determination to lay charges before the LCDT reviewable?

[43] Although MV argued at the first hearing that a determination to lay charges was not reviewable by this Office at all, he conceded that for the purposes of this review (but not by way of conceding any precedent) he accepted that this Office did have jurisdiction to review the determination by the Standards Committee to lay charges. There was consequently no need to consider the underlying issue as to the reviewability of a decision to lay charges although the decision in *Orlov v New Zealand Law Society*[5] would seem to put that beyond doubt. However, the approach to be taken when undertaking a review of a decision to prosecute does require some consideration, particularly in view of comments made by his Honour in the *Orlov* decision.

[44] In previous decisions, LCROs have adopted a cautious approach to any interference with a determination to lay charges (see for example *Poole v Yorkshire*[6],

[5] [2012] NZHC 2154.
[6] LCRO 133/2009.

Rugby v Auckland Standards Committee,[7] and *CN v Auckland Standards Committee 1*[8]).

[45] In *Poole v Yorkshire* the LCRO noted at [21] that "it must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review". The LCRO then identified four situations in which a decision to prosecute may be revisited. These situations were identified in *Kumar v Immigration Department*[9] and in *Polynesian Spa Limited v Osborne.*[10]

[46] In *Poole v Yorkshire*[11] the LCRO noted that:

> The cases cited indicate the kinds of basis upon which a decision to prosecute might be revisited. They include situations in which the decision to prosecute was:
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> (a) significantly influenced by irrelevant considerations;
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> (b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);
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> (c) exercised in a discriminatory manner;
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> (d) exercised capriciously in bad faith or with malice.

[47] In *Orlov,* his Honour made the following observations:-

> [61] In my view, at the time the Standards Committee determined to refer complaints to the Tribunal they were acting judicially, not as prosecutors, because:
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> (a) A determination made under section 152(2)(a) of the [LC Act] is one reached after considering relevant evidence, written submissions and hearing from the parties. That is, quintessentially, a judicial function.
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> (b) Only after that determination is made does the Standards Committee metamorphose into a prosecutor. Under section 154(1)(a), it is then required to "frame an appropriate charge and lay it before" the Tribunal.
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> [62] In those circumstances, a decision to refer a complaint to the Tribunal is reviewable in the same way and on the same grounds as any other decision made by any court or tribunal that is susceptible to this Court's supervisory jurisdiction.

[48] By coming to the view that a Standards Committee is acting judicially and not as prosecutors when considering whether to lay charges or not, Heath J would appear to be removing any constraints that this Office has imposed on itself when considering an

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[7] LCRO 67/2010.
[8] LCRO 106/2010.
[9] [1978] 2 NZLR 553
[10] [2005] NZAR 408.
[11] At [21].

application for review of a determination to lay charges. However, I also note the statement of Winkelmann J in *Deliu v Hong*[12] where she said at [31]:

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

This would appear to be an endorsement of the more restricted approach followed by this Office to date.

[49] To that extent therefore, the cautious approach adopted by this Office when reviewing a determination to lay charges remains relevant, and I intend to follow that approach in this review.

Section 351(1) LC Act

[50] Section 351(1) of the LC Act provides as follows:-

> If a lawyer …is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners' Act 1982, a complaint about that conduct may be made … to the Complaints Service established under section 121(1) by the New Zealand Law Society.

[51] SA refers to a decision of the Lawyers and Conveyancers Disciplinary Tribunal *Waikato Bay of Plenty Standards Committee No.2 v B.*[13] In that decision, the Tribunal took the view that proceedings are considered to have been "commenced" for the purposes of section 351(1) when charges are laid. SA referred to [64] of the decision where the Tribunal stated "the enquiry has to involve more than the simple proposition that proceedings of a disciplinary nature 'could' have been commenced, in that it would have been possible to commence them, irrespective of whether well-founded or not. The policy and purpose of the provision must be to ensure that a person does not face proceedings under the Lawyers and Conveyancers Act for conduct which would not have resulted in proceedings being commenced under the Law Practitioners Act. It is not a matter of finally determining the charge in coming to this view, but considering

[12] [2012] NZHC 158.
[13] [2010] NZLCDT 14 (6 July 2010) (referred to in submissions as "*Waikato Bay of Plenty Standards Committee No. 2 v XXX*") .

whether conduct occurring at a time when the Law Practitioners Act was in force could properly have been the subject of a charge under that Act".

[52] MV argues that section 351(1) does not involve a question of whether a Standards Committee has "jurisdiction" to consider a complaint or not, but rather, that it addresses the basis on which a complaint may be made and the procedure for dealing with that complaint, rather than an "all embracing jurisdictional provision".

[53] In strict terms it may not be correct to consider that section 351(1) involves a question as to jurisdiction or not, but its effect as described by the Tribunal is the same – namely, if the complaint is such that proceedings could not have properly been commenced under the Law Practitioners Act, then the Complaints Service cannot accept or consider the complaint.

[54] In determining the question as to whether or not proceedings could have been commenced, it is not necessary to finally determine that proceedings would have been commenced under the Law Practitioners Act before a complaint may be accepted. The question is whether proceedings could have been commenced in the sense as articulated by the Tribunal.

[55] Whether proceedings could have been commenced under the Law Practitioners Act or not, generally involves a consideration of whether or not the conduct was capable (if proven) of constituting misconduct or conduct unbecoming. What constitutes misconduct under the Law Practitioners Act 1982 has been well established by case law and the key principles have been carried forward into the statutory definition of misconduct in the LC Act. Section 7 of that Act defines misconduct as being conduct "that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable"[14] as well as conduct that consists "of the charging of grossly excessive costs for legal work carried out by the lawyer."[15]

[56] In *Pillai v Messiter (No 2)*[16] Kirby P noted that misconduct "includes a deliberate departure from accepted standards ... as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner." [17]

[14] Section 7(1)(a)(i) Lawyers and Conveyancers Act 2006.
[15] Section 7(1)(a)(iv) Lawyers and Conveyancers Act 2006.
[16] (1989) 16 NSWLR 197.
[17] At 200.

[57] Conduct unbecoming is not defined in the LC Act, but in *B v Medical Council*[18] Elias J noted that "conduct unbecoming ....must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purpose of protecting the public."

[58] In considering this issue, I have also had regard to the purposes of the LC Act as defined in section 3. These 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.

[59] The conduct complaints (other than the complaint concerning RZ) are inextricably linked to the complaint about costs. They allege a lack of information and/or advice relating to the costs being incurred. RX and RY allege that the conduct is responsible for the situation they have ended up in. It could be considered to indicate an indifference and an abuse by RV of his position as a lawyer. It could also be considered to be a departure from acceptable professional standards. That is all that is necessary to require that the complaints be accepted by the Complaints Service.

[60] RV's approach to RZ took place on 3 December 2008. It does not therefore have to meet the section 351(1) test, but given the view that I have reached subsequently the result would be that it met this test in any event.

The bills of costs

[61] In respect of the bills of costs the test that has been applied by this Office is whether or not the bills of costs could be considered to be either grossly excessive, or involve dishonesty.[19] In *Z and Za v D*[20] the LCRO considered a number of cases in which it was found that fees rendered were grossly excessive. In these cases fees which were 4 or 5 times what could be considered to be a fair and reasonable fee were considered to be grossly excessive.

[62] In this instance, the costs assessors have assessed that a fair and reasonable fee would have been $420,000. The fees charged by RV amounted to 2 ½ times the fees assessed by the assessors.

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[18] [2005] 3 NZLR 810.
[19] See for example *J v A,* LCRO 31/2009 .
[20] LCRO 04/2008.

[63] SA submits therefore that RV's bills cannot be considered to be grossly excessive, and applying section 351(1) of the LC Act, the complaint should not have been accepted for consideration by the Complaints Service.

[64] This was the principle adopted by me in *Body Corporate AV v ZC Solicitor*[21] where at [69] I stated that "[o]n this basis, it cannot be considered that the fees charged are grossly excessive. Without such a finding, the Standards Committee and the LCRO lack jurisdiction to consider the complaint in respect of bills of costs." The "finding" of course, was the possibility that the fees could be considered to be grossly excessive, not a finding that they were grossly excessive, for that is a matter to be proven before the Tribunal.

[65] The reference to the Australian cases in *Z and Za v D* by the LCRO provides a useful benchmark against which to establish whether the fees could be considered to be grossly excessive. However, that is not necessarily the only matter to be considered, as the LCRO himself noted in [29] of that decision:-

> It can be seen from these examples that for a fee to be grossly excessive it must cross a threshold of egregiousness. I do not consider that for fees to be grossly excessive they necessarily must be many times the amount which would have been reasonable (which seems to be a feature of the Australian cases).

[66] The egregious factors that exists in this case are not only the level of fees charged per se but the fact that there seems to have been no regard at all to the bigger picture as to how much RX and RY were likely to recover, and their overall circumstances. Whilst the actions of the MBT insurers clearly contributed to the escalation of costs, that is a factor which needed to be taken into account when making decisions as to the overall carriage of the case.

[67] There are also question marks over the nature of the proceedings issued (i.e. summary judgement as opposed to ordinary proceedings) as well as expressed views by the costs assessors that RV carried out work that was unnecessary[22]. The costs assessors also make reference to internal opinions[23] and were "forced to the overwhelming conclusion that not only do many of the hours recorded on some of the invoices appear excessive, they do not easily reconcile[24].

[68] Finally, the fact that the fees rendered were 2 ½ times what the costs assessors considered represented a fair and reasonable fee should not be discounted. If that

[21] LCRO 157/2010.
[22] At 102.
[23] At 12 supplementary report.
[24] At 82.

view is accepted, that constitutes significant overcharging. Taking all these factors into account I consider that the complaint concerning fees is such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act, and consequently the requirements of section 351(1) have been fulfilled.

Regulation 29

[69] Reg 29 provides as follows:

> 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 two years prior to the date of the complaint;
>
> (b) relates to a fee that does not exceed $2,000 exclusive of GST.

[70] RV rendered 59 bills of costs between 30 November 2005 and 30 November 2008. The complaint was lodged on 23 November 2009. Consequently reg 29 would exclude a consideration of the bills costs rendered prior to 23 November 2007 unless special circumstances were considered to exist which would justify otherwise.

[71] The leading authority on what constitutes "special circumstances" is the case of *Cortez Investments v Olphert and Collins*[25]. That case involved an application to the Court under section 151 of the Law Practitioners Act 1982 for an order that a bill of costs be referred for revision in circumstances where the bill had already been subject to revision. In those circumstances, section 151(b) of the LP Act provided that:

> The Court shall not make an order for the reference of a bill for revision *except in special circumstances* (emphasis added).

SA referred to comments by Woodhouse P where he opined that the test of "special circumstances would be met where aspects of the facts seemed to indicate a problem which had relatively unusual features while reasonably deserving at the same time relief of the kind provided by the provision".[26]

[72] At page 439 Richardson J noted that:

> The interests of justice must govern and in terms of section 151(1)(b) that requires allowing the reopening of the bill where there is a special circumstance present requiring that course.

[25] [1994] 2 NZLR 434(CA).
[26] At 437.

> It is obvious enough that circumstances cannot be regarded as special unless they bear on the obtaining of an order for reference of a bill for an actual bona fide revision by the District Council.

[73] In *Nicoll v Roche*[27] the special circumstances argued were delay in bringing the complaint and the level of fees rendered, both factors which are present in this review.

[74] In allowing the appeal in that case (and therefore declining the right to have the bills revised) her Honour took note of the fact that there was no adequate explanation for the delay in making application to the Court. The delay was substantial, being some fourteen months after the issue of the bills of costs.

[75] In paragraph 23 of her decision she noted that:

> Turning to the other ground, the level of fees rendered, it is clear that the Judge has proceeded on the basis of an impressionistic and global analysis of the level of charging in all of the bills of costs. …There is no analysis by the Judge of the merits of the challenge to those fees, and I have not been referred to anything which suggests that the fees were excessive, or in any way unjustified.

[76] In the present case I have not noted any specific reasons provided for the delay in lodging the complaint. MV has referred to RX's state of health, but there is no direct evidence concerning that. It may be that evidence will be produced before the Tribunal in support of or against the issue of delay constituting a special circumstance, but it is not a factor on which I rely for coming to the view that the complaint should be accepted.

[77] Similarly, I have taken note of the comments made by Winkelmann J as referred to in *Nicoll* above, and am not influenced by the level of charging per se when coming to the view that there are special circumstances which dictate that the complaint should be considered.

[78] MV relies on the statements of their Honours in *Cortez.* He refers to comments made by all three members of the Court:-

> Woodhouse P:
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> In no way would it be wise to lay down principles or embark on definitions which could only fetter the discretion of the Court but simply as one way of looking at the test of special circumstances in the present statutory context I think it would be met where aspects of the facts seem to indicate a problem which had relatively unusual features while reasonably deserving at the same time relief of the kind provided by the provision.[28]
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> Richardson J:

[27] CIV 2004-404-6552 (26 May 2005).
[28] At 437.

> With respect to the Judge I am satisfied that the serious risk of prejudice yardstick puts the statutory test too high. In its context in this legislation, which is directed to the assessment of the fairness and reasonableness of bills of costs in the public interest, the expression "special circumstances" should not be construed narrowly and it would be contrary to the social policies underlying these statutory provisions to impose on an applicant the burden of establishing a serious risk of injustice. Rather, it is a question of where the interests of justice lie in all the circumstances.[29]
>
> McMullin J:
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> What are "special circumstances" must be considered against the statutory background in which they are used. ... All that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary[30].

[79] MV also refers to the purposes of the Act as expressed in section 3 (refer paragraph [58]) and argues that all of the circumstances identified by the Standards Committee dictate that it was right to accept the complaints about the bills of costs.

[80] In its original determination, there was no indication that the Standards Committee had considered the restrictions imposed on it by reg 29. Although there is no requirement to give reasons for a determination to lay charges before the LCDT, I consider that it was incumbent on the Standards Committee to make it clear that it had considered the jurisdictional issue and made a conscious decision as to the reasons why it determined to accept the complaint about the bills of costs. This would necessarily involve an identification of the reasons for doing so.

[81] In its supplementary determination the Standards Committee provided five reasons which it considered constituted sufficient special circumstances to enable the bills of costs to be considered. These were as follows:-

> (a) The fact that the complainants, including the primary complainant, [RX], explained that their health and personal financial circumstances were such that [RX] was likely unable or unwilling to complain sooner;
>
> (b) That the level of overcharging was of such a degree or magnitude that it was appropriate in all the circumstances to consider the complaint;
>
> (c) That the impact on the complainants has been such that it would be contrary to justice for them not to be able to pursue a complaint over costs rendered more than 2 years prior to the date of the complaint;
>
> (d) The complaint and reports considered by the costs assessors suggested possible serious issues arising with respect to [RV's] billing practices and his reporting procedures, together with the adequacy of his advice to the complainants, who may not have appreciated at the time the significance of these matters;

[29] At 439.
[30] At 441.

> (e) The letter from [RZ] (who provided partial funding) which raised serious issues concerning [RV's] approach to funding and his dealings with [RZ].

[82] There is no evidence to support some of these reasons and without inquiring specifically into them, it is not possible to form a view one way or the other. I refer specifically to the reasons relating to health and the circumstances in which the approach to RZ became known. In addition the reason identified in paragraph (d) is somewhat circular in that it refers to the potential outcome of the complaint, and the reason provided in paragraph (b) relating to the level of overcharging resonates with the reason rejected by Winkelmann J in *Nicoll v Roche*.

[83] However, I take note of the comments made in *Cortez* that refer to the overall justice of the matter as identified in the extracts from the judgment quoted in paragraph [75] above. I also take note of Winkelmann J's comment in *Nicoll v Roche* as follows*:*

> In making a finding of special circumstances it is proper for the Court to have regard to the totality of the matters said to constitute special circumstances, as the Judge did. Therefore, although one matter on its own may not constitute a special circumstance, it may do so in combination with another. Further, the merits of the challenged bill of costs is plainly a matter that can be taken into account when assessing whether special circumstances exist.[31]

[84] I also take note of the purposes of the LC Act as referred to in paragraph [58] above. The most compelling reason advanced by the Standards Committee is the impact on RX and RY that the billing has had, and the overall result whereby the bills rendered are in excess of $1m and they have recovered only $655,000. They have also been obliged to fund the cost of repairing their home. They have been forced to sell their home and their business and live in rented accommodation. In addition, whilst no specific evidence has been provided to me, MV has advised that RX is in extremely poor health and which has no doubt been exacerbated by the events which have unfolded.

[85] Overall, I consider that it would not be fulfilling the objectives of the Act to deny RX and RY the opportunity to have the bills of costs considered by the Standards Committee. They are an integral part of the general conduct complaints against RV.

[86] In addition to the special circumstances referred to by the Standards Committee, I take note of the fact that it was not until the proceedings were settled and the final bill rendered that the end result was known to RX and RY. It would be illogical to exclude from consideration the bills rendered prior to 23 November 2007 when considering the complaints. The complaints arise out of dissatisfaction with the total costs incurred

[31] At [20].

when compared to the amount recovered. In these circumstances this Office has recognised that all bills of costs should be aggregated when they all relate to the same matter[32] and this in itself constitutes a "special circumstance" such as to justify a consideration of all the bills of costs.

[87] I therefore confirm the determination of the Standards Committee that there are sufficient special circumstances which exist in this case to warrant a consideration of the complaint concerning all of the bills of costs.

The costs assessors' reports

[88] SA submits that the reports by the costs assessors contain manifest flaws such that the Committee's reliance on them constituted an irrelevant consideration and/or rendered the Committee's determination unreasonable. This is of course one of the grounds identified in *Poole v Yorkshire* for reversing a determination to lay charges. He went at some length into a consideration of the assessors' review of the time records and comments made by them that excessive time had been spent on preparation and research. He also notes that no comments were made by the assessors on the remaining recorded time which he notes exceeds the fair and reasonable fee assessed by them.

[89] This approach by SA is itself flawed. The costs assessors are not tasked with a minute examination of the time records and to determine whether each attendance was justified or should be adjusted. Their role is not to act as costs revisers.

[90] The task of the costs assessors is to "[r]eview the lawyer's files and costing records" and to prepare a report which should include "comments on the fee itself and whether [they] consider it is a fair and reasonable fee", and if not to "specify what [they] consider to be a fair and reasonable fee"[33].

[91] The costs assessors have completed their task in accordance with these instructions. As noted previously, the assessors are lawyers experienced in the type of work undertaken by RV. They have formed a view as to what a fair and reasonable fee would have been and that is what they were required to do.

[92] The Standards Committee took the views of the costs assessors into account when determining to lay charges. However, that is not the sole matter that was taken

[32] See *JW v QE,* LCRO 192/2011.
[33] Letter of appointment Lawyers Complaints Service to assessors dated 15 July 2010.

into account when making that determination. The Standards Committee includes lawyers who are experienced in litigation as well, and would have been able to bring independent minds to bear when considering the issues presented in this matter.

[93] I consider that the evidence of the costs assessors will be better able to be properly tested before the Tribunal. In addition, RV will have the opportunity of providing both his own evidence and any expert evidence which he may wish to bring to the Tribunal for a full and detailed consideration of what would constitute a fair and reasonable fee in these circumstances.

[94] For these reasons, I do not consider that the submissions made by SA are sufficient to reverse the determination of the Committee.

Is there a real risk that RV may be suspended or struck off?

[95] The Standards Committee determined to lay charges against RV in respect of both his billing practices and other conduct. In this regard, the judgment of Heath J in *Orlov v NZLS* establishes two important principles:-

1. All matters complained of need to be considered on a case by case basis[34].

2. Each matter complained of must reach the threshold test enunciated.

[96] In *CN v Auckland Standards Committee 1*[35] the LCRO identified the need for Standards Committees to address each aspect of a complaint, and come to a separate determination in respect of each matter. Heath J has reinforced and added to this approach by holding that each aspect of a complaint must be capable of reaching a level of egregiousness before it is put before the Tribunal unless it is to form part of a charge based on repeated negligence or incompetence. Otherwise, the matter should be separated out from those matters which are to be the subject of charges before the Tribunal and dealt with by the Standards Committee.

[97] At [79] his Honour came to the view that "a significant threshold must be crossed before a Standards Committee can refer charges to [the Tribunal.]" In paragraph [80] he stated:-

> The test under the 1982 Act was whether "the case [was] of sufficient gravity to warrant its referral" to the NZ Tribunal. It is difficult to see why a similar test should not apply. In my view, a test that considers whether there is a real risk that a

[34] At 103 to 105.
[35] LCRO 106/2010.

> practitioner might be suspended or struck off is consistent with the statutory language.

[98] There may of course be circumstances which dictate that a matter should be considered by the Tribunal for other reasons, such as where conflicts of evidence are required to be resolved in the formal environment of the Tribunal. Nevertheless, the general principles required to be followed are as set out in *Orlov*.

[99] The Committee determined that all aspects of the complaint should be put before the Tribunal. It identified these as being: -

1. RV's practice of litigation and strategies pursued in the various matters.

2. RV's charging policy and the level of the charges.

3. Inadequate liaising with and reporting to the clients.

4. The meeting with RZ.

[100] In *Body Corporate AV v ZC Solicitor*[36] I noted that "[a] number of lesser misdemeanours do not aggregate to constitute a more serious offence" other than in circumstances where a charge of serial behaviour is laid. As the charges have not been framed and served on RV it must be assumed that it is the intention of the Committee to lay a separate charge in respect of each matter. In the light of the *Orlov* decision the Law Society will need to give some thought as to whether it should continue its practice of deferring framing of charges until any review is complete, as the issue of whether the charge is to be a separate charge or a charge of serial behaviour under section 241(c), or indeed a lesser charge of unsatisfactory conduct pursuant to section 241(e) will assume some significance.

[101] In the circumstances, SA rightly submits that each matter complained of must be capable of meeting the threshold test - namely that there is a real risk that the Practitioner may be suspended or struck off.

[102] Having reached the conclusion in respect of the considerations relating to section 351 that RV's bills of costs were such that they could be considered to be grossly excessive, it follows that there could be a finding of misconduct against RV, which could result in suspension or strike off. In respect of the bills of costs therefore the requirements of the threshold test are met.

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[36] LCRO 157/2010 at [100].

[103] As noted in paragraphs [14] to [22] above, the costs assessors do raise some serious issues with regard to the strategies pursued by RV. This aspect of the determination is inextricably linked with the issue of costs. Again, without the benefit of the charges, I am forced to second guess at the possible charges and particulars in support. It is possible that the charges will reflect a view that the strategies were designed to increase costs, or if not intentionally designed to do so, unnecessarily did so and that RV should have been aware of this.

[104] Because of the inextricable link with the costs themselves, I consider that this is a matter which should be put before the Tribunal. In this regard, I note that there are circumstances where, although strike off or suspension may not be a real risk in respect of an aspect of a complaint, a matter is still best put before the Tribunal for consideration. This could be one of those matters. In addition to strike off and suspension, the Tribunal does of course have the option of making any order which is open to the Standards Committee itself to make.[37]

[105] The issue of inadequately liaising with the client may not of itself be a charge which places RV at risk of strike off or suspension. However, the consequences of the alleged shortcomings are starkly evident, and it cannot be considered for a moment that RX and RY would have consciously pursued a path that has led them to their present circumstances. This leads one to the conclusion that the reporting and information provided to RX and RY was indeed inadequate, unless of course it is shown that RX and RY had all of the necessary information to enable them to make an informed decision but for some reason or other still chose the path adopted.

[106] Again, this is a matter which is linked to the level of costs, and to separate this aspect of the conduct out would result in this aspect of the complaint being considered out of context and without reference to the issue with regard to costs.

[107] The final matter relates to the approach made to RZ. If the facts as recounted by RZ are proven, such an approach (seeking litigation funding without the knowledge or consent of RX and RY) constitutes a serious breach of the duty of confidentiality owed to them. I consider that this matter does meet the threshold test in itself.

Lack of reasons

[108] SA submits that the Committee erred in law by failing to provide adequate reasons for its determinations.

[37] Section 242(1) LC Act.

[109] While section 158 of the LC Act provides that reasons for a determination pursuant to section 152(2)(b) or (c) must be provided, there is no specific requirement to provide reasons if the Committee determines pursuant to section 152(2)(a) to lay charges before the Tribunal. In general terms, while it has been accepted that reasons are required to be given by judicial and quasi-judicial bodies, in the case of determination by a Standards Committee to lay charges, it is sufficient if those reasons are brief, and express the Committee's views as to the gravity of the complaints.

[110] That position has been reinforced by Heath J in O*rlov.* At [82] of his decision, his Honour stated:-

> I have not overlooked the fact that the 2006 Act does not require reasons to be given for deciding to refer a complaint to the Tribunal. Equally, however, it does not prohibit that course. Where reasons are not given, it is open to a Court, on judicial review, to consider the nature of the conduct, the form of any charge drafted and the bases for it, to determine whether the Standards Committee has exceeded its jurisdiction. **So far as reasons are concerned, it is my view that it is sufficient for the Committee considering the charge to find that the conduct was "sufficiently serious to warrant reference to the Tribunal," on the basis of the test I have adopted** (emphasis added).

[111] In its determinations, the Standards Committee has made numerous references to what it considered to be the seriousness of the complaints by RX and RY. In the first determination I have noted the following comments:-

- [18] The Committee found the alleged conduct to be of a serious nature...and was concerned....
- [19] The Committee was concerned at the charging policy... the Committee was seriously concerned at the level of [RV's] costs.
- [21] The Committee was particularly concerned at the letter ... the subject matter of those discussions as recounted by [RZ], warranted serious concern.
- [22] ... the conduct of [RV] and the costs... .were sufficiently serious....

Those comments were repeated and confirmed in the second determination.

[112] There can be no doubt that when reading the determinations the Committee considered there were serious matters to be considered by the Committee. These comments constitute sufficient reasons in terms of O*rlov* and previous LCRO decisions and consequently the submission by SA as to lack of reasons is not accepted.

Estoppel

[113] SA's final submission is that RX and RY are estopped from denying the reasonableness of the fees rendered, particularly those in respect of the CBG

proceedings, as they had had approved and accepted the fees and claimed them as damages against MBT.

[114] No evidence as to approval and acceptance has been provided, other than the fact that the bills had been paid. Payment of a bill is no bar under the LC Act to lodging a complaint about those fees. There is also something of a gap in SA's logic here as acceptance, or even payment, of a bill of costs does not automatically render the fees fair and reasonable. That is something to be determined by objective assessment, and in this case the costs assessors have formed the view that they are not fair and reasonable.

[115] I also accept MV's submission that proof of acceptance by RX and RY that the fees were fair and reasonable is a matter of evidence to be produced and subjected to scrutiny in a manner which is not provided for by either the Standards Committee or the review hearing.

[116] For these reasons I do not consider this to constitute a valid reason for reversing the determination of the Standards Committee.

Summary

[117] The parties have provided a significant volume of material and submissions. Nothing has been identified such as would lead to a reversal of the decision to prosecute in accordance with the principles identified in *Poole v Yorkshire* and even adopting a less restricted approach as suggested in *Orlov* I do not consider that the determinations of the Standards Committee should be changed.

[118] Overall I am satisfied that all of the issues identified by the Standards Committee in its two determinations are such that should be put before the Tribunal.

Decision

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

Costs

[120] It is usual when a determination of the Standards Committee is confirmed on review, for costs to be ordered against the Applicant.

[121] The Standards Committee has participated fully in this review hearing and the issues raised are matters of general principle and importance. Because of this I consider that RV was right to pursue this application for review.

[122] In the circumstances, costs will lie where they fall.

DATED this 18th day of October 2012

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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:

RV as the Applicant
SA as Representative of the Applicant
Auckland Standards Committee as the Respondent
MV as Representative of the Respondent
The New Zealand Law Society