

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

MS AO

Applicant

AND

MR ZH

Respondent

DECISION ON COMPLAINT RELATING TO BILLS OF COSTS

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

Introduction

[1] On 20 August 2013 I issued a decision in which I adjourned AO's complaint about the quantum of ZH's bills of costs pending determination of liability by the Court. In addition, I invited the parties to provide submissions in respect of a complaint by AO with regard to an alleged failure by ZH to advise her that gifting into a Family Trust had not been completed.

[2] In an email dated 4 December 2013, FF (for AO) advised that her complaint with regard to gifting was withdrawn.

[3] On 8 November 2013 Judge B A Gibson issued a decision in which AO was found to be liable for ZH's outstanding bills of costs.¹ ZH has now requested that I complete my decision as to the complaint regarding quantum.

¹ CG v AO DC CIV 2010-004-000987 8 November 2013.

The complaint

[4] ZH rendered eight bills of costs for the work that he undertook on behalf of AO and her husband between 2004 and 2007. These totalled \$97,507.94.

[5] Mr and Mrs AO made payments totalling \$60,386.14 on account of the bills of costs which left a balance outstanding of \$37,121.80. ZH issued proceedings for the recovery of this amount in May 2010.

[6] In her complaint lodged on 4 August 2011, AO complained that she considered “the fees for the work undertaken to be excessive and inaccurate”. All of the detail relating to the complaint provided by her concerned alleged inaccuracy in ZH’s statements.

[7] In his covering letter to the Complaints Service, FF advised that AO had instructed him to advise that she wished to have the bills of costs “revised”.

Discussion

[8] In my August 2013 decision I noted that I suspected that FF and AO “proceeded on the basis that the procedure that was available under the Law Practitioners Act 1982 where bills of costs were subject to revisions by cost revisers, was still in operation”.² In his submissions filed in relation to this part of the review, FF has done nothing to cause me to think otherwise. He argues that all a complainant has to do is to raise a complaint about a lawyers fees, and that has the effect of shifting the burden of proving that the fees were fair and reasonable on to the lawyer.

[9] Complaints about fees are often made in an attempt to stall recovery by the lawyer which is what s 161(1) of the Lawyers and Conveyancers Act 2006 provides. It would be completely unfair to lawyers if there was no requirement for a complainant to provide some support for his or her complaint. I acknowledge that it is often difficult for a complainant to provide objective comment on what a fair and reasonable fee should be, and consequently it is not possible to be definitive as to what a complainant should produce to support a complaint about fees. Each case will have to be judged on its particular facts. However, in this instance, AO engaged FF to assist and advise her in connection with her complaint. FF has made no attempt to analyse what work ZH was instructed to do, what work was carried out, or to provide an opinion as to what he considered would be a fair and reasonable fee. That would have gone some way, if

not be adequate, to have the effect of shifting the onus then on to ZH to dispute that view, and to provide evidence or submissions to support his position.

[10] In my August decision³ I referred to the jurisdictional issues that AO was required to overcome to enable her complaint about fees to proceed, being:

- a complainant must show exceptional circumstances before a Standards Committee could consider a complaint about bills of costs rendered more than two years prior to the complaint; and
- a requirement that bills of costs must be considered to be grossly excessive before any disciplinary action could be taken with regard to the bills.

[11] FF submits that ZH was purposely delaying issuing proceedings for recovery of his fees so that AO would then come up against the timing issue. This is a submission which lacks logic. AO was able at any time to complain about ZH's bills of costs. She did not need to wait until he issued proceedings to recover his fees. It is somewhat ironic that FF is in effect criticising ZH for not issuing proceedings for recovery sooner.

[12] AO has also submitted that she delayed in complaining about ZH's costs because she was not aware that she could complain.

[13] Neither of these reasons are such as to amount to exceptional circumstances to invoke Regulation 29 of the Complaints Service and Standards Committees Regulations.⁴

[14] In his submissions, FF noted my reference in the August decision to J v A⁵ in which the LCRO stated that "in determining whether a fee is grossly excessive it is often helpful to determine first what a reasonable fee would be".⁶ I also noted that the Committee itself did not investigate the level of fees or make an independent assessment of what a reasonable fee would be.

[15] However, the Committee did not consider that ZH's fees were such that disciplinary proceedings could have been commenced under the Law Practitioners Act. The Committee comprises lawyers and lay people who would have considered countless complaints about fees and their expertise and opinion is not to be discounted.

² LCRO 301/2011 decision dated 20 August 2013 at [33].

³ Above n2 at [29] to [32].

⁴ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[16] What must also not be lost sight of is that the issue under consideration is whether or not the fees were so grossly excessive that disciplinary proceedings under the Law Practitioners Act could have been commenced. In *J v A* the LCRO went on to say:⁷

For a fee to be grossly excessive and therefore amount to misconduct it must bear no rational relationship with what would have been within the band of a fair and reasonable fee.

[17] He then went on to refer to Australian cases where the fees were many times what a fair and reasonable fee would have been and concluded:⁸

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).

[18] The decision of the Lawyers and Conveyancers Disciplinary Tribunal in *Auckland Standards Committee no 1 v Hart*⁹ is the first case of gross overcharging considered by the Tribunal since the Lawyers and Conveyancers Act came into force. In that case, Mr Hart charged a fee of \$35,000 for his services, for which the Tribunal accepted a fee of \$15,000 - \$16,000 would have been a fair and reasonable fee. Applying that decision to the present matter, it would have to be accepted that a fair and reasonable fee for ZH's services would be less than just over one half of the fee charged before there could be a finding that ZH's fees were grossly excessive.

[19] Judge Gibson noted in his judgment:¹⁰

There is nothing in the evidence before me as would have persuaded me to have exercised my discretion and referred the matter to the Law Society for revision under s 146 of the former Law Practitioners Act 1982 had that enactment still been in effect.

[20] Having considered the work and the nature of work carried out by ZH, it is difficult to accept that his fees were such as to cross the threshold required by s 351(1) of the

⁵ *J v A* LCRO 31/2009.

⁶ Above n5 at [23].

⁷ Above n5 at [24].

⁸ Above n5 at [25].

⁹ *Auckland Standards Committee no 1 v Hart* [2012] NZLCDT 20.

¹⁰ Above n1 at [31].

Lawyers and Conveyancers Act. For these reasons alone I do not consider that AO has overcome the jurisdictional issues which I have referred to.

Other considerations

[21] Even if I were undecided in my conclusions above, I have formed the view that AO's complaints are driven as much by the purpose of avoiding liability for ZH's costs as anything else and that it would be unreasonable for me now to delay matters further to either return the matter to the Standards Committee and/or seek an independent costs assessment.

[22] In this regard, I take into account the fact that the complaint about fees was not raised until August 2011, some four years after ZH's last bill had been rendered. I also take into account the following comments made by Judge Gibson:¹¹

There was little cross-examination of ZH on the fee notes rendered and no evidence was led by the defendant [AO] as might have challenged the quantum of fees in terms of the plaintiff's obligations to render fees that were fair and reasonable. They were rendered while the provisions of the Law Practitioners Act 1982 were in force and the defendant had the ability to seek a costs revision within six months of the costs being rendered by did not do so.

I note that the Judge found no merit in any of the defences raised by AO.

Decision

AO has not overcome the jurisdictional issues identified by me in my decision dated 20 August 2013. It follows therefore that pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

Note

Although Judge Gibson referred to entering judgment for the amounts certified by the Standards Committee as being due and owing, it is not clear to me that the Committee has issued a certificate pursuant to s 161(1) of the Lawyers and Conveyancers Act 2006. If ZH requires such a certificate to be provided, he can contact the Case Manager and request that a certificate be provided by this Office. That certificate will record the sum of the \$37,121.80 as being the amount due and payable to ZH.

¹¹ Above n1 at [31].

DATED this 12th day of March 2014.

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:

Ms AO as the Applicant
Mr FF as counsel for the Applicant
Mr ZH as the Respondent
Mr CG as a related person or entity
[A North Island] Standards Committee
The New Zealand Law Society
Secretary for Justice