LCRO 31 /2009

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Manawatu Standards Committee
BETWEEN	**CLIENT J** of Palmerston North
	Applicant
AND	**LAWYER A** of Palmerston North
	Respondent

DECISION

Background

[1] This is a review of a decision of the Manawatu Standards Committee in respect of a complaint by Client J against Lawyer A. The complaint concerns the amount charged by Lawyer A in respect of certain rural property work he undertook on Client J's behalf (or on behalf of entities he controlled). The bills in question were both dated 30 June 2008. The first was billed to company AAAA in the sum of $18 007.65. The second was billed to Partnership BBBB in the sum of $5 519.00.

[2] The Manawatu Standards Committee referred the matter to Mr X who it appointed as a costs assessor on 17 October 2008. Mr X formed a preliminary view which he expressed in a letter of 9 January. It appears that the preliminary report was provided to Lawyer A (on 16 January) through his counsel, but not to Client J. Subsequently Mr X met with Client J and a farm advisor on 20 January 2009. He also met with Lawyer A on 18 February 2008. He then provided a final report to the Committee on 24 February in which he recommended that both of the disputed bills be approved.

[3] On 27 February 2009 the Committee resolved to take no further action on the complaint on the basis that it had no jurisdiction to deal with the matter. It found that there was no indication of fees so unreasonable to justify the commencement of disciplinary proceedings and that the complaint did not disclose any other circumstance that would have justified disciplinary action against the lawyer.

[4] An application for review was made to this office on 13 March 2009. Accordingly, the only questions for this review is:

- whether it was appropriate for the Standards Committee to decline to consider the reasonableness of the amounts charged by Lawyer A on the basis that no jurisdiction to do so existed, and

- whether the Standards Committee was correct to conclude that there was no indication of fees so unreasonable to justify the commencement of disciplinary proceedings and that the complaint did not disclose any other circumstance that would have justified disciplinary action against the lawyer.

Client J sought to raise some new matters, including a suggestion that Lawyer A sought to divert a GST refund to his firm in order to be able to take his costs from the amount due. This matter was not put to the Standards Committee and it would be inappropriate for me to consider entirely new allegations.

[5] Client J provided a statement of grounds for his application for review as well as a letter outlining the basis of the application. The Standards Committee provided its file to this office. Lawyer A was informed of the application and given an opportunity to respond. He did so through his counsel on 7 April 2009. Client J replied to that response on 21 April 2009. That reply was provided to Lawyer A for his information. The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on this material made available to this office.

The Procedure of the Standards Committee

[6] Client J has raised the fact that he was not provided with the preliminary report of Mr X. Were the report provided only to the Committee for its internal purposes this may not have been of concern. However the fact that the report was provided to Lawyer A (who was given an opportunity to comment on it) but not to Client J is a breach of natural justice which must be addressed.

[7] I note that after the preliminary report was made available to Lawyer A Mr X met with both of the parties and at that time an opportunity existed to explore any concerns Mr X may have had in respect of the preliminary report. I also note that in its decision the Committee concluded that the jurisdiction to conduct a costs revision had been extinguished by the reform of the law. As such the report of Mr X did not form the basis of its decision.

[8] In light of these matters the failure of the Standards Committee to provide the preliminary report to Client J does not go to the heart of its decision and is not a basis for upsetting its decision. I have seen a copy of the report on the file of the Standards Committee and note that there are no surprising matters on that report which would require a particular response from Client J. I observe, however, that there appears no reason why Client J should not be provided with a copy of that report by the Standards Committee should he request it.

[9] Client J also suggested that the Committee had predetermined the matter prior to the receipt of the report of Mr X. There is no basis to support this assertion. The decision was made after the report was received by the Committee. It was also evident from the decision that the Committee had the report and took it into consideration in reaching its decision.

[10] Client J also sought to impugn the qualifications of Mr X as costs reviewer by suggesting that he did not have the requisite skill in rural conveyancing. There is no foundation for this criticism. Mr X was appointed as an experienced practitioner and his knowledge of professional practice appears to have been more than adequate to exercise judgement in this matter. My view is reinforced by the correspondence from him on the file and the report he made.

[11] Client J made a number of other arguments regarding the independence and bona fides of the Standards Committee. They were unsupported by any evidence and do not appear well founded. I do not propose to consider them further.

Jurisdiction to revise bills of costs

[12] The complainant has raised numerous points relating to the reasonableness of the bill of costs. He maintains that the amount charged was excessive in relation to the nature of the work undertaken. Many of the matters raised may be relevant to a revision of the bill of costs but are not relevant to the question of whether any

disciplinary action is appropriate. Due to the reform of this area of the law I must consider whether the Standards Committee had jurisdiction to revise the bill of costs.

[13] I note that the complainant states that the bills of costs were not properly delivered, however I do not consider that this objection has merit. The bills appear to have been delivered to the offices of the accountant of the entities, which was also the registered office of one of them. It is also clear that the accountant brought the accounts to the notice of Client J in a timely way. This may not have been Lawyer A's usual way of delivering bills, however it is clear that they were adequately brought to the notice of Client J. No particular method of service or delivery of a bill of costs is required.

[14] This review concerns two bills of costs which were rendered prior to 1 August 2008.The complaint was made on 4 September 2008. Complaints made subsequent to 1 August 2008 (when the Law Practitioners Act 1982 was repealed and the Lawyers and Conveyancers Act 2006 came into force) but which concern conduct prior to that date are dealt with in accordance with the s 351 of the Lawyers and Conveyancers Act 2006. Importantly, by virtue of the repeal of the Law Practitioners Act 1982 no application could be made to the District Law Society for a revision of the bills of costs under Part VIII of that Act.

[15] Section 351(1) of the Lawyers and Conveyancers Act sets out the basis upon which the newly constituted complaints service of the New Zealand Law Society may consider complaints regarding conduct which occurred prior to 1 August 2008. It provides that:

> If a lawyer or former lawyer or employee or former employee of 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, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

It was on the basis of this provision that the Standards Committee declined to consider whether the fees were reasonable, and concluded only that the fees were not so unreasonable to justify the commencement of disciplinary proceedings.

[16] In particular, that section provides that complaints may only be made in respect of "conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982". Cost revision has never been considered a proceeding of a disciplinary nature. Rather it was an administrative review of the reasonableness of the fee. Where there was gross or dishonest overcharging the matter may have been considered by a Complaints Committee or Disciplinary Tribunal however, the vast majority of costs revisions involved no issues of misconduct or discipline.

[17] It should be recognised that what appears to be a legislative oversight has caused a perverse lacuna in the remedies available to clients. This is particularly anomalous in light of the fact clients who complained prior to 1 August were entitled to have the matter considered under s 145 of the Law Practitioners Act 1982. Similarly clients whose bills were rendered after 1 August have the right to complain and have the bill examined for reasonableness under s 132(2) of the Lawyers and Conveyancers Act.

[18] I note that this is a question which has been fully considered by this office in a previous review. While this office is not bound to follow its previous decisions, the considerations in that case were identical and the same conclusion has been reached. I conclude that the Standards Committee was correct to decline jurisdiction to consider whether or not the fees were reasonable and to frame the question as one of whether or not the conduct complained of was such as to justify the commencement of disciplinary proceedings.

Standards for disciplinary intervention

[19] By s 352 of the Lawyers and Conveyancers Act 2006 a Standards Committee may only impose penalties in respect of conduct which could have been imposed for that conduct at the time the conduct occurred. The relevant standards in respect of conduct prior to 1 August 2008 are set out in s 106 of the Law Practitioners Act 1982. That section provides that disciplinary sanctions may be imposed where a practitioner is found guilty of:

- misconduct in his professional capacity, or
- conduct unbecoming a barrister or a solicitor,

- or negligence or incompetence in his professional capacity, of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[20] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. In the present case the only ground in respect of which discipline would follow in this case is if the bills of costs were found to be so grossly excessive as to amount to misconduct. Misconduct is generally considered to be conduct which is 'reprehensible' 'inexcusable', 'disgraceful', 'deplorable' or 'dishonourable'. (See for example *Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming is perhaps a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[21] The question therefore is whether the fees charged here were so unreasonable to justify the commencement of disciplinary proceedings or whether the material available to the Standards Committee disclosed any other circumstance that would have justified disciplinary action against the lawyer.

Were the bills grossly excessive?

[22] For billing practices to amount to misconduct the bill must be "grossly excessive". Client J suggested in his application to this office that the hourly rates claimed by Lawyer A is "outrageous". I note that this was not the view of Mr X in his cost revision report. While I am applying the standards in force prior to 1 August 2008 I note that the statutory definition of misconduct which came into force on that date (found in s 7 of the Lawyers and Conveyancers Act 2006) includes conduct that "consists of the charging of grossly excessive costs for legal work…". This is a statutory recognition of the common law position that grossly excessive charging may amount to a professional breach. Where the charges are grossly excessive it is indicative that the lawyer in question knew that he or she was not entitled to the amount claimed or at the least was reckless as to whether they were entitled to the amount claimed. Importantly it is not necessary to show that actual dishonesty was involved to establish that fees were grossly excessive. In *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASC 115 Beech AJA stated at para 227 "an allegation of gross overcharging does

not of itself involve any element of dishonesty. Dishonesty may be involved in gross overcharging, but need not be".

[23] In determining whether a fee is grossly excessive it is often helpful to determine first what a reasonable fee would be. Where a fee is many times that of what is reasonable this is prima facie evidence that the fee is grossly excessive: *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198. In the present case there has been an inquiry into what would be a reasonable fee and this is a useful starting place for analysis. Mr X undertook a thorough investigation into the work undertaken by Lawyer A and while I do not adopt his report, I do consider it very good evidence of whether the fees charged in this case were within the range of what could be considered reasonable.

[24] 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. I have taken some guidance from Australian courts which have considered this question. Thus in *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASC 115 it was found that a reasonable fee would have been $5,500 whereas the practitioner charged $22,000. In *Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 it was found that a reasonable fee would have been $5,820.60 whereas $28,365.60 was actually charged. In *New South Wales Bar Association v Amor-Smith* [2003] NSWADT 239 it was found that a reasonable fee was $32,500 whereas $151,441.05 was actually charged. In *Franconi v Legal Practitioners Complaints Committee* [2001] WASCA 431 it was found that a reasonable fee would be $1,359 whereas $4,154 was actually charged.

[25] 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). However, it is clear that the level of overcharging required to amount to misconduct is not present in this case.

[26] I note that a large amount of the material and arguments provided by the complainant is aimed at demonstrating that the bills were too high in all of the circumstances. In doing so he compares the work done with other transactions, argues that some work was unnecessary, suggests the charge out rate of Lawyer A was too

high, and refers to amounts paid over a long period of time. All of these matters go to the reasonableness of the fee. As I have already noted, this is not a matter which I have jurisdiction to determine and accordingly those matters will not be considered in this decision. Client J also considered the report of Mr X to be unsatisfactory. However, in light of the fact that the Committee did not base its decision on the report of Mr X these matters are not central to this review. However, for completeness I note that I did not find the arguments presented by Client J seeking to impugn the report of Mr X persuasive.

[27] I find that the bills of costs complained of in this matter are not so grossly excessive as to amount to misconduct.

Lawyer A's billing practices

[28] The Committee also found that the complaint did not disclose any other circumstance that would have justified disciplinary action against the lawyer. The focus of this complaint was the bills under scrutiny. Part of that analysis is the manner in which the amounts claimed were arrived at.

[29] Lawyer A's billing methods did not accord with good practice. While practitioners are not necessarily required to keep time records, it is usual to do so. As the costs revisor noted, the time spent on a matter is an important factor in determining the appropriate level of a bill. This was made difficult in the present case due to a total absence of any time records. The fact that Client J was not aware of the basis upon which Lawyer A was charging (and appears never to have been informed of this) resulted in an understandable dissatisfaction with the bills rendered. I note that under the Rules of Conduct and Client Care now applicable a lawyer is required to provide clients with information on the basis upon which fees will be charged in advance. That obligation was imposed from 1 August 2008.

[30] Client J suggested that Lawyer A charged a fee which was calculated by recourse to the value of the property being conveyed. The value of property involved in a transaction is of course a recognised factor to be taken into account in determining the reasonableness of a lawyer's fee. The suggestion of Client J was that in respect of rural conveyancing work Lawyer A always charged 1% of the value of the land. Client J refers to a number of historical bills which support this assertion. The Rules of Professional Conduct for Barristers and Solicitors (which were applicable at the

relevant time) state in the commentary to r 3.01 that the identified eight factors "shall" be taken into account when ascertaining the amount properly chargeable. A charging practice which looked only at the value of the property conveyed to the exclusion of other matters would run the risk of being in breach of r 3.01. Of course in assessing a bill the most important matter must be the amount of the bill rather than the way in which the sum was calculated.

[31] In respect of the bills under consideration the suggestion that Lawyer A simply charged a percentage of the purchase price is not sustainable. The Partnership BBBB purchase appeared to concern land valued at $650 000 and the bill rendered (including GST and excluding disbursements) was $5 175. In respect of the Company AAAA purchase the price of the land appeared to be somewhat over $2m and the bill rendered was $17 327.25 (including GST and excluding disbursements). While other bills rendered may have been calculated on the basis alleged, they are not under consideration here.

[32] In the bills of costs under consideration Lawyer A claims that his fees have been reduced by the use of phrases such as "My fee for the purchase – reduced to" and "My fee for the above substantial [ly] reduced to". Mr X noted in his letter of 9 January 2009 that he "did not understand Lawyer A's reference to the reduction and discounting of his charges. He has not advised the level of the deduction or the discount or the reasons for it".

[33] This is a matter of concern. Given the lack of any objective fee setting process in the practice of Lawyer A it appears that fees were set by Lawyer A by recourse to a global consideration of what he thought was fair and reasonable in all of the circumstances when the bills were drawn. There is no evidence that any discounts or reductions were in fact made by Lawyer A. As such the statements are misleading. Had this matter fallen to be decided under the new Rules of Conduct and Client Care for Lawyers this may well have amounted to a breach of r 11.1 which prohibits misleading or deceptive conduct and would therefore have amounted to unsatisfactory conduct. However the applicable standards are those outlined above found in the Law Practitioners Act 1982 and the threshold for disciplinary intervention is considerably higher.

[34] The question is whether this conduct could be properly considered to be in breach of the professional standards which were applicable prior to August 1 2008. As

noted above misconduct will be found where the conduct is ‘reprehensible’ ‘inexcusable’, ‘disgraceful’, ‘deplorable’ or ‘dishonourable’. I do not consider that that threshold has been reached here.

[35] A finding of conduct unbecoming may be found where the conduct is unacceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). However, not every professional lapse is sufficiently serious to require disciplinary intervention (*Perera v Medical Practitioners Disciplinary Tribunal* District Court, Whangarei MA 94/02, 10 June 2004, Judge Hubble at para 42). It must be established not only that the conduct departs from acceptable professional standards but also that the departure is of such a degree as to warrant sanction.

[36] I consider that the conduct of Lawyer A of stating that he had reduced bills is unacceptable. A competent, ethical, and responsible practitioner would not assert the existence of fictitious discounts and would not consider such conduct acceptable in a fellow practitioner. However, I note that it may be the case that Lawyer A in his subjective global consideration of the amount he chose to bill initially considered a sum higher than those actually billed appropriately and mentally reduced the amount owing. Taking these matters into consideration I conclude that the conduct of Lawyer A, while unacceptable, does not reach the threshold required for disciplinary intervention and therefore does not amount to conduct unbecoming within the meaning of that phrase under the provisions of the Law Practitioners Act 1982.

No Certification

[37] Pursuant to s 161 of the Lawyers and Conveyancers Act where a bill of costs is considered under s 132(2) the Standards Committee or this Office is required to certify the amount due under that bill of costs. Such a certification is conclusive as to the amount owing in subsequent proceedings. However, this application was made under s 351 of the Act. Accordingly, because no application was made (or could be made) under s 132(2) this office has no jurisdiction to certify the amount due in respect of the bills of costs complained about.

Costs

[38] In my view it is entirely understandable in the circumstances that Client J made the original complaint and this application for review. Lawyer A's billing practices lacked

any transparency. Mr X was also troubled by the bills and his opinion that they be upheld was reached only after considerable investigation and deliberation. Moreover, as I have observed, Lawyer A's suggestion that reductions in bills had been made were without foundation.

[39] In these circumstances I have considered whether an order for costs should be made. A general power to "make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit" is found in s 210(1). Section 210(3) provides that such an order may be made against a practitioner notwithstanding that no finding of unsatisfactory conduct has been made against the practitioner where "the proceedings were justified and it is just to do so". I must of course be cautious in exercising powers under the Lawyers and Conveyancers Act 2006 where the conduct under scrutiny occurred prior to the commencement of that Act. However I note that under s 102 of the Law Practitioners Act 1982 a similar power existed where a Complaints Committee on investigating a matter concluded that it was not of sufficient gravity to warrant the laying of a charge but "the inquiry was justified and it is just to do so".

[40] I consider that in this case it is appropriate to make an order of costs against Lawyer A. I observe that the Standards Committee did not reach this conclusion in respect of their own inquiry and I do not propose to revisit that decision. The costs order I make relates to the expenses incidental to the proceeding before this office. In making the costs order I take into account the fact that this was a relatively straightforward matter, and that (with the consent of the parties) this matter was disposed of on the papers. In light of this (and the fact that the complaint was not upheld), the order of costs is for a contribution and does not seek to recover all of the costs and expenses incurred in this matter.

Decision

[41] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006. The decision of the Manawatu Standards Committee 2 is confirmed.

[42] Lawyer A is to pay to the New Zealand Law Society the sum of $300 in respect of the costs and expenses of the Legal Complaints Review Officer incurred in the conduct of the review pursuant to s 210(3) of the Lawyers and Conveyancers Act.

DATED this 30th day of April 2009

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Duncan Webb
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:

Client J as Applicant
Lawyer A as Respondent
The Manawatu Standards Committee
The New Zealand Law Society