LCRO 31/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**MR GM** Of [North Island] Applicant
AND	**MS TT** of Auckland Respondent

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

DECISION

Application for review

[1] Ms TT (the Practitioner) acted for the ACP District Council in relation to a proceeding filed against the Council by Mr GM (the Applicant).

[2] The Applicant filed complaints against the Practitioner, alleging that she had breached the Rules of Conduct and Client Care. The allegations were that the Practitioner had overcharged the Council (LCCC Rule 9); had misled or deceived the Court (LCCC Rule 13.1); and used legal processes for improper purposes (LCCC Rule 2.3).

[3] None of the complaints were upheld by the Standards Committee which decided that no further action was appropriate or necessary pursuant to sections 138(1)(c) and (f) of the Lawyers and Conveyancers Act 2006. Under subsection (c) a Standards Committee may exercise its discretion to take no further action where it is of the view

that the complaint is frivolous or vexatious or is not made in good faith. Subsection (f) permits the Standards Committee to exercise its discretion to take no further action if it considers that there is in all the circumstances an adequate remedy or right of appeal (other than the right to petition the House of Representatives or make a complaint to the Ombudsman), that it would be reasonable for the person aggrieved to exercise.

[4] The Applicant sought a review of the Standards Committee decision on three specific grounds, which essentially reiterated his original complaints. A review hearing was held on 17 November 2011, attended by the Applicant in person, and by the Practitioner by way of telephone link. Both parties had the opportunity of addressing the review issues in the course of the hearing.

Allegation of excessive charging

[5] The Applicant's first ground of review was based on an observation made by the Court of Appeal which referred to the Practitioner's charges as "excessive". The Applicant took the view that the Standards Committee was required to take *"judicial notice of the Court of Appeal's finding that the costs claimed were excessive*". This concerned a costs order that had been made by the Court of Appeal against the Applicant who was unsuccessful in two appeal applications against decisions of the High Court.

[6] The Court of Appeal had directed the Council to file a memorandum as to the quantum of costs, with the Applicant (as appellant) thereafter having a specific time within which to respond. The Council's Memorandum was filed on its behalf by the Practitioner. The Council claimed costs based on four separate invoices relating to the two appeals that had been filed by the Applicant.

[7] The Court of Appeal's decision (given by Randerson J on 8 September 2010) stated that the Judges were not persuaded that the costs claimed by the Council were at a level that were justified. Observations were made by the Court about what it perceived had been involved in the work undertaken in relation to the appeals.

[8] The Court of Appeal issued a further decision the next day, the Judges noting that its earlier judgment had been issued without a response having been received from the Applicant within the allotted time, but noting that the Applicant had sent an email maintaining that the costs orders were *ultra vires*, and also submitting that the quantum of costs and disbursements claimed by the Council were exorbitant, disproportionate and unnecessary.

[9] The Judges were not persuaded on any of the points raised by the Applicant in opposition to the Costs Order. However, as to quantum of costs claimed by the Council, the Judges expressed their agreement with the Applicant that the costs were excessive, adding that this was why the Court had fixed the quantum of the indemnity significantly lower than the amount claimed.

[10] I noted that the Court's original decision on the costs order did not use the word 'excessive', but only in its second decision did the Court use this word in confirming its agreement with the Applicant's submissions on quantum. This did not necessarily signal that the charges to the Council by the Practitioner were excessive, but rather that the costs sought by the Council as contribution were perceived as not being justified for the work that the Court perceived was involved in the appeals.

[11] The costs were claimed by the Council, not the Practitioner. The costs Memorandum was that of the Council which sought to recover some of its legal costs in relation to the appeal. The Court did not approve all costs claimed by the Council and awarded a lesser amount to be paid by the Applicant to the Council.

[12] The reasonableness of a costs order made by a Court against a losing party in favour of a winning party is not the concern of the New Zealand Law Society (NZLS). The costs order is made by the Court (not a Practitioner), and falls outside of the jurisdiction of the NZLS.

[13] In any event, it is difficult to see how an application for a Costs Order, prepared by a lawyer for a client, could of itself amount to any wrong-doing, even if the amount claimed was perceived by an adjudicator to be excessive. It was open to the successful party to seek such contribution as they considered appropriate. It was then the role of the Court to assess that application, and to either accept or reject such of the costs claimed by the successful applicant. That is what the Court of Appeal did in this case. That the Court did not approve the entire amount claimed by the winning party does not give rise to disciplinary issues against the lawyer who prepared the Memorandum. I am unable to find any basis for criticising the Practitioner in relation to these matters.

Alleged error on part of Standards Committee concerning Applicant's standing

[14] The Applicant complained to the NZLS alleging excessive charges by the Practitioner. He relied on Rule 9 of the Rules of Conduct and Client Care which requires a lawyer to only charge a fee that is fair and reasonable for the services

provided, having regard to the interests of both the client and the lawyer and with regard also to the 13 "fee factors" set out in Rule 9.1.

[15] The Practitioner questioned the Applicant's right to complain on the basis that he was not a person chargeable with the bill of costs. The Practitioner referred the Standards Committee to section 132(2) of the Lawyers and Conveyancers Act which provides that*: "any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner …*".

[16] The Standards Committee agreed that the Applicant had no standing to make the complaint. The Applicant considered that the Committee had erred in taking this view. He disputed the conclusion that he was not a person chargeable for the practitioner's fees because the costs ordered by the Court are based on a bill of costs and are legally enforceable.

[17] The Applicant's view is that he becomes a person chargeable with the Practitioner's costs by virtue of the Court's costs order against him being based on, or arising from, costs charged by the Practitioner to the Council who is the Practitioner's client.

[18] The Practitioner disagreed, stating that a costs order imposed by the Court is between the parties to the proceeding. The Practitioner stated that she had no personal right of enforcement of that order, which could only be done by the Council.

[19] I have heard from both parties to this review and considered their viewpoints. It is clear from the tenor of section 132(2) of the Lawyers and Conveyancers Act that the 'person chargeable' is the person who is invoiced by the lawyer and may have the charges enforced against them. All invoices sent by the Practitioner (for the firm) were sent to the Practitioner's client which was the Council. It was the Council, and not the Applicant, that is the person chargeable with the Practitioner's fees, and liable to any enforcement proceedings by the Practitioner.

[20] The Practitioner did not invoice the Applicant. Rather, his complaint is based on a costs order of the Court. Notwithstanding that the costs sought by the Council may have reflected the fees it had paid to the Practitioner, it is difficult to see any basis on which the Applicant had standing to file a complaint under section 132(2) against a lawyer concerning charges to its client.

[21] The Applicant alternatively argued that as a ratepayer, he contributes to the Council's funds to pay its legal costs and he argued that this gives him standing. This too, is misconceived. Only the person who is charged legal fees by the lawyer is a person against whom the charges can be enforced, that person being the party chargeable. There are no circumstances under which the Practitioner could have enforced its invoice against the Applicant.

[22] The Standards Committee was right to have accepted the Practitioner's submission that the Applicant had no standing to have made the complaint. This made it unnecessary to deal with the allegation of excessive charges, but at the review hearing the Practitioner nevertheless took the opportunity to submit that the Court had omitted to fully take into account all of the attendances involved in the matter.

Allegation of abuse of process

[23] The Applicant was of the view that the application filed by the Practitioner (on behalf of her client Council) to strike out his proceeding against the Council was an abuse of legal process.

[24] The Applicant explained that when he filed his proceeding against the Council he also included an application for waiver of filing fee. He had expected that if his application for fee waiver was not granted, that the proceeding would not proceed. In the event, the proceeding was served by the Court on the Council, and, presumably on the Council's instruction the Practitioner applied to have the proceeding struck out. This was successful and led to costs ordered against the Applicant.

[25] The Applicant considered that this was an illegal action on the part of the Practitioner, who ought not to have advised her client to have taken this course of action. He disputed that a strike-out application was available (or ought to have been available) in respect of a proceeding that had been abandoned for non-payment of a filing fee.

[26] He accepted that the Practitioner did not know that he had failed to pay the filing fee, but he considered it was incumbent on her to have enquired with the Court as to the status of his proceeding.

[27] The Applicant is wholly misconceived in this complaint. The evidence showed that the Court in fact processed his proceeding against the Council, and served it, rightly or wrongly. Once served, it was incumbent on the Council to answer the proceeding filed by the Applicant.

[28] The Applicant questioned the status of a proceeding where an application for a fees waiver had been declined. In his view a proceeding should not be considered to be a "live" proceeding until the fees waiver application had been determined, and if declined the proceeding should fall into abeyance. He objected to the proceeding having been processed without regard to, or consideration of, the fees waiver application, or that it had been declined.

[29] These submissions were also made by the Applicant in the course of the court hearing, Mr Justice Miller's judgment of 19 June 2009, covering the affect of the non-payment of fees. The Judge noted that the Applicant had still not paid the filing fee, and that in terms of regulation 8.3 of the High Court Fees Regulations 2001, he may not take a step in the proceeding unless the fee is paid. His Honour noted that "[the Applicant's] *stance is that he may not proceed if the fee is not waived. He says he is contemplating another application for waiver, but may choose not to do so if he is liable for costs. He wishes to keep the proceeding on foot, at his option."* Under the sub-heading of, *"Is there anything to strike out?",* His Honour recorded that the Applicant *"contended that, the filing fee not having been paid, there is no live proceeding. Alternatively it is in abeyance*."

[30] However, His Honour considered that the effect of the High Court Fees Regulations was clear, and that under regulation 7 the payment of a filing fee may be postponed pending the determination of an application for waiver or review. He noted that this was what the Registrar had done in this case, and also noted that under regulation 8, which applies to a fee that has been postponed under regulation 7, the fee must be paid without delay to the Registrar and is recoverable as a debt due to the Crown. His Honour noted that the Registrar having processed the claim and having released it for service, meant that the Council was entitled to move to strike out, notwithstanding that the Applicant had not yet paid his filing fee.

[31] The confirmation by the Court of the Council's right to move to strike out the Applicant's proceeding was a decision within the power of the Court. The NZLS in its disciplinary role has no jurisdiction to consider the proceedings of the Courts. The Applicant was heard on the same point that he later pursed in his complaint against the Practitioner, and did not succeed in persuading Miller J of the argument. In all of the circumstances it is difficult to see any basis for upholding the allegation that the Practitioner acted illegally by having filed, for her client, a strike-out application. The Court clearly considered that the application was available to the Council.

[32] The Applicant further submitted that a procedural conflict existed, in relation to the status of a proceeding where an application for a fees waiver had been declined, and the Court meanwhile processing the matter. The procedures of a Court are not matters that can concern the NZLS or this office. Materially this is not an issue for which the Practitioner is responsible.

[33] I noted that the Standards Committee declined to uphold the complaint on the basis that it was vexatious or not made in good faith. Having heard from the Applicant and considered the material that he forwarded, I likewise question his bona fides in pursing this matter and have no hesitation in dismissing his application.

Decision

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

DATED this 24th day of November 2011

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Hanneke Bouchier
Legal Complaints Review Officer

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

Mr GM as the Applicant
Ms TT as the Respondent
The Auckland Standards Committee 3.
The New Zealand Law Society