LCRO 35 / 09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of Auckland Standards Committee No 2
BETWEEN	**CLIENT O** of Auckland
	Applicant
AND	**LAWYER S** of Auckland
	Respondent

Application for Review

[1] This is a review of a decision by the Auckland Standards Committee 2 in respect of a complaint by Client O against Lawyer S. The complaint concerns fees charged by Lawyer S's firm, XXX, in respect of litigation work.

[2] The Standards Committee had considered this to be a complaint about fees charged by Lawyer S, and after considering the matter, took the view that the allegation against Lawyer S was not such that it would have justified proceedings of a disciplinary nature under the Law Practitioners Act as required by section 351 of the Lawyers and Conveyancers Act 2006. It therefore declined jurisdiction to investigate the matter.

[3] In his review application Client O wrote that his complaint was not only about the fees charged but also included complaints about conduct. His view was that the Committee had failed to take into account the allegations that he had been given incorrect advice, that further fees were charged after he had said 'stop work', that he had been charged more than had been quoted, and the allegation that Lawyer S's error had led to the imposition of a court penalty of $10,000.00. which sum he counter-claimed against the fees.

Redirection of complaint

[4] Following a telephone conference with the parties a decision was made pursuant to section 209 of the Lawyers and Conveyancers Act to direct the Standards Committee to consider that part of the complaint pertaining to conduct related matters and to determine the complaint and forward a report to this office. A redirection order was made accordingly.

Review

[5] A review was commenced of the Standard Committee's decision in relation to the fees complaint. In a teleconference the parties were informed that the review could be adequately conducted on the papers, but were also informed of their right to a hearing in person. Client O elected to have the matter heard in person.

[6] The hearing took place on 29 April. Client O did not appear. Attempts to contact him by telephone were unsuccessful, and after a delay to allow for his appearance, the hearing proceeded with Lawyer S and his advocate.

Decision

[7] Having considered Client O's information, and the information provided by Lawyer S in his responses to the Standards Committee and at the hearing, I reached the conclusion that there was no basis upon which the complaint could be upheld, and therefore confirmed the decision of the Standards Committee to decline jurisdiction. A Minute of that oral decision was forwarded to the parties. The reasons for the decision now follow.

Jurisdiction to revise bills of costs

[8] Client O's complaint raises a question about the jurisdiction of a Standards Committee to revise a bill of costs. Nearly all of the bills of cost in issue were rendered before 1 August 2008 when the Lawyers and Conveyancers Act came into force. This Act repealed the former Law Practitioners Act and by section 351 preserved a right of complaint in respect of conduct that occurred prior to that date. However, no specific provisions were made for revising bills of costs that had been rendered prior to 1 August 2008. Costs-related complaints were not normally considered as being conduct issues.

[9] Section 351 sets out the basis upon which complaints about conduct prior to 1 August 2008 may be considered. 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".* Under the Law Practitioners Act cost revision was never considered a disciplinary matter but was, rather, a review of the reasonableness of the fee. The change in the law effectively removed the right to have a bill of costs revised as an administrative exercise.

[10] Section 351 applies to all complaints about conduct that occurred prior to 1 August 2008. As a result complaints about fees rendered before 1 August 2008 can only be considered as 'conduct' issues, and a Standards Committee's jurisdiction regarding fees complaints arises only where there was a gross or dishonest overcharging such that would have amounted to conduct that would have justified the commencement of disciplinary proceedings.

Standards for disciplinary intervention

[11] The threshold for disciplinary intervention under the Law Practitioners Act is set out in 106 of that Act, which provided for disciplinary sanctions where the practitioner was found guilty of misconduct in his professional capacity, conduct unbecoming of a barrister or solicitor, negligence or incompetence in his professional capacity of such a degree or so frequent as to reflect on his fitness to practice, or tend to bring the profession into disrepute. This threshold was relatively high.

[12] In the present case the only ground upon which discipline would follow would be if the bills of costs were so grossly excessive as to amount to misconduct. If not, there is no jurisdiction to consider the complaint

Were the bills grossly excessive?

[13] Client O raised several issues which he considered relevant to the amount he was charged. Among these were the allegations that he had been charged more than a fee quoted. He referred to having been given an estimate of $4,000.00 for work for which he was later billed $16,000.00. Additional allegations were that services had continued to be provided and charged after he said 'stop work', and that he had been given wrong advice which had created unnecessary costs.

[14] Lawyer S denied that there had been any overcharging. He referred to a letter he had sent to Client O in late February 2008 in which he wrote, *"In our view it is better to settle this matter rather than spend another $4,000.00 on airfares and lawyers fees*

going down to Nelson." Lawyer S's view was that this was neither a quote nor an estimate, and that the letter was intended to persuade Client O to consider a settlement proposal that had been outlined in a draft letter that was attached. He said that most of fees related to work in March and April in attempts to settlement matter. He said that his client refused to settle and was resolved to litigate. He added that the fees for preparation and attendance at the Nelson Court hearing were indeed near the $4,000.00 that had been mentioned in the earlier letter, which covered the preparation and attendance in relation to the court hearing. He said that the additional costs related to the March and April attendances, and to post litigation work.

[15] Lawyer S recalled that in July 2008 Client O had "vaguely" said not to do any further work when he was trying to have the property transferred to his mother prior to the auction. However, the auction did take place some days later and there were further attendances following the sale. Lawyer S referred particularly to his invoice of 17 July 2008 as showing that half his work after the auction was attending Client O and talking to him on the phone. Lawyer S also denied that he had given poor advice, and provided information in relation to the results he had achieved for his client.

[16] A copy of the time records that relating to the bills was provided. These were detailed and it has not been suggested that they are in any way incorrect. Furthermore, it is noted that the bill that related to the Nelson hearing was rendered on 28 April, and was accompanied by a printout from the time recording system. There is no evidence that Client O raised any concerns about the bill at that time

[17] The question for consideration is whether the fees that were charged could be considered as gross overcharging of a degree that would have led to disciplinary intervention under the former Law Practitioners Act. Some guidance may be sought from the statutory definition of 'misconduct' that came into force with the Lawyers and Conveyancers Act as conduct that *'consists of the charging of grossly excessive costs for legal work'* (section 7). It is not necessary to refine this for the purpose of the present review because it is clear that the level of charging required to amount to misconduct is not present in this case.

Additional matters

The counter-claim

[18] It was part of Client O's complaint that due to an error allegedly made by Lawyer S he incurred courts costs of $10,000.00 for late filing of an affidavit. He counter claims this amount against the legal fees.

[19] It seems to me that the question of whether or not there is a proper basis for a counter claim in any case is an entirely separate question from whether the fees that were charged for legal services are grossly excessive. This review is necessarily confined to the original complaint which related to fees that had been charged. There is no evidence in this case of overcharging. This application is declined.

Stay of Proceedings

[20] For the sake of completeness it is noted that Section 161 of the Lawyers and Conveyancers Act which provides for a stay of proceedings in respect of complaints made under section 132(2) of Act does not apply in this case for the reason that Client O's complaint is made under section 351 of the Act.

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

Costs

[21] Lawyer S applied for costs and was invited to make submissions. The application was primarily on the basis that the hearing had been requested by Client O who had the failed to attend, and on the further basis that the complaint was without merit. The amount sought covered the attendance time for Lawyer S and his advocate, the time spent in preparation for the review hearing and disbursements covering photocopying and parking in relation to the hearing.

[22] Client O was allowed an opportunity to respond the application. He explained that he had not intentionally missed the hearing but had attended a sick child the night before and had overlooked the hearing.

[23] A Legal Complaints Review Officer has a general power, to award costs as he or she thinks fit, pursuant to section 210 of the Lawyers and Conveyancers Ac. This may extend to an award of costs as between the complainant and practitioner in respect of the review. However such a power would be exercised sparingly.

[24] A relevant consideration in this case is that at a prior Directions Conference the parties had been informed, pursuant to section 206(2) of the Lawyers and Conveyancers Act, that I considered that the review was one that could be adequately determined in the absence of the parties, and they were invited to consent to the review being determined in the basis of the information that had been provided. Lawyer S stated his willingness to have the matter so determined. However, Client O asked for a hearing in person.

[25] Lawyer S duly attended the hearing with his advocate. Client O did not attend, and efforts to locate him on the on the day through the telephone contacts that he had provided were unsuccessful. Client O telephoned the Case Manager in the early afternoon, enquired whether the hearing had occurred, and told her that he was stressed with children and forgot. The present claim is materially based on Lawyer S and his advocate having attended a review hearing unnecessarily, thereby unnecessarily incurring costs. The claim is further based time involved in addressing Client O's complaint which was considered to be without merit.

[26] Client O was allowed to respond to the application. He wrote that he missed the hearing due to his own illness and the illness of his children on the two days prior to the hearing, referring also to stress, lack of sleep and confusion about what day it was.

[27] The guidelines that have been issued by this office outline the circumstances where costs may be awarded against a lay person. The fact that a complaint is not upheld is not alone a sufficient basis for assuming that it had no merit, and in this case. However, in the circumstances that Lawyer S and his advocate were put to the trouble of attending a hearing that had been sought by Lawyer S but where he did not attend is sufficient upon which to make a costs award.

[28] I have considered Client O's explanation and the overall circumstances. Had Client O notified his situation prior to the hearing there would have been reasonable opportunity to have informed the respondent to not come. I am mindful, too, of some discrepancy in his telephone advice to the Case Manager, and his written response, concerning the reasons for his non-attendance. I am also mindful that among the information provided in relation to the complaint, were oft repeated observations by various judges about Client O conducting proceedings so as to escalate the costs to the other party, failing to meet deadlines or to comply with directions, and providing information only at the 11th hour. These observations and the present situation, all indicate some lack of attention or concern by Client O about the circumstances of others who interact with him. I therefore intend to grant the application and make an order for costs against him in the total sum of $350.00. This is less than has been sought, and relates to the review attendances and parking cost. The order is intended to focus Client O's attention on the costs needlessly incurred by others while also taking into account any uncertainty about his financial circumstances. This sum shall be payable by Client O to Lawyer S.

This cost order is recorded in a separate memorandum attached to this decision.

DATED this 02nd day of June 2009

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Hanneke Bouchier

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

Client O as applicant
Lawyer S as respondent
Lawyer S's representative
The Auckland Standards Committee No.2
The New Zealand Law Society