LCRO 37/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury-Westland Standards Committee 2
BETWEEN	**Ms KIDDERMINSTER** of Christchurch Applicant
AND	**Mr ORKNEY and** **Mr KIDDWELLY** of Christchurch Respondent

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

DECISION

Background

[1] Mr Orkney and Mr Kiddwelly (the Practitioners) acted for Ms Kidderminster (the Applicant) and other members of her family in Court proceedings that the family was involved in relating to a trust or trusts in which they were discretionary beneficiaries. The litigation seems to have been complex and protracted and involved hearings in the High Court, Court of Appeal and Supreme Court. Messrs Orkney and Kiddwelly are partners in the firm of W, which appears to have acted for the Kidderminsters over a number of years.

[2] In relation to the appeal to the Supreme Court the Applicant (and members of her family) entered into a contingency fee arrangement. Details of that agreement are discernible from the discussion that follows. In essence it provided that a base fee of

$25,000 was to be paid and that additional (agreed) fees were payable on certain outcomes being achieved. The results were largely successful and the Applicant (and family) were billed according to the contingency fee agreement. The Applicant compared the fees charged with the hours involved and noted that the fee payable under the contingency fees agreement was higher than would have been the case on an hourly costing.

[3] The Applicant, on behalf of herself and the other family members, made a complaint to the Law Society in February 2009. The complaint comprised six separate allegations relating to fees charged (considered to be excessive) and in relation to funds deducted from the trust account.

[4] The Standards Committee gave notice that the complaints it would investigate concerned:

(a) An allegation of unsatisfactory conduct arising from excessive billing in the fee note to the complainants dated 8 August 2008 for an Application for Leave to Appeal to the Supreme Court.

(b) The entering into of a contingency fees arrangement between the complainants and the practitioners which led to the fee note referred to in (a).

(c) Whether or not the deduction from the practitioners trust account, in the names of the complainants, of $98,000.00 was in accordance with an authority given by the complainants.

[5] The Standards Committee gave reasons for limiting its investigation to these matters, but I do not set these out as they have not been challenged in the application for review.

Standards Committee decision

[7] The Standards Committee determined that all of the complaints should be dismissed. The Committee first noted that the conduct complained of pre-dates the Lawyers and Conveyancers Act 2006 (the Act) and therefore the Act and the Lawyers: Conduct and Client Care Rules 2008 made pursuant to the Act, did not apply to the conduct complained of. The applicable legislation is the previous Law Practitioners Act 1982 and associated Rules of Professional Conduct. I will come back to the significance of this point below.

[8] The Standards Committee made a number of findings to support its decision which include:

(a) The contingency fee agreement was both lawful and fair to the complainants.

(b) There were no circumstances disclosed suggesting any impropriety, over-bearing pressure or conduct by Mr Kiddwelly or Mr Orkney that forced the Kidderminsters to enter into the agreement.

(c) The contingency fee arrangement did not produce a fee disproportionate to the issues involves or the significance of the litigation.

(d) Time recording is only a mechanism used to establish one factor relevant to setting a fee i.e. the time involved in doing the work. The time involved is but one of a number of relevant factors, which include the complexity of the issues, the urgency and value of the matters involved, and the significance of the litigation to the parties.

(e) Even if its conclusions were wrong about the contingency fee agreement, the fees charged in the overall circumstances were justified taking into consideration the factors mentioned above. Apart from this, it was appropriate to reflect in the fee the substantial risk assumed by the practitioners in the litigation.

(f) The preponderance of information available is persuasive that it is more likely than not that the practitioners did advise the Kidderminsters about receipt of the $98,000.00.

(g) Even if this conclusion is wrong, the provision of a signed and dated invoice disclosing receipt of the money and its disbursement by way of defraying expenses was reasonable in this case. Further, the receipt and handling of the money could not be said to have fallen below the standard of conduct required such that a finding of professional misconduct or conduct unbecoming could be maintained.

Review application

[9] Ms Kidderminster has applied for a review of part of the Standards Committee decision, with a focus on two issues particularly. Her reasons for the application (which are paraphrased) are:

(a) The Standards Committee was wrong to find the fee was reasonable on the basis of its own ruling that in a contingency fee arrangement the practitioner should do no more than defer his reasonable fee. The Applicant considered the overall fee to be excessive.

(b) The Standards Committee was wrong to conclude the firm could deduct the $98,000 without specific instruction, and in any event, at the particular time the debt owed was only some $25,000.

[10] The parties' consent to the review being conducted on the papers was obtained pursuant to section 206(2) of the Act, that is, by a consideration of the documents and information that has been submitted. This included information in the Standards Committee file and information provided by the parties for the review.

Jurisdiction to revise bills of costs

[11] Although the review application cited 'the contingency fee arrangement' it is apparent from the complaint and the information provided by the Applicant that their complaints concerning the contingency fee arrangement are in effect complaints about the reasonableness of the legal fees. In that regard I accept the Standards Committee observation (in paragraph 35 of its decision) that "*There is a theme in the complaint that the complainants consider that the contingency arrangement would have only been fair and reasonable if the total cost incurred for those services was supported by a time record indicating that the level of fees is appropriate."* The Applicant stated in her review application that the Standards Committee was wrong to find the fee was reasonable, maintaining that the amount charged was excessive in relation to the work undertaken.

[12] It is material to note that the original complaint was made after 1 August 2008, but concerned conduct that occurred prior to that date. On that date the Law Practitioners Act 1982 was repealed and the Lawyers and Conveyancers Act 2006 came into force. This category of complaints is dealt with in accordance with the s 351 of the Lawyers and Conveyancers Act 2006 (the Act). 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. That is to say, the power to review fees disappeared with the repeal of the Law Practitioners Act. Thereafter, complaints about fees were required to be considered as 'conduct' issues. Section 351(1) of the Act 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.

[13] In short, the section provides that complaints (made after 1 August 2008) concerning pre-1 August 2008 conduct 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 previous legislation cost revision was not considered a proceeding of a 'disciplinary nature', but was essentially an administrative review of the reasonableness of the fee. The vast majority of costs revisions involved no issues of misconduct or discipline. Disciplinary proceedings would arise only where there was gross or dishonest overcharging.

[14] The consequence of the law change meant that with the introduction of the Lawyers and Conveyancers Act, any fees related complaints falling within this category needed to reach the threshold that could have led to disciplinary action against the lawyer. In that light the only question for a Standards Committee which considers a fees complaint under section 351 is whether the lawyers conduct in relation to the fees could have led to disciplinary intervention. One factor could be whether the fee could be considered "grossly excessive". I note this because the Applicant appears to have been under a misapprehension that there would be a costs revision, that is, that an assessment would be undertaken as to the reasonableness of the fees for the professional services.

Standards for disciplinary intervention

[15] In respect of the present complaints the previous professional conduct rules apply (those under the Law Practitioners Act now repealed), which set a higher threshold before any adverse finding can be made against a lawyer. The applicable standard for an adverse finding is that the conduct complained of must be of a kind that could be considered as 'conduct unbecoming' or '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).

Considerations

The fees agreement

[11] Many of the matters raised by the Applicant in this review 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. In that regard the Committee's decision correctly identified that the complaints were to be considered in the light of section 351 of the Lawyers and Conveyancers Act 2006, but the Committee did not fully explain the significance of its reference to this section when it reached conclusions on the reasonableness of the fee rather than framing the question as one of whether or not the conduct complained of was such as to justify the commencement of disciplinary proceedings. I do not think that this materially affects the outcome, but it may be helpful to explain that the focus of the review is whether the Practitioners' conduct (in relation to the fees charged) reached the threshold for disciplinary action. This considers all relevant factors, including consideration of whether the

quantum of fees could be described as gross. 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. Such a finding would bring the conduct within the required threshold for disciplinary action to be taken. For a fee to be grossly excessive it must bear no rational relationship with what would have been within the band of a fair and reasonable fee.

[12] The Standards Committee had before it a significant amount of information provided by the Applicant aimed at demonstrating that the bills were too high in all of the circumstances. The Committee also considered the Applicant's assertion that advice had been inadequate in respect of some part of the litigation, an assertion rejected by the Committee on the basis that no cogent evidence had been provided to support the contention, and that it was unlikely that all of the solicitors involved (which included a QC) would have failed to have kept the Applicant and her family appraised of all matters. I have considered this aspect of the complaint and the relevant information, and as I agree with the Committee's evaluation of the matter, I do not consider this further.

[13] The decision shows that the Committee carefully considered all of the information, which comprised significant volumes of material concerning the proceedings and copies of invoices. The Committee was aware that the time recorded was less than as charged, but had excluded attendances by junior staff. The Committee noted the Practitioners' acknowledgement that the fee did provide a premium on the value of time as recorded (which the Practitioners had described as modest), and their submission that the clients had agreed the fees in advance when they were well able to make their own assessment as to the value and reasonable costs for the work required. It appears that the Committee accepted the majority of the Practitioners' submissions, and concluded that the contingency arrangement was lawful, it being open to the parties to have made the agreement, and that there had been no improper pressure brought to bear on the Applicant or her family to entering into the arrangement.

[14] The Committee set out its reasons for concluding that the contingency fee arrangement did not produce a fee that was disproportionate to the issue debated and the significance of the litigation. The Committee accepted that time recording was not the only mechanism for assessing fees, and that other factors also included complexity of issues, urgency, significance of litigation to the parties, and others.

[15] The Applicant questioned whether the Standards Committee had considered all relevant matters, and contended that the Committee failed to take into account the (base) fee of $25,000. I note that the Committee's decision refers to this payment and all other payments provided by the Agreement, so clearly the Committee was aware of this base fee, and had noted that *"There was a substantial risk assumed by the Practitioners in this litigation, which they were entitled to reflect in their fees. Had the appeal been unsuccessful they would have received only $25,000 against a time record of about $93,000."* This was perhaps not altogether a complete analysis insofar as had the leave to appeal not succeeded then there would not have been an accumulation of hours to the value of $93,000. But it seems that the $25,000 was viewed by the Committee as a base payment for the firm having assumed the risk in the event of an unsuccessful outcome, and distinguishable for that reason.

[16] This appears to have been the approach taken by the Standards Committee, and one that needs to be considered in the overall structure of the fees agreement reached by the parties. I noted that the agreement further provided for specified sums to be paid if there was a successful outcome at various stages in the litigation work. These were in addition to the base payment. It is difficult to see any proper basis for characterising this payment differently from that agreed by the Applicant and her family. For that reason I do not consider the Committee's decision is wrong for failure to have taken into account the base payment in its overall assessment of the litigation related fees.

[17] Various factors are asserted by the Applicant as showing the fee was not reasonable, including that the firms time records show a value of only some $93,000 compared to the $150,000.00 billed. The Standards Committee considered whether the gap between these specified sums and the recorded hours, was such as to have disclosed a level of charging that could be described as 'excessively gross', such as to reach a threshold that could have led to disciplinary intervention. It is clear from the Committee's decision that intervention would have been appropriate had there been evidence of fees that were materially disproportionate to the legal services provided.

[18] Like the Committee, I accept that questions of reasonableness are not answered only by reference to the number of hours involved. The file show there to have been significant complexities; the Practitioners explained in some detail the nature and extent of their attendances. It further appears that no accurate account was taken of hours of attendance, perhaps not surprising given that this information was not being gathered for charging purposes. I am satisfied that the Committee's approach to assessing the various relevant

factors was reasonable. The Committee was fully aware of the gap between the recorded hours and the fee charged under the fees agreement, but accepted that very likely more hours had been expended. The Committee took into account all factors it considered were relevant, including that the parties entered into this agreement and fully aware of its implications. I see no reason to criticise the approach taken by the Committee.

[19] Other matters raised by the Applicant included the submission that no account had been taken of knowledge (and thus familiarity) acquired in the earlier stages of litigation. This fails to take into consideration that the kind and extent of research and preparation is materially different in relation to the applications sought to be made to the Supreme Court. A further issue raised by the Applicant claimed that there was no guarantee of the Applicant's family benefitting from the high value of the asset/s that were involved. The Practitioners' explanation that the Applicant and family were discretionary beneficiaries, and aware of that fact, satisfied the Committee as fully answering the complaint. It is clear that the Committee considered this information and I see no objection to the Committee's evaluation that the Applicant and her family clearly considered the court proceeding worthwhile, notwithstanding that they were discretionary beneficiaries.

[20] A further matter raised by the Applicant was the 10% interest, which they considered was an unlawful penalty. The Practitioners referred to the fact that the fees agreement, which included the agreed interest, should be seen in the light of the extensive period of credit extended to the Applicant and her family. The evidence shows that the Applicant and her family had full and free input into the terms of the agreement, and would have been well aware of the interest clause. This is an agreed term of the fees arrangement. Nor do I accept that the allegation that the Practitioners threatened to abandon their case if fees were not paid. This was fully addressed by the Standards Committee and its conclusions are supported by evidence on the file.

[21] There were other matters also raised by the Applicant supporting their disagreement with the Standards Committee decision on the complaint. Much of the argument relies on the benefit of hindsight, and I have taken the same approach as was taken by the Committee in considering the evidence in the light of circumstances prevailing at the time the agreement was made. Willing parties to an agreement necessarily confront difficulties if later arguing the reasonableness of its terms. In the absence of other factors that question whether the agreement was freely entered into, it must be assumed that parties on both sides proceeded on the understanding that the agreement was to bind them. I have not addressed each and every objection raised by the Applicant, having focused on those which seem to me to be the

main issues. I have nevertheless considered all of the information and have seen no reason to depart from the approach taken by the Committee in deciding to take no further action in relation to this matter.

[22] The question is whether overall the conduct of the Practitioner in relation to the fees charged reached a threshold that could have led to disciplinary proceedings. I have considered the Committee's analysis of the contingency fee agreement, which it found to be both lawful and fair to the Applicant and her family. The Committee found no impropriety on the part of the Practitioners. Having examined the information, I do not see any part of the arrangement reached the required threshold for disciplinary proceedings to have been taken, notwithstanding that the overall 'uplift' measurably benefitted the Practitioners. The Applicant has not demonstrated that the Practitioners conduct concerning the fees charged amounts to conduct that would meet the section 351 threshold for disciplinary intervention.

Authority to deduct fees

[23] The second ground for review related to the allegation that fees were deducted without authority, in particular the appropriation of $98,000. The Applicant considered that the Standards Committee was wrong to find the Practitioners could make the deduction against for fees without specific instructions from the Applicant's family. The Applicant asserted no such instruction was given, and that they were not told at the time the funds had been received.

[24] The Standards Committee concluded that there had been consent to the deduction. Referring to the summary of the Committee's findings (above) the Committee found that the Practitioners had told the Applicant's family about its receipt of the funds, and further, found that the Practitioners were implicitly authorised to apply the monies to unpaid fees, as that was the very purpose of their instructions to recover it from Public Trust in the first place. In any event, the Standards Committee noted that an invoice was issued and considered this was sufficient and the action of the lawyers was reasonable and judged against the test to be applied for cases under the Law Practitioners Act it was not prepared to find misconduct or conduct unbecoming.

[25] This office has previously set out the law concerning lawyers deducting fees from funds held in trust in the case of *A v Z* LCRO 40/2009. In that case there was a dispute as to whether the client had authorised the lawyer to deduct costs from funds held and the LCRO found on the facts of the case that there was no authorisation. The question the LCRO then

considered was whether such consent was required for such a deduction to occur. The following is an extract from that decision:

> [19] The applicable rules are found first in s 89 of the Law Practitioners Act 1982 which provided:
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> > (1) All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such money shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor.
> > (2) ... (3) ...
> > (4) Nothing in this section shall be construed to take away or affect any just claim or lien that any solicitor may have against any money so received by him.
>
> That section has now been replaced with s 110 of the Lawyers and Conveyancers Act 2006 which largely duplicates s 89.
>
> [20] Section 91(1)(a) of the Law Practitioners Act provided that regulations may be made "Regulating the use and audit of trust accounts of solicitors, and prescribing duties of solicitors in regard to trust accounts". Solicitors Trust Account Regulations 1998 were made pursuant to that authority. Regulation 8 of those regulations provided:
>
> (1) No trust account may be debited with any fees of a solicitor (except commission properly chargeable on the collection of money and disbursements), unless—
>
> (a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
>
> (b) An authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.
>
> It is of note that those Regulations have since been replaced with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 which contain an identical provision in Regulation 9.
>
> [21] Lawyers have routinely relied upon these regulations as authorising the deduction of fees from clients without the client's consent. In particular reg 8(1)(a) is relied on as authorising such a deduction providing a dated invoice has been issued. Because of the use of the word "or" it is maintained that it is not necessary to obtain any authority in writing to deduct fees from funds held in trust.

[22] It is not at all clear that the legislature intended by s 91 of the Law Practitioners Act that regulations could increase the rights (as opposed to duties) of lawyers in relation to funds of clients held in trust. There is a considerable tension between s 89 of the Law Practitioners Act which states that client's funds are to be held "exclusively for that person, to be paid to that person or as he directs" and the claimed right to take funds for fees without consent of clients.

[23] The Standards Committee gave consideration to the leading case of *Heslop v Cousins* [2007] 3 NZLR 679 which concerned the basis upon which lawyers are entitled to deduct fees from trust accounts. There Chisholm J held that s 89 of the Law Practitioners Act 1982 was the paramount provision and that the subordinate regulations could not override the obligations imposed by the statutory provision. In that case the client had given his lawyer clear directions as to how trust funds were to be used (to discharge obligations on a property settlement), but the lawyer refused to follow those instructions on the basis that he was entitled to deduct his fee from the funds held. On those facts Chilshom J held "*even if an account is rendered a solicitor is not entitled to deduct his or her costs from funds held in the trust account if the deduction would be contrary to the client's direction*".

[24] The present case differs in that (as Lawyer Z points out) there was no special purpose to which the funds were to be put. Rather the direction of the client was that the funds received be deposited into his bank account for his general purposes. However, the fact remains that s 89 (now s 110 of the Lawyers and Conveyancers Act) provides that the lawyer is obliged to hold a client's money "exclusively for that person, to be paid to that person or as he directs". In so far as the Solicitor's Trust Account Regulations 1998 are inconsistent with that obligation they can have no force.

[25] I conclude that a lawyer may only deal with trust funds in two ways pursuant to s 89 of the Law Practitioners Act 1982 (or s 110 of the Lawyers and Conveyancers Act 2006). That is by paying those funds to the client, or paying them at the direction of the client. Accordingly if a lawyer wishes to deduct his or her fees from the funds of a client held in trust he or she must obtain the direction of the client to do so.

[26] Lawyer Z did not have the authority of his client to deduct his fees from funds held in trust in this case. In light of this the deduction of his fees was in breach of his professional obligations.

[26] The Standards Committee concluded that even if it was wrong to find that the appropriation had been authorised, it was sufficient that the lawyers had issued an invoice. I do not agree with this part of the Standards Committee's reasoning. Further, I do not agree with the Standards Committee's conclusion that the receipt and handling of the money could

not have amounted to conduct unbecoming. In the absence of a consent or a special purpose to which the funds are to be put it may be that, depending on the particular facts of the case, lawyers of good standing may regard dealing with trust funds without recourse to the client as amounting to conduct unbecoming or unprofessional conduct and be unacceptable.

[27] For the review I have considered the basis of the Standards Committee's conclusion that the Applicant's family had authorised payment of the money towards legal fees. The Standards Committee noted that the Practitioners did not produce any signed authority to deduct the $98,000.00. Notwithstanding this, and the comments in the previous paragraph, I am satisfied after reviewing the file and considering the further submissions of the parties, that it was open to the Standards Committee to conclude on the preponderance of evidence that the lawyers did advise the Applicant and her family that the money had been received from the Public trust, and evidence that the purpose of pursing the Public Trust for these funds was to pay outstanding legal fees.

[28] The Standards Committee also found it noteworthy that the Applicant and family did not raise any complaint about the handling of the money at the time even though they must have been aware of it after receipt of the invoice (even if they deny prior knowledge) and only raised it as an issue in 2009. The fees were deducted in June 2006 and at no time (until making the complaint in 2009) did the family raise any objection to the fact that fees had been taken from the Public Trust payment. Had there been genuine objection to the actions of the lawyers one might have expected that some enquiry or complaint would have been raised at an earlier time. I can find no objection to the Committee having drawn an inference that no objection was raised because the funds were disbursed as intended and whilst no written authority was produced (and clearly not obtained) nevertheless it is more likely than not that the deduction was made by consent.

[29] The material question is whether the conduct complained of reached the threshold for disciplinary intervention on the basis of conduct unbecoming or misconduct (these being the professional standards against which to measure the conduct complained of). Taking into account all of the relevant matters, I agree with the Committee's conclusion that the conduct of the Practitioners did not reach the threshold required for disciplinary intervention. Accordingly, the Standards Committee was correct in deciding to take no further action in relation to this matter.

Decision

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

DATED this 3rd day of November 2010

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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:

Ms Kidderminster as the Applicant
Mr Kiddwelly as the Respondent
Mr Orkney as the Respondent
W as an interested party
The Canterbury-Westland Standards Committee 2
The New Zealand Law Society