LCRO 44/2010

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 No. 3
BETWEEN	**MR LARNARK** **MR LEICHSTER** **MS QUILT** of Auckland Applicants
AND	**MR KIRKBY** of Auckland Practitioner

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

DECISION

Application for review

[1] This application arises from circumstances where one of the Applicants, namely Mr Larnark, a pupil at an Auckland School was assaulted by another pupil at the school. The Applicants instructed Mr Caerphilly to act on their behalf in respect of a potential action against various parties. Mr Caerphilly instructed the Practitioner, a Barrister, to pursue the claim on behalf of the Applicants. At all relevant times, Mr Caerphilly remained the instructing solicitor.

[2] Proceedings were issued by the Practitioner on behalf of the Applicants on 1 May 2008. Subsequently, it was decided that an amended Statement of Claim was required and this was prepared and filed on 10 November 2008. In addition, the Practitioner formed the view at a later date, that the proceedings should be transferred to the High

Court due to the fact that the Applicants' claim included matters relating to the Bill of Rights and breaches of the rules of natural justice.

[3] The Practitioner's instructions were terminated on 19 December 2008.

The Complaints

[4] The details of the Applicants' complaints to the New Zealand Law Society are set out in a letter to the Society dated 14 April 2009. That letter sets out 7 matters concerning the performance of the Practitioner with which the Applicants were dissatisfied, and these were summarised in the Society's letter to the Practitioner on 24 April 2009. It is not necessary for me to repeat these in detail as they are fully recorded in the correspondence referred to. Briefly however, the Applicants' complaints included:

- Delays in providing advice and filing proceedings;
- Failure to follow instructions;
- Excessive and unnecessary work carried out with repetitive correspondence resulting in charges to the complainants in excess of what they considered appropriate;
- Failure to advise of a scheduled date for a judicial conference;
- Failure to advise the Applicants of charge out rates;
- Instigating recovery action for the Practioner's fees.

Applicable Standards

[5] The rules which apply to the conduct of the Practitioner prior to 1 August 2008 are those which applied under the Law Practitioners Act 1982 (now repealed). By virtue of section 351 (1) of the Lawyers and Conveyancers Act 2006 such complaints may be considered by a Standards Committee only where the conduct complained of could have led to proceedings of a disciplinary nature against the Practitioner under the former Law Practitioners Act.

[6] The applicable standards are those contained in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the

Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*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 could relate to conduct both in the capacity as a lawyer, and also as a private citizen. 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). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that:

> the negligence or incompetence has been 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.

[7] Although the Committee may not have been as fulsome as this in recording matters to be considered, these are the standards against which the Committee was required to measure the Practitioner's performance.

[8] The Standards Committee resolved pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, to take no further action in respect of the Applicants' complaints.

[9] The Applicants have applied for a review of the Committee's decision and have set out their reasons in paragraphs 7 to 13A (inclusive) of their letter dated 25 March 2010 accompanying the Application for review.

[10] All of the actions or omissions of the Practitioner complained about fall into the period prior to the commencement of the Lawyers and Conveyancers Act 2006 (1 August 2008) except for the final billings and the complaint relating to the failure to advise of the date set for the judicial conference.

Review

[11] The first ground on which the Applicants seek review is that the Standards Committee categorised the two assaults on the Complainant as "fights". Whilst this may have been an inappropriate description, how the incidents are referred to has no bearing on whether or not the Practitioner could be considered to be subject to disciplinary proceedings and is therefore of no relevance to this Application.

[12] The next matter the Applicants wish to have considered by the LCRO, relates to the report of the costs assessor (Mr Tain) appointed by the Committee to review the Practitioner's bills of costs. The Applicants consider that Mr Tain's conclusions were pre-determined and biased and employed double standards.

[13] Complaints concerning costs are referred by Standards Committees to assessors for independent review. The Law Practitioners' Act 1982 provided a standalone process for lawyers' accounts to be reviewed by costs revisers. However, under the 2006 Act, complaints concerning lawyers' charges are treated as disciplinary matters. The Complaints Service of the New Zealand Law Society has compiled a list of persons willing to act as costs assessors to review and comment on lawyers' accounts, in much the same way as a costs reviser did previously. However, the ultimate decision as to whether bills of costs rendered by a lawyer are such that the lawyer is to be the subject of disciplinary charges now rests with the Standard Committee.

[14] Mr Tain was a costs assessor appointed by the New Zealand Law Society. It can safely be assumed that the assessor will have had no previous involvement with the complaint, or the Practitioner whose accounts are being reviewed, and will have been considered by the Committee to have the requisite experience and ability to peer review the accounts. Consequently, it is difficult to imagine how the assessor could have been biased, or had the opportunity to pre-determine his views before receiving the file to carry out the review. I can see no evidence which would make me think otherwise.

[15] The instructions to the costs assessor were set out in the formal letter of instructions from the Complaints Service to Mr Tain dated 23 July 2009. His duties were stated as being to:

1) Review the Practitioner's files and costing records;

2) Request such further information from the Practitioner as may be necessary for the purpose of his assessment;

3) Contact the complainants and the Practitioner to discuss the complaint and the Practitioner's response to it; and if considered necessary, or appropriate to do so, meet with the parties, either jointly or separately

4) Prepare a report for the Standards Committee which should include:

    a. comments on the fees and whether the assessor considered the charges to be fair and reasonable fees for the services provided

    b. If the assessor was of the view that the fees were not fair and reasonable, to specify what he considered to be a fair and reasonable fee or, if he regarded it inappropriate to do so, to express a range within which he would consider a fee to be fair and reasonable; and

    c. Provide comments about any other matter arising out of his enquiry which may assist the Standards Committee in reaching a properly informed decision about the costs complaint.

[16] Mr Tain's report was issued on 22 December 2009 and copies have been provided to the parties.

[17] In the Applicants' letter dated 25 March 2010 accompanying the Application for review, the Applicants state that "the assessor seems to use double standards in his assessment, and in our view is based on a pre-determined and biased basis". I have already expressed my view on the allegations of bias and predetermination

[18] With regard to the issue of "double standards", the Applicants state that

> "To justify the Practitioner's conduct occurred before the new legislation came into force on 1 August 2008, the assessor claimed that the new legislation did not apply to the Practitioner;"
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> "To justify the Practitioner's attendances before the new legislation, the assessor claimed that Rules made under the new legislation and came into force on 1 August 2008 applied to the Practitioner."

[19] The Complainants seem to be stating that the assessor arbitrarily determined whether the new Act applied in order to suit his decision. They are perhaps referring particularly to the statement made by Mr Tain in paragraph 2.1(d) of his report that "I have considered and applied where relevant and appropriate the "reasonable fee factors" referred to in paragraph 9.1 of the Lawyers and Conveyancers Act (Lawyers:

Conduct and Client Care) Rules 2008". The "reasonable fee factors" applicable to the pre 1 August 2008 accounts would of course have been those factors which applied at the time, not those referred to in the 2008 Client Care Rules. It may not be clear to the Applicants, but the factors to be taken into account when assessing whether or not a lawyer's fee was reasonable, were essentially the same before 1 August 2008 as after. Consequently, while the assessor's statement is technically incorrect, I am satisfied that his decision would not have been any different.

[20] Whilst Mr Tain makes the statement in paragraph E 3.5 that "the total fees charged are at the upper end of scale" he was "by a small margin, unable to find that they are excessive". Mr Tain also concluded that the Practitioner made significant adjustments to the fee that would have been charged on a strict time basis, and that this therefore addressed the Applicants' complaints that the work done by the Practitioner was unnecessary and therefore resulted in excessive charges.

[21] Overall, I consider that there is nothing in Mr Tain's report that should have led the Standards Committee to consider that there had been a breach by the Practitioner of his professional obligations and on which disciplinary proceedings should be founded.

[22] The next matter in the Applicants' letter filed in support of the Application for review is that the Practitioner "deliberately concealed Court Notice from his client".

[23] The Notice in question is a letter from the District Court dated 19 November 2008 to the Practitioner, advising that the proceedings had been scheduled for a judicial conference on 25 March 2009. As this conduct is post 1 August 2008, it falls to be considered in terms of the Lawyers and Conveyancers Act 2006, and the complainants are quite correct to refer to the Client Care Rules promulgated pursuant to that Act.

[24] At the time it was contemplated that if the proceedings were to continue it was necessary to have them transferred to the High Court. This was because the Practitioner held the view that it was necessary to do so as the District Court did not have jurisdiction where Bill of Rights matters were raised and breaches of natural justice were being claimed.

[25] In his letter of 25 April 2009 to the Law Society in response to the complaint, the Practitioner advised that the scheduled judicial conference was to address timetabling issues as to how the case was to progress. There is no evidence on the Complaints Committee file to suggest that this was otherwise than the case.

[26] The Applicants refer to Rules 7 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, to support their contention that the Practitioner had breached his duty to them by not advising of the scheduled date.

[27] The decision of the Complaints Committee does not specifically refer to this aspect of the complaint. However, the Committee does record that it had considered all of "the material before it in reaching its decision to take no further action".

[28] I can see no evidence on the file of deliberate concealment or wilful failure to advise of the proposed judicial conference, as suggested by the Applicants. Allegations by a complainant of deliberate or wilful behaviour, inasmuch as those terms imply intentional behaviour on behalf of the Practitioner, are insufficient on their own. There must be some evidence supporting the Applicants' allegation that the actions of the Practitioner were intended to cause the Applicants harm. Given that the proposed judicial conference was to involve timetabling issues only, it is impossible to see how the failure to advise the Applicants of the proposed conference could have in any way been intended to cause harm in any substantial way.

[29] The approach to the conference would have, to a large degree been dictated by the position that the proceedings had reached as at 25 March 2009. If the proceedings had in fact been transferred to the High Court as was intended at that time, the judicial conference would have had no relevance at all.

[30] I consider therefore that the decision of the Committee in this regard was correct. At most, the failure to advise was a technical breach of Rule 7 by the Practitioner, which would not be capable of supporting any disciplinary action.

[31] The next matter raised by the Applicants is contained within paragraph 10 of their letter, in which the Applicants state that the Practitioner "hid" the basis on which fees would be charged. Once again, this matter has not been specifically referred to in the Standards Committee's decision, and I suggest that it may have been helpful for the Committee to have made its reasons clear in respect of all of the matters complained of to the parties in determining not to take any action in connection with the complaint. Indeed s139 (2) of the Lawyers and Conveyancers Act 2006 requires a Committee to give reasons for any decisions to take no, or any further, action in respect of a complaint.

[32] In the absence of any specific reasons by the Committee, but to ensure that the Applicants do not feel that this matter has not been properly considered by me, I would observe that both before and after 1 August 2008, any responsibility in this regard

rested with the instructing solicitor. This is made quite clear in Rule 3.7 of the Client Care Rules, which provides that where a lawyer is instructed by another lawyer, the obligations created by Rule 3.4 do not apply.

[33] In as much as there was any "obligation" to provide this information prior to 1 August 2008 (and I record that there was no formal obligation to do so in terms of disciplinary rules) this again, rested with the instructing solicitor.

[34] I also observe that the Applicants had ample opportunity to request Mr Caerphilly to make this enquiry of the Practitioner, having received 5 accounts from the Practitioner, the first of which is dated 10 September 2007.

[35] Again, I can find no grounds to depart from the decision of the Standards Committee.

[36] The next matter addressed in the Applicants' letter is contained within paragraph 11. The Applicants state that "considerable unauthorised, unnecessary and unreasonable services were imposed on the Complainants". There is some duplication here with the grounds referred to in paragraph 13, where the Applicants refer to the Practitioner's "unreasonable time recorded and grossly excessive fees charged." The issues traversed are also addressed to a considerable extent in this decision in the comments with regard to the Applicants concerns about the costs assessor's report.

[37] The costs assessors comments with regard to the Practitioner's bills are referred to in para 17 above. I would add to those comments, that the Practitioner was clearly concerned that he made absolutely sure that the Applicants were aware of his considerable concerns as to the likelihood of success of their claims, and was anxious to ensure that he did not give them false confidence as to the strength of their claim. This probably accounts also for the Applicants' perception that the Practitioner was "not on their side".

[38] The Practitioner was also keen to ensure that he did not expose his clients (or himself) to criticism by the Court, for pursuing an unmeritorious claim, which could have the result of costs orders against them. There was the potential for an indemnity costs order against the Applicants as the Practitioner refers to in his letter of 20 November 2008.

[39] I have noted in paragraph [20] above, Mr Tain's comments that the Practitioner has made a substantial reduction in his accounts as against the time recorded, and I

concur with the Committee's decision that no action should be pursued with regard to the matters raised in paragraphs 11 and 13 of the Applicants letter.

[40] This leaves the matter complained of in paragraph 13A of the Applicants' letter in which they raise concern that the Committee has not sufficiently concerned itself with the "incompetence and irresponsibility" evidenced by the Practitioner. This was referred to generally in the Applicants' letter and throughout correspondence with the Society. As such, there is nothing which has not otherwise been addressed in this decision, other than perhaps the Applicants complaint that the Practitioner had issued proceedings against them for recovery of his fees. It goes without saying, that a lawyer has the absolute right to pursue recovery of outstanding fees and there can be no suggestion that to do so would expose a lawyer to disciplinary action.

Decision

For all of the reasons referred to above, the decision of the Standards Committee is confirmed pursuant to section 211(1) (a) of the Lawyers and Conveyancers Act 2006

DATED this 01st day of October 2010

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Owen 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:

Mr Larnark, Mr Leichster and Ms Quilt as the Applicants
Mr Kirkby as the Practitioner
The Auckland Standards Committee No. 3
The New Zealand Law Society