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

LCRO 58/09

CONCERNING	The Lawyers and Conveyancers Act 2006
AND	
CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
BETWEEN	**MR NEWBURY** of Auckland
	Applicant
AND	**MR WINDSOR** of Auckland
	Respondent

DECISION

[1] This matter concerns the question of whether Mr Newbury acted unprofessionally in refusing to pay the bill of Mr Windsor. Both Mr Newbury and Mr Windsor are barristers. Mr Newbury (who has practised law for some time) retained the services of Mr Windsor (who is less experienced) to assist him in undertaking work.

[2] The Auckland Standards Committee 1 concluded that Mr Newbury was guilty of conduct unbecoming and ordered that he pay compensation of $2000 to Mr Windsor. Mr Newbury now seeks a review of that decision.

[3] The Standards Committee also concluded that it was proper that publication of its decision was necessary or desirable in the public interest. That decision was, however, suspended pending this application for review. The question was not directly addressed by either party to this hearing and as such I will not consider it further.

Background

[4] Mr Newbury retained Mr Windsor in April 2008 after advertising for the assistance of a junior barrister. At a meeting on 17 April Mr Newbury provided material

in respect of a matter pertaining to a client named X and gave instructions to Mr Windsor. The parties also discussed the rate of remuneration. Mr Windsor states that it was agreed that in most cases Mr Windsor would be paid at legal aid rates and that where the matter was legally aided Mr Windsor would be paid at half the applicable legal aid rate. Mr Windsor undertook the work in this matter which included preparing a brief of evidence. I note that there was no written record of instructions or any terms of retainer or rate of remuneration at that time.

[5] On 20 April 2008 Mr Newbury provided Mr Windsor with further instructions in respect of Mr W. He was instructed to assist in the preparation of submissions on leave to appeal and to undertake research in the matter. These were supplemented by an email of 24 April in which Mr Newbury noted that he was attaching submissions which could be "remerged". Some time after 20 April 2008 Mr Newbury emailed Mr Windsor stating that the rate of remuneration in this matter was to be $45 per hour capped at 15 hours. Mr Windsor appeared to accept this (although with some umbrage in a letter of 29 May 2008) and the invoice he issued appears consistent with this position. On 2 May 2008 Mr Windsor provided draft submissions to Mr Newbury.

[6] After a discussion by telephone on 4 May 2008 Mr Windsor attended on Mr Newbury's offices. Mr Newbury expressed dissatisfaction with the work of Mr Windsor. At that time Mr Windsor undertook further work on the W matter at Mr Newbury's offices. After this some further work was undertaken on the X file in respect of an application for further and better discovery which was provided by email on 8 May. Mr Newbury responded to that email on the same day by expressing dissatisfaction with the quality of the work undertaken by Mr Windsor. Mr Windsor responded by acknowledging "teething problems" and seeking to advance the relationship. It appears that the relationship was however ended and all relevant files were returned to Mr Newbury.

[7] Mr Windsor submitted two invoices for $1510 and $585. The copies of the invoices provided to this office were dated 10 June 2008 though it appears that the invoices were first sent to Mr Newbury under cover of a letter dated 29 May 2008. It appears that the 10 June invoices provided to this office were duplicates as they are marked "this invoice is significantly in arrears". I infer from this that the originals were sent on 29 May. The invoices themselves did not state the nature of the work undertaken, the hourly rate applicable, or the time spent on the matters. On 22 July 2008 Mr Newbury wrote to Mr Windsor objecting to the quantum of his bills on the

basis that his work was of inadequate quality and querying the terms of payment in the X matter. An offer to pay a reduced amount was made. Those invoices were not paid (and have not been paid). Mr Windsor raised the matter with Mr Newbury by letter dated 25 August 2008. It appears that the matter was then referred to Mr Windsor's father who assists in his practice as an accounts manager.

[8] It appears that some communication then occurred. A meeting was scheduled for 9 September however Mr Newbury did not attend that meeting. In response Mr Windsor Snr emailed Mr Newbury seeking payment of the invoices. A further meeting was arranged for the next week. Mr Windsor states that immediately prior to the meeting Mr Newbury agreed with Mr Windsor Snr that that the W account (for $585) was not disputed and would be paid in full. Mr Newbury disputes this. In any event at the meeting Mr Newbury offered to settle all matters for $900. That offer was declined.

[9] It appears that the meeting was somewhat heated. The parties at the hearing accepted that the exchanges at that meeting did not form part of the complaint. Mr Newbury stated that Mr Windsor Snr stated that he would issue proceedings to recover the debt. Mr Newbury stated that he was happy for his liability to pay the outstanding amount to be tested in the courts and said that it was on this basis that he took no steps to resolve the dispute himself. Mr Windsor finally complained to the New Zealand Law Society on 11 December 2008. That complaint was forwarded to Mr Newbury for comment on 16 December. Mr Newbury emailed the New Zealand Law Society on 27 January 2009 seeking a costs revision of Mr Windsor's bills.

The Complaint

[10] Mr Windsor complained that Mr Newbury, in failing to pay the invoices rendered, had breached his professional obligation. It is of note that the conduct in this case straddled 1 August 2008 when the Lawyers and Conveyancers Act 2006 and the related Rules of Conduct and Client Care came into force. However the obligations on lawyers to pay other lawyers they retain was not altered materially by that change. In light of this and the fact that the matter complained of comprises a single course of conduct and it would be unhelpful to divide the matter artificially I propose to consider the question of whether there was a breach of professional obligations by approaching the matter globally.

[11] Mr Windsor relied on r 10.7 which provides

> A lawyer who, acting in a professional capacity, instructs another lawyer, must pay the other lawyer's account promptly and in full unless agreement to the contrary is reached, or the fee is promptly disputed through proper professional channels. This rule applies to the accounts of barristers sole and foreign lawyers.

I note also that r 6.08 of the Rules of Professional Conduct for Barristers and Solicitors provided:

> A practitioner who instructs another practitioner in the role of counsel or any other capacity in any matter shall, unless agreement to the contrary is reached, become responsible personally for the prompt and full payment of the fee of the instructed practitioner.

The commentary to that rule further explains:

> The rule must be read subject to the right of the instructing practitioner's client to require the fee to be revised under part VIII of the [Law Practitioners] Act.

[12] The principles underlying the rules are the same. While the rules are articulated differently they are both expressions of the same professional expectation that a lawyer need not pursue a professional client and that in the event of a dispute over a fee it will be dealt with promptly and responsibly through professional channels.

[13] Barristers in particular are unable to recover their fees by recourse to the courts: *Atkinson v Pengelly* [1995] 3 NZLR 104; *Re Le Brasseur and Oakley* [1896] 2 Ch 487, 493. For this reason the professional rules place an obligation on instructing lawyers to be professionally (even if not legally) responsible for the payment of the fees of lawyers they instruct. Where it is agreed that the instructing lawyer is not to be personally responsible for the fees then he or she is professionally obliged to use reasonable endeavours to recover the fees from the lay client.

[14] The bill of Mr Windsor was disputed by Mr Newbury. Initially the complaint of Mr Newbury was about the quality of the work and this later became a dispute about the bill. The tone of Mr Newbury's letter of 29 May suggests that he may have anticipated some difficulty in obtaining payment in full from Mr Newbury. The first evidence of Mr Newbury disputing the bills is his letter of 22 July 2008. This is almost eight weeks after the invoices were sent to Mr Newbury. There is no evidence of any communication between Mr Windsor and Mr Newbury from 29 May to 22 July (other than the duplicate invoices having been sent by Mr Windsor to Mr Newbury).

[15] The issue for determination is whether Mr Newbury's actions comply with the professional rules or are otherwise in breach of professional standards. In terms of r 10.7 the question is whether he acted "promptly" in disputing the bills and whether he did so "through proper professional channels". In terms of the old r 6.08 the same question can be articulated as whether he properly accepted that he was "responsible personally for the prompt and full payment of the fee of the instructed practitioner" and in the event of dispute properly exercised "the right of the instructing practitioner's client to require the fee to be revised under part VIII of the [Law Practitioners] Act".

[16] Mr Windsors communication were met with silence between 29 May and 22 July. A near eight-week delay before indicating that a dispute existed is not sufficiently prompt. Mr Newbury stated in his application to this office that he could not challenge the bill because he was waiting for a "proper itemized account". I observe that the first reference to Mr Newbury requiring further details appears to be in the letter of Mr Newbury dated 18 December 2008 to the Law Society (in response to Mr Windsor's complaint). As such I do not accept that this was a proper reason for the delay. In any event, while Mr Windsor's bills might have been more detailed, this does not explain the delay between the issue of the bills and Mr Newbury's letter of 22 July. Mr Windsor was entitled to know well before that that he was unlikely to be paid without further action (even if the further action was the provision of a more detailed record of the work undertaken). It would seem reasonable that if a bill were to be disputed (or further details sought) then the dispute should be raised within a few days of when it fell for payment in the ordinary course of business. Whether this is taken to be on the 20th of the month following invoice or some other period the delay of Mr Newbury in raising this matter fell clearly outside of this.

[17] Rule 10.7 and r 6.08 also required Mr Newbury to raise the dispute through proper professional channels (expressly identified in the old rule as the costs revision process). Had he objected in a timely way it would have been open to him to seek a cost revision under the provisions of the now repealed Law Practitioners Act 1982. Mr Newbury states that he left the September meeting with Mr Windsor and Mr Windsor Snr under the impression that the matter would be brought before the ordinary courts by Mr Windsor. He argued that in light of this it was not incumbent upon him to take any action whatsoever. Of course one of the justifications for the rule is that a barrister is unable to pursue his fees in the ordinary courts. As such if Mr Newbury thought that this course of action was possible he was mistaken.

[18] In any event it was not appropriate for Mr Newbury to wait for Mr Windsor to take action to resolve the dispute. If there is disagreement about the fee properly payable it is incumbent upon the instructing lawyer to bring the matter before the professional body for resolution. It is not acceptable for an instructing lawyer to refuse to pay a disputed bill on the basis that the unpaid lawyer will bring the matter before the courts or other tribunal. This would be the case even if it were possible for the unpaid lawyer to sue (as for example where the unpaid lawyer is a solicitor).

[19] In light of this I must consider whether the Standards Committee was correct to find that the conduct of Mr Newbury amounted to a professional breach. The Standards Committee found that Mr Newbury was guilty of conduct unbecoming as set out in s 12(b) of the Lawyers and Conveyancers Act 2006. I note my earlier observation that the course of conduct under consideration straddles 1 August 2008 and therefore falls to be decided under both of the Law Practitioners Act 1982 (in respect of conduct prior to 1 August 2008) the Lawyers and Conveyancers Act 2006 (in respect of conduct after that date).

[20] 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; and see also *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming (under s 106(3)(b)) could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test was 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] I am of the view that the conduct of Mr Newbury could not be said to be truly egregious and as such does not amount to misconduct. The test for conduct unbecoming under both the Law Practitioners Act and the Lawyers and Conveyancers Act rests on whether the conduct would be considered acceptable by right thinking

members of the profession. The Standards Committee was comprised of Mr Newbury's professional peers and informed by lay membership. It would therefore be with great caution that I would depart from the Committee's opinion about what conduct was considered acceptable by lawyers of good standing. The Committee was of the view that Mr Newbury's conduct feel short of that standard. I see no reason to depart from that conclusion. Mr Newbury has treated Mr Windsor, a junior barrister (who quite likely has only a modest income at this stage) in his career very shabbily and in breach of clearly articulated professional standards. In respect of the conduct prior to 1 August 2008 I am of the view that Mr Newbury's conduct amounted to conduct unbecoming in breach of s 106(3)(b) of the Law Practitioners Act 2006.

[22] Mr Newbury's conduct continued after 1 August 2008 in that he continued to fail to pay the bill or take steps to dispute it through proper professional channels (until the very belated application for a costs revision on 27 January 2009). This was in breach of the clear words of r 10.7. In so far as it is possible to divide up the course of the conduct of Mr Newbury, the conduct subsequent to 1 August 2008 was also conduct unbecoming pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006 and therefore unsatisfactory conduct. I note further that given that I have found that r 10.7 was breached by Mr Newbury his conduct also amounts to unsatisfactory conduct pursuant to s 12(c) of the Act.

Compensation

[23] The Standards Committee ordered Mr Newbury to pay compensation to Mr Windsor. I note that this was the subject of a consent order the terms of which were reached at the hearing of this matter. The sealed order was issued shortly thereafter. In light of this no order in respect of compensation will be made and that part of the decision of the Standards Committee no longer stands.

Sanction

[24] I observe that despite finding a professional breach the Standards Committee imposed no sanction on Mr Newbury. Questions of compensation are distinct from the imposition of professional sanction and where unsatisfactory conduct exists the fact that some compensatory order has been made will not of itself affect the question of sanction. (I note however that it may be that the readiness of a lawyer to compensate a harmed party will be a relevant consideration).

[25] As I have noted the conduct complained of in this matter straddles the legislative change to the regulatory framework. The sanctions available for unsatisfactory conduct under the Lawyers and Conveyancers Act 2006 are considerably more severe than those that were available to District Disciplinary Tribunals under the Law Practitioners Act 1982. This represents a shift to the imposition of more meaningful penalties when unprofessional conduct is found. In this case the most significant aspects of the conduct complained of (and in particular the lengthy silence in response to the accounts being rendered) occurred under the Law Practitioners Act regime. I take s 352 of the Lawyers and Conveyancers Act to mean that in respect of conduct prior to 1 August 2008 the question of sanction must be approached on the same basis as it would have been had a District Disciplinary Tribunal been considering the question under s 106 of the Law Practitioners Act 1982. In light of that, and taking into account all of the circumstances surrounding the conduct, it would be inappropriate to reconsider the decision of the Standards Committee not to impose a sanction in this case. Had this conduct occurred primarily after 1 August 2008 a significantly different approach would have been taken.

Costs

[26] Mr Newbury has been unsuccessful in his application for review. The Costs Orders Guidelines of this Office indicate at point 3 that "Where a finding of unsatisfactory conduct is made or upheld against a practitioner costs orders will usually be made against the practitioner in favour of the Society". This is because it is appropriate that a lawyer who has been found to have breached professional standards should bear a significant portion of the costs of the associated regulatory response. I also note that this was a hearing conducted by the parties attending in person and was relatively straightforward. In accordance with the Costs Orders Guidelines an order for costs against Mr Newbury in the sum of $1200 is in the circumstances appropriate.

Result

[27] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee is confirmed. The following orders are made:

- Mr Newbury is ordered to pay to the New Zealand Law Society $1200.00 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

- The order that Mr Newbury pay Mr Windsor $2000 by way of compensation is replaced by the Consent Order made by the Legal Complaints Review Officer on 15 July 2009.

DATED this 20th day of July 2009

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Duncan Webb

Legal Complaints Review Officer

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

Mr Newbury as applicant
Mr Windsor respondent
The Auckland Standards Committee 1
The New Zealand Law Society