LCRO 66/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2
BETWEEN	**AP** of Wellington Applicant
AND	**ZK** of Wellington Respondent

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

DECISION

Application for review

[1] An application was sought by Mr AP (the Applicant) in respect of a decision made by the Wellington Standards Committee 2 in relation to his complaints against Mr ZK (the Practitioner). The decision is dated 25 March 2010. The Practitioner had acted in the estates of the Applicant's parents. He was one of the two Executor Trustees of their estates; the other being the Applicant. The Standards Committee noted that most of the complaints raised by the Applicant had been considered before and found to be unjustified. (This was a reference to previous complaints and an earlier decision dated 12 April 2008). The Committee noted that the Applicant accepted that the current complaints covered only the period between 1 August and 24 October 2008 when the complaint was made.

[2] The Committee's decision further noted that a meeting between the parties in November 2008 had resolved many of the matters in issue, but as the Applicant nevertheless wished to pursue his complaints (which included complaints about fees charged by the Practitioner), the Committee thereafter resolved that one of two bills of costs

should be subjected to a costs assessment. The other bill fell below the threshold for consideration and the Committee could find no special circumstances to justify further consideration of it.

[3] The Standards Committee's file showed that the Committee had arranged for a Costs Assessor to evaluate the second bill. The Costs Assessor concluded that the Practitioner's fees were fair and reasonable for the work done. His report had been forwarded to both the Applicant and the Practitioner, with an invitation to them to comment, but neither had provided any comment. After some consideration of the matter, the Standards Committee adopted the Costs Assessor's report.

[4] The Costs Assessor had also, however, brought to the attention of the Standards Committee that the Practitioner had deducted his legal fees in contradiction to the express directive of his Co-Executor, the Applicant, to not do so without his prior consent. In the light of these observations by the Costs Assessor, the Standard Committee considered the appropriateness of this action in the light of a prior decision by this office, *A v Z*, LCRO 40/2009, wherein LCRO, Mr Webb, had concluded that consent of a client was required before fees could be deducted. The Standards Committee had noted that the Applicant had given specific instructions to the Practitioner to not deduct fees without his prior approval, a directive that the Practitioner had ignored on the basis that his authority to deduct fees came from the wills of the Applicant's parents, (presumably the charging clauses), and the Trustee Act 1956. This led to the Standards Committee finding that the Practitioner was guilty of unsatisfactory conduct.

Review application

[5] The Applicant sought a review of the Standards Committee decision essentially because in the light of an adverse finding against the Practitioner, he was unable to comprehend why the Practitioner's fees were nevertheless upheld to be appropriate. He also contended that the Practitioner had charged for his time in dealing with him (the Applicant) with regard to his complaint regarding deduction of fees, which caused him to question the Costs Assessor's assessment that their fees were appropriate. In the Applicant's view, fees were charged by the Practitioner for dealing with the complaints and he sought to have these fees restored to the estate, together with interest and costs. He calculated this to be in the vicinity of $6,532.00 (plus GST). He also contended that the hours he had spent in pursuing his complaint against the Practitioner should also be paid for, this comprising around 120 hours, but as there is no recognised basis for self represented persons to claim the value of their time in pursuing a complaint, this will not be considered further.

[6] In addition the Applicant considered that there were elements in his earlier complaints that were relevant to the period of time covered by this review. He sought to resurrect these so as to ensure a proper consideration of the current issues.

[7] A review hearing was held on 26 January 2011 attended by the Applicant and the Practitioner.

Considerations

[8] There are aspects of the prior complaints that have a bearing on the complaints covered by the period of time incorporated in this review and these will be referred to as appropriate.

[9] I also observe that the Applicant's original complaints had been made when the Law Practitioners Act 1982 was still in force, which had a higher threshold than exists under the Lawyers and Conveyancers Act 2006 for disciplinary findings against lawyers. The later Act introduced the lower threshold of "unsatisfactory conduct", allowing a finding of unsatisfactory conduct to be made, for example, where the conduct in issue fell below the standard of competence and diligence that a member of the public is reasonably entitled to expect of a reasonably competent lawyer, (section 12(a)) or conduct that would be regarded by lawyers of good standing as being unacceptable as conduct unbecoming or as unprofessional conduct (section 12(b)). I have kept this in mind in considering those complaints that are relevant to this review.

Planning and investment strategy

[10] The Applicant submitted that the earlier failures by the Practitioner that he had complained of were still ongoing, particularly that the Practitioner had not formulated an investment plan for the estate funds, and in his view this matter remained current in the period of time covering this review. Additional matters included his dissatisfaction with the Standards Committee decision on the fees which he saw as having included charges that ought not to have been made. He remained dissatisfied with the Practitioner having placed (or invested) estate funds on interest bearing deposits.

[11] At the review hearing the Applicant produced two letters, which are dated December 2007 and March 2008. These cover the earlier period of the prior complaints and I do not propose to consider their content, but simply note that these reflect the fact of discussions and disagreement during the early part of 2008 as to the use of the estate funds, and ultimately led to the Applicant's complaints against the Practitioner in April 2008.

[12] The essential issue in the original complaint had related to the Practitioner's failure to have formulated an investment strategy. This has been dealt with by the Wellington District Law Society which concluded that there was no basis for an adverse finding where the two trustees were unable to agree on an investment plan. This decision was the subject of a review by LCRO Mr Webb as Lay Observer, who was satisfied that the matter had been properly investigated. At the review hearing it was explained to the Applicant that Section 351(2) of the Lawyers and Conveyancers Act 2006 prohibited any person from making a complaint that had been "disposed of" under the Law Practitioners Act, and for that reason the same matters could not be reconsidered, which in this case covered the complaint about the Practitioner's failure regarding investment of the estate funds. But as noted above, the Applicant saw this as an on-going failure and sought to have this matter reconsidered as part of the review.

[13] The Practitioner acknowledged having taken no steps in relation to investment of the funds whilst there was an investigation underway into complaints against him, as he was then awaiting the outcome of the Complaints Committee investigation (in relation to the original complaints). I also noted from the information on the file that at about the time that the Standards Committee decision was issued in August 2008, the Practitioner had decided that he could no longer act as a co-trustee with the Applicant and had resolved to resign as trustee and find a replacement. There is correspondence on the file to show that he was already taking steps in August 2008 to find a replacement, after the Standards Committee decision was issued. In his view it would have been inappropriate to embark on an investment strategy which should be made by the new trustee. What the evidence shows is that for the time period covered by this review the Practitioner was either awaiting the outcome of the investigation of complaints that had been made against him, or taking steps to find a replacement trustee.

[14] It was necessary that both trustees should be in agreement as to investment of funds, and the overall circumstances clearly suggest that consensus between them was unlikely to be reached, especially noting that the Applicant had meanwhile made further complaints against the Practitioner prior to the Committee having issued its decision on the original complaints. This reflects considerable and ongoing dissent between the parties, and was led to the Practitioner's decision to resign. I am unable to see that the Practitioner could be criticised for holding off any further action pending the outcome of the investigation, and thereafter deferring any investment decision to a new trustee to be appointed. The Practitioner was actively pursuing the matter of a replacement trustee as from early August 2008 and the evidence on the file shows that he kept the Applicant informed throughout his actions. In relation to the complaint that the Practitioner failed to formulate an investment

strategy within the timeframe covering this review, I can find no basis for an adverse finding against him.

Bills of costs/ deduction of fees

[15] The Applicant complained that the Practitioner had charged the estate for work involved in arranging a substitute trustee and dealing with his complaints. The Practitioner denied having charged the Estate for his attendances in relation to any complaints by either the Applicant or in relation to an investigation by the New Zealand Law Society. He confirmed that there have been no further charges since those bills.

[16] The Committee had focused its attention mainly on the bills of costs issued by the Practitioner in the period of time under its investigation. There were two bills of costs, both dated 15 August 2008. The first was under the sum of $2,000 and below the threshold set by Regulation 29 of the Lawyers and Conveyancers Act (Lawyers:Complaints Service and Standards Committees) Regulation 2008 which prohibit an enquiry unless there are special circumstances that would justify otherwise. The Committee could see no special circumstances in this case and declined to consider this bill. I find no fault with the Committee's assessment in this case.

[17] The second bill, which recorded a fee of $6,225,000, plus GST and disbursements, was forwarded by the Standards Committee to a Costs Assessor who eventually concluded, after having examined the original file and documents of the Practitioner, that the fee was fair and reasonable in all the circumstances. I noted that the Costs Assessor had the advantage of looking at all of the original files of the Practitioner, and in particular had noted that the Practitioner's charges had itemised every letter sent by the Practitioner. Copies of correspondence are on the file and I note that the charges made by the Practitioner are all incorporated in the bills of costs that have been reviewed by the Costs Assessor who, confirming the appropriateness of the fees, noted that a considerable volume of the Practitioner's attendances were generated by the actions of the Applicant. I have already noted that the Applicant was invited to comment on the Costs Assessor's report and did not avail himself of that opportunity. In these circumstances, the Standards Committee was entitled to conclude that neither party had any complaints about the assessment. The Standards Committee adopted the Assessor's report, and it is difficult to level criticism at its decision.

[18] The main task of this office is to review decisions made by Standards Committees on complaints, and this involves consideration of how the Committee went about considering the complaints. In this case the Committee arranged for an independent assessment of the

fees, and the Costs Assessor confirmed having examined the Practitioner's files, and noted that the Practitioner's bill was fully itemised. His report was subsequently considered by the Standards Committee. This means that the Practitioner's fees have been considered by both a Costs Assessor and the Standards Committee. I can find no fault with the Committee's actions with regard to the complaint concerning the Practitioner's fees. There is no basis for taking a different view to that arrived at by two other entities.

[19] The Standards Committee nevertheless made an adverse finding against the Practitioner for having deducted fees without the prior approval of the Applicant having been obtained. It appears that the Applicant is troubled by the Standards Committee approving the Practitioner's bills on the one hand, yet having made an adverse finding against the Practitioner on the other. This can be explained by separating the conduct issue (taking fees without deduction) from the quantum issue (amount of fees). It was appropriate that the Costs Assessor evaluated the Practitioner's fees solely in terms of the work and attendances involved. There was no aspect of the quantum of fees that impacted on the action of deducting the fee without consent. That was properly a separate issue, and the Practitioner bears an adverse finding concerning the manner of deducting the fee.

[20] The fact that there was no prior approval was not, in the present circumstances, necessarily a sufficient basis for disqualifying the fee or requiring a refund to the estate. The Practitioner was entitled to charge the estates for his work, and a client's refusal to consent to a deduction cannot prevent such charging. Had there been a disagreement over quantum of fee which resulted in approval being withheld, the appropriate course of action would have been a costs assessment. The costs assessment having been done in this case meant that the Practitioner's fee had been assessed as an appropriate charge, and one that the Practitioner may have pursued for payment.

"Investment"

[21] The Applicant had also complained about the placement of the funds on deposit which he considered an 'investment path' decided solely by the Practitioner. There was some dispute as to whether this amounted to an "investment", but in the light of the Practitioner's confirmation that these funds had been placed on an 'on-call' deposit, it is clear that the fund was never out of reach for another investment proposal. I do not see any purpose in considering whether the deposit amounted to an 'investment' or a 'placement', simply noting that the fund remained available at all times for any other planned investment, and that its accrual of interest meanwhile was a prudent course of action. I do not agree that the Practitioner's action in this regard amounted to wrongful conduct, further noting that the obligation to protect client funds was noted by Mr Webb in his Lay Observer Report, which

confirmed the appropriateness of the Practitioner's action. This complaint appears to have also been 'disposed of' in any event.

Review application by Practitioner

[22] The Practitioner also took the opportunity of seeking a reversal of the Standards Committee decision that he was guilty of unsatisfactory conduct, a finding that he considered to be wrong. The basis for the request was that he considered that the charging clauses in the wills of the Applicant's parents authorised the deduction of fees.

[23] Although I did not receive a formal application from him, the review process opens an opportunity for a total review of a matter, and it is not limited to only those matters raised by a review applicant. I have therefore considered the Practitioner's request.

[24] Charging clauses are routinely inserted into a will where there is an appointment of a professional trustee who would not otherwise be entitled to benefit from the trusteeship. However, a provision allowing for fees to be charged does not confer an entitlement to make a deduction without prior approval as to the particular fee having been obtained. The Standards Committee noted that the Practitioner had made such deductions against the express instructions of the Applicant to obtain prior consent before such deduction. In my view the Standards Committee properly relied on *A v Z* LCRO 40/2009 in finding that the Practitioner's conduct had been unsatisfactory in regard to that matter.

Decision

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

DATED this 16th day of February 2011

_____

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:

AP as the Applicant
ZK as the Respondent
The Wellington Standards Committee 2
The New Zealand Law Society