

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the City Standards Committee

**BETWEEN**

**AM**

Applicant

**AND**

**AN**

Respondent

**DECISION**

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

**Introduction**

[1] Ms AM applied for a review of the Standards Committee's decision dated 15 January 2013 in which the conduct of her firm, [AOL (AO)] in overcharging Mr AN, was found to have been unsatisfactory. The Committee also ordered AO to reduce its invoice from \$6,325 including GST, to \$1,000 including GST; and to pay a fine, costs and disbursements, all within 30 days of the date of the decision (the decision).<sup>1</sup>

**Background Facts**

[2] Lawyers at AO acted for Mr AN with respect to his application to Immigration New Zealand (INZ) for permanent residency. Mr AN was at risk of his application being refused, and the legal services were provided under urgency. INZ then declined Mr AN's application for permanent residency.

[3] As well as being disappointed with the outcome of his immigration application, Mr AN said he considered the advice he had received from AO was deficient, and they

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<sup>1</sup> Decision City Standards Committee, 15 January 2013.

charged too much for the work they did. He laid a complaint in those terms to the New Zealand Law Society (NZLS).

### **Standards Committee process**

[4] In his complaint to NZLS Mr AN said that Ms AM had told him that INZ “will definitely approve [his] application” for immigration. Mr AN says he received a copy of AO’s letter of engagement, paid \$1,000 on 1 July 2011, and instructed the firm on the basis of the terms of engagement.<sup>2</sup> He says on 18 July 2011 he received notification that INZ had declined his application, and he would not be granted an extension. He says that AO only sent one letter before his application was declined, and he cannot understand how the firm can justify charging him over \$6,000.<sup>3</sup>

[5] AO rejected Mr AN’s complaints,<sup>4</sup> saying Ms AM and her assistant Ms AP met with Mr AN on 1 July 2011, took his instructions and gave him preliminary advice. AO describes the \$1,000 Mr AN paid as an “initial deposit”, and says he instructed AO to obtain his records from INZ, to request an extension within which to file their response to INZ’s concerns, and to argue his case.

[6] AO describes Mr AN’s immigration application as having a lengthy history, with extensions spanning a year or more before AO was instructed. INZ allowed AO a further extension to provide a response. By that stage Mr AN had temporarily left New Zealand, which made it difficult for AO to obtain Mr AN’s further instructions and complete the submission to INZ. Nonetheless AO says it lodged the submission within time,<sup>5</sup> and issued Mr AN with an invoice for \$5,500 (excluding GST).<sup>6</sup>

[7] INZ declined Mr AN’s application, AO notified him, and Ms AM met with Mr AN when he returned from overseas to explain his options, and the reasons his application had been declined.

[8] Ms AM says that she supervised the lawyers in the firm who attended to Mr AN’s instructions,<sup>7</sup> that the fees were a reasonable reflection of the amount of work done for Mr AN under urgency. AO’s position is that Mr AN was told what the work would cost

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<sup>2</sup> Email AN to NZLS (2 December 2011).

<sup>3</sup> Email AN to NZLS (31 October 2011).

<sup>4</sup> Letter AO to NZLS (16 November 2011).

<sup>5</sup> Letters and emails AO to INZ (1 July to 11 July 2011).

<sup>6</sup> Invoice AO to (11 July 2011). Evidence of Ms AM at review hearing.

<sup>7</sup> AO file notes (1 July 2011 to 14 October 2011).

in advance and he instructed AO on that basis, but later refused to pay, instead laying his complaint to the NZLS.<sup>8</sup>

[9] The Standards Committee considered the information provided by the parties and appointed a Costs Assessor.<sup>9</sup> The Costs Assessor was provided with the information that was on the Standards Committee's file, and selected other documents and correspondence that he requested from AO, on the basis of which he prepared his report to the Committee (the Costs Assessor's report).<sup>10</sup>

*The Costs Assessor's Report*

[10] The Cost Assessor expressed the opinion that the scope and standard of the work AO had done for Mr AN did not support the fee, and the fee did not represent fair value for the work to Mr AN. The Cost Assessor provided a careful critique of the work AO had done, and said he was not surprised that the application had been declined, expressing the view that AO's submission to INZ "did not help at all".<sup>11</sup> He did not set out a detailed analysis against the reasonable fee factors in rule 9.1, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) but his overall conclusion was that AO had really only scoped the work, that the invoice was "manifestly excessive" and recommended a reasonable fee of \$1,000 including GST, which was the amount Mr AN had already paid.

[11] AO rejected the Costs Assessor's criticisms, and attributed any deficiencies in the submission to INZ to the lack of time, and absence of proper instructions from Mr AN after he had left the country. AO said that Mr AN's instructions were to delay the application, but that had been impossible given the already extensive delays before the firm was instructed. AO referred to the involvement of "a team of solicitors" spending "time after hours and during the weekend" preparing the submission, under urgency. AO said it had done more than just scoping, and that the fee is justified.<sup>12</sup>

[12] AO's view was that the Costs Assessor's report lacked objectivity, that AO has its own strategies for dealing with applications like Mr AN's, and AO's approach was not necessarily wrong only because the Costs Assessor held a different opinion of the best way to progress Mr AN's application.

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<sup>8</sup> Letter AO to NZLS (8 December 2011).

<sup>9</sup> NZLS to Costs Assessor (5 April 2012).

<sup>10</sup> Report Costs Assessor to NZLS, 27 April 2012.

<sup>11</sup> At [15].

<sup>12</sup> AO to NZLS (11 June 2012).

[13] AO said it had analysed the materials on its file, and formed the view that INZ had failed to assess Mr AN's employment position properly, had asked for irrelevant information and acted unreasonably. AO said that, contrary to the Costs Assessor's assumptions, AO had requested the former agent's files, they had not been forthcoming, it was not possible to obtain further information in the time available, and AO was unable to get any substantial help from Mr AN's employer.

[14] AO repeated its view that its fees were justified with reference to the reasonable fee factors in rule 9.1 of the Rules explained how the fee was calculated, and asked that it be upheld as fair and reasonable.

#### *Notice of Hearing*

[15] The Committee considered the information provided, resolved to set the matter down for hearing, and invited the parties to make submissions. The notice of hearing listed the two issues as the allegation that Ms AM had misrepresented or misled Mr AN as to the likely approval of his application, and the reasonableness of the fees.

#### *Submissions*

[16] Mr AN provided submissions referencing some of the Costs Assessor's criticisms in support of his own comments, criticising the legal knowledge of the lawyers involved, referring to a lack of evidence of the time the lawyers had spent, and repeating his concern that the fees were excessive.<sup>13</sup>

[17] Ms AM then provided a timeline of attendances from 30 June 2011 to 14 October 2011, a time/billing report, and an explanation that largely repeated information previously provided, including references to Mr AN's departure from New Zealand hampering communication attempts with AO, and difficulties in securing the co-operation of Mr AN's employer. Ms AM repeated her concerns over the Committee's choice of Costs Assessor, saying that he was a competitor of AO, reiterating her concerns over the perceived subjectivity of his analysis, noting that he had not met with Mr AN or reviewed the firm's time records in carrying out his assessment, and emphasising the urgency under which AO had provided the services.

[18] Ms AM also said that the decision by INZ to refuse Mr AN's visa application was unrelated to the quality of the service provided by AO, but was due to difficulties with the information Mr AN had provided to INZ relating to his assertion that he was a skilled migrant. Ms AM says that "our job was to make as strong a case as possible given the

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<sup>13</sup> Letter AN to NZLS (26 July 2012).

information that Mr AN could provide in the short timeframe given” and that this was “what we provided”.<sup>14</sup>

#### *Committee’s Consideration*

[19] The Standards Committee considered the allegation of misleading Mr AN, and formed the view that:<sup>15</sup>

Mr AN was quite aware of the INZ’s concerns in relation to his application for permanent residency even before he instructed AO Law to act on his behalf. The Committee is therefore of the view that AO Law was not in a position to mislead Mr AN as to the chance he had of being granted permanent residence by INZ.

[20] The Committee also accepted the Costs Assessor’s report, and in particular his observation that AO’s submission had done “nothing to advance matters for the applicant client”.

[21] With respect to fees, the Committee agreed with the Costs Assessor’s view that the fee was not fair and reasonable, and reduced it to \$1,000, largely on the basis of the:<sup>16</sup>

...contents of the law firm’s submissions to INZ, which added little or no value to the complainant’s application for permanent residency and having regard to the interests of both client and lawyer.

[22] The Committee considered that AO’s breach of rule 9, by charging a fee that was not fair and reasonable, was unsatisfactory conduct pursuant to s 12(c) of the Act, and made orders under s 156(1) of the Act.

[23] The Committee reduced the fee to \$1,000 all-inclusive,<sup>17</sup> imposed a fine of \$2,000 payable to NZLS,<sup>18</sup> ordered AO to pay costs and expenses incidental to the enquiry of \$1,200,<sup>19</sup> and issued a certificate under s 161(2) certifying the amount due as \$1,000 including GST.

[24] Ms AM objected to the decision and applied for a review.

#### **Review Application**

[25] Counsel for AO submits that the determination of unsatisfactory conduct should be quashed, and that the orders made under s 156(1) should be rescinded. In support, counsel submits that the Committee was wrong to have relied so comprehensively on

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<sup>14</sup> Letter AM to NZLS (13 August 2012).

<sup>15</sup> Above n1 at [12].

<sup>16</sup> Above n1 at [14].

<sup>17</sup> Lawyers and Conveyancers Act 2006, s 156(1)(e).

<sup>18</sup> s 156(1)(i).

<sup>19</sup> s 156(1)(n).

the Costs Assessor's report for a number of reasons, including that he was in direct competition with AO and was therefore an inappropriate choice. Counsel submits the report contained "clear errors", did not assess the fees against the reasonable fee factors in rule 9.1, and the Costs Assessor exceeded the scope of his role.

### **Review hearing**

[26] Ms AM attended a review hearing with counsel in Auckland on 21 November 2014. Mr AN had indicated that he intended to attend the review hearing, but he did not arrive, and the hearing proceeded in his absence.

### **Role of the LCRO**

[27] The role of the Legal Complaints Review Officer on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.<sup>20</sup>

### **Scope of Review**

[28] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

### **Review Issue**

[29] The question on review is whether there is any good reason to depart from the Committee's decision.

[30] There is no evidence to support Mr AN's assertion that Ms AM misled him as to the likelihood of success of his application to INZ. That aspect of the decision is confirmed on review, and will be given no further consideration.

[31] The focus of this review is on the Committee's consideration of the reasonableness of AO's fees.

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<sup>20</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[32] For the reasons discussed below, there is good reason to reverse this aspect of the Committee's decision on review, and pursuant to s 209(1)(a) of the Act, the Committee is directed to reconsider and determine the fees aspect of Mr AN's complaint.

## **Analysis**

### *Scope of the complaint*

[33] Mr AN's complaint was that he had not secured the outcome he wanted from INZ because AO had not provided an adequate level of service, and had then overcharged him.

[34] The Committee's focus was initially on the fee aspect of his complaint, but the Cost Assessor's report highlighted what he considered were deficiencies in the standard of the service AO provided.<sup>21</sup> The Committee accepted the contents of the Cost Assessor's report and agreed AO's submission to INZ "did nothing to advance matters for" Mr AN. There is no evidence in the decision of the Committee having considered AO's submissions on the Cost Assessor's report.

### *Was the bill fair and reasonable?*

[35] Counsel for AO submits that the decision lacks reasoning. He says the Committee appears to have simply adopted the Costs Assessor's reasons and report, with no accompanying explanation, despite AO raising concerns about the Costs Assessor's independence before the Committee made the decision.<sup>22</sup>

### *Delegation to a Costs Assessor*

[36] It is open to a Standards Committee to delegate functions and powers under s 184(1) of the Act. The NZLS's "Practice Notes Concerning the Functions and Operations of Lawyers Standards Committees" (the Practice Note) provides guidance to Committees when dealing with fee complaints and delegations, and says:

10.3 Fee complaints should be delegated by Standards Committees either to a specialist Costs Assessor appointed for that purpose by the NZLS complaints service or to an individual Standards Committee member. The delegation should be in writing. The Costs Assessor or Standards Committee member must undertake an analysis of the bill of costs and the client file and prepare a report for the Standards Committee. It is expected that the Cost Assessor would arrange a meeting with the lawyer and the complainants together, with the necessary files and costing records being made available, as part of the investigation.

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<sup>21</sup> Above n10 at [25].

<sup>22</sup> Submissions AO, 11 June 2012 and 13 August 2012.

[37] The Practice Note then provides a general layout for reports, and a template letter making the delegation.<sup>23</sup> The written delegation the Committee sent to the Costs Assessor on 5 April 2012 adopts the template, and says:

**City Standards Committee delegation under s 184(1) of the Lawyers and Conveyancers Act 2006 to undertake Costs Assessment - Complaint No ...**

...

In terms of the authority delegated to me by the City Standards Committee pursuant to s 184(1) of the Lawyers and Conveyancers Act 2006, you are hereby authorised to undertake an assessment of the bill of costs which is the subject of a complaint by Mr AN.

- Invoice dated 11 July 2011 to an amount of \$6,325 (all-inclusive)

The complaint file accompanies this letter and should be returned to the Standards Committee once you have completed your assessment.

Your duties as delegated costs assessor are to:

- (1) Review the lawyer's files and costing records;
- (2) Request such further information from the complainant or the lawyer as may be necessary for the purpose of your assessment;
- (3) If you consider it necessary contact the complainant and the lawyer to discuss the complaint and the lawyer's response to it and, if you consider it 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:
  - (i) Your comments on the fee itself and whether you consider it is fair and reasonable fee for the services provided in terms of Rule 9 of the Rules of Conduct and Client Care For Lawyers;
  - (ii) If you are of the view that the fee is not fair and reasonable, you should specify what you consider to be a fair and reasonable fee, or, if you regard it as inappropriate to do so, express a range within which you would consider a fee to be fair and reasonable; and
  - (iii) Your comments about any other matter arising out of your inquiry which might assist Standards Committee in reaching a properly informed decision about the costs complaint.

### The Report

[38] The report was requested to be forwarded to the Standards Committee no later than 28 May 2012. On 24 April 2012 the Costs Assessor requested the decision, "potentially prejudicial information" letter and accompanying report from INZ,<sup>24</sup> and the practitioner provided those to him by email the same day the Costs Assessor provided his report very promptly on 27 April 2012.

<sup>23</sup> Practice Note paragraphs 10.4, 10.5.

<sup>24</sup> Email Costs Assessor to NZLS (24 April 2012).



[39] There is no evidence that the Costs Assessor reviewed AO's files and costing records when preparing his report to the Standards Committee, although he did request further information he considered relevant from AO for the purpose of his assessment. It appears he did not consider it necessary to contact Mr AN or AO, or to meet with the parties, together or apart. His report commented on the fee in terms of rule 9, said he had considered the reasonable fee factors contained in rule 9.1, and concluded \$1,000 all-inclusive was a fair and reasonable fee. As mentioned above, he set out his carefully reasoned and detailed critique of the work AO had billed Mr AN for, and expressed his opinion that the work was substandard, and of little utility to Mr AN.

#### Discussion

[40] This Office places considerable weight on the views expressed by Committees and expert Costs Assessors, which "in the absence of any obvious error... should not be lightly dismissed".<sup>25</sup> However, this Office has on occasion called for a Committee to reappraise its view, even after it has received a report from a Costs Assessor. One example is LCRO 264/2012<sup>26</sup> in which the LCRO expressed reservations over the methodology adopted by the Costs Assessor in preparing his report, and over the Committee's determination, in that matter.

[41] The Committee had appointed a Costs Assessor to consider a law firm's fees of \$476,828.80 (GST inclusive). The LCRO referred to the decision of Priestley J in *Chean v Kensington Swan Lawyers*<sup>27</sup> as it related to the assessment of whether or not a bill of costs is fair and reasonable as required by rule 9.1. Noting that time costing is not the only consideration in billing, His Honour said:<sup>28</sup>

[23] ... the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out. It is very clear that for most of the bills this independent assessment has not been carried out.

[42] It is relevant to consider in this review whether any aspect of the Costs Assessor's report suggests his conclusions should be reconsidered. It is also relevant that the Costs Assessor, as a practitioner with experience in immigration related matters, identified what he considered to be serious deficiencies in the work done by

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<sup>25</sup> LCRO 128/2012 at [23].

<sup>26</sup> AA v B L, B M & B K, LCRO 264/2012.

<sup>27</sup> *Chean v Kensington Swan* HC Auckland, CIV-2006 404-1047 7 June 2006.

<sup>28</sup> At [23].

AO. Given that analysis, it is curious that the Committee accepted the Costs Assessor's view that work was done to a low standard, but does not appear to have considered whether the work done fell short of the standard of competence and diligence that a member of the public is entitled to expect a reasonably competent lawyer,<sup>29</sup> or was conduct unbecoming or unprofessional.<sup>30</sup>

[43] As a layperson, it is unlikely that Mr AN could have critiqued AO's work as the Costs Assessor was able to. However, once Mr AN saw the Costs Assessor's comments, he was happy to adopt them,<sup>31</sup> and observed that AO could have raised a challenge before the Costs Assessor carried out his assessment. Ms AM does not dispute that with the benefit of hindsight, AO probably could have raised its concerns earlier, but says delay is not fatal to AO's position.

[44] It was not unreasonable for AO to have raised its concerns after it received the Costs Assessor's report, particularly because the Costs Assessor's critique of the work AO had done was so uncompromising. AO's concerns and Mr AN's comments were available to the Committee before it made its decision, but there is no mention in the decision of either party's submissions on the Costs Assessor's report.

[45] There is no evidence of the Committee or the Costs Assessor explicitly analysing the fees against the relevant factors in rule 9.1, although the Costs Assessor says in his report he had:

taken into account all of the factors set out in the Rules of Conduct and Client Care in setting a fee and [found] that the invoice is manifestly excessive.<sup>32</sup>

[46] In the decision the Committee records that it:<sup>33</sup>

...accepts the contents of [the Costs Assessor's report]. The Committee agrees with [the Costs Assessor's] observation that AO Law's submission of 11 July 2011 to the INZ did nothing to advance matters for the applicant client.

[47] The Committee then referred to rule 9, the interests of client and lawyer, and agreed with the Costs Assessor's view that the fee charged was not fair and reasonable, and that a reasonable fee in the circumstances would be \$1,000 including GST and disbursements. The Committee then recorded its determination that in charging a fee that was not fair and reasonable, AO had breached rule 9, and its conduct was unsatisfactory.

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<sup>29</sup> Lawyers and Conveyancers Act 2006, s 12(a).

<sup>30</sup> Section 12(b).

<sup>31</sup> LetterAn to NZLS (26 July 2012).

<sup>32</sup> Above n10 at [29].

<sup>33</sup> Above n1 at [13].

[48] It is not clear from the decision whether the Committee or the Costs Assessor was aware that, according to Ms AM, AO's invoice to Mr AN's was for a fixed fee, the amount of which she says they agreed at the initial meeting. Whether a fee is fixed is one of a range of factors to be taken into account in determining the reasonableness of a fee.<sup>34</sup>

[49] The extent to which the Committee recognised AO's concern that the Costs Assessor may be a competitor in the market and locality for similar legal services is also not clear. There is nothing objectionable in the Committee having appointed a local specialist as a Costs Assessor, particularly because one of the factors to be taken into account under rule 9.1 is "the fee customarily charged in the market and locality for similar legal services".<sup>35</sup> However, a clear exercise of the Committee's independent discretion would cure any appearance of competitor bias.

[50] In considering the fees aspect of Mr AN's complaint, it is also not obvious what weight the Committee gave to other relevant factors, including the importance of the matter to Mr AN, or the urgency under which AO says it was acting. In summary it is not possible to exclude the prospect that the Committee uncritically accepted the Costs Assessor's view, formed without him having undertaken an analysis of the bill of costs against AO's client file as the Practice Note and instrument of delegation require. It appears his critique may have led the Committee to the conclusion that there was only one correct approach to resolving Mr AN's legal problem. That may or may not be correct, but the Committee adopted it as the basis for substantially reducing the fee without clearly explaining its reasoning.

[51] As the LCRO said in LCRO 264/2012:<sup>36</sup>

Determining what constitutes a fair and reasonable bill of costs is a difficult and, some would argue, subjective task. It is for that reason that guidelines for Standards Committees indicate that there should be a range of allowable fees before any adverse finding is made.

[52] The LCRO discussed two different approaches to analysing what constitutes a reasonable fee, with reference to comments made by the New Zealand Lawyers and Conveyancers Act Disciplinary Tribunal in *Auckland Standards Committee No 1 v Hart*.<sup>37</sup>

[88] Mr Bircher's starting point for analysis of what constitutes a reasonable fee was the amount of time and labour expended at the established hourly rate

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<sup>34</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 9.1(i).

<sup>35</sup> Rule 9.1(m).

<sup>36</sup> Above n26 at [80].

<sup>37</sup> *Auckland Standards Committee 1 v Hart* [2012] NZLCDT 20.

for Mr Hart and other practitioners. He had then offered his opinion on the various factors to be given weight in accordance with the Principles of Charging referred to at paragraph [85].

[89] Mr Billington's approach was somewhat different. While agreeing with Mr Bircher that the time spent on a job at the relevant hourly rate would tell you what the job cost you, he argued that it does not tell you what the job is actually worth. To find that out, he said you need to assess the value of what you are doing for the client, and that relates to your charge-out rates and what the client requires of you.

[53] The LCRO then referred to comments made by Donaldson J relating to the exercise of assessing a fair and reasonable fee in *Property and Reversionary Investment Corporation v Secretary of State for the Environment*, where His Honour said:<sup>38</sup>

It is an exercise in assessment, an exercise in balanced judgment – not an arithmetical calculation...

It also follows that it is wrong always to start by assessing the direct and indirect expense to the solicitor, represented by the time spent on the business...

This error is compounded if, as an invariable rule, the figure representing the expense of recorded time spent on the transaction is multiplied by another figure to reflect the other factors.

[54] It is reasonable to assume that the Standards Committee in the present matter appointed the Costs Assessor because of his experience in the area of law from which Mr AN's complaint arose. The Costs Assessor appears to have adopted the approach adopted by Mr Billington, and commended by the Tribunal. However, although he says he took into account the factors set out in rule 9.1, it is not apparent how those affected his conclusion that a reasonable fee would be an all inclusive amount of \$1,000. The only basis for that figure appears to have been his view that AO's only achievement for Mr AN was to scope the work that needed to be done. If there is some reason to impugn that opinion, it follows that there may be reason to challenge his conclusion of what constitutes a reasonable fee for the work AO did.

[55] It is not clear from the decision whether the Standards Committee grappled with the rule 9.1 factors in its decision-making process, or whether it critically engaged with the Costs Assessor's report.

[56] Although the amount of fees in the present matter is significantly less than the fees under consideration in LCRO 264/2012, there was an opportunity for the Costs Assessor, or the Committee, or both, to identify the factors that were relevant, and comment on the impact of those in assessing the fee that should properly be charged.

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<sup>38</sup> *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441.

[57] Bearing in mind the consequences of the Costs Assessor's view that the work done was inappropriate, unnecessary, and carried out incompetently on the practitioner involved, it would have been appropriate for the Committee to have expressed its own independent view, particularly after Ms AM had tendered submissions challenging the Costs Assessor's Report.

[58] On one view, it is implicit in the Committee's decision that it independently formed its own view and then adopted the Costs Assessor's report. If that were the case, there would be no grounds for concern about the Costs Assessor's objectivity, because his report would only have added weight to the Committee's independently formed view. The contrary view is that the Committee did not independently exercise its discretion, but uncritically adopted the report in its entirety. A close reading of the decision raises concern that the latter view may be correct, suggesting that the Committee acquiesced to the Costs Assessor's opinion, and agreed with his observations on the utility of AO's submission to Mr AN, without exercising its discretion in assessing the reasonableness of AO's fee, or the standards issues raised.

[59] There is no indication that the Costs Assessor undertook an analysis of the bill of costs with reference to AO's client file as the instrument of delegation requires. The indications are that the Costs Assessor worked only with the narrow range of documents he had requested. Nor is there any suggestion that he arranged a meeting, or otherwise discussed the situation, with AO or the complainant.

[60] Although the Costs Assessor mentioned that he had "taken into account all of the factors set out" in rule 9.1,<sup>39</sup> there is no visible analysis in the report, only a finding that the fee was "manifestly excessive". There was no acknowledgement in the Costs Assessor's report or the decision that there may or may not be more than one legitimate approach to challenging INZ's position.

[61] Having received the Costs Assessor's report, it fell to the Committee to exercise its discretion, not solely on the basis of the Costs Assessor's report, but on the basis of all of the information available to it.

[62] It is not clear from the decision whether the Committee considered AO's submissions were unpersuasive, or whether they should be afforded any weight at all. AO raised objections to the Costs Assessor's views, and while it is not practical or necessary for a Committee to address the minutiae of every submission made to it, it would have been reasonable for the Committee to have acknowledged the existence of

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<sup>39</sup> Above n10 at [29].

AO's submissions countering the Costs Assessor's opinion. This is particularly so because there could be a link between criticisms of the quality of another practitioner's work and competition in a local market.

[63] If the Committee had analysed the factors under rule 9.1, it is likely it would have discussed rule 9.1(m), and drawn a comparison with similar legal services being provided in the local market. At that point, the Committee had the opportunity to address the parties' contrary views. In circumstances where the Costs Assessor's view of the quality of the service provided was so uncompromising, and the general thrust of his report was that the fees were manifestly excessive, it would have been helpful for the Committee to have set out its reasoning on that matter.

[64] In the circumstances, it is difficult to see what steps the Costs Assessor or the Committee took to identify or address the interests of the lawyers involved, as rule 9 anticipates.

*How to proceed*

[65] It is preferable for a range of views to be brought to bear in considering AO's standard of service and fees. A Standards Committee is best placed to do that, being constituted of lay and professional members, who have regard to the interests of both Mr AN and AO, and take into account the relevant factors, including the relevant matters identified in rule 9.1.

[66] In the circumstances, the decision is reversed, rendering the s 161(2) certificate of no effect. This matter is returned to the Standards Committee pursuant to s 209(1) of the Act, with a direction that a Committee reconsider and determine the part of the complaint that refers to the standard of work done, and AO's fees on the following basis:

- (a) The Standards Committee should first consider whether to refer the parts of the complaint to a different Committee to undertake this reconsideration.
- (b) The Committee that undertakes the reconsideration should consider:
  - (i) Whether the standard of service AO provided fell below either of the standards in s 12(a) or (b) of the Act.
  - (ii) Whether the fees are fair and reasonable when analysed against the requirements of rules 9 and 9.1.
- (c) In assisting it to consider whether a different view from that formed by the Costs Assessor can reasonably be formed on either or both issues, the

Committee is free to appoint an investigator, a second Costs Assessor or both. The existing Costs Assessor's report should not be provided to any appointee.

- (d) The Committee should circulate any report it obtains from a second Costs Assessor or investigator to the parties, and should invite submissions from the parties on the standards and fees issues.
- (e) The Committee should then consider and determine:
  - (i) Whether the standard of service AO provided fell below either of the standards in s 12(a) or (b) of the Act;
  - (ii) Whether the fees are fair and reasonable in the context of rules 9 and 9.1, and the implications of that determination under s 12(c) of the Act.

[67] It is not necessary for the Committee to supply a follow-up report to this Office.

### **Costs**

[68] The LCRO has a broad discretion under s 210 of the Act to make such orders as to the payment of costs and expenses as the LCRO thinks fit.

[69] There is no good reason to order either party to pay costs. Mr AN has not conducted himself in a manner that would attract a cost award on review. AO has applied for a review and secured a fresh look at the complaint. It is open to the Committee to make costs orders once it has concluded its reconsideration. Any such order, and the decision itself, would be amenable to review by this Office, in the usual way.

[70] Having considered the full range of costs orders that may be appropriate in all the circumstances of this review, I do not consider it appropriate to make any orders for costs or expenses.

### **Orders:**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee:

- (a) that Ms AM did not mislead Mr AN is confirmed;

- (b) that AO's conduct in overcharging Mr AN was a breach of r 9 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 is reversed.

Pursuant to s 209(1) of the Lawyers and Conveyancers Act the Standards Committee is directed to reconsider and determine the part of the complaint that refers to the standard of work done and AO's fees.

**DATED** this 19th day of December 2014

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D Thresher  
**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 AM as the Applicant  
Mr AN Singh as the Respondent  
Mr AR as the Respondent's Representative  
City Standards Committee  
New Zealand Law Society