

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Nelson Standards Committee

BETWEEN

LB
of South Island

Applicant

AND

STANDARDS COMMITTEE

Respondent

DECISION

Introduction

[1] This is an application for review of a decision of the Standards Committee which considered an own motion complaint against LB (the Practitioner). Despite concluding that no further action was necessary or appropriate, the Committee nevertheless ordered the Practitioner to pay the sum of \$500.00 to the New Zealand Law Society in respect of the costs of and expenses incidental to the enquiry.

[2] The Practitioner seeks a review of the costs order against him.

Background

[3] In May 2010 the NZLS Inspector undertook a routine audit of the trust account in a firm where the Practitioner is the Trust Account Partner. The Inspector subsequently informed the firm's partners of the concerns he had in relation to various estates which he would detail further in a report to the Standards Committee.

[4] In a memorandum dated 4 June 2010 the Inspector informed the Standards Committee that the core of his referral concerned the "*issue of billing and failing to exercise transparency*" with the executors. The Inspector's report covered a number of

estates handled by the firm, but particularly focused on the [X] Estate. Of this the Inspector noted that there had been a sizeable uplift in fees (near to one-third of the entire bill), and that no client care disclosure or invoice appeared to have been sent to the executors.

[5] The Practitioner was sent a copy of the Inspector's report and invited to comment. The Practitioner responded to all of the Inspector's comments, noting that the Inspector had indicated an overall satisfaction with the firm's trust accounting regime. Addressing the [X] Estate matter, the Practitioner acknowledged that invoices ought to have been sent to the executor earlier, and that the executor had not commented after receiving them. The Practitioner defended the fees uplift on the basis of the complexity of the Estate.

[6] The Inspector was asked to comment on the Practitioner's response, and sent a lengthy letter to the Committee in September 2010 which covered all of the estates that he had audited. Of the [X] Estate he observed that *"any possible failure to complete client care disclosures is of graver consequence if the firm has taken fees of substantial quantum by deduction without rigid compliance with trust account regulation 9."*

[7] As a result the Practitioner was informed that the Standards Committee had resolved to commence an own motion enquiry in relation to the [X] Estate, and also appointed a costs assessor.

[8] The Inspector revisited the law practice on 13 to 15 October 2010, and provided a more positive but not completely exculpatory report to the Standards Committee.

[9] On 3 November 2010 the Costs Assessor reported back to the Committee. He had been tasked with assessing the account rendered in the [X] Estate in a sum of \$21,937.50 including GST, and the fee "uplift" of \$6,000.00. The Costs Assessor concluded that "the work was done expeditiously, efficiently and with professional vigor", and while an uplift was justified, he concluded a 30% uplift was not justifiable, and that this should be halved.

[10] In November the Practitioner was sent a Notice of Hearing and invited to make submissions in respect of the conduct matters, the appropriate orders that could be made and on the possibility of publication in the event of a finding of unsatisfactory conduct. Included was a copy of the Cost Assessor's report and a further report by the Inspector.

[11] In reply the Practitioner submitted that there was a lack of detail about the actual complaint he was facing, and he had 'assumed' the nature of the complaint from the correspondence. He discerned the complaint to relate to the [X] Estate fee and in particular the fees uplift. The Practitioner made submissions that the fee was justified and so no finding of unsatisfactory conduct should be made against him. The Practitioner included a costs assessment he had obtained from a senior practitioner in another area who had concluded that the charge was "very reasonable".

[12] Subsequently the Standards Committee advised the Practitioner that it accepted that its notice of the particulars of the complaint had been "inadequate", and that accordingly the Hearing date was moved to 3 February 2011.

[13] The Committee clarified the issue to be "*whether the fee charged to the estateand (the) bill of costs dated 31 March 2010 of \$19,500.00 plus GST was fair and reasonable in terms of Rule 9 of the Lawyers Conduct and Client Care Rules 2008*" (the Rules). It set out Rule 9 and s130(c) of the Lawyers and Conveyancers Act 2006 (the Act) ("own motion" investigations).

Standards Committee Decision

[14] The Standards Committee's Notice of Determination of 24 February 2011 set out the detail of the complaint, and the basis for concluding that there was no unsatisfactory conduct, having noted that "*the two very experienced Practitioners who had reviewed the file had concluded that the work completed was very competently carried out, in an efficient and expeditious way*". The Committee nevertheless stated that "*there was some unease within the Committee at the ultimate amount of the bill rendered to the Estate, the timing of the invoice, and in particular the level of the 'uplift'*".

[15] The Committee resolved pursuant to Section 157(2) of the Act that the Practitioner pay the sum of \$500.00 to the New Zealand Law Society in respect of the costs of and expenses incidental to the inquiry".

Application for Review

[16] In his application for review dated 5 April 2011 the Practitioner sought removal of the order for costs made against him on the grounds that it was "*unfair and inappropriate*".

[17] The review grounds included that “*the complaint proceeded on a basis of an own motion complaint which the Committee effectively dismissed*”, “*that in the circumstances (the complaint) should never have been brought against (him)*”; and given a finding that there was no unsatisfactory conduct, his conduct was not open to criticism.

[18] The NZLS responded to the review application on behalf of the Standards Committee, clarifying that the reason the complaint was brought against the Practitioner was because he was the partner responsible for the file.

[19] This review has been undertaken on the papers pursuant to section 206 of the Act. The parties have consented to this process, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Discussion

[20] Section 157(2) of the Act allows a costs order to be made against a practitioner notwithstanding that there is no adverse finding. This states:

Even though, in proceedings relating to a complaint or matter, a Standards Committee has made a determination under Section 152(2)(c) and has not made a finding that there has been unsatisfactory conduct on the part of a person...to whom the proceedings relate, the Standards Committee may, if it considers that the proceedings were justified and that it is just to do so, order that person to pay to the New Zealand Law Society... such sums as the Standards Committee thinks fit in respect of the expenses of and incidental to the proceedings and any investigation of that person’s conduct or of that person’s affairs or trust account carried out by, or on behalf of, the Standards Committee.

[21] The key elements are that the power to impose costs is discretionary (the Standards Committee “*may ...*”), the Committee must consider “*that the proceedings were justified*” and that “*it is just to do so*”.

[22] While this office can review the exercise of a discretionary power, there would need to be a proper basis for intervening with the exercise of a discretion.

[23] I have considered the Practitioner submissions. Concerning the failure to disclose details of the wrongdoing, the Committee acknowledged and subsequently remedied that matter. This is not a sufficient basis for challenging the costs order.

[24] That the matter commenced as own motion enquiry is also not of itself a sufficient reason for challenging the costs order. For all practical purposes an own-motion enquiry must proceed through the same procedural pathways as a complaint by a third person.

[25] I have also considered the submission that the complaint ought not to have been made against the Practitioner. However, as the partner responsible for the firm's trust account it was appropriate that he should be the person to respond to any relevant concerns.

[26] I have understood from his review application that the Practitioner holds the view that the conduct is 'not subject to criticism'. However, the fact that no adverse finding has resulted does not necessarily mean that there is no basis for criticism of the conduct. In this case, despite not making an adverse finding, the Committee expressed its disquiet over the size of the uplift. It is clear that the Committee remained unhappy with the charges for the work, the amount of the uplift, and the timing of the invoices.

[27] In terms of the substantive enquiry, the first issue is whether the Committee's enquiry was justified. The Inspector clearly had concerns sufficient to have brought them to the attention of the Standards Committee. The procedural omissions identified by the Inspector (failure to provide client care information and failure to send invoices before deducting fees) were largely accepted by the Practitioner in his letter dated 20 July 2010, where he stated that the firm had "taken steps to deal with the issues raised...". The Practitioner considered the uplift justified on the basis of the complexity of the estate.

[28] On the question of whether the Standards Committee's enquiry was justified, I am satisfied on the basis of the evidence that it was. On its face the fees uplift was large, and fees had been taken without the executors having been aware of the fees. That the Committee pursued the matter was a proper exercise of its discretion.

[29] The next question is whether it was "just" to make the costs order. This question asks whether it was fair and reasonable to seek a financial contribution from the Practitioner towards costs of the enquiry. Considerations might include the justification of the enquiry and the reasonableness of the steps that were taken which incurred the costs, as well as the circumstances giving rise to the enquiry and the circumstances of the individual charged with contributing to the costs.

[30] Having concluded that the enquiry was justified, it is also my view that the steps taken by the Committee in appointing a costs assessor was reasonable. There were a number of concerns identified by the Inspector on a routine visit and as I have also noted, the Practitioner acknowledged aspects of the shortcomings identified by the Inspector. That the Practitioner disagreed that the uplift was unreasonable was a proper basis for having the matter considered by a costs assessor.

[31] The cost of investigations are borne by the members of the NZLS. Where concerns are identified and costs incurred in the investigating the concerns, it is not unreasonable that a contribution towards costs should be borne by the lawyer involved. The Practitioner has not demonstrated that the Committee exercised its discretion improperly or unreasonably. None of the Practitioner's submissions have disclosed any circumstances that are relevant to his ability to contribute.

[32] Section 157 of the Lawyers and Conveyancers Act 2006 specifically makes provision for a contribution from a lawyer notwithstanding that there has been no adverse finding. The absence of an adverse finding is not a sufficient basis for challenging a costs order under this section.

[33] None of the grounds advanced by the Practitioner show that the Committee has exercised its discretion improperly. I have found no reason to challenge the Committee's exercise of a discretionary power in this case. Accordingly the application for review is declined.

Costs

[34] The Practitioner has been unsuccessful in his review application. The LCRO Guidelines state that where an adverse finding is made, or upheld against a Practitioner costs orders will usually be made against the Practitioner in favour of the NZLS in respect of the costs of an expenses incidental to the enquiry.

[35] The LCRO Guidelines also set out the principles that apply to the making of such an order. Where the review is straight forward, and conducted on the papers, as is the case here, a costs order of \$900 is considered appropriate. An order will be made accordingly.

Decision

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

Orders

Pursuant to section 210 of the Lawyers and Conveyancers Act 2006 the Practitioner is ordered to pay costs in the sum of \$900. This is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 1st day of September 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:

LB as the Applicant Practitioner
Standards Committee as the Respondent
The New Zealand Law Society