

LCRO 80/2011

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee 1

BETWEEN

MR TB

Applicant

AND

MR NX

Respondent

DECISION

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

Introduction

[1] Mr TB has applied for review of the determination by Auckland Standards Committee 1 to take no further action in respect of his complaint about fees rendered by Mr NX. This decision is remarkable more for the events which occurred during the course of the review than the outcome.

Background

[2] In December 2004 Mr TB was charged with offences under the Resource Management Act. In July 2007 he instructed Mr NX to act on his behalf to defend the charges.

[3] It is accepted by both parties that Mr NX agreed to act for Mr TB for a fee of

\$100,000 plus GST but there is disagreement between Mr NX and Mr TB as to the basis on which the fees were to be paid.

[4] Mr TB says that he only agreed to pay the fee if the charges were successfully defended and he recovered his legal costs. Mr NX says that the fee was a fixed fee.

[5] Mr TB paid one half of the fee on 31 July 2007 and an account was rendered by Mr NX on 3 August 2007.

[6] Mr NX rendered his second account for the balance of the fees on 13 November 2007, which invoice was duly paid by Mr TB.

[7] Following significant delays in the progress of the prosecution, Mr NX was ultimately successful in having the proceedings stayed and the charges withdrawn.

[8] Mr TB also sought Mr NX's assistance in connection with an insurance claim to meet his legal costs which the insurance company was resisting. This dispute was resolved resulting in a payment by the insurance company of \$30,000.

[9] Shortly afterwards, Mr TB lodged his complaint with the New Zealand Law Society Complaints Service on 20 April 2010.

Mr TB's complaint and the Standards Committee determination

[10] Mr TB forwarded the two invoices rendered by Mr NX with his complaint. He advised that his brief to Mr NX was that he would agree to Mr NX's "huge fee" only if he could win and that he could recover costs expended.

[11] He noted that the first invoice was for preparation of the case, for which he considered Mr NX had done "next to nothing". He advised that Mr NX did not have any staff available to conduct this preparation and in the end that Mr TB himself had done a lot of the work. He advised that he also engaged a private investigator and the services of another law firm to provide resource management expertise which Mr NX did not have.

[12] He then says that the second invoice was for the actual trial which was set down for two weeks but in the end occupied only one day where the issue of delay was argued.

[13] Mr TB also complained about Mr NX's tardiness in pursuing the insurance claim.

[14] Mr NX instructed Mr NW to represent him in connection with the complaint. Mr NW responded to the Complaints Service on 24 June 2010 and objected to the Law Society accepting the complaint. He argued that the provisions of Regulation 29 of the Standard Committee Regulations¹ prevented consideration of bills of costs which predate the complaint by more than two years. The bills of costs were dated 3 August 2007 and 31 August 2007, and the complaint was lodged on 20 April 2010.

[15] The Complaints Service issued a Notice of Hearing on 2 September 2010 which noted the issues to be addressed as:

- overcharging; and
- whether the Committee had jurisdiction to consider the accounts.

[16] Mr NW provided brief submissions in response to the Notice of Hearing in which he again raised the jurisdictional issue. He also noted that the Committee had not called for a costs assessor's report.

[17] At its hearing on 17 September 2010 the Standards Committee resolved to call for a report by a costs assessor and adjourned the matter until the report was available.

[18] The costs assessor's report was provided on 3 February 2011. In this report, the assessor referred to "the paucity of information supplied by Mr NX" and noted that the only reference to time records had been supplied in a letter from Mr NW to the Complaints Service in which he advised that "Mr NX's time records show that his [Mr NX's] office recorded \$193,202 in time." The assessor also noted that despite the Society requesting the time records from Mr NX, these had not been provided.

[19] In paragraph 4 of his report the assessor stated:

Notwithstanding that the Committee made it quite clear that it would deal with the matter on the papers, still no time records were made available. Therefore the writer must reach a decision based on the information contained on the Society files.

[20] Prior to this, the assessor had referred to the basis on which he had approached the review. This was with reference to the provisions of section 351 of the Lawyers and Conveyancers Act. At paragraph 2.3 of his report the assessor stated:

The Standards Committee has therefore referred this matter to the writer in the

¹ Lawyers & Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

context of a costs complaint as to whether there has been “grossly dishonest overcharging”. I have been asked to consider each bill and indicate whether overcharging is present. If no overcharging is present then there will be no jurisdiction to deal with the matter.

[21] He then proceeded to consider all of the costing factors relevant to an assessment of Mr NX’s fees and at paragraph 22 concluded:

Under the reasonable fee factors paragraph 9.1 I believe that a reasonable fee has been charged. In the circumstances I do not consider that Mr NX has been grossly dishonest in his overcharging of Mr TB in relation to the invoices dated 03.08.2007 for \$56,250 and invoice dated 13.11.2007 for \$56,250.²

[22] Following comments from Mr NW and Mr TB the Standards Committee proceeded to consider the matter and on 8 March 2011 issued its decision. It formed the view that there was sufficient information before it to conclude that Mr NX’s fees were not grossly excessive and therefore proceedings could not have been commenced against Mr NX pursuant to the Law Practitioners Act 1982 and in these circumstances section 351(1) of the Lawyers and Conveyancers Act operated so as to exclude consideration of the complaint by the Standards Committee.

[23] Similarly, the Committee considered that there was no “dishonest billing practices” such as would mean that proceedings could have been commenced against Mr NX pursuant to the Law Practitioners Act 1982, and again, this operated so as to exclude consideration of the complaint by the Standards Committee.

[24] Mr TB has applied for a review of that determination. He considered that the Committee had “gone off on tangents and got concerned with irrelevant matters.” The basis for his complaint was that he considered the second payment was for the conduct of the hearing which instead of being two weeks duration, lasted only one day. He considers therefore that he is entitled to a refund of part of that payment.

Review

Mr TB’s view of the bills

[25] Mr TB considers that the first payment of \$50,000 plus GST to Mr NX was for preparation of his case, and the second payment of the same amount was for the trial. It must be noted at the outset of this review, that Mr TB is mistaken in interpreting the

² It is noted that the reference to paragraph 9.1 is to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 whereas the relevant factors to be taken into account with regard to Mr NX’s bills of costs were contained within Rule 3.01 of the Rules of

bills in this way. Mr NX agreed to act for Mr TB in connection with the prosecution for a total fee of \$100,000 plus GST. That fee was not divided up in the way that Mr TB asserts. It was a fee for the total retainer. There was no specific sum allocated to the hearing although it was anticipated at the time that a trial of at least one week would be necessary.

[26] If the trial had proceeded, it would seem that the time estimated by Mr NX to conduct the defence would have been considerably exceeded.

[27] As it happened, the trial did not proceed and Mr NX billed the amount that had been agreed.

[28] All fees rendered by a lawyer must be fair and reasonable. That applied as much before the commencement of the Lawyers and Conveyancers Act as after. The difference is that under the Law Practitioners Act only billings that were “grossly excessive” or “dishonest” would result in disciplinary proceedings being brought against the lawyer.

[29] Because the bills rendered by Mr NX were rendered prior to the commencement of the Lawyers and Conveyancers Act, but Mr TB complained after the commencement of that Act, section 351(1) requires that a complaint about fees could only be accepted if proceedings of a disciplinary nature could have been commenced against Mr NX under the Law Practitioners Act.

[30] Previous decisions of this Office³ have adopted the approach of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in *Waikato Bay of Plenty Standards Committee 2 v (Name Suppressed)*⁴ to this issue. At [64] of that decision the Tribunal stated:

...we think that the inquiry has to involve more than the simple proposition that proceedings of a disciplinary nature “could” have been commenced, in that it would not have been possible to commence them, irrespective of whether well founded or not. The policy and purpose of the provision must be to ensure that a person does not face proceedings under the Lawyers and Conveyancers Act for conduct which would not have resulted in proceedings being commenced under the Law Practitioners Act. It is not a matter of finally determining a charge in coming to this view, but considering whether conduct occurring at a time when the Law Practitioners Act was in force could properly have been the subject of a charge under that Act.”

Professional Conduct for Barristers and Solicitors which were in force at that time. However the fee factors to be taken into account in both sets of rules are predominantly the same.

³ See for example *LCRO 299/2011*.

⁴ [2010] NZLCDT 14.

[31] That is the test that has to be applied to this issue. In other words, was a fee of \$100,000 plus GST for the work that Mr NX carried out “grossly excessive”? It is not simply, as seen by Mr TB (but understandably), that because Mr NX did not conduct a two-week trial that Mr TB should receive a refund.

Mr NX’s failure to provide his files

[32] As noted in the introduction to this decision, the events which occurred during the conduct of this review are of some note.

[33] Both the Standards Committee and the costs assessor appointed by the Committee proceeded on the basis of information provided to them by Mr NW. He did not produce any time records or any other evidence to support his contention that Mr NX had recorded time of \$193,202.

[34] In addition, I came to the view that the costs assessor appointed by the Standards Committee had somewhat exceeded his role (although I have not reviewed the instructions provided by the Standards Committee) in that he proffered a view as to whether Mr NX’s fees were “grossly excessive” and therefore whether the Standards Committee could accept the complaint or not. That is a decision for the Standards Committee to make, not a costs assessor. The assessor’s function is to review the fee charged and offer an opinion as to whether or not the fees were fair and reasonable.

[35] In addition, the assessor also strayed into considering whether or not payment of the fee was subject to success and recovery as alleged by Mr TB. That was not an issue to be determined by him either.

[36] In the circumstances, I resolved that it was necessary for this Office to commission an independent report from an alternative costs assessor. I also considered that it was necessary for that alternative assessor to have both Mr NX’s files and time records that Mr NW asserted were in existence.

[37] On 11 August 2011, I therefore requested Mr NX to produce his files and time records, that request being made pursuant to the powers available to the LCRO under sections 147 and 204(d) of the Lawyers and Conveyancers Act.

[38] It is not necessary to recount in full the details of the attempts made by this Office to have Mr NX comply with that request. Should it become necessary to do so,

full details are included in an affidavit sworn by me on 26 March 2012 in support of an application to the High Court⁵ in the exercise of its inherent jurisdiction to compel Mr NX to provide his files and records.

[39] What is important to record however, is that the attendances required in respect of Mr NX's lack of response to the request from this Office are relevant to the question of costs to be determined later in this decision.

[40] In her judgment, Goddard J made the following comment:-

A statutorily granted power to request documentation necessarily implies an intention that its production be compellable. In the absence of a frank power to do so, but in the light of the purposes of the Act and the fundamental obligations on B as a lawyer to uphold the rule of law and to facilitate the administration of justice, it is appropriate to exercise the inherent jurisdiction of this Court to order production of the documents B has thus far failed to produce. To so order could not be conferring on an administrative body powers that were not by implication contemplated by the statute.⁶

[41] Goddard J made the following orders against Mr NX:

1. "B" [Mr NX] is ordered to produce the documentation by 4:00 pm on Friday 29 June 2012.
2. The matter is to be placed in the duty list for the following week to be called on a date that week to be notified by the registrar.
3. In the event of failure by "B" to comply with the Legal Complaints Review Officer's requests to produce the relevant documentation by 29 June 2012, consideration will be given at the hearing the following week to suspending "B" from practice forthwith.
4. There will be an order for indemnity costs and disbursements against "B" up to and including the cost of the hearing on 6 June 2012.

Jurisdiction

[42] Following the judgment of the court Mr NX delivered his files and timesheets and it was then possible to commission an independent report by a costs assessor.

[43] However, it is necessary first to address the argument by Mr NW to the Standards Committee that because the bills of costs were more than two years old at the time of the complaint, the Standards Committee lacked jurisdiction to consider them.

⁵ See *Legal Complaints Review Officer v B* [2012] NZHC 1349.

⁶ *Ibid* at [47].

[44] This particular issue was not addressed by the Standards Committee in its determination, notwithstanding the fact that it had been included as a matter for consideration in the Notice of Hearing. The Standards Committee focused instead on the issue as to whether or not it considered there had been gross or dishonest overcharging.

[45] In correspondence with Mr NW, the Complaints Service advised that as the matter related to conduct prior to 1 August 2008, it did not consider that Regulation 29 was applicable or could override the provisions of section 351(2)(b)(iii) of the Lawyers and Conveyancers Act. That sub-section provides that no person is entitled to make a complaint in respect of a bill of costs that was rendered more than six years prior to the commencement of the section i.e. prior to 1 August 2002. The Complaints Service view was therefore that in these circumstances a Standards Committee could, by virtue of this section, consider bills of costs rendered after 1 August 2001, and that Regulation 29 had no application.

[46] There is nothing in the Regulations or section 351 that indicates that Regulation 29 does not apply in respect of bills rendered prior to 1 August 2008. Consequently, the Standards Committee has no jurisdiction to consider a complaint about bills of costs which are more than two years old at the time of the complaint, unless special circumstances exist. If special circumstances are found to exist, then section 351(2)(b)(iii) prevents a consideration of any bill of costs rendered prior to 1 August 2002.

[47] The first issue to be determined therefore is whether special circumstances exist. What constitutes special circumstances has been considered in two recent LCRO decisions.⁷ At [19] of *RU v MW*, the LCRO referred to the leading authority of *Cortez Investments Limited v Olphert & Collins*⁸ and had this to say:

All three members of the Court rejected the trial judge's finding that "serious risk of injustice" was needed to succeed in showing "special circumstances", but all produced different "tests". Woodhouse P opined that "*if the issue is to be related to perceived injustice then the simple risk of injustice should be sufficient*" (at 437), while Richardson J considered that "*It [was] a question of where the interests of justice [lay] in all the circumstances*" (at 439). McMullin J's view was that "*[a]ll that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary*" (at 441). These comments provide some guidance in ascertaining "special circumstances".

⁷ See *RV v Auckland Standards Committee* LCRO 299/2011; *RU v MW* LCRO 293/2011.

⁸ [1984] 2 NZLR 434 (CA).

[48] In the present instance, the compelling issue in reaching a view as to whether or not special circumstances existed is the fact that the final impact on Mr TB personally was not known until the insurance claim had been finalised, resulting in a payment to him of \$30,000 only. That occurred in February 2010 and Mr TB lodged his complaint in April 2010. If the insurer had met all of the costs, the amount of Mr NX's bills would have been irrelevant to Mr TB. Instead he was obliged to personally fund \$70,000 plus GST.

[49] In addition, the amount of Mr NX's bill must have some bearing on the decision, although I do take note of the fact that Mr TB had both agreed to this fee and paid the invoices rendered.

[50] Overall however, I consider that special circumstances did exist such as to mean that the Complaints Service had authority to accept Mr TB's complaint.

[51] The next issue is whether or not Mr NX's bills constituted gross or dishonest overcharging such that section 351(1) would operate to allow the Complaints Service to accept the complaint. That consideration not only relates to whether or not the complaint should be accepted in terms of section 351(1) but if the finding is such as to admit the bills into consideration, it would almost invariably follow that there would be an adverse finding against the lawyer.

[52] That is why Mr NX's challenge to jurisdiction on this ground was unable to be considered until such time as the files and time records had been received and an alternative costs assessor's report delivered.

The costs assessor's report

[53] The report of the costs assessor appointed by this Office was delivered on 23 August 2012. The assessor correctly approached her role as being to assess whether the fees "in the round" were fair and reasonable. That is the approach directed by Priestly J in *Chean & Luvit v Kensington Swan*.⁹

⁹ HC Auckland CIV 2006-404-1047, 7 June 2006.

[54] In doing so, the assessor first addressed all of the costing factors.¹⁰ She took particular note of Mr NX's charge-out rate of \$1000 per hour and made the following comments:

This is an expensive hourly rate but I am satisfied Mr TB was aware of what the rate was in advance and happy to pay it and the estimate provided as long as (according to Mr TB) it secured him avoiding the conviction.

[55] It was also noted by the assessor that the result achieved for Mr TB was the outcome he desired and he also sought Mr NX's assistance with regard to his insurance claim, which was not part of his original brief.

[56] The report concludes in the following way:

In the circumstances I do not consider Mr NX's fee of \$100,000 was unreasonable, and I actually find it was within the range expected. This is especially so given the favourable outcome for Mr TB in that he avoided the conviction and achieved a settlement with NZI for a contribution towards his fee.

[57] The members of Standards Committees include lawyers who are experienced in the area of law in respect of which the lawyer has been engaged. They also include lay persons. It is ultimately the Standards Committee which must make a determination as to whether or not a lawyer's bills are appropriate. The question to be determined in the present case is whether the bills constituted gross or dishonest overcharging.

[58] There have now been two assessors' reports, and a consideration by the Standards Committee, all of which have concluded that Mr NX's bills did not constitute gross or dishonest overcharging.

[59] There is nothing that has been presented that would cause me to come to a different conclusion and the determination of the Standards Committee will therefore be confirmed.

[60] For the sake of completeness it is necessary to briefly address Mr TB's contention that the fee was only payable if Mr NX was successful and all accosts were recovered. Such an arrangement, particularly the recovery of all fees, is an unusual arrangement, and it is to be expected that it would have been recorded in some way. Mr TB has not provided any record of such an arrangement, and in the circumstances, there is nothing on which such a finding can be sustained.

¹⁰ Again, the cost assessor appears to have referred to the Conduct and Client Care Rules rather than the Rules of Professional conduct.

The Completion of the review

[61] This review was completed on the papers after Mr NX finally provided his consent pursuant to section 206(2)(b) of the Lawyers and Conveyancers Act. This was not provided by him in the first instance and it was not until another hearing was scheduled that Mr NX consented to the review being completed in this manner.

Costs

[62] Section 210(3) of the Lawyers and Conveyancers provides that:

...without finding that there has been unsatisfactory conduct on the part of a person (being a Practitioner...) to whom the proceedings relate, the Legal Complaints Review Officer may, if he or she 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 Legal Complaints Review Officer thinks fit in respect of the expenses of and incidental to the proceedings and any investigation of that person's conduct... .

[63] I referred earlier in this decision to the difficulties which were encountered in progressing this review. While indemnity costs were awarded by the Court against Mr NX in respect of those proceedings, that does not recover any of the costs incurred by this Office as a result of the delays, additional hearings, and attendances required as a result of Mr NX's intransigence in complying with the request for his files, the scheduling of hearings where Mr NX did not appear, and the appearance of counsel at hearings with minimal instructions.

[64] Mr TB's application for review was justified. The amount of the fee was significant and it was not unreasonable for him to consider that there should be some refund. He was also somewhat dissatisfied with the overall service provided by Mr NX. There is evidence on the file that he considered at times that he was asked to attend meetings when no progress had been made, and that Mr NX was dilatory in his attendances with regard to the insurance matter. This supports the view that both the complaint and the application for review were justified.

[65] In addition, I consider that it is just that Mr NX should be ordered to contribute to the costs of this review. This Office is funded by levies on lawyers. Mr NX has considerably increased the costs of this review by his actions referred to above.

[66] The Costs Orders Guidelines produced by this Office refer to a range of orders from \$1,200 to \$2,400 to be recovered in successful review applications. These amounts have been assessed as being approximately one half of the costs of a review hearing.

[67] In the circumstances, I consider that this review has consumed at least more than two times the resources than it otherwise should have. There will therefore be an Order for costs against Mr NX at the midway-point of the range referred to in the guidelines.

Decision

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

Pursuant to section 210(3) of the Lawyers and Conveyancers Act 2006, Mr NX is order to pay the sum of \$1,800 by way of costs to the New Zealand Law Society such sum to be paid by no later than 13 January 2013.

DATED this 13th day of December 2012

O W J 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 TB as the Applicant
Mr NX as the Respondent
Mr NW as the Representative of the Respondent
Auckland Standards Committee 1
The New Zealand Law Society