LCRO 88/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 1
BETWEEN	**AE** Applicant
AND	**ZW and ZV** of X Respondents

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

DECISION

Application for review

[1] The circumstances giving rise to this application have some history. Mr ZW (Mr ZW) is a partner in the firm AAE acting in the administration of the Estate of the Applicant's mother. Mr ZV (Mr ZV) is a consultant to the firm and the sole Executor of the Estate.

[2] In March 2009, the Applicant lodged a complaint with the New Zealand Law Society Complaints service with regard to an account rendered by AAE for administration of the Estate.

[3] On 26 August 2009, the Standards Committee decided to take no action in respect of the complaint.

[4] On 14 October 2009 the Applicant lodged an application for review in respect of that decision.

[5] On 10 February 2010, the Legal Complaints Review Officer (LCRO) issued his decision, LCRO 167/2009.

[6] That decision upheld the application for review and reversed the decision of the Waikato Bay of Plenty Standards Committee 1. The Committee was directed by the LCRO pursuant to Section 209 of the Lawyers and Conveyancers Act 2006 (the Act) to reconsider the matter. That reconsideration took place and a further notice of determination was issued by the Standards Committee on 19 May 2010. The decision of the Standards Committee was to confirm its previous decision to take no action. In its reasons for doing so, the Committee confirmed that it had reconsidered the original complaint having taken into account all of the issues raised by the LCRO in his decision of 10 February 2010.

In reconsidering the complaint, the Committee also considered responses by the original costs assessor to the matters raised by the LCRO. In addition it engaged a second costs assessor whose report was also considered by the Committee.

[7] The Applicant raises five issues where she considers the Standards Committee has based its decision on wrong principles.

[8] The Applicant seeks two outcomes:-

(i) A determination of a fair and reasonable fee for all of the work carried out on the file in 2008 and early 2009;

(ii) A direction as to whether lawyers must now specify to prospective clients that their billing method is calculated with reference to a percentage of the value of the property involved.

[9] The LCRO formed the view, pursuant to Section 206 of the Act, that this application could be adequately determined on the basis of the information and documentation available to this office and the parties consented to the review being carried out without a hearing.

Review

[10] It is important from the outset of this decision to note the framework provided by the Act in respect of complaints relating to solicitors' bills of cost.

[11] A complaint relating to a solicitor's bill of costs is treated in the same way as a complaint about any other conduct of a legal practitioner. Complaints are made pursuant to s 132(2) of the Act. All complaints, including complaints about bills of cost, fall to be considered within the disciplinary framework of the Act.

[12] In this regard, the framework provided by the Act is considerably different from the framework contained within the Law Practitioners' Act 1983 which governed the conduct of legal practitioners prior to 1 August 2008. That Act contained a specific procedure whereby bills of cost were subject to revision by the District Law Society through costs revisers, which then made a specific finding as to any adjustments to be made to the bill and certified accordingly. This difference must be recognised by the Applicant when she seeks an outcome that the LCRO determine what is a fair and reasonable fee for all of the work carried out on the file in 2008 and early 2009.

[13] Under the Act, any adjustment to be made to the Practitioner's account pursuant to s 156(1)(e), may only be made following a finding of either misconduct or unsatisfactory conduct.

[14] That is not to say that in the course of its deliberations, the Committee does not establish what it considers to be a fair and reasonable fee. That must be a starting point in its deliberations. However, the Committee must then exercise a discretion as to whether or not any particular bill of costs is so at variance from what the Committee considers to be a fair and reasonable fee, that disciplinary orders should be made.

[15] It is to be noted, therefore, that the focus of the Standards Committee and the LCRO is on whether the Practitioner's conduct is deserving of professional discipline.

[16] Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that a lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in Rule 9.1.

[17] The 13 factors set out on Rule 9.1 have been previously been set out in full in paragraph 23 of LCRO 167/2009

[18] I agree with the general observations of the Standards Committee in the first paragraph on the second page of its decision. I would also observe that it is not appropriate for the LCRO to simply replace the views of the costs assessor and the Standards Committee with his or her own views of reasonableness. While the composition of the Standards Committee is not known, I observe that members of the Committee are themselves experienced cost revisers. In addition, the Committee must include at least one lay member who represents the views of the public as to what constitutes a fair and reasonable fee.

[19] For the reason noted above, I hesitate to engage in a detailed examination of the factors considered by the costs assessors appointed by the Committee. However, given the comments of the LCRO in the previous decision, it is appropriate that I do that in a general way.

[20] In the previous decision, the LCRO was critical of various aspects of the report by the first costs assessor appointed by the Committee. Those comments were made without the benefit of the full survey report referred to by the assessor, whose firm had been responsible for carrying out the survey. That report in full, has been made available to the Standards Committee and to me. However, as property rights attach to the report, it is understandable that the assessor is unwilling for it to be disseminated further.

[21] The survey was conducted in April 2009, and 323 firms constituting 21% of law firms nationally, responded. The geographical mix of respondents equated roughly to the geographical spread of firms throughout New Zealand.

[22] It is important to convey to the Applicant, that the assessor, through his firm AAF, has conducted a number of surveys on various aspects of costing within the Legal Profession. The results of those surveys represent current practices by survey participants. It is reasonable to infer therefore, that the survey results reflect what is generally considered acceptable to the clients of the participants, and not, as has been suggested, a preferred outcome by practitioners.

[23] At the end of the process whereby each of the factors (and others if appropriate) are taken into consideration, the overall approach is to then to "take a step back and look at the fee in the round" – *Chean v Kensington Swan* (7 June 2006) HC Ak CIV-2006-404-1047

[24] In this regard, the approach of the second costs assessor appointed by the Standards Committee is relevant. He observed that there were limited time records kept by the Practitioner and that costing had been carried out on a task based approach. He examined the fees allocated to each outcome, and made certain adjustments, thereby arriving at a figure which he considered was a reasonable fee for the tasks performed.

[25] As a check, he then estimated what time would have been expended on the file and then applied the hourly rates of those carrying out the work to that. In passing, he noted that those rates were modest.

[26] Having applied the two approaches, he then stood back and took an overall approach to the file. By this process, he arrived at a figure which was $783 less than the amount charged by the Practitioner.

[27] It is tempting to adopt a position, that an average of the two assessments represents what could be considered to be a fair and reasonable fee. However, it must be noted that the first costs assessor considered that a fee in excess of that charged could be considered fair and reasonable, and the second assessor observed that the hourly rates charged by the firm were somewhat low.

[28] In any event, such an approach is not justified under the current Act. The question to be asked is whether in all of the circumstances, the fee charged varies sufficiently from what can be considered fair and reasonable as to warrant a disciplinary charge.

[29] I reiterate that this is not a cost revision process. It is a process whereby consideration has to be given to whether, after a consideration of the issues, the Committee forms the view that the practitioner should be charged with either professional misconduct, or unsatisfactory conduct pursuant to s 152 of the Act.

[30] Section 7(1)(iv) of the Act defines misconduct with regard to fees, as conduct that consists of the charging of grossly excessive costs for legal work. Cases in this category involve the charging of many times what would be a fair and reasonable fee as in *Mijatovic v Legal Practitioners Complaints committee* (2008) WASCA 115, where the fee charged was four times what could be considered to be a fair and reasonable fee. That is clearly not the case here.

[31] Unsatisfactory conduct arises in the costs arena where it is considered that the practitioner is in breach of the Rules of Conduct, by charging a fee in excess of what is considered to be a fair and reasonable fee. This involves an assessment as to whether the fee exceeds what is considered to be a fair and reasonable fee by such an amount as to justify a disciplinary charge.

[32] In this case, the matter has now been considered by a Standards Committee twice, on which there are experienced practitioners and lay members. In each case, the Committee has not considered that a disciplinary charge is appropriate. In all of the circumstances, it would be inappropriate for me to interfere with that view and accordingly the decision of the Committee is upheld.

Miscellaneous

[33] The Applicant also seeks a direction as to whether lawyers must now specify to prospective clients that their billing method is calculated with reference to a percentage of the value of the property involved. This is not a complaint, nor is it a matter which the LCRO can pronounce on. However, I observe that Section 94(j) of the Act and Rule 3.4 of the Client Care Rules now require practitioners to provide the client in advance, with information as to the basis of how fees will be charged. To that extent, the Applicant's request is met.

Decision

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

DATED this 16th day of November 2010

Owen Vaughan
Legal Complaints Review Officer

Note:

The complaint and decision in respect of which LCRO 167/2009 was issued, included Mr ZV as a co-respondent. The present Standards committee decision refers only to Mr ZW. However, I note the Application for Review includes Mr ZV as a party and I consider that this is correct. Mr ZV has therefore been included as the a co-respondent in this decision

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

AE as the Applicant
ZW as Respondent
ZV as Respondent
The Waikato Bay of Plenty Standards Committee
The New Zealand Law Society