LCRO 95 /09

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

**AND**

**CONCERNING** a determination of the Auckland Standards Committee 4 of the New Zealand Law Society

**BETWEEN** **Ms Linton**
Applicant

**AND** **Mr Keswick**
Respondent

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

**DECISION**

**Application for review**

[1] An application was made by Ms Linton for a review of a decision by the Auckland Standards Committee 4 in respect of her complaint against Mr Keswick. The complaint related to legal work done for Ms Linton by Mr Keswick in respect of an Employment Court matter that Ms Linton was involved in. Ms Linton complained that aspects of the service of Mr Keswick were substandard, that he inappropriately required payments in advance from Ms Linton, that he had inappropriately organised a settlement conference, and inappropriately imposed conditions on the release of files. In her application for review Ms Linton stated that the decision of the Standards Committee was inadequate and did not reflect a serious investigation. She considered that the issues she had raised had not been addressed in any way.

[2] Ms Linton was bringing action against a former employer. It appears to have been recognised that while the prospects of success were good there was a very real likelihood that the fruits of the litigation would be less than the costs incurred. Ms Linton, however, made it clear that she considered it a moral issue and wanted the matter to be determined by the Court. Ms Linton is a woman of modest means and the costs of pursing the matter were always an issue. While the possibility of legal aid was explored and at one point an application form was completed, this was not pursued.

Ms Linton says that Mr Keswick "talked her out of it". Mr Keswick states that he advised Ms Linton that any grant of legal aid would have to be paid back and in light of this Ms Linton elected to make other arrangements regarding payment of his fees.

[3] A hearing in respect of this matter was conducted on 17 August 2009 at which both Ms Linton and Mr Keswick were present.

[4] Ms Linton originally complained to the Law Society by a letter dated November 10 2008. The central aspects of that complaint were the manner in which the lawyer-client relationship came to an end, the manner of the release of the files by Mr Keswick to Ms Linton subsequent to the termination, and the quality of aspects of the work. In a reply to Ms Linton of 24 November 2008 the Complaints Service of the New Zealand Law Society stated that the issues appeared to be overcharging, a failure to follow instructions, and refusal to continue to act until further fees had been paid. I observe that this framing of the issues differs significantly from the impression I draw from Ms Linton's letter of complaint. For example it overlooks the issue of the release of the files stated by Ms Linton to be the "most important issue". While the complaint does concern the arrangements for payments of Mr Keswick's accounts, there is no suggestion in the letter of complaint that they should not be paid or that they were unreasonable. It was on this framing of the complaint by the Complaints Service that Mr Keswick was invited to respond (although he was provided with the original complaint and documents). Understandably Mr Keswick addressed his response (of 26 November 2008) to the three issues of complaint set out in the letter of the Society.

[5] The Standards Committee referred the matter to a costs assessor to provide advice as regards the reasonableness of the bill. On 3 June 2009 the Committee provided the parties with its decision. In that decision the Committee adopted the costs assessor's view that the bill was not unreasonable for the work done. The Committee also found that there was no evidence that Mr Keswick had failed to follow Ms Linton's instructions or otherwise was guilty of any other form of professional misconduct.

[6] The Committee did not directly address the issues of whether Mr Keswick had inappropriately withdrawn from acting or acted inappropriately in the way he released the files on the matter to Ms Linton.

**Disclosure of complaint to a third party**

[7] I observe that Ms Linton further complained that some time after she made the original complaint Mr Keswick disclosed this fact to the lawyers for Ms Linton's former employer with whom she remained in dispute. Mr Keswick claimed that he had done this in the course of an enquiry as to whether any adverse comment had been made

about his conduct or work in the course of the hearing. Ms Linton appeared to be of the view that the disclosure was malicious. This disclosure was unhelpful to Ms Linton who was seeking costs subsequent to her being successful in the Employment Court action (the existence of the complaint was raised at the costs hearing). Mr Keswick had no obligation to Ms Linton to keep the fact that she had made a complaint against him confidential. Because there was no lawyer client relationship between Mr Keswick and Ms Linton at the time of the disclosure he had no ongoing obligation to protect the interests of Ms Linton. Had Mr Keswick made that disclosure with the intention of intermeddling in the costs application it would have been a matter of professional concern. However a finding of that nature is not open on the available evidence.

**Costs revision**

[8] While cost did not form a central aspect of Ms Linton's original complaint it has been treated as a costs complaint. Accordingly Ms Linton has requested that that aspect of the decision of the Standards Committee be reviewed.

[9] At the hearing I pointed out that the costs assessor, who was a specialist (presumably in the area of employment litigation), was better placed than I to make a judgment about whether or not the costs were reasonable. I suggested that it was proper for the Standards Committee to adopt the view of the assessor. Ms Linton objected to the assessor's view that the errors in Mr Keswick's work she had alerted him to were not a proper basis to amend the fee. I am of the view that this was a reasonable view for the assessor to take. It was also tempered by an observation of the assessor that time records indicated more time than was actually charged had been spent on the file. Ms Linton was not able to show that there was any flaw in the manner in which the costs assessor reached his views.

[10] At the hearing Mr Keswick submitted that his bill should be increased to reflect time that he had not billed. The power to revise bills of costs is found in s 156(1)(e) of the Lawyers and Conveyancers Act. That section confers a power to reduce fees for work. There is no power to increase fees. In any event it would have been inappropriate for me to consider a substantive application of that nature introduced without warning at the hearing itself.

[11] The decision of the Standards Committee adopting the view of the costs assessor that the fee was fair and reasonable is upheld.

**Quality of work**

[12] Ms Linton complained that after the lawyer client relationship had been terminated and she had to represent herself it became apparent that Mr Keswick had made numerous errors in court documents. In this she was referring mainly to the brief of evidence. I note that errors in the statement of claim occurred as well, although they were mostly corrected by an amended statement of claim being filed. The errors in the brief include inaccurate document references, some typographical errors, an omission to delete certain information, and certain other errors. While it was accepted at the hearing that some errors are inevitable in lengthy court documents which undergo several drafts, Ms Linton maintained that the number of errors were such as to fall short of a standard of competence and diligence that she was entitled to expect of Mr Keswick.

[13] Mr Keswick states that the brief was worked on intensively on 7 October (the date on which it was due to be filed). Mr Keswick said in his response to the Law Society that some of the errors were due to using an earlier brief prepared by Ms Linton as a template and the fact that the errors came about due to this was "completely and utterly lost on Ms Linton". In respect of the errors in the statement of claim he stated to the Society that "again as you will see from Ms Linton's complaint that was entirely my fault. It had nothing at all to do with Ms Linton despite her having been sent the statement of claim and had time to read it through before it was filed and served". This is not a helpful response.

[14] Mr Keswick's explanation of the errors is not particularly satisfactory. He does not deny that errors exist in the brief of evidence, however, he seems to want to lay responsibility for that at the door of Ms Linton. It is certainly accepted that to-ing and fro-ing over such documents can lead to drafting errors. Responsibility for the accuracy of such documents rests ultimately with the lawyer who files them. Mr Keswick does not appear to accept this.

[15] The brief of evidence contained numerous errors. However, they were not errors of substance. They were largely errors of style or, in most cases, erroneous references to documents. While there were clearly errors which caused inconvenience to Ms Linton and the Court it was not a significant failing. The documents were on the whole competently drafted. Although the Standards Committee did not explicitly deal with the complaint as regards the quality of the service of Mr Keswick, it formed the view that there had been no form of professional misconduct (by which I presume it was referring globally to both misconduct and unsatisfactory conduct).

[16] The Standards Committee exercised its discretion under s 138(2) of the Lawyers and Conveyancers Act 2006 to take no action where "it appears to the Standards

Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate". Given the nature of the drafting errors I conclude that it was open to the Standards Committee to exercise its discretion in the way it did in relation to this aspect of the complaint.

**Attending settlement conference**

[17] Ms Linton also complained that a settlement conference was undertaken in circumstances when Ms Linton considered it was not useful. Her view was that in light of the intransigence of the parties, the fact that mediation had been attempted, and the matter had already been before the Employment Relations Authority there was no useful purpose to be served by such a settlement conference.

[18] It appears that there was certainly some difference of view between Ms Linton and Mr Keswick throughout the conduct of this matter as to the best strategy to adopt. Mr Keswick was of the view that while the claim was sound it was unwise to pursue it to a hearing in light of the fact that the costs would likely exceed any award. He also stated that he considered strategic advantages existed in assessing the other side at a settlement conference. It may be that Ms Linton was reluctant to accept the advice of Mr Keswick to agree to the settlement conference, Ms Linton did ultimately agree and the settlement conference was conducted. Providing forceful advice as to what he or she considers to be the best way to proceed is not a professional breach by a lawyer. Although Ms Linton was disappointed with the outcome of the settlement conference there was no professional breach by Mr Keswick in this regard.

**Privacy Act**

[19] Ms Linton also complained that Mr Keswick made it difficult for her to conduct her case because initially he would not release the documents relating to the matter until his fee had been paid. He later released the files on the basis that his disbursements were paid immediately and Ms Linton agreed to pay his fee when it fell due. An invoice was raised on 13 October 2008 at the time the relationship came to an end. Prior to that there were no amounts outstanding.

[20] A lawyer is entitled to retain documents and other property of a client until his or her fee is paid pursuant to a retaining lien: *Shand v MJ Atkinson Ltd (in liquidation)* [1966] NZLR 551 (CA). That right is significantly curtailed by the Privacy Act 1993 which, in Privacy Principle 6, provides that where an agency (including a lawyer) holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled to have access to that information. That includes receiving

a copy of the information (s 42). As such Ms Linton was entitled as of right to copies of all documents containing personal information held by Mr Keswick.

[21] It is permissible to impose a reasonable charge for making that information available (see s 35 of the Privacy Act). However the charge imposed by Mr Keswick for the making available of the information in question did not relate to the provision of the information. Rather it was in relation to expenses incurred in the conduct of the matter and his fee (although he later abandoned the demand that his fee be paid).

[22] Mr Keswick also required Ms Linton to sign the invoice he had raised in this matter with the endorsement "I undertake to pay the outstanding costs on or before 20th November". Ms Linton stated in her complaint that she felt "blackmailed" by Mr Keswick's demands and that she signed the acknowledgement under duress.

[23] I have observed that Mr Keswick did not have a right to retain the documents or to require the payment of unrelated amounts prior to their release in this matter. However, I observe that Mr Keswick acted promptly in providing the relevant documents and appeared to be motivated to ensure that (given the fact that he would not be acting further) Ms Linton was in a position to progress the matter herself as best as she was able. It appears that considering Mr Keswick's conduct in this regard globally the Standards Committee was of the view that it did not amount to a professional breach.

[24] It is not clear from the determination of the Standards Committee that the members turned their minds to the fact that Mr Keswick was not entitled to withhold the documents in question. Had he been entitled to hold the documents his actions would have amounted to relinquishing some of his rights. While the Committee may have been aware of the legal obligations of Mr Keswick when it made its finding, it is equally possible that they were not so aware. In the absence of a right to retain he appears to have insisted on the payment of disbursements and the undertaking to pay before providing the copies of the documents he was legally obliged to provided (by way of copy) in any event.

[25] I have considered the conduct of Mr Keswick in this regard, including the fact that his refusal to provide the documents was in breach of his obligations under the Privacy Act. I have taken into account the fact that he ultimately required only the costs of photocopying and related disbursements to be paid for the file to be uplifted (and not his outstanding fees) and the fact that it appears that in his own mind he was relinquishing his rights in the matter. While retaining documents in breach of an

obligation to provide them (or copies of them under the Privacy Act) may warrant a professional response, in all of the circumstances this is not appropriate in this case.

**The events around termination**

[26] A central aspect of this complaint is the allegation that the termination of the retainer (or the manner in which it was terminated) was wrongful. The parties' accounts of the manner of termination diverged in significant respects. However it is clear that the retainer was terminated because Mr Keswick and Ms Linton were unable to agree on an arrangement for the payment of Mr Keswick's fees. Had Mr Keswick agreed to Ms Linton's proposal as to the payment of fees the retainer would have continued, however he was not prepared to do so. Mr Keswick terminated the retainer by indicating that he was not prepared to undertake further work until an acceptable agreement as to the payment of his fee was reached.

[27] Ms Linton's ability to pay fees had been recognised as an issue early on. Ms Linton changed lawyers because her former lawyer was too expensive. She had also contemplated making an application for legal aid (and filled out the forms which disclosed she was a sickness beneficiary). It is unclear why the legal aid application was not submitted, however, there is not sufficient information to consider that as a ground of complaint in this matter.

[28] It appears that at the outset Mr Keswick satisfied himself that Ms Linton was putting arrangements in place that would mean his fees would be paid.

[29] A further discussion took place between Ms Linton and Mr Keswick regarding fees after the settlement conference which was conducted in the matter. It appears that Mr Keswick was uncomfortable with Ms Linton's intransigence in the face of settlement offers. He states in his letter of 26 November 2008 "I was quite clear to both Ms Linton and her husband the concern that I had and I always have in 'matter of principle cases' where the client is dissatisfied with the outcome and the lawyer is then left having to chase his or her client for payment of fees". In that letter he said, "I could not have been any clearer with Mr and Mrs Linton" as regards costs after the settlement conference.

[30] At the hearing Mr Keswick stated that after the settlement conference he clearly understood that he would render his bills on an interim basis and that they would be paid on normal commercial terms. I am not persuaded that an agreement to that effect was reached at that time. While it is clear that fees were discussed the matter seems to have been disposed of by Mr Keswick rendering a bill for work to date and it being paid promptly. While the parties agreed that the fact that fees could exceed the fruits of the

litigation was a topic of that conversation, it does not appear that a firm arrangement as to how fees would be met was reached there. While Mr Keswick may have assumed that it was understood that fees would be paid when the invoices were rendered, this was not the understanding taken from that conversation by Ms Linton.

[31] Ms Linton's account of that discussion is mainly consistent with that of Mr Keswick. It is clear that a discussion about fees took place and that as a result of that Mr Keswick issued an interim bill and Ms Linton took steps to ensure it was paid promptly. It is clear that Mr Keswick was aware of Ms Linton's financial situation and that he had concerns about the payment of his fees. However there is no evidence that any particular agreement was reached as regards payment of fees.

[32] Ms Linton stated that on Friday 10 October in the course of a telephone call about the hearing (which was scheduled for 23rd of October) Mr Keswick raised the issue of how he was to be paid. She states that her response was that she thought that given it was ten days out from the hearing and that she had just paid $7090 and there were no amounts outstanding he would be paid after judgment. She says that in response to this Mr Keswick stated that he would require $30 000 to be paid into his trust account prior to the hearing. Ms Linton's husband was present at the hearing and corroborated that he overheard the telephone conversation in question and that what he heard was consistent with Ms Linton's version of events.

[33] Mr Keswick denies that the conversation of the evening of 10 October proceeded in the manner asserted by Ms Linton. He acknowledges that payment of fees was raised, but asserts that all he required was an assurance that Ms Linton would pay his invoices promptly as they fell due. He refutes the assertion that he demanded money to be paid into his trust account. He states that he communicated that he was not prepared to defer payment of his account until judgment was issued in the matter. Ms XX, a staff solicitor, attended the hearing. She stated that she was working in an adjacent office when the conversation in question took place and that the doors to both offices were open at the time. She stated that she overheard the telephone conversation and that what she overheard was consistent with Mr Keswick's version of events.

[34] I did not find either of the parties to be more convincing than the other. The corroborating evidence of the respective witnesses was of limited use. There was no reason for either party to be listening carefully at the time and there is a high likelihood that relevant statements in the telephone calls were not overheard.

[35] If Mr Keswick had, with the hearing date looming, demanded that such a large sum be placed in his trust account it would be a very serious matter. In light of the consequences of such a finding I must be positively satisfied that such a demand was made. On the evidence available to me I am not satisfied that Mr Keswick made a demand that $30 000 be paid into his trust account prior to the matter being heard.

[36] It is not immediately clear as to why, after the parties had been in a working lawyer-client relationship for some months, the discussion of 10 October took place in the manner it did. Ms Linton suggests (in her application to this office) that there was some tension arose between Mr Keswick and herself around this time due to her ”telling him consistently about errors he was making.” She suggests that it was this which precipitated the discussion about fees. Mr Keswick at the hearing acknowledged that there was a disagreement about what was to be put in the brief which was being prepared.

[37] It also appears that there was a division between the parties as regards the wisdom of Ms Linton insisting on going to trial in the face of what Mr Keswick appears to have considered tenable settlement offers. At the hearing Mr Keswick stated that the discussion about costs followed him raising (again) the offer of the other side to settle which Ms Linton (again) rejected. Mr Keswick states that this prompted him to raise the issue of costs. He states that Ms Linton “turned this conversation around” and alleged that Mr Keswick was demanding payment in advance. Mr Keswick denied that he was demanding payment in advance or that he required payment for the work done to date prior to the hearing. Rather, he asserted, all he required was her assurance that when he rendered his bill she would pay it “smartly”.

[38] It appears that tensions arose because Mr Keswick had become increasing concerned with Ms Linton’s insistence on “having her day in court”. It may also be that the deterioration of the relationship was contributed to by the criticisms of Mr Keswick’s work. In any case Mr Keswick considered that the matter of costs required revisiting at the time of the telephone call.

[39] It may well be that the actual content of the discussion of that telephone conversation lies somewhere in between the accounts of the respective parties, however, it is not open to me to construct a conversation in respect of which no evidence exists. All that I am prepared to conclude on the evidence is that that in the course of the telephone conversation some friction about the course of the litigation arose. In response to this Mr Keswick raised the issue of fees and as a consequence of that discussion Ms Linton assumed the stance that she would meet fees when judgment issued. This was unacceptable to Mr Keswick.

[40] Mr Keswick emailed Ms Linton shortly after (at 5 54 p.m.) the telephone conversation. That email does not assist a great deal in determining what was actually said in the conversation other than to confirm that the ability of Ms Linton to pay Mr Keswick's fees was in issue. In that email Mr Keswick states that he thought he had made his position on fees clear at the settlement conference (some months earlier). He states that he would not be Ms Linton's bank in respect of the litigation and seemed particularly concerned that the litigation was being taken as a matter of principle rather than being economically justifiable. He stated that he considered that the hearing "will cost at least $30 000" and that Ms Linton had "no right or expectation that I would do this work for you and not be paid immediately".

[41] Ms Linton responded shortly thereafter by email (at 6 46 p.m.) stating that there had been a misunderstanding and that she considered that the discussion at the settlement conference related to his fees outstanding at that time (which she had paid immediately on invoice). She queried whether Mr Keswick was now stating that he no longer wished to act on the basis that he would get paid on judgment. This was followed up by a further email (on Monday 13 October at 9 40 am) from Ms Linton to Mr Keswick seeking clarification as to whether Mr Keswick was prepared to act for her further in the matter.

[42] Mr Keswick responded promptly (on 13 October at 10 00 a.m.) stating that he could not wait until after judgment to be paid. He also advised Ms Linton that the Judge had scheduled a chambers hearing for 12 noon the following day to determine whether certain evidence would be admitted. It appears that as counsel Mr Keswick had agreed to have the matter discussed at that time. Mr Keswick concluded by stating "I have not told the Court of the dilemma you have as a result of your own actions. You need to make a decision soon".

[43] In response to this (on 13 October at 10 59 a.m.) Ms Linton stated that in her view Mr Keswick had made it clear he no longer wished to act for her and sought to collect the relevant bundles of documents. Shortly thereafter Mr Keswick informed opposing counsel and the court that he no longer acted for Ms Linton.

[44] Mr Keswick replied (on 13 October at 11 16 a.m.) that the position was "because of you not me" and queried "what is going to happen now with my outstanding fees. Do you intend to pay me today or not?" It appears that at the time no invoice for outstanding fees had been issued to Ms Linton.

[45] After some further exchanges in which Mr Keswick made it clear he required payment before allowing Ms Linton to uplift the files he emailed an invoice to Ms Linton

(on 13 October at 4 14 p.m.). At 6 37 p.m. that evening Mr Keswick softened his stance and sent a carefully drafted email stating that he would release the documents on payment of outstanding disbursements and an undertaking to pay the account by the 20th of the month. In that email he stated that he had not demanded payment up front but rather "some comfort from you that I would be paid when the work was completed". He also stated that his staff solicitor had heard the conversation.

[46] The discussion which occurred on 10 October 2008 and the subsequent exchanges resulted in Mr Keswick refusing to act in the matter. It is not accurate to suggest that Ms Linton chose to terminate the retainer. The parties appeared to become polarised. Whereas Ms Linton had paid the previous account immediately on it being rendered on 10 October she adopted the position that she would pay any further invoices on judgment. Mr Keswick was not prepared to act further on the basis of such a fee arrangement and made it clear that he would not proceed on that basis.

[47] The issues therefore are whether Mr Keswick was entitled to terminate the retainer and if so whether he did so properly.

**Termination - discussion**

[48] In general a lawyer is required to complete the legal work he or she has agreed to undertake and may not terminate the retainer before completion without good cause.

[49] The Rules of Conduct and Client Care for Lawyers address this issue directly. In particular r 4.2.1 provides that a lawyer has good cause to refuse to act further for a client where there is an inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time.

[50] Ms Linton has asserted on a number of occasions that she considers that Mr Keswick ought to have been more explicit with her about required payments. It may well be that had the matter been addressed directly earlier the issues under consideration would not have arisen. I observe that 3.4 of the Rules of Conduct and Client Care require a lawyer to provide the client in advance with information including information on the basis on which the fees will be charged and when payment of fees is to be made. Those rules came into force on 1 August 2008. Ms Linton retained Mr Keswick in February 2008. As such there was no professional obligation on Mr Keswick to provide information as to how or when fees would be chargeable.

[51] In the absence of an explicit agreement it is expected that a client will pay a lawyer's normal and reasonable fee at the conclusion of a matter. Where the parties have agreed that a matter may be billed on an interim basis the assumption is that the client will pay the lawyers normal and reasonable fee on normal commercial terms

when billed. In many cases it is accepted that the "20th of the month" following the issuing of an invoice is an acceptable delay between invoice and payment.

[52] In so far as Ms Linton was not prepared to agree to meet payments on this normal basis Mr Keswick was entitled to refuse to act in the matter further. Ms Linton acknowledges that she was unable to make such a commitment and would only agree to pay once the judgment had been delivered.

[53] Given that Mr Keswick was entitled to refuse to act for Ms Linton further in light of the fact that she could not provide him with an assurance for payment it must be considered whether he terminated the relationship in an appropriate manner.

[54] In particular r 4.2.3 of the Rules of Conduct and Client Care provide:

> A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—
>
> (a) had due regard to his or her fiduciary duties to the client concerned; and
> (b) given the client reasonable notice to enable the client to make alternative arrangements for representation.

[55] It appears that in the telephone call of 10 October Mr Keswick was seeking to reach a fee agreement with Ms Linton. While a requirement that bills are paid when rendered (rather than on judgment) is not unreasonable, it may be that, not having made the matter clear earlier on in the relationship and then raising the issue shortly before a hearing was inappropriate. An impasse was reached by 13 October and Mr Keswick took no further substantive steps in relation to the proceeding.

[56] The retainer in this matter was terminated by Mr Keswick without notice on 13 October 2008. That was ten days out from a hearing which was scheduled to run for three days. It was also the day before a scheduled chambers conference regarding the admissibility of certain evidence. While it appears that Ms Linton only articulated her inability to pay fees in a manner acceptable to Mr Keswick late in the day, it was incumbent on Mr Keswick to clarify such matters early on if they were a matter of concern. If he was to require some security about the payment of his fee (to which he was entitled) he ought to have attended to this well before the hearing was looming. Mr Keswick had long been aware that Ms Linton would find payment of a substantial fee difficult. It is not open to a lawyer to raise concerns about payment of fees on the eve of a hearing.

[57] In this regard the conduct of Mr Keswick was unsatisfactory.

**Orders**

[58] In light of the finding of unsatisfactory conduct I must now consider what orders ought to be made. I observe that Mr Keswick's conduct could not be characterised as outrageous or deplorable. The conduct was in breach of the Rules of Conduct and Client Care and therefore amounted to unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act. It was also conduct which would be regarded by lawyers of good standing as unacceptable and therefore unsatisfactory conduct pursuant to s 12(b) of the Act.

[59] I observe further that Ms Linton contributed to the position in which she found herself. It was not tenable to state that payment would not be made until judgement issued. While the position of Ms Linton was unrealistic, her distress at being left without legal assistance at this time and having to conduct the hearing herself (with the assistance of her husband) was understandable. One of the reasons that lawyers are retained is to avoid the stress of engaging in legal matters without assistance.

[60] I consider it appropriate to compensate for the distress of Ms Linton by ordering a reduction of the fee. The ability to compensate for anguish and distress in the lawyer client relationship has been recognised in a number of cases, most recently *Heslop v Cousins* [2007] 3 NZLR 679. While in most cases such an award would be accompanied by damages for specified losses, this is not always the case: *McKaskell v Benseman* [1989] 3 NZLR 75. Given the purposes of the Lawyers and Conveyancers Act (which in s 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown to have occurred.

[61] Such an order will be particularly appropriate where the client is not a sophisticated person and looks to the lawyer to relieve the stresses that might accompany legal matters. In this case the legal work involved was the conduct of a court hearing – a particularly stressful event. Having heard from Ms Linton I am satisfied that the conduct of Mr Keswick in, without notice, refusing to act further caused her anxiety and distress to such a degree that compensation is appropriate. The Court of Appeal has recognised that such distress damages are compensatory in nature: *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at para 171.

[62] Such an order could be made pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act which expressly states that where loss had been suffered then a compensatory order may be made. However, in all of the circumstances (and in

particular the fact that Mr Keswick's invoice is outstanding) it is most appropriate that the order be made under s 156(1)(e) which confers a power to reduce fees.

[63] Taking these matters into account I order that Mr Keswick's fees be reduced by $1000.00.

[64] Mr Keswick is also censured.

[65] It is also appropriate that an order of costs be made against Mr Keswick in light of the fact that he has been found to fall short of the applicable professional standards. This matter was conducted by a hearing in person and was relatively straightforward. I take account of the *Costs Orders Guidelines* of this office. Mr Keswick is required to pay to the New Zealand Law Society $1200 in respect of the cost of conducting this review.

**Decision**

[66] The application for review is upheld. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

[67] The following orders are made:

- The outstanding bill of Mr Keswick is reduced by $1000.00 to $6153.20.
- Mr Keswick is censured.
- Mr Keswick is to pay $1200.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

**DATED** this 25th day of August 2009

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Duncan Webb
**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 Linton as Applicant
Mr Keswick as Respondent
Auckland Standards Committee 4
The New Zealand Law Society