LCRO 166/2018

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**KZ** Applicant
AND	**AB** Respondent

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

DECISION

Introduction

[1] Mr KZ has applied for a review of the determination by [Area] Standards Committee [X] (the Committee) to take no further action on his complaint about Mr AB's bills of costs.

[2] The complaint was made some four and a half years after the first invoice was rendered and three years after the final invoice was rendered. Therefore, the Committee's decision and this review rests on whether there are "special circumstances" providing jurisdiction for the Committee to consider Mr KZ's complaints.

Background

[3] On 23 September 2013, [Company A] and [Company B] (the Companies) were placed in liquidation.

[4] On the same day, Mr KZ was declared bankrupt.

[5] In his submissions for the respondent, dated 14 May 2019, Mr GR says [Law Firm A] (the firm employing Mr AB):

> were asked by the liquidators to represent Mr KZ in his personal capacity.

[6] In an affidavit dated 18 June 2018, Mr KZ says:

> 4. [The liquidator] provided me a list of lawyers as he believed I required legal advice as he could see that it was possible for my bankruptcy to be annulled and all of my and the companies creditors to be paid.
>
> 5. I contacted [Mr AB] of [Law Firm A] and duly instructed him.

[7] The liquidators proposed to liquidate Mr KZ's companies' assets, as well as Mr KZ's, which would be sufficient to enable all debts of the companies and Mr KZ to be paid. This would then enable an application to be made for Mr KZ's bankruptcy to be annulled.

[8] During the period that Mr AB was retained by Mr KZ, he rendered 18 invoices on a monthly basis, the first on 4 November 2013 and the last on 29 November 2015. Mr AB's bills totalled $86,610.15. Mr AB ceased to act for Mr KZ when Mr KZ instructed another lawyer (Mr TW) to act for him.

[9] Mr KZ's bankruptcy was annulled on 16 February 2016. Prior to the annulment there had been discussions between Mr TW and Mr AB about Mr AB's bills, none of which had been paid. Mr TW proposed there should be an independent review of the bills of costs but if this was not acceptable, Mr TW advised that the liquidator had suggested that "perhaps the Law Society would be a more appropriate venue for matters to be discussed should the lack of agreement continue".

[10] It is apparent that no agreement was reached and nothing further occurred until [Law Firm A] issued proceedings in April 2018 to recover the outstanding invoices.

[11] Mr KZ lodged his complaint with the New Zealand Law Society on 18 June 2018.

Complaint

[12] Mr KZ's complaint was accompanied by a letter from Mr TW. Mr TW acknowledged that the complaint was outside the two-year time limit,[1] and said:

---

[1] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 29(a), which provides that a Standards Committee must not deal with a complaint about bills of costs rendered more than 2 years prior to the date of the complaint, unless the Standards Committee determines that there are special circumstances that would justify otherwise.

> However, [Law Firm A] has not attempted to collect these invoices until this time and Mr KZ was of the view that they had abandoned these fees. Mr KZ states in his affidavit that the fee does not reflect the time spent, work done nor the result of his file.

[13] Mr KZ's complaint related to "serious overbilling whilst [he] was an undischarged bankrupt". He complained that Mr AB had made no progress towards having his bankruptcy annulled "or any work product produced". He advised that he had "instructed a different lawyer who completed an annulment of [his] bankruptcy within a couple of months at a fraction of the cost". He assumed that [Law Firm A] had written off the fees as he had not heard anything from the firm until it issued the recovery proceedings.

[14] In the section of the complaint form which asks the complainant what outcome is sought, Mr KZ said:

> I am happy to pay a reasonable fee for work done. I believe that a reasonable fee would be in the range of $10,000–$15,000.

[15] In submissions for Mr KZ, Mr PY says:

- "Mr KZ believed he retained [Law Firm A] on a contingency basis, if his bankruptcy was annulled, an invoice would be rendered".
- "On review of the file it is soon to be contended that [Law Firm A] acted negligently".
- "[Law Firm A] failed to make an application to annul the bankruptcy on the basis that the order for adjudication should never have been made".
- "Mr KZ … is adamant he did not agree to the retention of Mr QL".
- "It would turn out that [Law Firm A] achieved very little (if anything at all) for Mr KZ in his circumstances".
- "Mr KZ argues that the fees charged are firstly, without a proper basis absentia success as per the arrangement, and secondly, excessive in any event".
- "The fact the invoices were not pursued is telling in itself".

[16] Mr PY submits that "Mr KZ's reasons as provided were indeed '… abnormal, uncommon or out of the ordinary' or where a lawyer had undertaken work 'deemed to be incompetent or negligent'".

The Standards Committee determination

[17] In its determination, the Committee referred to the Court of Appeal judgment in *Cortez Investments Ltd v Olphert & Collins*.[2] The Court said:[3]

---

[2] Standards Committee determination, 24 August 2018 at [15], citing *Cortez Investments Ltd v Olphert & Collins* [1984] 2 NZLR 434 (CA).
[3] At 441.

> [a]ll that can be said is, that to be special circumstances it must be abnormal, uncommon, or out of the ordinary'. Examples of 'special circumstances' could include where a lawyer had undertaken no work at all for the fees invoiced or where the work undertaken was deemed to be incompetent or negligent.

[18] The Committee "was unable to identify any special circumstances that would allow it to deal with the matter further".[4]

[19] The Committee also noted the discretion provided to Standards Committees by s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act) "to take no further action on a complaint where there is an adequate remedy which the complainant could pursue".[5] The Committee considered a more appropriate remedy was available to Mr KZ through the courts, particularly as the matter was already before the court by reason of the proceedings issued by [Law Firm A].[6]

Application for review

[20] Mr KZ has applied for a review of the Committee's decision. Set out below in full are the supporting reasons for the application provided by Mr KZ:

> The retainer was prior to Mr KZs bankruptcy. The matter sat in abeyance for some time until the bankruptcy was annuled. I am told the Standards Committee was aware of this background information through my previous lawyer, Mr TW. Mr TW no longer holds a practising certificate. This was the "special reasons" to why the fee review was required outside the usual window of 2 years. I ask that the LCRO revert the matter back to the Standards Committee for a fee review in the usual way. The fees I have been charged are horrendous and I did not even authorise some of the work – including (and I am sure there are others) the disbursements to Mr QL. I find it extraordinary that I could be liable for instructing another Barrister when I already had lawyers instructed. I was not consulted at all. As part of the fee review, I would like an assessment in terms of the work allegedly performed.

Review on the Papers

[21] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[22] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that

---

[4] Standards Committee determination, above n 2 at [16].
[5] At [17].
[6] Those proceedings are stayed until completion of this review: see s 161 of the Lawyers and Conveyancers Act 2006.

necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Review

[23] Mr KZ asks for a "fee review in the usual way". It is appropriate to observe here that the complaints procedure set out in the Act is not the same as the costs revision process that was provided for in the Law Practitioners Act 1982.

[24] It would seem that either Mr KZ or Mr PY may be under a misapprehension that the costs revision procedure remains the same. The difference between the two procedures was commented on in a decision of this Office:[7]

> [20] …Under the Law Practitioners Act 1982, a party chargeable with a lawyer's bill of costs, could apply to have that bill revised by costs revisers appointed by the Law Society. In the process, bills of costs were adjusted, sometimes by modest amounts. This has been described by a leading commentator on costs issues, as "tinkering".
>
> [21] The costs revision process was abolished when the Law Practitioners Act 1982 was repealed by the Lawyers and Conveyancers Act 2006. Complaints about bills of costs are now treated in the same manner as any other complaint about a lawyer's conduct. In some cases, the Standards Committee will refer the bill to a costs assessor to provide a report to the Committee, but before a lawyer's bill can be adjusted the Standards Committee must first make a finding of unsatisfactory conduct pursuant to section 12 (c) of the Act by reason of a breach of rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
>
> [22] Rule 9 provides as follows:
>
> > "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"
>
> [23] Consequently, the manner in which a lawyer's bill may be adjusted has changed, and can only follow a finding of unsatisfactory conduct. This requires some degree of certainty that a lawyer's bill is demonstrably too high.
>
> [24] Given the terminology used by Ms IX and Mr IY, I perceive that they may have been labouring under the impression that the "costs revision" process may still be in force. If that is the case, that is unfortunate, as it has contributed towards a situation where this matter has been unduly extended, rather than being settled between the parties in a pragmatic way.

[25] The reason for including these comments at some length is to make it clear that Mr KZ's objective of having Mr AB's bills of costs subject to a "fee review" may not

[7] *IX on behalf of ADG v SC*, LCRO 226/2010 (13 March 2012).

necessarily be achieved even if the decision on review was that the Committee has jurisdiction to consider the complaint.

[26] Having made these observations, it remains to determine whether or not the Committee has jurisdiction to receive Mr KZ's complaints about Mr AB's bills of costs.

Cortez Investments Ltd v Olphert & Collins

[27] The judgment of the Court of Appeal contains a comprehensive discussion of what is required to be considered when determining whether or not "special circumstances" existed to enable the District Law Society to accept an application to revise a bill of costs for a second time.[8] In that case the applicant had lost the right to appeal the first decision because the company's lawyer had not filed the appeal within the prescribed time limit.[9] The Judges made the following comments and observations:

Woodhouse P

- "…the test of special circumstances…would be met where aspects of the facts seemed to indicate a problem which had relatively unusual features while reasonably deserving at the same time [of] relief…".
- The mistake had been made by the company's solicitor and the delay was short – the notice of appeal was filed 22 days late.
- "There was no possible prejudice to the respondent yet the company thereupon lost its right to challenge the Law Society ruling".
- The revised bill had been paid so "there is no question of delaying tactics on the company's behalf in order to avoid payment…".
- "… the company remains dissatisfied for reasons which it generally wishes to put forward".
- "… the bill in itself is still a substantial one and it has been shown that as delivered it involved a significant degree of error" (the bill had been reduced by the Costs Revision Committee on the first revision).

[8] The judgment related to the expression as it appeared in s 151 of the Law Practitioners Act 1982, which was repealed by the Lawyers and Conveyancers Act 2006.
[9] Time in this case ran over the Christmas period, whereas the time for filing a statement of defence in the court was suspended.

Richardson J

- "… the serious risk of prejudice yardstick" as applied by the High Court "puts the statutory test too high".
- "… in the public interest, the expression 'special circumstances' should not be construed narrowly".
- "… it is a question of where the interests of justice lie in all the circumstances."
- "… no Court could or ought to lay down any exhaustive definition of the words" (his Honour was recording a comment here that had been made in an 1886 judgment)
- "A factor or combination of factors which may properly be characterised as not ordinary or common or usual may constitute a "special circumstance …"
- "… the inquiry never calls for the mechanical application of a rigid set of criteria. The interests of justice must govern …"
- Allowing the bill to be revised again allowed the right to appeal which had been lost by the solicitor's mistake, to be reinstated.
- The company had demonstrated its conviction that the first revision had not reduced the bill by a sufficient amount by immediately instructing its solicitor to appeal.
- "In the face of a winding-up petition by the respondent the company paid the revised bill".

McMullin J

- "… because the circumstances are special to each case, a judgment on whether or not they exist will often be a value judgement on the facts, and not one of general application".
- "All that can be said is that to be special, circumstances must be abnormal, uncommon, or out of the ordinary".

- "… the time limits prescribed … balance the need on the one hand to afford the client the opportunity to seek a form of redress for his grievance … on the other, the need to achieve finality in a dispute".

- "… if there is a perceived risk of injustice I do not think anything more is required".

- "The bill was paid only because a failure to pay it would have resulted in the company being wound up …".

[28] All three Justices allowed the appeal.

[29] The conclusion to be drawn from these comments is that a decision as to what constitutes special circumstances is very much a value judgement made with reference to the particular circumstances of each case and there can be no hard and fast definition of the expression.

[30] This judgment has been used as a "touchstone" in decisions issued by this Office.[10]

[31] It remains to identify what Mr KZ considers to be the "special circumstances" of his case.

[32] He says:

- Mr AB did not achieve what he was retained to do and provided incompetent advice.

- Mr KZ instructed another lawyer who obtained an annulment at a fraction of the cost.

- Mr KZ thought that [Law Firm A] had written the fees off because they did not pursue payment.

- "An unusual fee arrangement, limited success during the same, deficient advice rendered, enormous invoices rendered, a stay of execution…".

Discussion

[33] The complaint did not include any detail as to why Mr AB's advice was alleged to be deficient, other than the fact that he did not achieve an annulment of Mr KZ's bankruptcy.

[10] See for example *RV v Auckland Standards Committee* LCRO 299/2011 (18 October 2012), *CB and NM v Standards Committee* LCRO 108/2014 (29 June 2015).

[34] The Terms of Engagement, dated 8 October 2013, provided to Mr KZ by Mr AB included the following:

> You have asked us to advise you on your bankruptcy and an annulment application, as discussed at our meeting with you on 30 September 2013. This will involve co-operating with Pricewaterhouse Coopers, the liquidators of your related companies, Chatham Island Seafoods (2009) Limited and Chatham Islands Properties Ltd.

[35] Pricewaterhouse Coopers had produced a comprehensive report on 30 September 2013 that included a chapter headed "Realisation Strategy, Actions and Timetable". It is assumed that the meeting with Mr KZ on 30 September 2013 referred to in the Terms of Engagement included either a consideration of this report and/or was a meeting which the liquidators attended.

[36] Mr KZ has not denied being provided with a copy of the report.

[37] The Realisation Strategy set out in the report (at chapter 3) stated that "[o]nce sales are completed and all creditors and costs paid then bankruptcy is annulled". In the application for annulment filed by Mr TW, no provision for payment of Mr AB's costs were made. The detail of why that was the case is not known or relevant to this review. What is relevant is that it is apparent that discussions took place at the time as to how and when Mr AB's bills of costs were to be paid, but even then no complaint was made to the Lawyers Complaints Service.

[38] The competency of Mr AB's advice has not been the subject of any inquiry, and nobody has "deemed" Mr AB's work to be deficient. The competence of the advice provided does not fall to be addressed within the parameters of a complaint about fees simpliciter.

[39] Mr PY submits that Mr KZ ought to have filed an application to annul Mr KZ's bankruptcy on grounds that it should never have been made. This is a submission that needs to be supported by detailed information (including what Mr AB was instructed to do) but has not been. Mr PY advises that a complaint about the competency of Mr AB's advice was being prepared, and that is the context in which this issue needs to be explored.

[40] Mr KZ says that Mr TW obtained an annulment of the bankruptcy within a very short time after he was instructed. However, at the time Mr KZ instructed Mr TW, a significant amount of work had been undertaken towards achieving the goal. The fact that an annulment was obtained shortly after Mr TW was instructed provides no evidential support for Mr KZ's allegations about Mr AB's advice.

[41] Mr PY says "the fee arrangement was well discussed and clear". There is absolutely no evidence that supports Mr KZ's contention that payment of the fees was

conditional upon Mr AB achieving an annulment of the bankruptcy. A term such as this would need to have been explicitly recorded and the terms of engagement would be the place to do that. It was not.

[42] Mr KZ's assertion that he was not aware of, and did not agree to Mr AB instructing Mr QL, is not correct either. In a letter to Mr KZ on 14 November 2013 Mr AB says that the "high level strategic overview" being pursued had "been prepared with the assistance of your counsel, Mr QL". (This letter also traversed in depth the advantages and disadvantages of the liquidator's strategy referred to in [36] above which was presumably followed to the stage where an application to annul Mr KZ's bankruptcy was possible.) On the same day (14 November 2013) Mr AB sent Mr KZ an email forwarding an email and attachments "from your counsel Mr QL".

[43] There is no evidence that Mr KZ objected at that stage to the instruction of Mr QL. His objection now does not assist him in his assertions that special circumstances exist to require the Standards Committee to accept the complaint about "serious overbilling".

[44] Mr KZ did not complain about Mr AB's advice, or his fees, during the time that Mr AB acted for him. Mr KZ has only now made his complaints some four and a half years after the first bill was rendered, and three years after the final bill. Mr KZ says he thought that [Law Firm A] had written the fees off because he had not heard from them over this period of time. That was Mr KZ's inference.

[45] In *CB and NM v Standards Committee* the position was expressed thus:[11]

> No criticism can be made of [a law firm] for waiting a year before commencing proceedings. There is no logic in the proposition that [a law firm] may have been deliberately letting time go by to prevent a complaint being made. Holding a Damoclean threat of complaint over the lawyers after receiving the final bill can only be sustained for so long. In the absence of something special regulation 29 cuts that off.

[46] That disposes of the validity of Mr KZ's inference that the firm had written off its fees as constituting (or contributing to) special circumstances.

[47] In the foregoing paragraphs, each of the factors put forward by Mr PY have been addressed. They do not, either individually or collectively, support Mr PY's submission that "special circumstances exist here like no case [he has] seen before".

[48] A final factor in considering Mr KZ's application is the need to obtain finality. The "interests of justice" referred to by Richardson J lie with [Law Firm A]. Their invoices have remained unpaid now for some 4 to 6 years. If the decision on review was that the complaint

[11] At [56].

be accepted, further time would elapse until matters could be brought to a head. There is a need for the parties to address this matter now in a pragmatic way. There must be some finality.

Decision

[49] In all of the circumstances it cannot be said that special circumstances exist that require Mr KZ's complaint to be accepted.

[50] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is confirmed.

Publication

Anonymised publication

[51] Pursuant to s 206(4) of the Act, I direct that this decision be published anonymously.

DATED this 16TH day of July 2019

_____

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:

Mr KZ as the Applicant
Mr AB as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society