

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2023] NZLCRO 015

Ref: LCRO 184/2021

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

PW

Applicant

AND

QM

Respondent

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

Introduction

[1] Ms PW has applied for a review of the determination by [Area] Standards Committee X to take no further action on her complaints against Ms QM.

Background/complaints

[2] Ms PW and her brother own two units in a Body Corporate development.¹

[3] The Body Corporate was administered by Company A Ltd (Company A Ltd).

[4] Ms PW failed to make payment of Body Corporate levies. Company A Ltd instructed Ms QM to recover payment. At the time of the events giving rise to Ms PW's complaints, Ms QM was employed by Law Firm A (Law Firm A).

¹ For the purposes of this decision, the owner will be referred to as Ms PW.

[5] Section 124(2) of the Unit Titles Act 2010 provides that any reasonable costs incurred in collecting levies are recoverable as a debt due to the Body Corporate.

[6] The Body Corporate incurred legal fees in the course of action undertaken to recover payment of the levies.

[7] Ms PW has complained about the quantum of the fees.

[8] Ms PW has also complained that Ms QM² enabled Company A Ltd to use the law for improper purposes.³

Ms QM's response

[9] Ms QM responded to the complaint and outlined the history of events involved and the steps taken to recover the debt. She advised that all fees were based on time recorded and provided her time records.

[10] She did not address the complaint that she had used the law for improper purposes.

The Standards Committee determination

[11] The Committee identified two issues to be addressed:⁴

- a) Were the fees charged fair and reasonable for the services provided? (rule 9 and 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC));
- b) Did Ms QM use legal processes only for proper purposes? (rule 2.3 of the RCCC).

Fees

[12] Before addressing the complaint about the quantum of Ms QM's fees, the Committee posed the question as to whether Ms PW was a 'person chargeable with a bill of costs' and consequently able to complain about fees.

[13] In the Committee's view, the fees "were presumably set by the partners of the firm, FS and YA".⁵

² In her complaint, Ms PW makes this complaint against PBB.

³ The improper purposes Ms PW refers to is a strategy to wear her out with threats of legal fees so that she capitulated and paid the Body Corporate levies.

⁴ Standards Committee determination (28 September 2021) at [20].

⁵ At [23].

[14] As Ms PW had complained about Ms QM, the Committee considered that further action “was unnecessary and inappropriate and determined to take no further action on Ms PW’s complaint about the quantum of fees.

Proper purpose

[15] Ms QM advised the Committee that she was acting in accordance with her instructions from Company A Ltd. The Committee noted that the Body Corporate was entitled to recover costs incurred in pursuing owners of units in the development for payment of outstanding levies, pursuant to s 124 of the Unit Titles Act 2010.

[16] The Committee said:⁶

The simple fact that Ms PW took issue with proceedings being brought against her did not mean that the litigation had been commenced for some improper purpose. It is clear that the Body Corporate had already exhausted all available avenues in the hope of resolving the dispute without the need to resort to litigation. There was no evidence to suggest that the claims were in any way frivolous or vexatious.

[17] The Committee determined to take no further action on this complaint.

Ms PW’s application for review

[18] In support of her application for review, Ms PW referred to her complaints and included her letter of 4 November 2020 to the Lawyers Complaints Service, in which she replied to Ms QM’s response to her complaints.

[19] Much of this letter, and Ms PW’s complaints, relate to the conduct of Company A Ltd. Her complaint against Ms QM is that she enabled Company A Ltd to act in a bullying manner. She also asserts that Ms QM had not fully accounted for payments made to Law Firm A and then pursued recovery in the Tenancy Tribunal.

Process

[20] Ms QM advised that she was happy for the review to be completed on the papers, relying upon the material before the Standards Committee.

[21] Ms PW also advised she was agreeable for the review to be completed on the papers.

⁶ At [30].

Nature and scope of review

[22] The High Court has described a review by this Office in the following way:⁷

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[23] This review has been conducted in accordance with those comments.

Review

Was Ms PW the 'person chargeable' with the bill of costs?

[24] At [21] of its determination, the Committee determined that Ms PW was a 'person chargeable with a bill of costs' but did not include any reasons in support of that decision. I include here my reasons for supporting the Committee's decision.

[25] Section 132(2) of the Lawyers and Conveyancers Act 2006 enables "any person chargeable with a bill of costs ... may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner"

[26] Ms PW became liable to pay legal fees in two ways. The first was by Order of the Tenancy Tribunal, the second was by the claim by Company A Ltd to recover fees incurred in recovering the levies payable by Ms PW.

The Tenancy Tribunal Order.

[27] Ms PW was ordered to pay costs by the Tenancy Tribunal. The question that arises is whether the legal costs became subsumed into the Tribunal Order, thereby losing separate identity as a lawyer's bill of costs, about which a complaint can be made to the Lawyers Complaints Service.

[28] This question was addressed by the High Court in *Henderson Reeves Connell Rishworth Lawyers Limited v Busch*.⁸

[29] In that case, the law firm (Henderson Reeves) had obtained judgement in the District Court against Mrs Busch for unpaid fees. Mrs Busch then complained to the Lawyers Complaints Service about the quantum of the fees. The Standards Committee

⁷ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

⁸ *Henderson Reeves Connell Rishworth Lawyers Ltd v Busch* [2013] NZHC 2521.

declined to take any further action on the complaint, on the basis that there was an adequate remedy that would be reasonable for Mrs Busch to take,⁹ being an appeal to the High Court.

[30] Mrs Busch then lodged an application for review of that decision to this Office.

[31] Associate Judge R M Bell concluded his consideration of this issue in the following manner:¹⁰

I sum up on this part of the decision. Mrs Busch's application for review is still to be decided. It could arguably result in an adjustment to Henderson Reeves' fees. The policy that the courts should not allow their proceedings to impinge on the procedures under the Lawyers and Conveyancers Act for investigating the amounts payable for lawyers' bills and the need to avoid a miscarriage of justice mean that the judgement of the District Court should not be relied upon as finally establishing the amount of Mrs Busch's liability under Henderson Reeves' bill.

[32] The emphasis was on the amount of the bill, and Henderson Reeves was still able to rely on the Court judgement as to liability in its bankruptcy application against Ms Busch.

[33] Applying that judgement to the facts here, Ms PW remained liable for the Tenancy Tribunal Order, but retained the right to challenge the amount of the legal costs included in that Order.

Invoices rendered to Company A Ltd

[34] Ms QM acted for Company A Ltd. Ms QM addressed her statements, which included legal fees, to Company A Ltd. Company A Ltd was primarily responsible for payment of these fees.

[35] Company A Ltd included the costs in its claim against Ms PW. Did Ms PW, thereby, become a 'person chargeable with the bills of costs'?

[36] This question was canvassed, in some detail, in the judgment of the Court of Appeal in *Black v ASB Bank Ltd*.¹¹

[37] In that case, ASB Bank was entitled to claim indemnity costs against Mr Black. The Court noted that the party liable for indemnity costs had three avenues available, one of which was to refer the fee to the New Zealand Law Society.

⁹ Section 138(1)(f) Lawyers and Conveyancers Act 2006.

¹⁰ At [36].

¹¹ [2012] NZCA 384 at [69]–[99].

[38] The Court first referred to *Simpson Grierson v Gilmour*¹² where, the Court said, Stevens J was in no doubt that a person in Mr Black's position would not be included as a person chargeable with the costs. He said:

...The opening words [of s132(2)] are important. Such person must be one 'who is chargeable with a bill of costs.' This depends on there being a contract of retainer between the practitioner and the person concerned.

[39] The Court then referred to two decisions of this Office. In the first,¹³ the Court had made an Order against the defendant, which included legal costs and the Review Officer did not accept that the complainant had standing to make a complaint pursuant to s 132(2).¹⁴

[40] The second decision involves a fact situation which mirrors the facts in this review. In that review, the applicant lawyer, argued that the respondent (who was in the same position as Ms PW) was not a party chargeable in terms of s 132(2) and therefore did not have standing to complain about the lawyer's fees.

[41] In that case, the respondent had lodged her complaint about fees with the Complaints Service before the claim came before the Court. The review decision refers to the judgment of Judge Cunningham in *Body Corporate 183119 v Walden*¹⁵ in which the Judge says:¹⁶

[34] Section 132(2) talks about any person chargeable with a bill of costs. Because the predecessor section defines a party chargeable more widely to include "... any other party chargeable with the bill ..." it could be argued that the ambit of persons who can avail themselves of the cost revision process has been narrowed.

[35] The purposes of the Lawyers and Conveyancers Act is set out in section 3 of the Act. They include to maintain public confidence in the provision of legal services and to protect the consumers of legal services. There are in my view good policy grounds that the current section 132(2) should not be interpreted narrowly.

[42] The Judge went on to hold that a person in Ms PW's position, was a 'party chargeable' in terms of the Act.

[43] The Court of Appeal (in *Black v ASB*) then moved on to consider two judgments of the High Court "which note the issue without needing to decide the point".¹⁷

¹² HC Auckland CIV-2008-404-8674 at [63].

¹³ *GM v TTL* LCRO 31/2011.

¹⁴ This decision adopts a different position than the Court in *Henderson Reeves*, referred to above [28]–[32]. This decision rests on the Court's judgment, which postdates the LCRO decision.

¹⁵ (DC Auckland, CIV-2008-044-002283, 27 April 2010).

¹⁶ At [34]–[35].

¹⁷ *Black v ASB*, above n 11, at [98].

[44] The Court concludes its discussion¹⁸ in the following manner:

We have set all this out because we have suggested that a complaint under s 132(2) is a potential avenue for dealing, in a detailed way, with a challenge to the reasonableness of indemnity costs. Yet it remains to be authoritatively decided whether, in a case such as this, that is so. Hopefully the background we have set out will assist when that decision needs to be made.

[45] I am not aware of any subsequent judgment of the Courts which has 'authoritatively' decided the question. For now, I adopt the view that Ms PW does have standing to complain, based on the words of Judge Cunningham, the suggestion by the Court of Appeal that it is so, and previous decisions of this Office.

Who was responsible for setting the fee?

[46] Following the determination by the Committee to take no further action on Ms PW's complaints against Ms QM (which included the complaint about fees), the Committee commenced an investigation against Messrs FS and YA in which the quantum of the fees was addressed.

[47] The rationale for that decision followed a decision of this Office and I include here an extensive quotation from that decision:¹⁹

[63] As noted earlier, although the firm's 15 May 2018 letter to [deleted], which accompanied the 14 May 2018 invoice, was in [deleted] name, the invoice was not authored or signed by [deleted], or any other member of the firm.

[64] These circumstances are referred to in the New Zealand Law Society's Practice Note concerning the functions and operations of Lawyers Standards Committees which acknowledges that "[e]xcept in the case of a sole practitioner, bills of cost are issued by a firm, not an individual lawyer". For that reason, the Standards Committee, to whom a client's complaint has been referred by the LCS, must "consider carefully the appropriate party to investigate".

[65] The Practice Note further explains that the Committee "should be satisfied" the lawyer complained about "was the person actually and substantially responsible for the decision to set the fee and issue the bill", and recommends "[c]aution will need to be exercised where that person is an employed solicitor or legal executive".

[66] Because the task of determining a fee is "often the responsibility of the partners of the firm", the Practice Note adds it would therefore "be unfair to hold an employee", who was "not directly responsible" for determining the fee, "professionally responsible" and then make a finding of unsatisfactory conduct against that lawyer.

[48] I have some reservations about accepting the view that the task of determining a fee is often the responsibility of the partners of the firm. However, I confirm the

¹⁸ At [99].

¹⁹ No reference is included here as the decision has not been published.

Committee's decision to take no further action on Ms PW's complaint about fees against Ms QM, primarily because the quantum of the firm's fees was addressed in the own motion investigation against Messrs FS and YA, and is also the subject of review.

Proper purpose

[49] Ms PW has complained that Company A Ltd was pursuing payment of the fees in order to wear her down and in order to get her to accept the levy imposed by Company A Ltd to repair the roof of the development. Ms PW maintained that the roof needed to be replaced rather than repaired. She therefore, objected to the levy imposed on the owners of units in the development.

[50] Rule 2.3 of the Conduct and Client Care Rules provides:²⁰

A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[51] Ms PW complains that Ms QM enabled the Body Corporate to pursue recovery of legal costs thereby using the law for improper purposes.

[52] The authors of the text, *Ethics, Professional Responsibility and the Lawyer*,²¹ discuss the application of r 2.3.²² They say:

It is often difficult to show that an action has been taken or a proceeding brought for an improper purpose. To find that an action is an abuse of process will result in the barring of the action and the denying of the litigant the right to make the claim. This is a serious step, and the Court will generally be slow to make such a finding. ...

The dividing line between using a legal process to one's advantage and abusing a legal process to gain an illegitimate advantage is difficult to detect objectively. A key ingredient is the client's motivation in taking the action complained of. In all but the most obvious of cases, this will not be readily apparent. The onus lies on the lawyer to determine the client's intentions and objectives and to ascertain whether they amount to the use of legal processes for an improper purpose. If the purpose is improper, the lawyer should refuse to assist.

[53] To reach a view that Ms QM was complicit in Company A Ltd wrongly pursuing payment of its levy, would be to place Ms QM in the position of deciding whether the roof should be replaced or repaired. That is clearly not something that could be expected of Ms QM.

²⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

²¹ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016).

²² At 352–353.

[54] As against the suggestion that Ms QM was using the law for an improper purpose, one needs to refer to the strict requirements of rr 4 and 4.1.1 of the Conduct and Client Care Rules:

4 A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.

...

4.1.1 The following are not good cause to refuse to accept instructions:

...

(c) the merits of the matter upon which the lawyer is consulted.

...

[55] Ms QM was instructed by Company A Ltd to pursue recovery of the levy set by Company A Ltd. Her duty was to her client.

Decision

[56] For the reasons discussed above, and pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee to take no further action on Ms PW's complaints is confirmed.

Publication

[57] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006:

(a) I direct that this decision be published in an anonymised format on the website of this Office.

DATED this 21st day of MARCH 2023

O 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:

Ms PW as the Applicant
Ms QM as the Respondent
Mr FS and Mr YA as Related Persons
[Area] Standards Committee X
New Zealand Law Society