

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

[2021] NZLCRO 117

Ref: LCRO 216/2020

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

YH

Applicant

AND

DP

Respondent

DECISION

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

Introduction

[1] In a decision dated 16 October 2020, the [Area] Standards Committee [X] decided to take no action on Ms YH complaint about her former lawyer, Mr DP.

[2] The Committee based its decision on s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This section allows a Committee to dismiss a complaint at an early stage, if it considers that further action on the complaint is neither necessary nor appropriate.

[3] My decision on this review application, unusually made with the consent of both Ms YH and Mr DP, is that I am directing the Standards Committee to reconsider the whole of Ms YH complaint. Specific directions as to the manner in which the Committee must undertake that task, are set out by me at the end of this decision.

Background

[4] What follows has already been set out by me in a Minute to the parties as part of my case management of Ms YH review application. It will be familiar to the parties, but it is important for me to explicitly repeat it for the benefit of the Committee.

[5] Ms YH was represented by Mr DP (and others in his law firm, [Law Firm AB] (AB)), beginning in about 2013, in connection with litigation concerning her mother's care and welfare whilst she was alive, and her estate after she had passed away. The litigation included a claim in negligence against Ms YH late mother's former lawyers.

[6] The negligence claim was settled.

[7] The retainer was terminated in approximately July 2019.

[8] Over the course of the retainer Ms YH has paid legal fees of approximately \$700,000.

Complaint

[9] In her complaint to the New Zealand Law Society Complaints Service (Complaints Service) dated 4 September 2019, Ms YH identified the following issues (the following is more or less a verbatim reproduction of the complaint):

- (a) AB took advantage of Ms YH position. Each of the proceedings effectively covered the same ground, however, the cases cost more and more to fight each time. There has been no efficiency realised.
- (b) Although Ms YH received a settlement payment, she does not consider that the negligence claim was successful. She paid more in legal fees for this claim alone, just to end up in mediation, than she was able to recover. AB should have advised her from the beginning that most of what she was claiming could not be attributed directly to the actions of her late mother's former lawyers and was too remote for compensation. They should also have advised that it would cost more to bring the claim than would be recovered. Instead, AB enabled Ms YH to bring the claim by allowing her to defer the billing. She only began to discover the limitations to the quantum of her claim when counsel instructed wrote to her in December 2018. By this time, she had spent too much money to drop the case.

- (c) It became obvious during the mediation that she had paid over double the legal fees of all the other parties involved in the Family Court proceedings.
- (d) Ms YH question is whether she has been invoiced in line with AB's terms of agreement. The final invoice covers time that should have been included in previous months' invoices. The terms and conditions are available on AB's website, however, Ms YH had no visibility of when or if they have been updated since they had been sent, as a link, to her in 2013.

[10] In her complaint, Ms YH noted that she had "questioned the level of billing on many occasions."

[11] It appears that there is, on the basis of AB's invoicing, a balance owing to that law firm by Ms YH of \$42,337.50.

[12] By way of outcome Ms YH sought:

- (a) a review of AB's invoices from October 2013; and
- (b) a review of the negligence case to ascertain whether AB should have dissuaded her from, rather than enabled her to proceed with, pursuing the case.

[13] Ms YH also noted that she had "been overcharged" so would not be paying the outstanding balance, and that she sought a refund for the fees overpayment.

The Standards Committee decision

[14] The Committee began its decision by noting that the complaint concerned "total fees of almost \$700,000 that [Mr DP] charged [Ms YH] in relation to five separate, but related matters, between 2013 and 2019.

[15] The Committee said that it "focused on what it regards as the key issues", which it set out as follows:¹

- does the Committee have jurisdiction to consider the invoices issued more than two years prior to the date of the complaint in light of Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008?

¹ Standards Committee decision at [8].

- did Mr DP charge a fee that was fair and reasonable for services provided, as required by Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008[?]
- did Mr DP charge Ms YH for time already invoiced?
- were there any other issues that required a disciplinary action?

[16] As set out by me in further detail below, the Committee concluded that there were no special circumstances justifying an assessment of fees charged before September 2017 (i.e. two years or more before the date on which Ms YH lodged her complaint). Indeed, the Committee only extended its reach back to some 12 months before Ms YH lodged her complaint.

[17] As well, the Committee concluded that the fees charged for the period as assessed, were fair and reasonable. It also concluded that there had been no doubling-up of time and charging.

[18] In relation to other matters raised by Ms YH in her complaint, the Committee described these as “ancillary” to the “reasonableness of the fees” but concluded that none of the matters raised warranted further action.²

Application for review

[19] Ms YH lodged her review application on 27 November 2020. By way of outcome, she said that she “would like to see [AB’s] charges reviewed and reduced as the LCRO sees fit” and that she did not consider herself liable to pay for the outstanding balance of some \$42,000.

[20] In describing her review application as “a complete review of the decision from the Standards Committee”, Ms YH said that she did “not feel that they conducted a thorough investigation of the matters at hand.”

Responses by Mr DP.

[21] In relation to both Ms YH complaint and review application, Mr DP provided both the Complaints Service and this Office with comprehensive rebuttal and explanation.

² Standards Committee decision at [22] and following.

Discussion

[22] Ms YH review application was assigned to me for case management, hearing and decision.

[23] In assessing the file in order to make preliminary timetabling directions, I noted that the complaint concerned fees charged by Mr DP, as well as other aspects of his representation of Ms YH.

[24] In relation to fees, the Committee elected to consider only a portion of the total fees charged by Mr DP, for invoices issued in the period between 4 September 2018 and 4 June 2019 (nine months).

[25] The fees charged during that nine-month period were \$412,798.22, exclusive of GST and disbursements.³

[26] In deciding to limit its consideration of fees to the above, the Committee said the following:

[11] Ms YH complaint was lodged in September 2019, so the Committee considered whether special circumstances exist to enable it to deal with invoices issued prior to September 2017. It found no such special circumstances in this case. The information provided showed that Ms YH was invoiced regularly during the course of all matters, there was no deception by [AB], and she was aware of the costs she was being charged which she discussed with Mr DP on several occasions. Whilst the instructions may have generally related to Ms YH mother's affairs, there were separate proceedings during the course of the retainer, with the later instructions being largely focused on the claim against [her late mother's law firm XYZ]. The Committee was of the view that while Mr DP's fees were high, that was not a reason, in and of itself, to declare special circumstances.

[27] The Committee correctly identified that only "special circumstances" permit assessment of fees issued more than two years prior to a complaint being lodged. It also correctly stated that "special circumstances must be abnormal, uncommon, or out of the ordinary."⁴

[28] However, I have some difficulty discerning the Committee's rationale for not extending the reach of its assessment to at least September 2017, being two years before Ms YH lodged her complaint.

³ See the table prepared by the Committee at [13].

⁴ Standards Committee decision at [10], in which the Committee referred to the well-known judgment of the Court of Appeal in: *Cortez Investments Ltd v Olphert and Collins* [1984] 2 NZLR 434 (CA) at 441.

[29] Review Officers have routinely held, as have Standards Committees, that “special circumstances” exist to go beyond the two-year reach, when a retainer lasts for more than two years and invoices are regularly issued during the term of the retainer.

[30] The rationale is that invoices issued more than two years before a complaint has been lodged should be considered as part of an overall assessment of the total fees charged for the matter.

[31] The Committee seemed only to focus on whether the fees “were high” (which it said they were), as being the trigger for whether special circumstances existed.

[32] I have concerns as to whether that reflects a proper consideration of whether there were special circumstances.

[33] The Committee’s conclusion that the fees it elected to consider were fair and reasonable, was made without reference to Mr DP’s file, and without the benefit of an assessment carried out by an experienced costs assessor.

[34] Indeed, the Committee’s reasoning was limited to the following passages in its decision:

[14] The Committee comprises members who have significant expertise in both litigation and estate matters. It was therefore satisfied that it had the requisite experience to assess the reasonableness of the fees in this complaint and that it was not necessary to appoint a costs’ assessor. It was also satisfied that the material it had before it was sufficient to enable it to assess the reasonableness of the fees charged.

[15] In considering this issue, the Committee noted that Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules) prohibits lawyers from charging a client more than a fee that is fair and reasonable, having regard to the interests of the client and the lawyer.

[16] The factors to be considered in determining the reasonableness of a fee are set out in Rule 9.1. They include the time and labour expended, the complexity of the matter, the experience, reputation, and ability of the lawyer, the skill and specialised knowledge required to perform the services properly and the degree of risk assumed by the lawyer in undertaking the services, including the value of any property involved.

[17] The Committee took account of the factors in Rule 9.1 to the extent they were applicable. It concluded that while the fees charged by Mr DP might appear disproportionate to the outcome achieved, they were fair and reasonable for the services rendered, given that:

- the amount of work required for the litigation was considerable and it included a considerable amount of work that Ms YH would not have been aware of;

- Mr DP is an experienced practitioner with specialised knowledge and expertise;
- the value of the parents' estate was approximately \$3 million;
- a QC's opinion was obtained on Ms YH prospects of success in her negligence claim against [her late mother's law firm XYZ]; and
- Mr DP discounted his fees by between 10% and 20% for Ms YH.

[18] The Committee also noted that Ms YH had instructed [AB] for a considerable period and was being invoiced regularly, which put her on notice as to the level of fees that she could expect to incur, should she continue to instruct the firm. The Committee was satisfied overall that the fees were within the range that would be expected for such proceedings, particularly given the amount of work required to be undertaken and the value of the matter at stake. Having inquired into this aspect of Ms YH complaint and having concluded that Mr DP's fees were fair and reasonable, the Committee decided to take no further action in relation to this aspect of the complaint.

[35] It may well indeed be the case that the fees charged across the entirety of the retainer were fair and reasonable. But I struggle to understand how that assessment can be made – even just in relation to the nine months selected by the Committee – on the basis of Ms YH complaint and Mr DP's response to that complaint.

[36] I mean no disrespect whatsoever to either of Ms YH or Mr DP – both provided helpful material to the Committee. But Ms YH must be left with a feeling that her complaint was only superficially considered by the Committee.

[37] I would agree with that sentiment.

[38] It cannot possibly be the case that, no matter how experienced a Committee considers itself to be in the subject matter of a complaint before it, that determining whether \$400,000 worth of legal fees (being only a nine month snapshot of fees charged across a lengthy retainer) can be accomplished on the basis of limited information (complaint and response). At the very least, a review of the relevant files is called for.

[39] As well, in my view it somewhat misses the point to say that simply because Ms YH was being regularly invoiced that this “put her on notice as to the level of fees she could expect to incur” and that this somehow translates to an independent and objective assessment as to whether those fees are fair and reasonable in the first place.

[40] Furthermore, the fact that a lawyer has offered to discount their fees does not cloak either the discounted or undiscounted amount with the mantle of fairness and reasonableness.

[41] A similar issue arose recently in a review application considered by Review Officer Maidment.⁵ He said the following:

[231] A feature of the Committee's fee analysis is that it references r 9.1 factors, but provides minimal explanation as to why the factor referenced assumes significance.

[232] Having carefully considered the analysis proffered, I am not persuaded that the Committee's reference to the fee factors addressed, sufficiently (in the absence of further explanation) addresses the question as to whether fees charged were fair and reasonable.

[233] The factors set out in r 9.1 provide useful guidance for a Committee, but simple explanation that a particular fee factor has been considered, is not in itself sufficient to establish the relevance of the factor to the fee.

[234] There may be circumstances where it is adequate to simply reference the fee factors relied on, but in others it will be necessary to provide more comprehensive explanation in order to ensure that the complainant fully understands the reasoning that has gone into the decision-making process.

[235] Reference to a r 9.1 factor may have little meaning for a complainant in the absence of explanation as to why the factor was considered significant.

[236] The simple citing of a r 9.1 factor does not necessarily imbue the factor with any particular significance or relevance for the fee enquiry.

[237] Whilst the r 9.1 factors provide a helpful architecture around which a comprehensive fee analysis can be constructed, it is important that Committees do not lose sight of the need to step back and look at the fee in the round.

[238] It has been observed that lawyers have an obligation when billing to:

... to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[239] I am not satisfied that the scope of the Committee's inquiry, as reflected by its decision, was sufficiently comprehensive.

[240] My colleagues and I have observed in recent times, when considering review applications arising out of fees complaints, that Standards Committees are increasingly undertaking a "fair and reasonable" assessment – sometimes involving substantial fees – without the benefit of input from a cost assessor.

⁵ *VM v XZ* [2020] NZLCRO 216. Citations are omitted. The Review Officer was considering fees of a little under \$257,000.

[241] There is no requirement that a Committee appoint an assessor. A Committee may (particularly a specialist Committee) consider that it has sufficient and relevant expertise amongst its membership, to consider the fee complaint itself.

[242] However, where fees under consideration are this significant, it seems to me that the appointment of a cost assessor is not only worthwhile, but critical to the assessment that a Committee must ultimately make about a challenged fee.

[243] There are considerable benefits in having an independent cost assessor appointed in circumstances where the fee complained of is this substantial. A cost assessor's report can be particularly valuable in circumstances where the complaint concerns litigation costs.

[244] Informed from a background and expertise in the area of litigation engaged by the complaint, an experienced assessor is able to provide both accurate assessment as to the range of costs that would be reasonably incurred for litigating the case, and an informed calculation as to whether costs incurred which appear to have exceeded what would conventionally have been expected, present as reasonable.

[245] A cost assessor will meet with the parties.

[246] The assessor prepares a report for the Committee.

[247] That report is copied to the parties, and opportunity provided for the parties to comment.

[248] It is a process that allows for more direct input from the parties and is likely, in my view, to heighten confidence particularly for complainants, that their concerns have been adequately addressed.

[249] Of course, it remains the function of a Standards Committee to ultimately decide whether fees charged are fair and reasonable. An assessor's report may be accepted or rejected in whole or in part by the Committee; that is the prerogative of any decision maker when considering evidence that has been provided.

[250] At the very least however, an assessor's report and the parties' comments about that report will greatly assist a Committee with its task of ruling on the fairness and reasonableness of a lawyer's fee.

[251] It bears repeating, that this was a substantial fee.

[252] I emphasise that I have not concluded that the fee in this case was unreasonable, rather that the Committee's decision provides insufficient evidence of it having adequately considered the question as to whether the fee charged was fair and reasonable in the circumstances.

[253] It is regrettable that resolution of this matter will be delayed, but I do not consider that I am, in the circumstances, well placed to determine whether the fee is fair and reasonable.

[42] The New Zealand Law Society's *Practice Note Concerning the Functions and Operations of Lawyers Standards Committees* (Practice Note) has the following to say about fees complaints (citations omitted):

- 10.3 Fees complaints should be delegated by Standards Committees either to a specialist costs assessor appointed for that purpose by the NZLS Complaints Service or to an individual Standards Committee member. The delegation should be in writing. The costs assessor or Standards Committee member must undertake an analysis of the bill of costs and the client file and prepare a report for the Standards Committee. It is expected that the costs assessor would arrange a meeting with the lawyer and the complainant together, with the necessary files and costing records being made available, as part of the investigation.
- 10.4 The costs assessor's report should refer to the following matters:
- (a) Whether the costs assessor considers that the fee is fair and reasonable for the services provided in terms of Rule 9 and, if not, the costs assessor should express an opinion:
 - (i) Concerning a fee which is fair and reasonable; or
 - (ii) A range within which a fee would be considered fair and reasonable.
 - (b) Whether anything else emerged from the inquiry which the costs assessor considered to be relevant for the purpose of assisting the Standards Committee with its inquiry into the fee complaint.
- ...
- 10.6 The costs assessor's reports should be copied to the parties, with an opportunity to respond. ...

[43] I accept of course that these are guidelines only, and do not carry the force of regulation. Even so, the good sense in what the guidelines recommend is tolerably clear.

[44] As a Review Officer, whose statutory function is to consider material that was before a Standards Committee and carry out an independent assessment of its methodology, reasoning and conclusions, I am not prepared to conduct what would in effect be a first-instance consideration of the fees charged to Ms YH. I say "first instance", because the Committee's approach was so superficial as to be of very little assistance to the parties or to me.

[45] I held a teleconference with the parties on Monday 5 July 2021, at which I indicated my misgivings about the Committee's assessment of the fees charged, and suggested that I was minded to refer at least the complaint about fees, back to the Committee with specific directions as to how it should approach its assessment of those fees. My purpose in arranging the teleconference was to gauge whether the parties would consent to me referring the matter back to the Committee, with those specific directions.

[46] An issue arose during the course of the teleconference as to precisely what issues would be referred back. Mr DP's position was that only the question of fees (and only those fees considered by the Committee), and the fairness and reasonableness of those fees, should be referred back and that all other issues of complaint should be finally disposed of, one way or the other, by me conducting a full review of those matters.

[47] My reservations about that approach are first, limiting the inquiry to the fees charged during the period selected by the Committee would necessarily mean that I agree with its conclusions that no special circumstances exist to consider pre-September 2018 fees.

[48] Quite apart from what seems to be an error by the Committee in drawing a line in the sand for invoices issued before September 2018 – which is only 12 months before Ms YH lodged her complaint – the Committee's overall assessment of the issue of "special circumstances" seemed to be limited to the question of whether the fees were high. I would expect, on a reference back, for the Committee to make a fresh assessment as to whether or not special circumstances exist to consider fees charged before September 2017, this being the two-year period relevant to fees complaints.

[49] Secondly, it seems to me that the other issues of complaint raised by Ms YH are inextricably linked to the overall question of whether the fees charged were fair and reasonable.

[50] For example, in her complaint Ms YH raises the question of whether or not work was "efficiently" carried out (this, perhaps, raising issues under r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)).

[51] As well, Ms YH questions whether she received adequate advice about recoverable losses in the negligence claim against her mother's law firm. This seems also to raise issues under rr 3 and 13.3 of the Rules.

[52] I cannot see how an assessment of whether fees charged were fair and reasonable can be separated out from those issues. Were I to finally determine those issues and refer only the question of fees back to the Committee, then it would seem to me that the principles of *issue estoppel* and/or *res judicata* would prevent the Committee from taking those issues of complaint into account when assessing the fairness and reasonableness of the fees.

Decision

[53] Accordingly and for the reasons outlined by me above, pursuant to s 209 of the Act, I am redirecting the Committee to reconsider the whole of Ms YH complaint. The agreed terms upon which I do so are that the Committee must:

- (a) forthwith appoint a costs assessor to carry out an independent assessment and prepare a report for the Committee about their independent assessment, consistent with the suggestions in the Practice Note. For the avoidance of doubt, the costs assessment would involve the assessor calling for and reviewing Mr DP's files, and meeting with both Ms YH and Mr DP (either separately or together);
- (b) direct the costs assessor to turn their mind to the question of whether special circumstances exist justifying a consideration of fees charged before September 2017, this being two years before the date of Ms YH complaint (see: 10.4(b) of the Practice Note). For the avoidance of any doubt I direct the Committee to, at the very least, consider fees charged after September 2017, and not September 2018 as it did in its decision;
- (c) direct the costs assessor to identify any other matter which might emerge from their investigation and which the costs assessor considers relevant for the purposes of assisting the Standards Committee; and
- (d) having received the costs assessor's report, invite submissions from the parties.

[54] I would expect the Committee to bring a proper consideration as to whether special circumstances exist justifying an assessment of fees charged before September 2017.

[55] As well, I expect the Committee to consider the question of whether fees charged were fair and reasonable in the context of the issues of complaint raised by Ms YH in her original complaint.

[56] I strongly encourage the Committee to complete its inquiry by the end of this year (2021).

[57] Finally, in the course of making submissions to me about the above, Ms YH and Mr DP raised separate issues which I briefly address as follows:

- (a) Mr DP has indicated that his consent to the process that I have adopted is limited to the specific orders that I have made at [53]–[56] immediately above, and that in relation to “the balance of the July Minute⁶ and in all other respects” he “[reserves] his position.” He has asked me to record that reservation of rights in my decision. I have no difficulty with that. Apart from the actual orders that I have made, which are by consent, comments about the Committee’s processes are my own and consistent with my role as a decision-maker. They are made by me to provide context and rationale for the consequent orders.
- (b) Ms YH has raised issues of potential bias by the Committee and/or the costs assessor and asked me to make directions to the Standards Committee to this effect. However, I think that the proper approach is for Ms YH to raise the issues she has identified directly with the Complaints Service.

Anonymised publication

[58] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 I direct that this decision may be published but without any details that may directly or indirectly identify the parties, or any other person named in this decision.

DATED this 29th day of July 2021

R Hesketh
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 YH as the Applicant
Mr DP as the Respondent
Mr GW as the related person
[Area] Standards Committee [X]
New Zealand Law Society

⁶ Repeated verbatim by me in this decision at [5]–[52].