

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [A South Island] Standards Committee

BETWEEN

MR AT

Applicant

AND

MS ZH, MR ZE, MS ZG AND MR ZF

Respondents

DECISION

Introduction

[1] This complaint relates to the amount of the bills for legal services provided by Mr ZE, Ms ZH and Ms ZG who were all lawyers associated with [Firm A] at the relevant time. The bills total \$26,753.20 (the bills) and include fees of \$21,713 (the fees).

[2] Mr ZF appears to have been drawn into the complaint process because of his involvement in proceedings commenced by [Firm A] to recover the bills, although none of his fees are included in the bills that were the subject of Mr AT's complaint.

[3] The legal services were provided in two stages. First, Mr ZE was engaged and gave advice that resulted in a caveat being registered against land in which Mr AT claimed an interest (the caveat). Second, Ms ZH and Ms ZG were engaged to conduct a High Court proceeding to prevent the caveat from lapsing (the High Court proceeding).

[4] After the High Court proceeding had settled, [Firm A] sought payment of the bills from Mr AT, and when he did not pay, it commenced recovery proceedings in the District Court on [date] (the District Court proceeding).

[5] Mr AT then laid a complaint on 28 September 2010 criticising various aspects of the lawyers' conduct, and the bills (the first complaint).

[6] The Committee considered that the District Court proceeding constituted an adequate remedy that Mr AT could reasonably exercise in respect of the first complaint. The Committee decided on 2 December 2010, pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), to take no further action in respect of Mr AT's complaints (the first decision).

[7] No review was sought of the first decision, and [Firm A] obtained judgment against Mr AT by default [date] in the District Court proceeding. Mr AT then successfully applied to set that judgment aside, and [Firm A] appealed that decision to the High Court.

[8] The High Court dismissed the appeal in its judgment [date], said that the issue of quantum of the fees had not been determined, and left it open to [Firm A] to consider what recovery steps were appropriate with respect to the bills.

[9] [Text redacted] Mr AT laid another complaint to the New Zealand Law Society (NZLS) on 28 August 2012, repeating complaints he had already made in the first complaint, but focussing particularly on the bills (the second complaint).

[10] The second complaint is the subject of this review.

Standards Committee

[11] In the second complaint¹ Mr AT repeated his complaints about the bills, made allegations about the lawyers' conduct, and said that if the "financial aspects can be resolved [he sees] no need to continue with the complaints about their behaviour".² Mr AT said that he wanted the bills reviewed because he did not consider they represented a fair and reasonable fee for the legal work undertaken on his behalf. He said that the fees had increased over the quote he had been given without any discussion with him. Mr AT said he is not liable to pay more than the amount he was quoted for the work he wanted done, which was either \$10,000 or \$12,000.

[12] The respondents objected to the Committee considering the second complaint, saying that it had determined the first complaint about the same matters, so it had no jurisdiction to consider the second complaint.

[13] The Committee considered the jurisdictional question, and found that it could consider and determine the second complaint. The Committee noted the High Court's comment that the issue of quantum had not been determined, and reasoned that it

¹ Second complaint to NZLS dated 28 August 2012.

² Above n 1, letter attached to complaint at para 13.

could determine the amount of the bills on the second complaint because it had determined the first complaint without considering its merits, at a time when [Firm A] and Mr AT were parties to the District Court proceeding.

[14] In the decision the Committee set out the history leading to the first complaint, and referred in detail to the correspondence and documents that relate to the retainers entered into between Mr AT, his neighbours (S & D), Mr ZE, and Ms ZH. The Committee recorded it had considered the lawyers' files, invoices and timesheets, described fee sharing arrangements apparently made between Mr AT, S & D and S & D's eleventh-hour decision not to be parties to the High Court proceeding. Ms ZH's requirement that \$10,000 in fees was to be lodged in advance of her undertaking substantial work on the High Court proceeding aspect of the file, and her agreement that she would invoice Mr AT direct, and not S or D, were also noted.

[15] On the basis of its consideration of all the information before it, the Committee formed the view that:

- a. Mr AT had accepted personal liability for all of the fees;
- b. Although it lacked jurisdiction to consider invoices rendered before 1 August 2008 there was no evidence of overcharging in those fees, and the fees were substantially less than they might have been if the fee had been charged only on the basis of the time recorded in the timesheets multiplied by the hourly rate; and
- c. The fees rendered after 1 August 2008 were fair and reasonable.

[16] On the basis of those findings, the Committee determined to take no further action on the complaint or any issues involved in it under s 152(2)(c) of the Act, and issued a Certificate for the purposes of s 161(2) of the Act certifying the amount due to [Firm A] in respect of the bills under the determination. The s 161(2) certificate included all of the bills [Firm A] had rendered in respect of the caveat and the High Court proceeding from 2007 to 2009, referred to an amount Mr AT had initially paid towards the bills, and certified "\$23,753.20 as the amount due (subject to any interest payable pursuant to the terms of the engagement)".³

[17] Mr AT was dissatisfied with the decision, and applied for a review.

³ Section 161(2) certificate dated 8 April 2013.

Grounds for Review

[18] The primary grounds for Mr AT's review application are that he is not liable for the whole of the fees, and that the fees are not fair and reasonable. Mr AT says he paid an initial amount of \$3,000 on account of fees, and he refuses to pay any more until the substance of his disputes are determined as to:

- a. The amount of the bills; and
- b. The proportion of those that he is liable to pay.

[19] Mr AT disputes that he is liable to pay bills that he says should properly be paid by his neighbours S and D, and that [Firm A] capped his legal costs at either \$10,000 or \$12,000.

Role of the LCRO on Review

[20] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of Review

[21] The Legal Complaints Review Officer (LCRO) has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Issues

Conduct

[22] Although Mr AT is critical of the lawyers' conduct, he said at the review hearing that he had received good service, and that there are no conduct issues that require consideration on review aside from the fees.

[23] The information provided does not give rise to any concerns over conduct or service that require consideration on review other than the fees, so there is no reason to consider the conduct and service aspects of Mr AT's complaint.

Fees

[24] Mr AT said at the review hearing that his primary concern is to obtain a determination on the reasonableness of the bills, and the extent of his liability to pay those bills.

Liability

[25] Although [Firm A] billed S and D as well as Mr AT, S and D were not parties to Mr AT's complaint, and have no standing to apply for a review.

[26] [Firm A] addressed a total of 11 bills to Mr AT at various times between 10 December 2007 and 30 September 2009. One of the eleven bills was also addressed to S and D. The bill dated 10 December 2007 for Mr ZE's fees was addressed only to D but bears a comment saying "[p]lease note my comments in my letter of 10 December 2007 about Mr AT agreement to arrange payment of fee". The 10 December letter says:

In light of the above and some further work that Mr AT wishes undertaken in this matter, we discussed the payment of my fees for all the work done to date in this matter. We agreed that we would sent [sic] you our account for the work done to investigate this matter and provide options for further action to protect your position with [Company A]. We would also send a copy of the account to Mr M TE to pass on to Mr AT. Mr AT agreed to arrange payment of this account. Therefore we attach a copy of the account for your information.

[27] Although D's bill was issued to Mr and Mrs D, not to Mr AT, it is evident from the correspondence that [Firm A] considers Mr AT is liable to pay D's bill. On that basis the Committee included D's bill in its Certificate of the amount due to the lawyers under s 161(2), which is attached to the decision.

[28] Without determining liability, this review has also proceeded on the basis that [Firm A] considers Mr AT is liable for all of the bills, while recognising that any apportionment of liability between Mr AT, S and D is not a matter that could be determined by this review.

Quantum

[29] Mr AT's primary concern, and the focus of this review, is on the amount of [Firm A]'s bills.

Review Issue

[30] The issue on review is whether the lawyers charged Mr AT a fee that was fair and reasonable for the services provided, having regard to the interests of both him and the lawyers, and having regard also to the factors set out in Rule 9.1. which provides:⁴

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.

Reasonable fee factors

9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

- (a) the time and labour expended:
- (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
- (c) the importance of the matter to the client and the results achieved:
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
- (f) the complexity of the matter and the difficulty or novelty of the questions involved:
- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.

⁴ Rule 9 and 9.1 the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Review Process

[31] The question of jurisdiction was raised by the respondents and addressed in a Minute dated 15 November 2013, which confirmed this review would proceed on the basis that the Committee had jurisdiction to make the decision because the reasonableness of the fees had not been determined.

[32] Mr AT attended a review hearing in [city] on 11 February 2014, and although the respondents were not required to, all four of them attended and participated in the review hearing.

[33] In addition to the materials that were before the Standards Committee, which include the bills, timesheets and hourly rates, the parties filed further submissions, gave evidence, and Mr AT produced an affidavit sworn by Mr TE, all of which I have carefully considered.

[Paragraph redacted]

[34] Having considered the substance of the dispute over the amount of the bills, the outcome of this review is that the lawyers charged Mr AT a fee that was both fair and reasonable for the services provided, having regard to the interests of both him and the lawyers, and having regard also to the factors set out in Rule 9.1.⁵

Background

[35] At this point it is helpful to identify what work the lawyers who are the subject of Mr AT's complaint did.

[36] Mr ZF did no work for Mr AT. He did not record time, or render fees in the invoices that are the subject of this review. There are no grounds on which a complaint about fees could be sustained against him.

[37] The timesheets show that Mr ZE, Ms ZH, and Ms ZG recorded time, and that some of that time was included in the fees billed to Mr AT. Each of them contributed to the amount of the invoices.

[38] Mr AT's lawyer, Mr TE, introduced him to Mr ZE, who provided advice to him, as well as to S and D, on the interests in land that were under threat, and how those might be protected by registration of the caveat.

⁵ Above n 4.

[39] The time records show that Mr AT initially instructed Mr ZE in early December 2007 to provide him with legal advice in relation to a potential dispute with a third party over land. The dispute affected Mr AT, S and D.

[40] In Mr TE's undated affidavit that Mr AT produced at the review hearing, Mr TE says that when he and Mr AT met with Mr ZE, Mr ZE suggested Ms ZH would attend to the Court proceedings and that the estimate of that work was "likely to be \$10,000 plus GST and disbursements".⁶ Mr TE explained that [Firm A] was to invoice Mr AT directly for its fees, and that his firm would not be liable for payment of those fees. Mr TE says it:⁷

was made clear and agreed at the initial meeting with Ms ZH that the account would be paid by [Mr AT] at the end of the proceedings and that was accepted by Ms ZH. At this meeting Ms ZH advised that the costs would likely exceed the \$10,000 estimate and would likely be \$10,000 plus the costs incurred to date.

[41] Mr ZE completed the first part of his instructions, the caveat was registered and then notice was served to have the caveat removed which attracted consideration of whether the matter would proceed to litigation.

[42] Mr ZE introduced Ms ZH to Mr AT, S and D, and they all instructed Ms ZH to commence the High Court proceeding, with Mr TE being named as instructing solicitor in the proceeding.

[43] Although Mr TE was nominally the instructing solicitor, Ms ZH's evidence, and that of Ms ZG, was that Ms ZG provided support to Ms ZH, attended to adjournments and undertook work that could have been done by the instructing solicitor, but was not. That work formed part of the fees

[44] Ms ZG's evidence at the review hearing, which is supported by the time records, was that she recorded her time. The time records confirm that position, and she says she then had no influence over the amount of fees that were rendered.

[45] Ms ZH briefed evidence from Mr ZE as an expert, and he recorded time for his attendances in doing that work which formed part of the fees.

[46] S and D withdrew their instructions from Ms ZH shortly before the High Court proceeding was due to be filed, saying that they did not wish to be parties. Mr AT proceeded as the sole plaintiff in the High Court proceeding. From her initial instructions up to filing the High Court proceeding Ms ZH and Mr ZE invoiced fees of

⁶ Affidavit of [Mr TE], Undated, at para 4.

\$8,000 which represented slightly over half of the value of the time they had recorded. That invoice, raised on 29 February 2008, was the single largest invoice for a total of \$10,625 including GST and disbursements, one of which was the filing fee of \$1,100 for the High Court proceeding.

[47] Mr AT says he did not receive several invoices because they were sent to Mr TE who did not pass them on. Mr TE says he assumed [Firm A] was sending invoices direct to Mr AT.

[48] Mr AT then progressed settlement negotiations over several months, and the High Court proceeding was adjourned several times, in the face of what Ms ZH and Ms ZG described as some reluctance on the Court's part to grant repeated adjournments, even though the adjournments were sought with the parties' consent.

[49] Mr AT said that he signed a Settlement Agreement with a number of other parties, after what he described at the review hearing as lengthy negotiations, and received payment of settlement sums under that Agreement. He said he was assisted in the negotiations by Mr TE, and that he did not require assistance from any of the respondents, whose role after the caveat was registered related only to commencing the High Court proceeding and monitoring the proceeding until Mr AT had negotiated settlement. Mr AT did not believe he should have been charged for Ms ZH or Ms ZG arranging and attending Court for the various adjournments of the High Court proceeding, particularly when those adjournments were not sought on his instructions, and when the other party had given its consent.

[50] It appears from Mr AT's comments at the review hearing that he may not have appreciated the importance of progressing the application he had put before the High Court for determination.

[51] Ms ZH and Ms ZG' evidence was that throughout the High Court proceeding they were acting on Mr AT's instructions to preserve the caveat, and that the thrust of those instructions only changed when he reached settlement, at which point it was possible to discontinue the High Court proceeding.

[52] Ms ZH's evidence was that the High Court was pressing for resolution of the proceeding, and driving the parties towards a hearing, which made it more difficult and time consuming to obtain adjournments. The time Ms ZH and Ms ZG spent negotiating and securing adjournments forms part of the fees under review.

⁷ Above n 9 at [8].

Invoices issued before 1 August 2008

[53] Different statutory provisions apply to lawyers' invoices depending on whether the invoices were rendered before or after 1 August 2008.

[54] As mentioned above, the Committee considered it did not have jurisdiction to consider all of the fees billed, having formed the view that s 351 of the Act excluded invoices rendered before 1 August 2008 from its jurisdiction.

[55] Section 351(1) of the Act deals with complaints about lawyers' conduct before 1 August 2008 as follows:

If a lawyer... is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

[56] Conduct of a disciplinary nature before 1 August 2008 in respect of billing would have to relate to overcharging that was gross or dishonest.

[57] Although the Committee considered it lacked jurisdiction to consider fees rendered before 1 August 2008, it reviewed the invoices, the associated hourly rates and time records provided, and came to the view that [Firm A] had not overcharged grossly or dishonestly for fees before 1 August 2008.

[58] It is relevant to note that the Rules of Professional Conduct, which applied before 1 July 2008, also required lawyers to charge only a fee that was fair and reasonable, and that the assessment of a fair and reasonable fee was to be carried out with reference to factors that are replicated in Rule 9.1.

Invoices rendered after 1 August 2008

[59] With respect to invoices rendered after 1 August 2008, the Committee considered whether there were "special circumstances" that would provide it with jurisdiction over invoices that were rendered more than two years before Mr AT laid his complaint, or invoices that fell below the \$2,000 threshold set by Rule 29. Rule 29 says:⁸

If a complaint relates to a bill of costs rendered by a lawyer ... unless the Standards Committee to which the complaint is referred determines that there are

⁸ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs—

(a) was rendered more than 2 years prior to the date of the complaint; or

(b) relates to a fee that does not exceed \$2,000, exclusive of goods and services tax.

[60] The invoices in question were rendered between September 2008 and September 2009, and only one of them exceeded \$2,000. Nonetheless, the Committee accepted that special circumstances existed on three bases. First, that the fees would not have fallen outside the two year limit at the time Mr AT had laid the first complaint; second that the reasonableness of the fees had not been considered, and third that the fee dispute was likely to be ongoing.

[61] The Committee therefore accepted jurisdiction over all of the bills rendered after 1 August 2008.

Treatment of Invoices – Fees for Essentially a Single Legal Service

[62] This Office has adopted the approach on a number of occasions that it is artificial to separate out invoices that relate to essentially a single legal service, and that such invoices are treated as a special circumstance for the purposes of Rule 29.

[63] The fees covered two stages of a legal process that protected non-owner interests in a single piece of land: first by registration of a caveat, and second by preventing the caveat from lapsing through an application made to the High Court. For the purposes of reviewing the fees, the legal service was to protect legal interests in the piece of land in question, and that was essentially a single legal service.

[64] In the circumstances all of the invoices rendered between 10 December 2007 and 30 September 2009 have been considered on review.

Were the fees fair and reasonable?

[65] The question on review is whether it was reasonable for the Committee to find that the lawyers charged Mr AT a fee that was fair and reasonable in accordance with Rule 9 and 9.1.

[66] At the review hearing Mr AT confirmed that he had been provided with all of [Firm A]'s invoices and the timesheets that support those invoices well in advance of the review hearing. He indicated that he had not considered the detail of the bills or the

timesheets, and did not identify any specific areas which he considered were unfair or unreasonable. Mr AT emphasised that he believed [Firm A] had given him a quote, and that the bills were therefore capped at no more than \$10,000 or \$12,000. He says he was charged significantly more than he was quoted, he should not have been billed for all the adjournments, and that overall the bills are not fair or reasonable.

[67] In making the decision, the Committee had before it Mr AT's first and second complaints, which included his assertion that the bills exceeded the quote he says Mr ZE gave him. The decision records that when it dealt with the second complaint the Committee reviewed [Firm A]'s files, bills, timesheets and the hourly rates, and considered all of those with reference to the reasonable fee factors. Having done so, the Committee determined that the fees rendered after 1 August 2008 were fair and reasonable.

[68] With respect to the bills rendered before 1 August 2008, although the Committee decided it had no jurisdiction over those, it said it had:⁹

...reviewed the fee invoices rendered prior to 1 August 2008, and the associated charge out rates and time records provided. The Committee cannot see any indication of overcharging, let alone gross overcharging. The Committee notes that the time recorded was discounted significantly (by \$7,960) in the 29 February 2008 invoice.

[69] Standards Committees are constituted of lawyers with a broad range of expertise in legal practice. The Committee is well placed to make determinations on the reasonableness of fees, provided it takes into account the relevant information and considers that against the reasonable fee factors. It is clear from the decision that the Committee has carefully considered the bills, hourly rates, timesheets, files and has considered the fees against the reasonable fee factors set out in Rule 9.1, including Mr AT's assertion that he was given a quote. In those circumstances, there would need to be good reasons to depart from the decision on review.

[70] I indicated to the parties at the start of the review hearing that I had carefully reviewed all of the bills, considered those against the detailed time records, and with reference to the reasonable fee factors. With respect to Mr AT's assertion that he was quoted a capped amount of \$10,000 or \$12,000, that is supported to some extent by Mr TE's evidence. Mr TE's recollection was that Ms ZH had indicated costs of over \$10,000 plus the existing fees.

⁹ Standards Committee determination dated 8 April 2013 at [49].

[71] Although it is apparent that Mr AT steadfastly believes his fees were capped at \$10,000 or \$12,000, it is highly unlikely that Ms ZH could have quoted a fee to conclude the litigation, particularly given the uncertainty inherent in Court proceedings. If the matter had proceeded to a full contested hearing, for example, it is likely that the legal costs would have been significantly more than \$10,000 or \$12,000. It is also unlikely that Mr ZE would have been in a position to commit Ms ZH to a fee might be for concluding the High Court proceeding. I therefore conclude that no quote was given and the fees for the High Court proceeding were not capped at \$10,000 or \$12,000.

[72] I explained to the parties that I had considered the information provided to the Committee, and on review. I also heard from all parties at the review hearing, and considered the further evidence and submissions filed. In the circumstances I have not found it necessary to consider [Firm A]'s files. Having carried out a detailed review, I have found no good reason to interfere with the Committee's exercise of its discretion in finding that the fees were fair and reasonable.

[73] As a consequence the decision is confirmed, subject to the comments below that relate to the certificate issued for the purposes of s 161(2).

Section 161(2) Certificate

[74] Section 161(2) provides for the Committee to record the amounts due to or from the practitioner in respect of a bill, or bills, and under the determination. The Certificate the Committee issued in this matter under s 161(2) also refers to a payment Mr AT made. It was not necessary for the Committee to record that payment, or make an adjustment for it in the Certificate.

[75] The s 161(2) Certificate is therefore modified to record the amounts of the bills totalling \$ 26753.20 that have been upheld as fair and reasonable on review.

Costs

[76] Section 210 of the Act provides a discretion for the LCRO to make costs orders on terms he or she thinks fit.

[77] The review was sought by Mr AT, as is his right. Although this decision confirms that of the Standards Committee, there is no evidence that Mr AT acted in bad faith in bringing his application for review, or that he deliberately protracted the review process. There are therefore no grounds on which to order him to pay costs on review.

[78] It was helpful for the lawyers involved to attend the review hearing, although they were not required to do so. There is no evidence that the lawyers involved have deliberately added to the time and cost of this review. They made a reasonable request early on for a determination on jurisdiction, and have done nothing to protract the review process. There are no grounds on which to make an order that any of them should pay costs on review.

Decision

Pursuant to s 211(1)(a), the:

- a. decision is confirmed; and
- b. the s 161(2) Certificate is modified to record the sum due under the invoices on review as \$26,753.20 as attached.

DATED this 26th day of March 2014.

Dorothy 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 AT as the Applicant
Ms ZH, Mr ZE, Ms ZG and Mr ZF as the Respondents
Mr TF as a related person or entity
[A South Island] Standards Committee
The New Zealand Law Society