

CONCERNING

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

AND

CONCERNING

a determination of [city] Standards Committee [x]

BETWEEN

REVIEW SUBCOMMITTEES

Applicants

AND

PQ

Respondent

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

Introduction

[1] Review subcommittees have applied for a review of the determination by [city] Standards Committee [x] to take no further action in respect of their complaints concerning fees charged by XM to complete deeds of variation of lease for each apartment in the development to record a rent review. The two subcommittees are represented by their chairmen, Messrs AB and CD, and the complaint was processed against the principal of the firm, Mr PQ.

Background

[2] Following a review of the ground rent for the two apartment buildings, SS and TT, each apartment owner was required by the lessor to complete a deed of variation of lease to record the new ground rent. XM was instructed to carry out the work.

[3] XM rendered an account to each apartment owner for \$550 plus GST and disbursements of \$116.87, making a total of \$749.37.

[4] The lease entered into by each apartment owner established a [z] review subcommittee:¹

¹ Memorandum of lease, Schedule G at [37].

... to negotiate and determine by agreement or arbitration with the Lessor and the Head Lessor on behalf of all the Lessees of [each apartment building], the current market value of the Land from which the new Rental for each Apartment [was to] be deduced.

[5] The [z] review subcommittees complained about the fee rendered by XM.

The complaint

[6] Submissions made by the subcommittees in support of their complaints included:

- (a) The lease variation process did not have to take place because it was not necessary for the new ground rent to be recorded on the titles.
- (b) All documentation for each owner was identical (except for specific details like owner's name, title references, etc) so the process was straightforward and highly repetitive well able to be carried out by non-legally qualified staff.
- (c) The law firm did not have to arrange for the owners' signatures to be witnessed or obtain consent from any mortgagees. It simply had to check the documents and file them electronically with LINZ.
- (d) The disbursement of \$16.87 for printing and forms was not warranted because in most cases the forms were emailed to the owners who then printed them out.
- (e) Fee estimates for the same work obtained from two other law firms were \$350 plus GST and disbursements, totalling \$502.50, in contrast to the \$550 fee (total cost \$749.37) charged by XM.

[7] In response PQ argued that the fee charged was fair and reasonable and made the following submissions:

- (a) Because of his clients' obligation to pay rental under the head lease it was essential that the rent due for each apartment was correct and recorded on the title thereby protecting his client against default and his client required the variation to be completed.

- (b) His approach for setting fees for these matters “ha[d] drawn on experience with a number of other similar leasehold apartment buildings”.²
- (c) A costs revision in October 2005 had determined that a fair and reasonable fee for similar documentation was \$500 plus GST and disbursements.
- (d) The work required to complete the variation was significant and lengthy.

[8] The Standards Committee referred the complaint to a costs assessor (Mr EF) who provided a report in which he concluded that the fee charged was fair and reasonable.

The Standards Committee determination

[9] After considering Mr EF’s report and submissions from each party the Standards Committee determined to take no further action in respect of the complaint.

[10] In reaching that decision the Committee, determined that:³

- (a) ... although there were economies of scale involved in the work undertaken, the matters required accuracy and a large amount of oversight for each file and the amount of time allocated to PQ, as the supervising partner, on each file was appropriate; and
- (b) ... it was important for the Deeds of Variation to be handled carefully [by] ... an experienced law firm ... a certain level of oversight from PQ was required and this was reflected in the fee.

[11] Accordingly it was satisfied that the fees rendered were fair and reasonable.

Application for review

[12] The subcommittees have requested this determination to be reviewed and have sought that:⁴

... the standard fee to be charged to each Lessee [be] reduced to \$350 plus disbursements and GST as per quotes from [the other law firms]. [They] also dispute the Printing and Forms charge of \$16.87. This charge should be deleted as all the forms were emailed and then had to be printed by each Lessee.

[13] The subcommittees have submitted that:⁵

² PQ letter to LCS (10 March 2015) at 2.

³ Standards Committee decision at [12] and [14].

⁴ Application for review (5 February 2016) at Part 8.

... the investigation carried out by the Costs Assessor was defective and inadequate. [He] failed to consider and apply properly the factors set out in rule 9.1 [of the Rules] ... Further, the [city] Standards Committee in its decision merely confirmed the Costs Assessor's conclusions and did not provide any explanation in relation to the Rule 9.1 factors.

[14] PQ advised he had nothing to add to what had been submitted by him to the Lawyers Complaints Service and Mr EF.

Review

[15] This review has been undertaken on the papers with the consent of both parties.⁶

Preliminary issues

[16] In his response to the complaint PQ questioned the authority of the subcommittees to make the complaint. Schedule G of the lease provided that the:⁷

sole function of the RR Subcommittee shall be to negotiate and determine by agreement or arbitration with the Lessor and Head Lessor on behalf of all of the Lessees ... the current market value of the Land from which the Rental for each Apartment shall be deduced.

[17] Section 132(2) of the Lawyers and Conveyancers Act provides that "any person who is chargeable with a bill of costs" may complain about the fee. The individual apartment owners had no direct contractual obligation to pay the account rendered by XM and their obligation arose through the terms of the lease. This 'indirect' obligation to pay nonetheless renders the lessee 'chargeable' with the bill of costs. To decide otherwise would be to deny the consumer protection focus of the Lawyers and Conveyancers Act.

[18] The authority of the subcommittees to make the complaint through their chairmen derives from the statute rather than from the terms of the lease.

[19] Another important issue that was not addressed by the Standards Committee is whether or not it had jurisdiction to consider the complaint. Reg 29 of the Standards Committees Regulations⁸ provides that a Standards Committee must not deal with a complaint about a bill of costs that does not exceed \$2,000 exclusive of GST, "unless

⁵ Above n 3, at Part 7.

⁶ Lawyers and Conveyancers Act 2006, s 206(2).

⁷ Above n 1.

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

the ... Committee ... determines that there are special circumstances that would justify otherwise...”

[20] The complaint by the subcommittees can only be addressed in terms of a complaint about each bill of costs, which was for \$550 plus GST and disbursements \$116.87. There are no grounds to aggregate the 246 bills of costs as is done when a lawyer renders interim bills of costs in respect of the same matter. The only basis on which to consider there are ‘special circumstances’ to allow the Committee to consider the complaint, is the number of bills rendered, all for the same amount. The repetitive nature of the work carried out is another unusual feature to take into account.

[21] A discussion of the phrase ‘special circumstances’ is contained in *RV v Auckland Standards Committee*.⁹ In that decision I have referred to the leading authority of *Cortez Investments Limited v Olphert* where Woodhouse P opined that the test of:¹⁰

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 relief of the kind provided by the provision.

I do not intend to expand the discussion in this decision beyond that and specifically decide whether or not there are special circumstances here which enabled this complaint to be considered but given that the Committee has considered and determined the complaint the review should proceed.

Is the fee fair and reasonable?

[22] The fee charged by XM was \$550 plus GST and disbursements of \$116.87 which included a disbursement of \$16.87 for printing and forms.¹¹ The subcommittees objected to this disbursement on the grounds that the forms were emailed to each lessee. PQ did not address this complaint in his response, and it was reasonable not to do so. The amount is minimal and to some extent reduces the complaint to triviality. The forms used would appear to be the electronic forms produced by Auckland District Law Society Inc and use of the forms attracts a charge. Some printing would have been required to ensure a complete file was created for each variation.

⁹ *RV v Auckland Standards Committee* LCRO 299/2011.

¹⁰ *Cortez Investments Limited v Olphert* [1984] 2 NZLR 434 (CA) at 437.

¹¹ Email Messrs AB & CD to Complaints Service (19 February 2015) at 4.

[23] The costs assessor refers to the “sheer volume of paper accumulated for just one apartment.”¹² This comment attracted criticism by the subcommittees but a disbursement of \$16.87 is justified by even a minimal amount of documentation.

[24] The complaint about the disbursement is rejected.

[25] The Committee focussed its attention on the fee of \$550. This is the only element of the overall complaint that requires to be addressed. The test is whether or not the fee was ‘fair and reasonable.’

[26] The first observation to be made is that determining a fair and reasonable fee “... is an exercise in assessment, an exercise in balanced judgment, not an arithmetical calculation”.¹³ It follows therefore, that what constitutes a “fair and reasonable fee” must allow for a degree of variation, and this is particularly so, given that a finding that a fee is not “fair and reasonable” will generally result in a finding of unsatisfactory conduct against a lawyer, and be recorded against his or her professional record.

[27] The subcommittees have provided evidence that two other firms in [city x] had indicated they would have done the work for \$350 plus GST and disbursements. That is not conclusive that the account rendered by XM was not fair and reasonable. Law firms are in a competitive market and it cannot be discounted that the two firms tendered a low figure in order to secure the instructions. I agree with the Mr EF when he commented¹⁴ the lessor was not required to ‘shop around’ to obtain the cheapest price for the services to be carried out.

[28] Mr EF also made the following comments in his report in coming to the view that the fee charged was fair and reasonable:

[17] The undertaking of the instructions given to XM requires a very significant number of attendances in relation to the 246 apartments ... While there are likely to be some economies of scale, there are also likely to be individual instances where particular difficulties arise warranting much greater commitments of professional time.

...

[20] There is some justification in instances such as this for the charging of a flat fee to give certainty and to reduce administration costs. Practitioners who have been involved in large scale exercises will be aware that although there is a great deal of repetition, there is an ongoing need for detailed professional oversight and that it cannot be taken for granted that every respondent will return documents exactly in the form that they are required.

¹² Costs assessor report at [13].

¹³ *Property & Reversionary Investment Corporation Limited v Secretary of State for the Environment* [1975] 2 All ER 436, [1975] 1 WLR 1504 at 441.

¹⁴ Above n 12, at [31].

...

[22] This is clearly a matter of some considerable importance to the client and warrants the commitment of appropriate personnel with appropriate skill levels.

...

[25] There was a reasonable degree of risk in this transaction undertaken by XM in the sense that failure to ensure that a particular variation was executed and registered could lead to enforcement problems for the client and expose XM to the risk of a claim.

[26] ... Practitioners involved in large scale exercises such as this will know that, while in theory they are a repetitive exercise, they require a great deal of ongoing oversight.

...

[29] ...The fee was agreed with XM's client and there is no suggestion that any estimate or quote could or should have been given to the individual apartment owners. This is a matter where XM's client simply seeks to recoup from the individual lessees the legal costs it incurs (and for which it is responsible ultimately) with XM.

[30] ... the hourly rates ... for the personnel involved are not unreasonable either by Auckland standards or in the light of the nature of the work involved.

...

[32] ... The complainants have sought to minimise the time and oversight required in the completion of the project, but I do not accept that the fact that part of the process is handled electronically that the time or the expertise involved is significantly less.

[29] These are all valid comments. In undertaking these instructions, XM was required to prepare and process 246 variations of lease. The possibilities of error increase with such a volume of documentation to be completed. Each unique identifier differs by only one digit, the correct rental for each apartment must be recorded, names must be spelled correctly, signatures checked and a multitude of other matters completed to ensure the documentation is completed correctly. Any error may have consequences beyond the contemplation of the subcommittees.

[30] Overall, despite the criticisms of Mr EF's report by the subcommittees, there is no reason to disregard the view that he arrived at, namely, that the fee charged is fair and reasonable, and I endorse all of the comments made by him. The determination of the Standards Committee to take no further action on the complaints is confirmed.

Decision

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

DATED this 30th day of November 2016

O W J 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:

Review subcommittees (Messrs AB and CD) as the Applicants
Mr PQ as the Respondent
Mr MN as a related person
[City] Standards Committee [x]
The New Zealand Law Society