Introduction

[1] Company A Limited (Company A) has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of its complaint concerning fees charged by Mr WC and Mr VB (the lawyers), both of whom are partners in [Law Firm A] (the firm).

Background

[2] Mr and Mrs TG (the TGs) and related entities were clients of the firm for a number of years. The firm did work and recorded time to various files. The TGs terminated all of the firm’s then-current retainers. The lawyers issued invoices for unbilled fees. The TGs and related entities instructed new lawyers, and provided
authorities to uplift files from the firm. Files were uplifted. Mr TG objected to paying the lawyers’ fees, and made a complaint through [Company A] to the New Zealand Law Society (NZLS).

The complaint

[3] The following fees were the subject of [Company A]’s complaint:

<table>
<thead>
<tr>
<th>PERSON CHARGEABLE</th>
<th>DATE</th>
<th>INVOICE NUMBER</th>
<th>MATTER</th>
<th>FEE (excluding GST and disbursements)</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Company B] Limited</td>
<td>28/04/17</td>
<td>504660</td>
<td>Sale of Business</td>
<td>9,000.00</td>
</tr>
<tr>
<td>(Company B)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>[Company A]</td>
<td>03/07/17</td>
<td>505015</td>
<td>Commission Claim by [Company C]</td>
<td>18,265.75</td>
</tr>
<tr>
<td></td>
<td>09/08/17</td>
<td>505239</td>
<td>Purchase [Address A]</td>
<td>780.00</td>
</tr>
<tr>
<td></td>
<td>09/08/17</td>
<td>505237</td>
<td>[Address B]</td>
<td>800.00</td>
</tr>
<tr>
<td>Total chargeable to (Company B)</td>
<td></td>
<td></td>
<td></td>
<td>9,000.00</td>
</tr>
<tr>
<td>[Company A]</td>
<td>09/08/17</td>
<td>505236</td>
<td>Proposed purchase: [Address C]</td>
<td>1,015.00</td>
</tr>
<tr>
<td></td>
<td>09/08/17</td>
<td>505235</td>
<td>Proposed purchase [Address D]</td>
<td>500.00</td>
</tr>
<tr>
<td></td>
<td>09/08/17</td>
<td>505243</td>
<td>[Trust A] - Administration</td>
<td>1,240.00</td>
</tr>
<tr>
<td></td>
<td>09/08/17</td>
<td>505244</td>
<td>Miscellaneous attendances and testamentary planning</td>
<td>1,500.00</td>
</tr>
<tr>
<td>Total chargeable to Mr &amp; Mrs TG</td>
<td></td>
<td></td>
<td></td>
<td>4,255.00</td>
</tr>
<tr>
<td>Mr TG</td>
<td>09/08/17</td>
<td>505234</td>
<td>[Trust B] – Trustee Retirement</td>
<td>455.00</td>
</tr>
<tr>
<td>----------------</td>
<td>----------</td>
<td>--------</td>
<td>--------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td><strong>Total chargeable to client Mr TG</strong></td>
<td></td>
<td></td>
<td></td>
<td>455.00</td>
</tr>
<tr>
<td>[Company D] Limited (Company D)</td>
<td>09/08/17</td>
<td>505241</td>
<td>Sale of [Address E]</td>
<td>950.00</td>
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<tr>
<td></td>
<td>09/08/17</td>
<td>505240</td>
<td>Lease to [Company E] Limited</td>
<td>525.00</td>
</tr>
<tr>
<td><strong>Total chargeable to Company D</strong></td>
<td></td>
<td></td>
<td></td>
<td>1,475.00</td>
</tr>
<tr>
<td>[Trust C]</td>
<td>09/08/17</td>
<td>505242</td>
<td>Trust Administration</td>
<td>720.00</td>
</tr>
<tr>
<td><strong>Total chargeable to [Trust C]</strong></td>
<td></td>
<td></td>
<td></td>
<td>720.00</td>
</tr>
</tbody>
</table>

[4] Mr TG considers the Committee should aggregate all of those fees, and deal with them in the aggregate.

[5] Except for the fees charged in invoices 504660 ($9,000) to [Company B], and 505015 ($18,265.75) to [Company A], Mr TG’s position is that the lawyers should charge a fee of no more than $15,000.

[6] The fees charged in invoices 504660 and 505015 are also challenged by Mr TG on the basis they are excessive, unfair and unreasonable.

[7] Mr TG says the firm is well aware that, regardless of which person or entity is being charged, “the work was all paid for by me”. He contends that time was not accurately recorded to individual files, and that fees were charged for “preliminary inquiries” and matters that did not proceed.

[8] Mr TG says the lawyers did not comply with their obligation to provide information about fees and related matters at the start of each retainer, and he is disappointed that the firm decided to pursue recovery action with respect to its fees.

*Mr WC*

[9] Mr WC says that letters of engagement are routinely sent out for every file opened, and that those refer clients to the terms of engagement on the firm’s website. Mr WC provided copies of emails sent by Mr TG’s assistants requesting urgent responses from Mr WC at various times in early 2017. He does not accept that the fees were unfair or unreasonable.
The Committee was satisfied Mr WC had provided the information required by the rules, and did not consider there were special circumstances such that it could consider fees of less than $2,000 on “separate and unrelated matters”. The Committee considered the fees charged to [Company B] without the file that Mr TG had uplifted. The Committee was not satisfied the fees were unfair or unreasonable. Although there was some delay in issuing invoices for fees, the Committee considered further action in relation to Mr WC’s conduct and fees was neither necessary nor appropriate.

MR VB

Mr VB’s reply, supported by his letter of 2 May 2017 and detailed time records, traversed his involvement in a summary judgment matter on instructions from Mr TG as a director of [Company A] in 2017. [Company A] was sued by a real estate agent claiming a commission payment on a sale that had occurred in 2015, after a property of [Company A]’s had been on the market for around two years.

Mr VB says Mr TG gave him to understand at the time of his instructions that he was less concerned about the cost of successfully defending the commission claim than the result. Mr VB says he initially indicated to Mr TG that his fee might be around $11,000, but he did not provide a quote. Mr VB refers to the District Court’s schedule of scale costs as some indication that his fee was reasonable.

Mr VB says that as other evidence came to light, Mr and Mrs TG’ recollection of events firmed up, and the documents he had drafted on their early instructions were revised. A different approach emerged that would have involved [Company A]/TG joining the purchaser’s representative as a party. Not long before the matter was first called, the real estate agency discontinued its application for summary judgment. The proceeding continued on the standard track towards trial, with costs reserved and the real estate agency indicating it (rather than [Company A]/TG) would join the purchaser (rather than its representative) as a party. Mr VB says that after his retainer ended, costs were ordered in favour of [Company A] on the discontinued application for summary judgment.

The Committee issued a notice of hearing on Mr VB’s file indicating it intended to consider matters including whether:

(a) he had failed to promptly inform Mr TG that the fee estimate of $11,000 had been exceeded, in breach of r 9.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules); and
(b) there had been unsatisfactory conduct on his part within any of the definitions in s 12 of the Lawyers and Conveyancers Act 2006 (the Act).

[15] Mr VB provided further submissions to which Mr and Mrs TG responded.

[16] The Committee considered the materials and concluded that Mr VB had “technically breached rule 9.4”, in that he had failed to advise [Company A]/TG that his fees were likely to exceed his earlier estimate. In the exercise of its discretion, the Committee decided pursuant to s 152(2)(c) of the Act that it would not take further action. The Committee considered Mr and/or Mrs TG must have known as the matter unfolded that the estimate had become unreliable. If they had been aware the fee exceeded the estimate, the Committee’s view was that [Company A] would probably have continued with its defence anyway.

[17] The Committee’s view was that while the fee could have been as little as $17,000, it was not prepared to tinker, and the fee was not so unreasonable or unfair as to justify a reduction.

Application for review

[18] Mr TG disagrees with both decisions and applied for reviews. The applications for review have been dealt with in one decision with the parties’ consent.

Mr WC

[19] Mr TG would like the fees reduced and for Mr WC to be censured. He says the $9,000 fee for [Company B] is excessive by comparison to the lessee’s. However, the [Company B] transaction is referred to in the table of fees as a ‘sale of business” legal fees, and was charged in addition to the fee of $2,665 that the lessee paid towards [Company B]’s legal costs under the lease. He does not accept the matter was unusually important, or the risks particularly significant, for [Company B].

[20] Mr TG considered the Committee was wrong to find that billing:

… 10 files for one client on the eve of the clients departure did not amount to “special circumstances” for the purpose of Rule 29. Particularly when many of the files had been dormant for long periods of time. It was abnormal, uncommon and out of the ordinary for this to occur. There was no basis for the Committee to conclude the timing was a coincidence. We believe these matters would not have been billed at all if we had not decided to discontinue our instructions to the firm there and then.

[21] Mr TG argues on various bases that the other fees should have been considered against the factors set out in r 9, and potentially reduced.
Mr VB

[22] Mr TG says he made it clear to Mr VB when they spoke that he was sensitive to costs, and that he did not want to lose to the real estate agent because he felt the commission claim was unfair. He says that part-way through the retainer Mr VB had provided him with a considered view that, for the work he had done to date and a half-day hearing in [City A], his fees “would be “no more than $11,000”.

[23] Mr TG says there were no substantial changes to his affidavit, preparing and amending his evidence was just part of the process of defending the application for summary judgment, and he gave no instructions to prepare a claim in deception. Mr TG denies he was familiar with civil litigation or the likely costs of that. Mr TG says that the excessive fee on the summary judgment matter “was the last straw” for his professional relationship with the firm, particularly since the matter was not concluded. Mr TG feels deceived. He would like this Office to uphold his complaint and cancel the legal fees charged by Mr VB.

[24] Mr VB observes that Mr TG has not indicated what costs he was awarded by the court, and says Mr TG was no novice at litigation. Mr VB believes Mr TG was aware:

that Court was an expensive process and he took the view he must win at all costs. He was a man of principle and his stance with the firm [was] that costs were not an issue.

[25] Mr VB says from experience that Mr TG would have been well aware that:

multiple changes, meetings and conflicting instructions would ... cause an increase in costs when the stakes were so high given the claim for $250,000 against [[Company A].].

Review on the papers

[26] Mr WC and Mr VB agreed to these reviews being determined in a single decision. Mr WC agreed to the review of the decision on the complaint relating to his involvement being dealt with on the papers.

[27] Mr VB did not expressly agree to the review of the decision on the complaint relating to his involvement being dealt with on the papers.

[28] Mr and Mrs TG requested a hearing.

[29] The parties’ consent to a review being undertaken on the papers is not a prerequisite to a Legal Complaints Review Officer (LCRO) adopting that procedure.
[30] I have reviewed all the available materials. I am satisfied this review can be determined on the papers pursuant to s 206(2) of the Act. That section allows an 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.

[31] There are no additional issues or questions in my mind that 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, albeit without the consent of all parties.

Nature and scope of review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

… the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to “any review” …

… the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[33] More recently, the High Court has described a review by this Office in the following way:²

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.

Discussion

Fees

¹ [case citation removed].  
² [case citation removed].
Fee complaints under the Act are subject to s 132(2) which says:

Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner …

Section 132(2) is significant to [Company A]’s complaint, because [Company A] has its own legal personality. [Company A] is not Mr TG, Mrs TG, [Company D] or [Company B]. It is accepted, however, that for his own reasons, Mr TG may have decided to pay all the bills, and that as Mr TG was a director of [Company A] the fee complaint can be considered on the basis that the complaint is made by Mr TG on behalf of [Company A].

Special Circumstances

Mr TG says the Committee wrongly concluded that there were no special circumstances, under reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations), that applied to the invoices issued by the firm on 9 August 2017. In his view, 10 bills presented shortly before he took his business elsewhere should have been treated by the Committee as one fee, rather than ten separate fees.

Regulation 29 says:

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

…

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

Mr TG may be correct in saying Mr WC may not have charged all of the fees when he did, or perhaps at all, if the firm had retained Mr and Mrs TG and their related entities as clients. However, the end of the retainer does not disentitle Mr WC from charging fees. Retainers begin and end all the time. It is difficult to see how the end of a retainer, or even several retainers, could be a special circumstance within the meaning of reg 29.

Four invoices were charged to Mr and Mrs TG personally. [Company A] is not Mr and/or Mrs TG. [Company A] has no clear statutory right to make a complaint about fees for which Mr and Mrs TG personally are the persons who are chargeable.

Further, each invoice related to a separate matter:
(a) the proposed purchase of [Address C];

(b) the proposed purchase of [Address D];

(c) the [Trust A] – Administration; and

(d) miscellaneous attendances and testamentary planning.

[41] Each of those files is unrelated to the others. Each invoice stands alone. Mr and Mrs TG are the only feature that is common to the invoices. None of the four invoices charge a fee that is greater than $2,000. There is no reason to aggregate the fees. Even if those invoices could pass through the s 132(2) gateway, no special circumstances exist for the purposes of reg 29. It was not open to the Committee, just as it is not open to this Office, to deal with the complaint about those four invoices.

[42] One invoice was charged to Mr TG personally for a file named “[Trust B] – Trustee Retirement. [Company A] is not Mr TG. [Company A] has no clear statutory right to make a complaint about fees for which Mr TG personally is the person who is chargeable. The same applies to the invoice to [Trust C].

[43] Further, like the four invoices described above, this file stands alone. There are no other fees charged solely to Mr TG to aggregate it with. It was not open to the Committee, just as it is not open to this Office, to deal with the complaint about this invoice. Mr TG personally could have made the complaint, but it still could not have advanced beyond the reg 29 gateway without special circumstances, of which there is no evidence. The same applies to the invoice to [Trust C].

[44] The same difficulties also apply to the two invoices to [Company D]. The two [Company D] matters, the Sale of [Address E], and the Lease to [Company E] apparently share no common ground, beyond the fact that they are both [Company D] matters. [Company A] is not [Company D], so it has no clear statutory right to complain about fees that are chargeable to [Company D]. Both invoices are for less than $2,000. There is no reason to aggregate them and no other evidence of special circumstances. There is nowhere for this element of [Company A]’s complaint to go. It was not open to the Committee, just as it is not open to this Office, to deal with the complaint about the two invoices issued to [Company D].

[Company B]

[45] Mr TG says the $9,000 fee for [Company B] is excessive by comparison to the lessee’s legal fees, and was charged in addition to the fee of $2,665 that the lessee paid
towards [Company B]'s legal costs under the lease. He does not accept the matter was unusually important, or the risks particularly significant, for [Company B].

[46] The obvious point is that comparison with the lessee’s legal fees is not a reliable indication of whether Mr WC’s fees were fair and reasonable. There are no other indications in the evidence that the fee was unfair or unreasonable.

[47] The second point is that [Company B] is not [Company A]. Each has separate legal personality. [Company A] has no clear statutory right to make a complaint about fees that are chargeable to [Company B].

[48] In the circumstances, I decline to take this element of [Company A]'s complaint further.

[49] That leaves the invoice issued by Mr VB to [Company A], which I address below.

Mr VB

[50] Mr TG considers the fees excessive by the measure of his own assessment, and by the estimate of up to $11,000 provided by Mr VB part way through the retainer for the work he had done to date and a half-day hearing in [City A].

[51] Mr TG says there were no substantial changes to his affidavit, preparing and amending his evidence was just part of the process of defending the application for summary judgment, and he gave no instructions to prepare a claim in deception. Mr TG denies he was familiar with civil litigation or the likely costs of that. Mr TG says that the excessive fee on the summary judgment matter “was the last straw” for his professional relationship with the firm, particularly since the matter was not concluded. Mr TG feels deceived. He would like this Office to uphold his complaint and cancel the legal fees charged by Mr VB.

[52] Mr VB notes that Mr TG has not indicated what costs he was awarded by the court, and maintains that Mr TG was no novice at litigation. Mr VB considers Mr TG would have been well aware of how costs increase commensurate with attendances, that the relatively high value of the claim was a factor, and that the proceeding involved a point of principle for Mr TG.

[53] The conflict between the evidence of Mr TG and Mr VB is to be resolved on the balance of probabilities.

[54] The thrust of Mr TG’ evidence about himself in all this is that he sees himself as a man of principle. His affidavit evidence demonstrates he saw himself as blameless
and the victim of others’ misdeeds. His evidence is indicative of a person with a palpable, and perhaps well-placed, sense of unfairness that he had become embroiled in the commission claim.

[55] The evidence does not satisfy me that Mr VB overran costs without grounds. Changes to instructions, revising evidence and redrafting documents all takes time and costs money. It is not accurate for Mr TG to say there were no substantial changes to his affidavit, or that preparing and amending his evidence was just part of the process of defending the application for summary judgment. To an extent those comments are true, but they do not paint the full picture.

[56] While Mr TG may not have instructed Mr VB to prepare a claim in deception, the evidence was there, and the preparatory work had been done. That much is clear from the fact that Mr VB managed to persuade [Company C] lawyers that there was a real risk of a deception claim emerging, however the details of that might ultimately be pleaded.

[57] It is accepted that the prospect of any fee from Mr VB for the work he had done on the application for summary judgment matter may well have been “the last straw” for the TG. Mr TG is free to instruct any lawyer, “last straw” or not. He does not have to explain himself. Whatever his reasons, the retainer ended and Mr VB’ bill remained unpaid. It is difficult to see any relevance in what Mr TG may have known about the fees that could be incurred in civil litigation. One matter is rarely the same as another.

[58] Given the firm’s standard terms of engagement, it is difficult to accept that Mr TG did not appreciate that the time devoted to making multiple changes to documents, attending meetings, working through conflicting instructions and the like would result in an increase to [Company A]’s costs. There is no reason not to accept that the value of the claim against [Company A], $250,000, was significant, particularly given Mr TG’ demonstration that he is sensitive to fees now, even if he was less sensitive at the time.

[59] It is reasonably clear from the materials that the time devoted to the file is accurately recorded, and the outcome, at least in terms of derailing the summary judgment application, was well spent.

[60] In short, there is no basis for a departure from the Committee’s decision. It is accepted that Mr VB did not advise [Company A] that his fees were likely to exceed his earlier estimate, and he should have. However, there is no good reason to disturb the exercise of the Committee’s discretion in deciding to take no further action in that regard.
There was no quote, only an indication of fees and an understanding of the time it was taking to advance the defence of the summary judgment. Mr TG, and probably also Mrs TG, should have known as the matter of common sense that they could not rely on an estimate when the basis of the estimate had changed significantly as the retainer unfolded.

Mr VB should have provided an updated estimate, if only to reset the TG’s expectations. That he did not does not warrant an adverse conduct finding.

It is accepted that the fee could have been less, but the fee of $19,845.75 to [Company A] was not so unreasonable or unfair as to justify a reduction.

As there is no good reason to modify or reverse the decision, it is confirmed.

Anonymised publication

Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything that might lead to their identification.

Decision

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

DATED this 30TH day of April 2020

_____________________
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:

[Company A] Ltd as the Applicant
WC and VB as the Respondents
Mr KJ as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society