IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-214
[2022] NZHC 1501

BETWEEN	TOBIAS MICHAEL BRAUN and KEVIN IAN BOND Applicants
AND	LEGAL COMPLAINTS REVIEW OFFICER First Respondent
	SIMONE HARRIS Second Respondent

Hearing: 22 June 2022

Appearances: J Long for the Applicants
First Respondent abides the decision of the Court
Second Respondent on her own behalf

Judgment: 28 June 2022

JUDGMENT OF GORDON J

This judgment was delivered by me
on 28 June 2022 at 11:30 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:
J Long, Barrister, Auckland
H Carrad and C Wrightson, Crown Law, Wellington

Copy to:
Second Respondent

[1] This is an application for judicial review of a decision of a Legal Complaints Review Officer (LCRO) regarding what the applicants Tobias Braun and Kevin Bond (together the applicants) say was a slip in a decision of a Law Society Standards Committee (Committee) which should have been corrected by the LCRO.

[2] The applicants are lawyers who are in practice in partnership together. They successfully defended a fees complaint made to the New Zealand Law Society (NZLS) by the second respondent, Simone Harris, who had been a client of their law firm.

[3] In its decision the Committee referred to the total of the invoices rendered by the applicants' law firm to Ms Harris as "$52,958.50 including disbursements and GST", when it should have been "excluding disbursements and GST". The Committee subsequently accepted there was an error in its decision which repeated an error in a costs assessor's report to the Committee, but said in the absence of consent from Ms Harris, it was not able to correct its decision.

[4] The applicants, therefore, applied to the LCRO for a review of the Committee's decision.[1] They say it was important for them to do so because the error legally prevented them from suing Ms Harris for the full amount she owed.

[5] In its decision the LCRO held that the "application is an abuse of process" and "it would undermine public confidence in the administration of justice" for the review to proceed. He struck out the application for review.

[6] The applicants seek judicial review of the LCRO's decision which they say misconstrued several legal doctrines and also breached natural justice.

[7] The LCRO abides the Court's decision.[2] Ms Harris, who lives in Australia, was served with the proceedings but did not file a statement of defence or affidavit in accordance with the Court's timetable orders. The Court gave her an opportunity to file a late affidavit and submissions. Ms Harris did not file an affidavit but filed submissions and appeared by VMR. She seeks to uphold the decision of the LCRO.

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1 Pursuant to Lawyers and Conveyancers Act 2006 (LCA), s 194.
2 Except in regard to costs.

Factual background

[8] Mr Braun has filed an affidavit on behalf of himself and Mr Bond annexing relevant documents. The following summary is drawn from that affidavit.

Fee complaint and first Committee process

[9] Ms Harris had been a client of the applicants' law firm. On 9 September 2019 Ms Harris made a complaint to the New Zealand Law Society regarding the applicants' legal fees. The complaint related to 20 invoices rendered between October 2017 and July 2019. The total sum of the invoices was $52,958.50 excluding GST and disbursements. The GST component not included in this sum totals $7,139.35 and the disbursements total $1,831.18 (including GST).

[10] In its decision of 9 March 2020, the Committee noted that its members had considerable experience in the type of legal work undertaken and relied on the experience of the members to assess the reasonableness of the fees. In those circumstances the first Committee was satisfied it was not necessary to appoint a costs assessor (assessor). It resolved to take no further action in relation to the complaint.[3]

[11] Around 2 April 2020 Ms Harris applied to the LCRO for a review of the first Committee's decision. She said she would like the decision reversed and an assessor appointed.

[12] In a decision dated 13 January 2021, the LCRO noted that the Committee's reasons were brief and said that consumer confidence in the provision of regulated services could be enhanced by the appointment of an assessor. The LCRO directed the Committee to reconsider Ms Harris' complaint and to appoint an assessor to assist with that inquiry. The LCRO did not make a finding on the reasonableness of the total fees.

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3 Pursuant to LCA, s 138(2).

Second Committee process

[13] The Committee duly appointed an assessor. In his report of 21 May 2021 to the Committee the assessor referred to the 20 bills totalling "$52,958.50 including GST" (the GST error). His recommendation was that the total fee was fair and reasonable for the work performed. It is the statement that the fees were "including GST" that set in train events that resulted in this application for judicial review. The fee was, in fact, exclusive of GST (as well as disbursements).

[14] By letter dated 25 May 2021 the Legal Standards Officer sent the assessor's report to Mr Braun and Mr Bond along with a notice of hearing that set the complaint down to be heard on 7 July 2021. Submissions were invited. The applicants did not notice the GST error in the assessor's report. Mr Braun says this was an inadvertent oversight on their behalf. For them, the key information was the recommendation that the fee was fair and reasonable. Accordingly, given the conclusion in their favour the applicants thought it was unnecessary to make further submissions (they had made full submissions attaching documents from their files for the first hearing) and they did not seek to be heard at the Committee hearing.

[15] On 30 May 2021 Ms Harris made submissions by way of a one page letter from her father, Mr Harris, who is now deceased, but who was then a solicitor practising in New South Wales, Australia. Mr Harris submitted that:

(a) The findings of the assessor in the sum of $52,000 for costs and fees due to the solicitors be accepted;

(b) Upon the Committee adopting the report the matter be considered as at an end in respect of the costs dispute; and

(c) As a gesture of good faith Ms Harris had paid the sum of NZ$30,000 leaving the sum of NZ$22,000 payable in the event that the findings of the assessor were adopted.

[16] As is apparent Mr Harris' letter slightly understated the total fees. The applicants were not provided with a copy of that letter before the Committee issued its decision.

Second Committee decision and s 161 certificate

[17] On 17 August 2021 the Committee sent the applicants its Notice of Determination (Committee decision) which:

(a) Referred to the assessor's report and said that the 20 bills totalled "$52,958.50 including disbursements and GST";

(b) Resolved to accept the recommendation of the assessor; and

(c) Decided to take no further action on the complaint.

[18] In referring to the assessor's report the Committee decision repeated the error that the total amount stated included GST. I note that it was apparent from the material filed by the applicants for the first hearing that the total fee was $52,958.50 and GST and disbursements were added to that fee. It would have therefore been possible for the Committee to have noticed and corrected the GST error. The Committee compounded the error by also saying the total amount included disbursements (disbursements error).

[19] Along with the Committee's decision the applicants received:

(a) A copy of Mr Harris' letter dated 30 May 2021 referred to in [15] above; and

(b) A certificate under s 161(2) of the Lawyers and Conveyancers Act 2006 (LCA) which certified that:

> … in accordance with its Determination dated 17 August 2021, the sum of $52,958.50 is due from Ms Harris to Braun, Bond and Lomas Limited.
>
> (original s 161 certificate)

[20] As is apparent there is no reference to GST or disbursements in the original s 161 certificate.

[21] On 24 August 2021 the Professional Standards Officer,[4] on behalf of the Committee, sent the applicants an "amended Determination" which corrected an error in the Committee's decision regarding the name of the assessor together with an amended certificate issued under s 161(2) of the LCA which repeated the GST error and included the disbursements error by certifying that:

> … in accordance with its Determination dated 17 August 2021, the sum of $52,958.50 (inclusive of GST and disbursements) is due from Ms Harris to Braun, Bond and Lomas Limited.
>
> (amended s 161 certificate)

[22] As is apparent the change to the amended s 161 certificate was the addition of the words "(inclusive of GST and disbursements)".

Applicants' efforts to rectify the GST error

[23] Mr Braun says that as soon as he received the amended s 161 certificate, he noticed the GST error in it and in the Committee's decision. He says that upon re-reading the assessor's recommendation more closely he realised the GST error in the amended s 161 certificate probably came from the assessor's mistake.

[24] Mr Braun says the GST error in the amended s 161 certificate was particularly problematic for the applicants, because s 161(3) of the LCA provides that a s 161 certificate is "final and conclusive as to the amount due".[5] He says by its amended certificate the Committee had effectively reduced his firm's fees and prevented his firm from suing Ms Harris for the full amount owed to them.

[25] Mr Braun says that upon realising the error he immediately sent an email on 24 August 2021 to the Professional Standards Officer asking if the GST error in the amended s 161 certificate could be corrected. Mr Braun says he had expected this would be straightforward given the clear error and also given that the original s 161

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4 Previously called the Legal Standards Officer.

5 Unless there is a review and then it is the decision of the LCRO which is final and conclusive.

certificate had already been amended by the Committee. He also asked the Professional Standards Officer if she had received correspondence from Mr Harris.

[26] On 15 September 2021 the Professional Standards Officer wrote to the applicants advising that the Committee had sought clarification from the assessor regarding the amount in his report. The letter stated that:

> The Costs Assessor has advised he made an error in that the figure of $52,958.50 as taken from the LCRO's decision, should have been expressed to be exclusive of GST". This has been confirmed by the Costs Assessor.

[27] The Professional Standards Officer asked if the parties consented to the Committee issuing a corrected Determination under the slip rule but noted that in the absence of the parties' consent the Committee could take no further action and it would need to be resolved by way of an appeal to the LCRO.

[28] By email of 21 September 2021 Mr Braun advised that he and Mr Bond consented to the error being corrected. But he noted their position that consent was not required to correct an error under the slip rule. He made the point that if the original s 161 certificate was able to be changed without reference to the parties previously, it seemed inconsistent that an obvious error could not now be corrected without the consent of all parties.

[29] By letter dated 28 September 2021 the Professional Standards Officer wrote to the applicants saying the advice the Committee had received from the NZLS was that the consent of both parties was required before a corrected Determination could be issued. The Committee had not received any response on the issue from Ms Harris or Mr Harris on her behalf and accordingly the Committee had no power to issue a corrected Determination.

[30] Mr Braun says, in those circumstances the only way to rectify the GST error was through an application to the LCRO for review of the Committee's decision.

Payment from Ms Harris

[31] On 3 September 2021 Mr Harris sent a letter dated 31 August 2021 to the applicants saying that Ms Harris intended to pay $22,958.50 and that she considered that to be the end of the matter (having previously paid $30,000 as recorded in the Committee decision). Mr Braun responded to Mr Harris on 6 September 2021 noting the applicants' view that the GST error was just that and the applicants would be seeking that it be corrected by either the Committee or the LCRO. After that email, on 7 September 2021 the applicants received from Ms Harris payment of $22,950.50 (rather than $22,958.50). Mr Braun says there was never any agreement that payment of this sum would represent settlement of the fee dispute. The applicants still wished to be able to recover the full amount owing.

LCRO complaint

[32] On 24 September 2021 the applicants applied to the LCRO for a review of the Committee decision on the grounds that:

(a) The Committee decision wrongly carried through a typographical error;

(b) The Committee and the assessor had admitted the error; and

(c) The error had not been rectified because Ms Harris did not consent to the use of the slip rule.

[33] The applicants sought orders that:

(a) "The amount owing by Ms Harris is $58,958.50 plus GST and disbursements"; and

(b) "disbursements include interest at the contractual rate agreed to by Ms Harris".

[34] On 23 December 2021 Mr Harris wrote to the LCRO on Ms Harris' behalf. His letter included the following:

> The alleged slip-rule does not exist for the benefit of a solicitor who made an error. The LCRO made no determination for the amount of costs payable.[6] [The assessor] went to the Committee in February 2021 or later with his report. During this period the solicitor [sic] advised they did not wish to make any further comment and Simone advised that she paid a total of $52,000. The solicitor [sic] advised they did not wish to make any further comment.

[35] The letter then referred to case law and stated that issues relevant to this matter were res judicata; Anshun estoppel; issue estoppel; finality of litigation; estoppel by misleading and deceptive conduct; and non est factum.

[36] On 7 January 2022 the LCRO directed by way of an email from the Registrar that a redacted copy of Mr Harris' 23 December 2021 letter be provided to the applicants; and that Mr Braun was to provide any response to Mr Harris' letter by 12 January 2022. The LCRO further directed that the response was to focus on the paragraph I have quoted at [34] above and was to be limited to no more than half an A4 page, single spacing and font 12.

[37] Mr Braun says that because of the directions referred to in the email from the Registrar, he understood that the key issue troubling the LCRO was the scope of the slip rule. On 11 January 2022 Mr Braun filed a memorandum annexing a copy of the 15 September 2021 letter from the Committee (referred to above at [26]), along with the commentary in *McGechan on Procedure* on r 11.10 of the High Court Rules 2016. That rule, commonly known as the 'slip rule' enables the High Court to correct an accidental slip or omission whether or not made by an officer of the court.[7]

LCRO decision

[38] On 14 January 2022 the LCRO issued his decision striking out the application for review on the grounds that it was an "abuse of process".[8]

[39] The LCRO noted that neither the LCA nor any of the subordinate regulations or rules includes a slip rule or its equivalent. The LCRO said in that event, at first

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6 This appears to be a reference to the first LCRO decision.

7 The slip rule has been applied in the High Court where a judgment sum misstated the inclusion of GST: *Matthews v Memelink* [2021] NZHC 174 at [9]. The slip rule has also been applied where the error is that of counsel: *Re Gower* [2020] NZHC at [11]–[15].

8 It was a different LCRO from the LCRO who made the first LCRO decision.

blush, it was contestable as to whether a Committee or a Review Officer could correct an error in a decision or determination once it had been issued. However, the LCRO went on to say that it might be argued that in accordance with statutory obligations to comply with the rules of natural justice[9] certain categories of error made by a Committee or a LCRO ought to be able to be corrected after a decision or determination has been issued. But the LCRO said he did not need to definitively decide that point because in his view Mr Braun's review application failed for a different reason.

[40] The LCRO accepted there had been a GST error in the assessor's report and in the Committee's decision but he said the Committee was entitled to proceed on the basis that the assessor's conclusion was correct. Because the applicants had elected not to make submissions to the Committee the GST error "thus became Mr Braun's error".

[41] After setting out an extract from the judgment of Lord Bingham in *Johnson v Gore Wood & Co,*[10] the LCRO concluded:

> [42] In the context of this Office's review jurisdiction, whether an application for review is an abuse of process translates neatly to an assessment in the present case of whether it raises an issue which could have been raised and dealt with when the matter was before the Standards Committee.
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> [43] In my view it would undermine public confidence in the administration of justice for a Review Officer to embark upon a separate inquiry in those circumstances.
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> [44] I am satisfied that Mr Braun's application for review is an abuse of process. Put another way, he is attempting to raise an issue on review which he had overlooked when the matter was being considered by the Committee.

First ground of review: error of law/unreasonableness

Irrelevant and wrong test for abuse of process

[42] Mr Long, for the applicants, submits the LCRO applied an irrelevant and wrong test for abuse of process when he applied the House of Lords decision in *Johnson v Gore Wood & Co*. In that case the appellant, a businessman, conducted his

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9 LCA, s 142(1) (Standards Committees) and s 200(c) (Review Officers).
10 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

affairs through a number of companies. One of his companies commenced proceedings against the respondents, a firm of solicitors, for professional negligence. Before the action came to trial, solicitors representing the company notified the solicitors for the respondents that the appellant also had a personal claim against the respondents arising out of the same matters which he would pursue in due course. The company's proceedings were eventually compromised during the trial and the appellant then issued proceedings against the defendants. The passage quoted by the LCRO which I set out below needs to be seen in that context.

> The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

[43] In any event and importantly, the judgment makes it clear that:

> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

[44] There is a helpful discussion of abuse of process in *Merisant Co Inc v Flujo Sanguineo Holdings Pty Ltd*.[11] The Court noted that the jurisdiction of the Court to intervene for abuse of process stems from the Court's obligation to ensure that its procedures are used fairly, not in an oppressive or unjust manner. The Court further said:

> [24] In *Waterhouse v Contractors Bonding Ltd*, the Supreme Court recorded with approval extracts from the Australian High Court decision of *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*, where it was stated that abuse of process extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment". The onus on a party alleging abuse of process by bringing a proceeding for an improper purpose has been described as "a heavy one" and one to be exercised only in "the most exceptional circumstances".
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> …
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> [27] It is clear, therefore, that just as it is not every breach of the rules that would be regarded as an abuse of process, similarly not every action by a party which results in some form of unfairness to another party will be an abuse of process. The conduct must be "manifestly unfair". There must be something more than the breach of a rule or an action, which might offend a general sense of fair play. The action must be an abuse of the Court's process with all the seriousness that the word "abuse" entails. Some action involving serious unfairness is required, where the Court perceives it has a duty to intervene and protect the Court process. It must conclude that it is obliged to intervene to stop the Court's process being used in the way proposed by the offending party.

[45] For the LCRO to say that by electing not to make submissions to the Committee, "the assessor's GST error thus became Mr Braun's error" was not entirely fair. It was also an error on the part of the Committee. When the first LCRO directed that the Committee refer Ms Harris' complaint to an assessor, the first LCRO made it clear that on receipt of an assessor's report the Committee would "independently reconsider and determine Ms Harris' fee complaint with reference to that report".

[46] The applicants had filed relevant material prior to the decision of the first Committee from which it could be seen that the sum of $52,958.50 was exclusive of GST. The Committee did not pick up the error in the assessor's report. It could have. Further the Committee made an additional error in stating that the sum was inclusive of disbursements when that had not been stated in the report of the assessor.

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[11] *Merisant Co Inc v Flujo Sanguineo Holdings Pty Ltd* [2018] NZCA 390, [2018] NZAR 1550, (footnotes omitted).

[47] The Committee acknowledged there was an error and said it would correct the error if Ms Harris consented. She did not respond to the letter from the Committee. It is not necessary for this Court to decide whether or not the Committee had an express or implied power to make the correction in the absence of consent. The point is the Committee recognised that its decision and amended s 161 certificate contained an error. Once the Committee took the position that it was not able to make the correction, the only option for the applicants was to seek a review by an LCRO for the matter to be considered afresh.

[48] The LCRO's decision that the application for review was an abuse of process was effectively reached on the basis that Mr Braun raised an issue on review which he had earlier overlooked. In all the circumstances that falls a long way short of the way in which abuse of process is described in the passages quoted in [44] above. There is no "manifest unfairness" to Ms Harris. She would otherwise receive a windfall of around $9,000 in circumstances where the fee total was considered to be fair and reasonable.

[49] The LCRO erred in law in finding the test for abuse of process was met in all the circumstances.

Misconstrued scope of the review jurisdiction

[50] Mr Long submits that the LCRO misconstrued the scope of his own review jurisdiction which is very wide and "much broader than an appeal".[12]

[51] The Committee accepted it made an error. It was willing to make the necessary correction to its decision but considered it could not do so in the absence of consent from both parties. While the LCRO, on review, is required to undertake an independent analysis and reach their own view, in this case the LCRO confined his consideration simply to the fact that the applicants had not noticed the error in the assessor's report. In doing so the LCRO improperly narrowed his review jurisdiction.

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12 Citing *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

Only true conclusion contradicts the determination

[52] Thirdly, Mr Long submits that an error of law also arises because the only true conclusion (ie. that there was no abuse of process) contradicts the LCRO's determination.

[53] In *Bryson v Three Foot Six* the Supreme Court said:[13]

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". …

[54] In this case:

(a) The applicants' failure to notice the GST error in the assessor's report at an earlier point in time was inadvertent;

(b) The evidence is that the applicants never intended to adopt the GST error by not making submissions before the Committee;

(c) Both the Committee and the assessor have accepted and have confirmed that the GST error was a mistake. The Committee made a further mistake regarding disbursements;

(d) The Committee was willing to correct the GST error using the slip rule (if both parties consented);

(e) Ms Harris did not respond to the inquiry on behalf of the Committee as to whether she would consent; and

(f) Ms Harris suffered no detriment from the applicants' failure to notice the GST error prior to the Committee decision. She was well aware of

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[13] *Bryson v Three Foot Six* [2005] NZSC 34, [2005] 3 NZLR 721 at [26], (footnote omitted).

> the total of the invoices and the GST component and disbursements. The assessor found the total of the fees was fair and reasonable for the work performed.

[55] In my view this falls into the category of rare cases where on a view of the facts, the decision of abuse of process could not reasonably be entertained. This third error could also be construed as making the decision unreasonable on a *Wednesbury* basis.

[56] The first ground of review is established on all three bases advanced by the applicants.

Second (alternative) ground of review: breach of natural justice

[57] Mr Long submits that in exercising his power to strike out the applicants' review application for abuse of process, the LCRO acted in breach of their right to natural justice.

[58] In his decision the LCRO referred to s 205(1) of the LCA which provides:

> **205 Legal Complaints Review Officer may strike out, determine, or adjourn application for review**
>
> (1) The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—
> (a) discloses no reasonable cause of action; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of process.
>
> …

[59] The LCRO then commented that in his view s 205 of the LCA is intended to equip his office with a summary ability to bar applications for review that plainly lack merit. He likened the jurisdiction in s 205 to the provisions of r 15.1 of the High Court Rules.

[60] The issue here, raised on behalf of the applicants, is that the LCRO did not give them any warning of his intention to strike out the review application or of the potential adverse finding that they had engaged in an abuse of process.

[61] There may be room for argument as to the precise parameters of the rules of natural justice that apply to some decisions by a LCRO to strike out an application for review.[14] But in this case the strike out was because of 'abuse of process'.

[62] In that case s 214 applies. It provides:

> **214 Adverse comment**
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> The Legal Complaints Review Officer may not, in any decision, direction, or order made under section 211 or in any report made under section 213, make any comment that is adverse to any person unless that person has been given a reasonable opportunity to be heard.

[63] There is a helpful discussion by Dobson J in *C v Legal Complaints Review Officer* [15] on the issue of natural justice/legitimate expectation. The Judge said:

> [60] The Act recognises the obligation for the LCRO to conduct matters consistently with the rules of natural justice, and the LCRO's ability to conduct reviews with as little formality and technicality as possible is subject to any constraints that may be imposed by the rules of natural justice.
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> [61] It is not useful to propound any minimum standards that might apply uniformly in complaints proceedings, and the content of obligations on a decision maker will depend on the facts and circumstances, and the context in which they arise. The guidelines describing the procedure for the LCRO provide indications as to the standards of natural justice that are to apply. Those indications are also relevant to the extent that parties in a review before the LCRO might have a legitimate expectation of certain procedural standards. In this regard, clause 26 of the guidelines states that all affected parties have the right to be personally heard by the LCRO.
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> [62] A further indication of the standards expected is the obligation imposed by s 214 of the Act that precludes the LCRO from making any comment adverse to any person in a decision or report issued under the Act, unless that person has been given a reasonable opportunity to be heard. The terms of that section do not explicitly require a person to be aware of the nature of any adverse comment that is in prospect when afforded an opportunity to be heard. However, in general terms at least that is a reasonable implication of what is expected.
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> [63] Mr McVeigh submitted that a right to be heard includes a requirement of notice of the potential outcomes of the decision-making process. An opportunity to be heard is not a full opportunity if submissions cannot be made in the full knowledge of the possible consequences of a Tribunal's decision. The issue here is whether the outcome decided on by the LCRO was one that ought reasonably to have been anticipated by the practitioner or whether it was

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14 LCA, s 206(3).

15 *C v Legal Complaints Review Officer* [2012] NZHC 3528, [2013] NZAR 398 at [60]–[63], (footnotes omitted).

> out of the ordinary in a respect that required the practitioner to be given notice so as to enable consideration of a response to the proposed course of action.

[64] I respectfully adopt the reasoning of Dobson J in [63] quoted above.

[65] In this case the LCRO:

(a) Did not give the applicants any warning of his intention to strike out their review application, or the potential adverse finding that they engaged in an abuse of legal process;

(b) Did not give the applicants an opportunity to make submissions regarding strike out or abuse of process;

(c) Restricted the applicants' reply submissions to a response to Mr Harris' submission that the alleged slip rule does not exist for the benefit of a solicitor who made an error (more fully set out in [34] above); and

(d) Restricted submissions to half an A4 page, font size 12, single spacing.

[66] I accept that the outcome to strike out the application for review on the grounds of abuse of process decided on by the LCRO was not one that ought reasonably to have been anticipated by the applicants in all the above circumstances. The applicants should have been given notice of the outcome the LCRO was considering and given the opportunity to respond. The LCRO's failure to do so was a breach of natural justice.

Section 214 – "adverse comment"

[67] Mr Long makes a separate submission in relation to s 214 (which I have incorporated in my discussion above).

[68] I accept his submission that in exercising his power to strike out the applicants' review application for abuse of process the LCRO acted in breach of s 214 of the LCA. Abuse of process is a serious allegation which is adverse to a person, particularly to a

person who is a legal practitioner with 21 years' legal experience and who is an officer of the Court.

[69] The second ground of review is made out.

Third (alternative) ground of review: error of law in failure to correct the s 161 certificate

[70] In the further alternative Mr Long argues that in the absence of a finding of unsatisfactory conduct on the part of the applicants, a Committee has no jurisdiction to reduce a lawyer's fees. In this case Mr Long says the GST error in the s 161 certificate and the Committee decision not to correct it, has had the effect of reducing the applicants' fees.

[71] I accept that submission. Section 152 of the LCA sets out the powers of a Committee to determine a complaint or matter. Section 152(2)(b) provides that a Committee may make a determination that there has been unsatisfactory conduct on the part of a practitioner. If a Committee makes a determination under s 152(2)(b) the Committee may order the practitioner to reduce his fees for any work which is the subject of the proceedings before the Committee.[16] There was no finding under s 152(2)(b). Accordingly, the Committee had no power to reduce the fee, which is what it effectively did in its decision.

[72] This ground of review is made out.

Relief

[73] Having found the LCRO erred, it is necessary to consider the appropriate remedy. The applicants submit that if any or all of the grounds of review are established, the LCRO's decision should be quashed. Mr Long also submits that this is a clear case where this Court should grant substitutionary relief.

[74] The orthodox approach when a reviewing court identifies an error is to send the matter back to the decision-maker and, where appropriate, give directions to the

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16 Section 156(1)(e).

decision-maker. However, in a clear case the reviewing court may make a decision itself. Williams J discussed this issue in *Ellis v Legal Complaints Review Officer*:[17]

> [108] ... Mr Smith submits that the decision should be set aside without being remitted for a rehearing. Mr Brown objects to this, arguing that it amounts to the court substituting its own views of the merits of the complaint. The other option is to direct the LCRO to reconsider Mr Ellis' appeal in light of my conclusions that:
>
> (a) retrospective instructions are relevant to a determination in this context; and
>
> (b) J gave retrospective instructions.
>
> [109] In judicial review proceedings, there are situations where it will be appropriate for the court to make its own decision on an issue that has not been considered, or has been wrongly considered, by the decision maker whose decision is subject to review. As stated in *Leeder v Christchurch District Court*, the remedy of substituting the reviewing court's view for that of the decision maker is a course that can be taken, but only in a clear case.
>
> [110] Other factors can also be relevant, such as the time elapsed since the last of the events in issue and the desire to avoid subjecting the parties to the expense, trouble and stress of a rehearing. Those two considerations were influential in Greig J's decision to set aside a Nursing Council decision finding the applicant guilty of professional misconduct rather than directing that the matter be reheard.

[75] I consider this is a clear case where this Court can make its own decision rather than sending the matter back to the LCRO for reconsideration:

(a) It is accepted that there was an error in the Committee decision;

(b) The Committee would have rectified the error and reissued its decision and the s 161 certificate had Ms Harris consented to the correction of the error;

(c) Ms Harris did not say she refused to consent. She simply did not respond to the letter from the Committee. In order to have the error remedied the applicants had no option but to apply to the LCRO for review;

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[17] *Ellis v Legal Complaints Review Officer* [2013] NZHC 3514, [2014] NZAR 220 at [108] to [110], (footnotes omitted). See also *Edwards v Attorney-General* [2017] NZHC 3180 at [118] and [119] discussing other cases including *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341.

(d) The LCRO wrongly applied the test for abuse of process. Although the applicants should have noted the error earlier, seeking a review was not an abuse of process;

(e) There is no foundation for an estoppel;[18]

(f) To send the matter back would subject the parties to the expense of a re-hearing. Although the hearing would most likely be on the papers there would still be some cost; and

(g) It is now over two and a half years since the complaint was first made in September 2019. Further delay is undesirable.

Result

[76] The application for judicial review is granted. The decision of the LCRO is quashed. I make an order that the Committee decision of 17 August 2021 and s 161 certificate are amended so each states that the invoices totalled "$52,958.50 excluding GST and disbursements".

[77] For completeness I note that while proceedings before a LCRO are presumptively private, the applicants did not seek name suppression.

Costs

[78] Costs are reserved. If agreement can be reached the parties should file a joint memorandum within 20 working days from the date of this judgment. If agreement cannot be reached the applicants are to file and serve a memorandum within five working days of the date for the joint memorandum. Any responses are to be filed and served within five working days from the date of service of the applicants' memorandum.

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[18] Ms Harris made her second payment after the applicants emailed her to say they would be seeking a correction of the error. It cannot be said Ms Harris made her second payment relying on the error. If there was reliance it would not have been reasonable and there is no evidence of any detriment to her: *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

[79] Memoranda are not to exceed four pages (excluding attachments). I will determine costs on the papers.

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Gordon J