

LCRO 22/2012

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [A North Island]Standards Committee

BETWEEN

MR XA

Applicant

AND

MS AJ

Respondent

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

DECISION

Background

[1] Mr XA made a complaint about the conduct of Ms AY who had acted for him in respect of certain difficulties he was having relating to his business as a [farmer] and seller of [product]. I note at the outset that Ms AY was the lawyer with overall supervision of the matter; however a number of other members of Ms AY's firm also worked on this file.

[2] Mr XA had a number of matters with which he needed assistance.

- a. He had a significant business in selling [the product] to other [farmers], however the Ministry of Agriculture and Fisheries (MAF) prohibited the movement of [the product] between the North and South Island which adversely affected this business. They also confiscated Mr XA's stock of [the product]. He needed assistance in dealing with MAF.
- b. Mr XA was in financial difficulties and his creditors were pressing him. He needed assistance in dealing with these matters.
- c. Mr XA considered that his financial woes were due to the wrongful conduct of his accountant (it appears he had borrowed money from a company related to

his former accountant and the accountant had some role in managing his affairs) and he sought assistance in pursuing him.

[3] The tenor of the complaint was that Ms AY did not diligently and competently pursue these matters, and also that she overcharged for the work that she did. Mr XA states that Ms AY charged up to \$40,000. Mr XA is now bankrupt and he appears to consider that Ms AY is at least in part responsible for this. He states that eventually he obtained a remedy by his own endeavour in respect of MAF through the Ombudsman, and that his new lawyers are pursuing his former accountant.

[4] Ms AY denies the allegations. She states:

- a. that she investigated issues relating to Mr XA's former accountant, however her view was that action against him was inadvisable for strategic reasons.
- b. that all instructions were pursued diligently and in particular:
 - i. no instructions to pursue the accountant were ever received;
 - ii. that she properly and effectively sought compensation from MAF in respect of the confiscation of [the product] under the Biosecurity Act (supporting information was provided);
 - iii. that she dealt with the creditors of Mr XA and sought to extricate him from his financial position, ultimately without success, although for a period of in excess of two years she managed to persuade creditors to defer action; and
 - iv. that various other issues were also dealt with such as dealing with the [related] Industry Board.
- c. Ms AY provided details of the costs that had been charged according to her firm's records. She asserted that \$31,538 was billed to Mr XA. Although not determinative, it is noted that on a time-costed basis the fees in this matter would amount to in excess of \$41,000.

[5] Ms AY provided various other correspondence in support of her position.

[6] The Standards Committee looked at these matters in considerable detail and provided an analysis of the complaint, the response of Ms AY, the further reply of Mr XA, and the documents that were provided. The detailed analysis demonstrates that the Standards Committee carefully considered the factual material before it.

[7] In determining to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 the Committee placed particular reliance on:

- a. the documentary evidence which showed that a large amount of work had been undertaken, and also Mr XA's new lawyer's positive comment on the large amount of work undertaken by Ms AY;
- b. the fact that the bills were rendered more than two years prior to the complaint (with the exception of the final invoice of 31 August 2009); and
- c. that it did not believe that there was any basis to the allegations made.

Application for Review

[8] In his application for review to this Office, Mr XA largely recounted his previous assertions in respect of the size of the fee, and the allegation that Ms AY was ineffective. He also took the opportunity to provide two letters from the Ombudsman which indicated that he had approached the Ombudsman and that the Ombudsman supported his application for compensation from MAF. Mr XA argues that this shows that Ms AY did not act effectively for him in respect of the MAF claim and that he obtained compensation by his own endeavours.

[9] Since the Standards Committee decision Ms AY has obtained the files in this matter (they had been held by the Official Assignee) and made further comment on the work that was undertaken and provided some further documents. She also commented on the letters from the Ombudsman provided by Mr XA which she stated she had not previously seen. In particular she responded that regardless of those letters she (and other members of her firm) did a large amount of work on the MAF compensation claim, which was ultimately successful. While the Ombudsman supported the payment of compensation, this did not alter the work done by Ms AY and her firm.

[10] This review has been undertaken on the papers pursuant to s 206 of the Act. The parties have consented to this process, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Considerations

[11] In conducting this review I have reconsidered the complaint and all of the material that was put before the Standards Committee. I touch on the two key aspects of the complaint in turn.

Competence and diligence

[12] At the heart of this complaint is the allegation that Ms AY did not do enough to assist Mr XA. Mr XA appears to be of the view that what advantages did come his way were largely due to his own efforts (the MAF compensation) and that the unfortunate things which befell him (such as the bankruptcy and his secured creditors seizing his assets) were due to failures of Ms AY. He also considers that Ms AY did not pursue a claim against his accountant when it would have been prudent to do so.

[13] The obligation of competence and diligence is fundamental and is found in Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008:

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[14] It is clear that substantial and competent work was carried out in making a formal application for compensation in respect of the [the product] from MAF. That application was ultimately successful. The fact that the Ombudsman also took an interest in the matter at the request of Mr XA does not change this. I note that the fact that the Ombudsman was considering the matter was expressly referred to in the covering letter which accompanied the application for compensation written by Ms AY of 16 October 2008, wherein she informed Mr XA that she had finalised the details of the MAF claim.

[15] While it is clear that a series of unfortunate events did befall Mr XA, there is no evidence that this was due to any failure by Ms AY. The material provided indicates that Ms AY (and those she worked with) acted diligently and properly within timeframes that were reasonable in the circumstances.

[16] The fact that creditors seized assets and that Mr XA was bankrupted cannot be said to have been caused by Ms AY or anything she did or failed to do. I conclude that Ms AY acted competently and diligently throughout and that there has been no breach of the professional obligation of competence. The analysis of the Standards Committee was correct in this regard.

Costs

[17] Mr XA complained that the costs charged were excessive. He claimed that \$40,000 in costs was charged. Ms AY responded by providing time records, invoices and reporting letters. She stated that \$31,538 was charged.

[18] The material provided shows that the following amounts were charged (including GST and disbursements):

Date	Amount	Relating to	Notes
[Nov 2006]	\$5,729.40	Sale of stock / Accountant matters	Reporting letter states "actual time in excess of \$1,500 [sic \$15,000] but billed for the moment at \$5000". Paid by deduction. (This seems to have taken into account a \$10,000 paid in advance).
[Dec 2006]	\$2,890.34	Seeking information from Accountant / Finance company	Reporting letter states "We enclose a note of our costs which are again at a discounted rate". Paid by deduction.
[April 2007]	\$3,617.16	No significant narration.	
[Jun 2008]	\$12,231.53	Dealing with creditors, dealing with "Ombudsman claim", working on MAF compensation, dealing with Baycorp.	Narration on bill states that the bill is for "[o]ur professional services from November 2006 to date" Reporting letter states "we thought it appropriate to render a note of our cost to you for the time we spent on your behalf since December 2006". Noted that client had no means to pay (although presumably some was paid by deduction).
[Aug 2009]	\$11,569.17	No significant narration.	Reporting letter states that this is for "time we have spent in the course of the last year".
Total	\$36,037.60		

[19] I note that while the GST exclusive amount of the bill was \$31,538, when GST is added, along with an "office charge" (which was up to \$272 on invoices) and some relatively minor disbursements, the total amount payable by Mr XA was in fact \$36,037.60. While this is not the \$40,000 sum complained of, he was "charged" more than the GST exclusive costs of \$31,538 which is focussed on by Ms AY.

[20] The amount of \$36,037.60 is a significant sum and Mr XA has raised as an issue the quantum of the bill.

[21] Rule 9 of the Lawyers: Conduct and Client Care Rules 2008 (RCCC) sets out the basic rule in respect of costs which is that "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". The rule proceeds to identify a non exhaustive list of factors which will be relevant considerations (of which time spent is but one) in assessing the reasonableness of a bill.

[22] The Standards Committee considered that this matter could be disposed of on the basis that Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints

Service and Standards Committees) Regulations 2008 was decisive. That regulation provides:

If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, 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 —

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

(b)

[23] The Committee did not specifically refer to the above proviso about 'special circumstances'. However, its decision implies that the circumstances were considered, the Committee having noted the documented evidence of the work done by the Practitioner, and also that the Applicant's new lawyer commented that she (the Practitioner) had undertaken a large amount of work. On this basis the Committee concluded it was not necessary to consider the costs complaint further.

[24] In this case the Committee noted that the complaint was made on 28 August 2011 and therefore all but one bill (of five) was rendered more than 2 years prior to the date of the complaint. This may have been a sufficient basis for dismissing the complaint in respect of the first four invoices, but it was incumbent on the Committee to give separate consideration to the last invoice, which fell outside of Regulation 29.

[25] A further oversight on the part of the Standards Committee, and perhaps more significant, was its failure to have recognised that the four earlier bills were rendered prior to 1 August 2008 (when the Law Practitioners Act 1982 was repealed and the Lawyers and Conveyancers Act 2006 came into force). Complaints made subsequent to 1 August 2008, concerning conduct prior to that date, must be dealt with in accordance with s 351 of the Lawyers and Conveyancers Act, as 'conduct' complaints. This is so regardless of whether the complaint concerned professional conduct, or was a complaint about fees.

[26] Section 351 provides that:

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.

[27] Importantly, the former procedure for costs revisions of bills under Part VII of the Law Practitioners Act no longer exists by virtue of the repeal of that Act. All complaints about matters that occurred prior to 1 August 2008 (including complaints about fees) are required to be dealt with as 'conduct' complaints by virtue of s 351(1) of the Lawyers and Conveyancers Act.

[28] This is relevant to the question of whether a Standards Committee has jurisdiction to consider the complaint, since Standards Committee's may only consider complaints which concern "conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982...". As noted, cost revision itself was never considered a proceeding of a disciplinary nature under the former Act. Rather it was an administrative review of the reasonableness of the fee. The vast majority of costs revisions involved no issues of misconduct or discipline. However, a disciplinary proceeding could result where there was gross or dishonest overcharging. In the light of its conclusion above, the Committee ought to have disposed of that part of the complaint pursuant to s 351.

[29] On review I am required to revisit the Committee's conclusions. I have considered all of the information on the file, looking particularly for any evidence that gross overcharging occurred, to the extent that it would have overcome the jurisdictional threshold of s 351. However, I can find no such evidence. Therefore from any point of view these bills do not give rise to disciplinary concerns and the complaint therefore does not reach the threshold required to bring it within the Committee's jurisdiction.

The 31 August 2009 bill

[30] The last bill of 31 August 2009 is not caught by s 351. Nor does it come within Regulation 29, as the complaint was made just within the 2 year time frame. This bill should have been considered under the current disciplinary regime of the Lawyers and Conveyancers Act 2006 as a 'conduct' issue; the Standards Committee ought not to have dismissed the complaint without consideration of whether this bill was reasonable.

[31] It is proper when considering any single bill to consider it in the context of those that went before (and conceivably in some cases those that came after). Obviously the appropriateness of the final bill will depend to a significant degree on the magnitude of the overall costs. Therefore, although the quantum of the first four bills cannot be challenged, they are a relevant factor in considering the quantum of the final bill.

[32] I have examined the time records which were provided by the Practitioner and note that it does appear that time is recorded for the billing period of the last bill which on a bare time-cost basis would justify the bill which was in fact rendered. Much of that work appears

to have been undertaken by a relatively junior staff member, L, who was a law clerk at the relevant time. I note that it appears that L has recorded her attendances in great detail. It is proper to consider whether all of her attendances provided value to the client which it was appropriate to charge for.

[33] Although I have examined the time records, in the absence of the accompanying file it is difficult to determine whether the amount charged was fair and reasonable in all of the circumstances. I have no particular suspicion of overcharging; however, neither is it clear to me that this has not occurred.

[34] My view is that the Standards Committee misdirected itself when it considered that Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 was a decisive reason for not considering the costs complaint further.

[35] I consider that this matter should be returned to the Standards Committee to consider whether the Practitioner has charged a fee which was fair and reasonable in respect of the invoice rendered on 31 August 2009. In referring this matter back to the Committee I note:

- a. that this is the only matter referred back to the Committee and the decision of the Committee is upheld in all other respects; and
- b. that in considering the bill it will be appropriate to consider the work undertaken as a whole, the results achieved in total, and the quantum of the amount invoiced in total.

[36] It is appreciated that the Standards Committee may wish to appoint a costs assessor to assist with this task.

Decision

Pursuant to s 209 of the Lawyers and Conveyancers Act 2006 I direct that the Wellington Standards Committee 1 is to reconsider and determine the specified matter of whether the invoice dated 31 August 2009 is fair and reasonable.

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act, Standards Committee decision is confirmed in all other respects.

DATED this 6th day of June 2013

Hanneke Bouchier
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 XA as the Applicant
Ms AY as the Respondent
Mr AZ as a related person or entity
[A North Island] Standards Committee
The New Zealand Law Society