

LCRO 04/2012

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee

BETWEEN

Ms XL
Applicant

AND

Mr BF
Respondent

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

DECISION

Background

[1] Ms XL seeks a review of a decision of the Auckland Standards Committee. The Committee considered a complaint by Ms XL in respect of Mr BF's conduct when she instructed him to assist her to sell her cafe business. While Ms XL complained in respect of a number of matters it appears that at the root of this complaint it is about the quantum of the fee charged by Mr BF in respect of the sale of Ms XL's cafe business. The business sold for \$54,000.00 The fee Mr BF charged for effecting the sale was \$5,462.50.

[2] The facts surrounding the complaint are:

- a. On 17 February 2011, Ms XL instructed Mr BF to help her to sell her cafe business, XYZ. Ms XL says that she instructed Mr BF to act for her after they had a telephone conversation in which he advised her that the legal fees would be \$800.00 + GST and that the matter should be concluded within two weeks.
- b. During the legal transaction, it appeared that a question arose as to whether Ms XL had fully paid a number of invoices. The invoices reflected

rates, body corporate levies, an unpaid invoice from her previous solicitors and other outgoings. Investigation into, and resolution of, these issues led to a delay in settlement and a significant increase in the amount of time that Mr BF spent on the matter.

- c. Two weeks after instructing Mr BF, Ms XL said that she was considering asking her previous solicitors to take over the file. She says that Mr BF advised that this would be more expensive and slower than allowing him to complete the settlement, and that the cost for him to do so would be approximately \$1,000.00.
- d. Following settlement, Mr BF sent Ms XL the proceeds of the sale of XYZ. She noticed that Mr BF had deducted \$5,462.50 in legal fees.

The complaint

[3] Ms XL complained that Mr BF deducted legal fees far in excess of what she believed the legal work would cost and that Mr BF had not properly advised her how she would be billed. She also complained that Mr BF failed to undertake the legal work in a manner that was timely and also protected her interests, leading to her paying expenses that would otherwise have been avoided.

Mr BF's response

[4] Mr BF stated that there were a number of difficulties that were faced in trying to complete the transaction. These included ongoing disputes between the various parties as to alleged unpaid sums by Ms XL, including rent, body corporate levies, outgoings relating to possession of the property, and legal fees due to a different law firm relating to an earlier matter involving XYZ. Furthermore, when settlement was made, there was a shortfall in the amount paid to Ms XL and Mr BF took steps to rectify this.

[5] Mr BF, concerned at the amount of work that he was doing, contacted Ms XL and requested payment of \$1,000.00 on account. Mr BF stated that on each occasion he raised concerns about the amount of legal work he was doing, and its associated cost. He says that Ms XL assured him that payment for legal fees was not going to be a problem and she just wanted the matter sorted. Mr BF said that this was the response even when he informed Ms XL "that the costs were escalating to a few thousand dollars due to matters which were not originally anticipated".¹

¹ Letter from Mr BF to NZLS (27 July 2011) at 3.

[6] In terms of the final deduction of legal fees, Mr BF said that he advised Ms XL that he would deduct the fees before releasing the remainder to her and also advised her as to what the costs would be.

Ms XL's reply

[7] Ms XL stated that she did not agree to legal fees on the basis of Mr BF's hourly rate and that the invoice presented by Mr BF does not reflect the number of times that she went to his office. She expected to pay no more than \$1,600.00 for the legal services and was disappointed that Mr BF had not informed her of the amount of work he had done, what exactly he had done and how much each piece of work cost. She was concerned that she was charged on 19 April 2011 for a communication with Mr BF in which her husband queried the size of the invoice presented to her on 18 April 2011.

[8] Ms XL also reiterated that Mr BF had not completed the necessary legal work within an acceptable timeframe.

Decision of the Standards Committee

[9] The Committee decided that Mr BF had properly informed Ms XL of the basis of the legal fees, namely his hourly rate, when he gave her his Terms of Engagement. The Committee further noted that the Rules of Conduct and Client Care (specifically Rule 3.4) did not require Mr BF to obtain Ms XL's agreement to the specific details in the Letter of Engagement. The Committee also noted that the transaction had been complex, involving a considerable number of attendances above those that would normally be encountered in this type of transaction. In the circumstances, the Committee did not find Mr BF's costs to have been unreasonable.

[10] The Committee resolved to take no further action.

Application for Review

[11] On 30 December 2011, Ms XL submitted an application for review of the decision. She reiterated her dissatisfaction with Mr BF's invoice and stated that the first she knew about Mr BF's hourly rate of \$300.00 was when it was mentioned in correspondence sent to her by the NZLS and that her understanding was that the cost of the transaction would be no more than \$1000.00. Ms XL also did not understand why she had received two invoices that differed by \$89.30.

Analysis and review

[12] Ms XL's complaint is twofold. Firstly that Mr BF presented her with an invoice

for legal fees that was far in excess of what she believed she would be charged. Secondly, that Mr BF did not proceed with the transaction in a timely manner, thereby incurring further costs that could have otherwise been avoided.

Whether Mr BF's invoice for legal services is reasonable

[13] In considering whether Mr BF's fees were reasonable, the first question is whether Ms XL was aware of how she was going to be charged for the legal services provided by Mr BF? Ms XL was sent a Letter of Engagement, dated 18 February 2011, in which Mr BF's hourly rate of \$300.00 was clearly stipulated. The letter also stated "[y]ou will be bound by these terms if after receipt of this letter, you orally advise us of your acceptance or if you instruct us to proceed to act for you".² The documents attached to the Letter of Engagement, titled 'Information for Clients of [firm]' and 'Standard Terms of Engagement' clearly note the basis on which legal fees are to be charged and when payment is to be made.

[14] Whilst there is no evidence on file that Ms XL signed the Letter of Engagement, she clearly instructed Mr BF to do the necessary legal work in relation to the sale of XYZ and she had received clear information as to how that work would be charged by Mr BF. It is my view that Ms XL was given reasonable notice of the basis and rate on which she would be charged for the legal services.

[15] Having concluded that Ms XL was aware of the basis for charging of legal fees, the next question is whether Mr BF's invoice was reasonable in the circumstances? Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides:

A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interest of both the client and lawyer and having regard to the factors set out in Rule 9.1.

[16] The factors in Rule 9.1 include, amongst others: the time and labour expended; the skill required to perform the services properly; the importance of the matter to the client and the results achieved; the complexity of the matter; the experience, reputation and ability of the lawyer; any quote or estimate given; and the fee usually charged in the market and locality for similar legal services.

² Letter of Engagement from Mr BF to Ms XL (18 February 2011).

[17] The transaction undertaken by Mr BF became more complex than either he or Ms XL anticipated. Considerable time was spent by Mr BF:

- a. in negotiations and correspondence between various parties in relation to outgoings that the vendor and purchaser had stipulated should be paid in advance, and on which obtaining the Deed of Lease were dependent;
- b. clarifying with another legal firm what payments Ms XL needed to make to her current landlord and making repeated efforts to obtain the necessary evidence from Ms XL; and
- c. attempting to sort out with the purchaser's solicitors as to the meeting of the landlord's requirement for the assignment of the lease and what security was required for finance.

[18] Mr BF had advised Ms XL that she could do some of this work herself, as whilst it was time-consuming it was not complex; nonetheless, Ms XL elected to have Mr BF complete these tasks.

[19] Taking into consideration the factors outlined in Rule 9.1, it is apparent that the transaction was not straightforward by any means. Ms XL was keen for the matter to be settled promptly and Mr BF spent a significant amount of time trying to achieve this, in the face of disputes about outstanding sums owed by Ms XL to a number of parties and her failure to provide him promptly with clear evidence to counter the claims that such sums were owed by her.

[20] It is my view that it was unreasonable of Mr BF to charge \$300.00 for his conversation with Mr XL's husband on 19 April, when he rang Mr BF to express his dissatisfaction with the size of the invoice. It seems inappropriate to charge a client further fees arising from a telephone conversation in which the client was raising their concerns about the size of the invoice they had received, after the legal services had been concluded. That is part of the professional obligation of a lawyer to deal promptly and fairly with complaints and cannot be properly charged for. Lawyers can charge for the delivery of professional services and matters ancillary to that, but not for meeting their professional obligations to respond to complaints.

[21] I also comment on the request by Mr BF for payment of \$1,000.00 by Ms XL on 18 March as a security for his fee. Although the Terms of Engagement say that "when payment of fees is to be made is set out in our Standard Terms of Engagement" this is

not in fact the case. There appears therefore to be no basis upon which Mr BF was able to ask for the payment of fees in advance, or without rendering an invoice.

[22] Mr BF provided his time records in this matter. I consider it proper to express some reservation about the manner of time recording of Mr BF in this case. They are very unhelpful, and are as follows:

Date	Details	Time	Rate	Amount
16/03/2011	Attendance client	2.00	300.00	600.00
25/03/2011	Attendance other	1.00	300.00	300.00
13/04/2011	Attendance other	1.00	300.00	300.00
15/04/2011	Attendance client	2.00	300.00	600.00
18/04/2011	Attendance client	4.00	300.00	1200.00
19/04/2011	Attendance client	5.00	300.00	1500.00
27/04/2011	Attendance other	1.00	300.00	300.00

[23] Ms XL queried these records.

[24] In response Mr BF stated that “we had recorded our time in blocks based on the time we have spent over the course of the transaction”.³

[25] This is not a satisfactory approach. Mr BF relies (quite rightly) on his Terms of Engagement and Letter of Engagement. That letter states that fees will be calculated on a time and attendance basis at the rate of \$300.00 per hour. If a lawyer chooses to charge on such a basis it is implicit that they will keep records of the work done contemporaneously. It is clear from the documents provided to the Committee that numerous attendances occurred which are not recorded.

[26] It must of course be recognised that time recording is a blunt tool in measuring the value of legal work and that it must be balanced against the other factors set out in Rule 9 when assessing the bill. There may also be occasions when some time is poorly recorded or not recorded contemporaneously. However in the present case it appears that there is no real time recording at all.

³ Letter from Mr BF to NZLS (1 September 2011).

[27] The time records provided appear to be a post-hoc reconstruction in the broadest terms of the time that may have been spent on this file. I note that Mr BF has not gone through the file and considered how much time each step might have taken (such as the preparation of a settlement statement, or attendance at a meeting) but simply estimated how much time was taken overall and then allocated that time in broad blocks to a number of days. In fact there is no real and reliable record of the time that Mr BF took to complete this work.

[28] In light of this I consider that the time records of Mr BF bear no weight in assessing whether the fee is reasonable.

[29] I also note that the fee is a relatively large one, particularly when viewed in light of the purchase price. However I am ill-placed to determine whether the fee is, in all of the circumstances, a reasonable one. For that reason I propose to return this question to the Standards Committee for further consideration.

Did Mr BF deduct fees for legal services without authority?

[30] The next question to be answered is whether Mr BF made an unauthorised deduction of his legal fees after he received the settlement sum from the sale of XYZ, as alleged by Ms XL.

[31] The basic obligation of a lawyer who receives money is set out in s 110 of the Lawyers and Conveyancers Act 2006 which provides:

A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person ... must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[32] A lawyer therefore may only deal with funds on the authority of his client. The particular issue of the deduction of fees is dealt with by Regulation 9 of the Lawyers and Conveyancers (Trust Account) Regulations 2008 which provides that no fees may be taken from a trust account unless either a dated invoice has been issued in respect of those fees and a copy of that invoice is available for inspection, or the client has agreed in writing to the transaction.

[33] Whilst Ms XL did not provide written agreement to the transaction, Mr BF issued the necessary invoice, he says this was on the same day that he spoke with Ms XL about the legal fees and how they were going to be paid. The file note of that conversation (of 18 April) is dated 20 April. I also note that it does not record any

particular authority to deduct fees. However I consider that the authority to deduct fees can be found in the Terms of Engagement.

[34] Furthermore, it is clear from the client engagement documentation that by accepting the terms and conditions within them, Ms XL had authorised Mr BF to recoup the fees for legal services in the manner that he did. Clause 1 of the 'Information for Clients of [firm]' clearly states the basis on which legal fees are to be calculated and that "[w]e may deduct from any funds held on your behalf in our trust account any fees, expenses or disbursements for which we have provided you an invoice." Although they are not signed they were clearly agreed to by Ms XL by her conduct in continuing with the retainer.

[35] Mr BF thereby satisfied s 110 by obtaining an authority for the deduction (in the Terms of Engagement) and satisfied Regulation 9 of the Lawyers and Conveyancers (Trust Account) Regulations 2008 (by the provision of an invoice).

[36] For the reasons given, it is my view that Mr BF was authorised to deduct the legal fees.

Did Mr BF fail to act in a timely manner?

[37] Ms XL complains that Mr BF failed to act in her interest, in a timely manner, and that by him failing to do so she incurred unnecessary expenses.

[38] Mr BF received instructions from Ms XL on 17 February 2011. Ms XL stated that she was led to believe that settlement could be completed within two weeks. Unfortunately, Mr BF encountered a series of unexpected obstacles to what should have been a straightforward piece of legal work. These obstacles, caused by a number of different issues, led to an understandable delay in the transaction. Mr BF provided to the Committee a detailed chronology of the main obstacles that he encountered and the legal work that was required to overcome them. The information provided by Mr BF shows that there were many days on which legal work was undertaken on behalf of Ms XL and that no issue appears to have been left unattended for an unreasonable length of time.

[39] Part of the delay in the process appears to have been the result of Ms XL failing to provide Mr BF with the evidence that he required in order to be able to argue on her behalf, during the disputes that arose.

[40] After considering the information provided by Ms XL and Mr BF, it is my view that Mr BF acted competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

Conclusion

[41] The Committee determined that Mr BF's costs were not unreasonable in the circumstances and that his conduct was not such as to raise any professional standards issues. I conclude:

- a. That the Committee was correct to conclude that Mr BF's conduct does not raise any professional standard issue; and
- b. That the Committee placed undue reliance on the time records of Mr BF in concluding that the fee was reasonable and that the question of whether the fee was reasonable should be reconsidered putting aside the records of Mr BF in respect of the time he claims was spent on the matter.

Decision

Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006 I direct the Standards Committee to reconsider the specific matter of whether the fee of Mr BF was reasonable putting aside the records of Mr BF in respect of the time he claims was spent on the matter.

DATED this 19th day of July 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:

Ms. XL as the Applicant
Mr. BF as the Respondent
[Name removed] as a related person or entity
Auckland Standards Committee
The New Zealand Law Society