

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

IG

Applicant

AND

HC

Respondent

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

DECISION

Introduction

[1] Ms IG has applied for a review of a decision by the Standards Committee to take no further action in respect of conduct and service complaints she made against Mr HC.

Facts

[2] Ms IG instructed Mr HC to assist her in resolving a dispute with her brother over their mother's estate. The estate assets were located in England, her brother was the administrator under their mother's will and lived in their mother's house. Ms IG says she was entitled to half the value of the house, and that when she first instructed Mr HC she had been trying to negotiate with her brother for over two years to obtain her entitlement.

[3] Ms IG says when she first instructed Mr HC she was intent on commencing court proceedings, but that he prevailed on her to continue negotiating, and she was dissatisfied when several months later, the matter was not resolved and she was forced to commence court proceedings in England. Ms IG says Mr HC should have told her from the beginning that he could not advise her on English law, or act in court proceedings commenced in England. She says that his failings delayed the commencement of proceedings, which put her at a disadvantage.

[4] Ms IG says she initially faced difficulties in paying Mr HCs' bill because she was on a limited income. She says that her financial position has improved somewhat, but she is now unwilling to pay his bill because of the deficiencies she perceives in the service he provided, and his conduct.

[5] Ms IG's conduct concerns relate to alleged failures by Mr HC to respond to emails, and his suggestion that she sack him.

[6] Mr HC says that Ms IG initially instructed him to redraft and send a letter on his letterhead that she had written to her brother, in the hope that would generate the outcome she sought. The letter was sent, and Mr HC received a response from the brother's English lawyer. Mr HC then sent his letter of engagement and client information to Ms IG. Ms IG then indicated she would find it difficult to pay.

[7] Mr HC's approach was to take the risk that it may take Ms IG some time to pay his fees, but in the meantime he did work for her, knowing that she continued to take steps on her own account towards resolving the situation with her brother.

[8] Ms IG then wrote to the English lawyers,¹ and copied those communications to Mr HC. The English lawyers did not respond to Ms IG's correspondence, but replied to Mr HC with a settlement offer. Ms IG, through Mr HC, made a counter offer saying she would accept £100,000 by the end of June, with her brother meeting any additional costs and taxes. The counter-offer was put on the basis that if her brother did not accept it, Ms IG would commence proceedings in the English court.

[9] Mr HC says he "had always informed Ms IG that he was not able to issue proceedings in English courts and that she would have to instruct separate representation to do that". He says her response to him was that she could commence proceedings herself.

¹ Letter [Law Firm A] to [Law Firm B] (31 May 2011).

[10] Ms IG says Mr HC did not tell her until very late in the piece that he could not act for her or advise her on the English court process, and believes he should have told her at the very beginning to instruct English lawyers.

[11] On Ms IG's instructions, Mr HC continued to negotiate, but Ms IG and her brother were unable to reach agreement. In the course of the negotiations, Mr HC says an email from the English lawyer was "inadvertently overlooked and quite possibly deleted", on a day that he was away from the office. He says he discovered the absence of the email two months later, then contacted the English lawyers and reignited settlement discussions.

[12] Mr HC sought further instructions from Ms IG, who confirmed she was in the process of lodging a claim in the English court. Mr HC wrote to the English lawyers explaining that Ms IG was commencing proceedings, and asking whether they were authorised to accept service.

[13] The English lawyers indicated that Ms IG's brother believed he and Ms IG had reached agreement between themselves, and sought to formalise the documentation necessary to complete settlement. Ms IG told Mr HC she objected to the English lawyers contacting him, rather than responding directly to her. She did not accept settlement on the terms recorded in their letter or agree to sign documentation giving effect to settlement.

[14] Mr HC then sent an email to her saying:²

...can you fire me and then you can deal direct with your brother and [Law Firm B]. They will only deal direct with you if you confirm you have no lawyer. This will save on further costs.

[15] Mr HC rendered his bill, and followed up when Ms IG did not pay it, eventually lodging the debt with Baycorp. Ms IG believes Mr HC should have waited until she received her settlement money and deducted his fees from that. She said he had not told her that he could not act in the English courts. She blames him for the failed negotiations, and believes she should not pay for his poor service. She laid a complaint to the New Zealand Law Society (NZLS).

² Email HC to IG (7 December 2011).

Standards Committee

[16] The Standards Committee considered the various aspects of Ms IG's complaint, and concluded that further action on her complaints was unnecessary or inappropriate under s138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[17] Ms IG was dissatisfied with the Committee's decision, and applied for a review.

Review application

[18] At the heart of Ms IG's review application is her assertion that Mr HC did not tell her he could not advise her, or act for her, with respect to proceedings in the English court.

[19] She says she did not accept the terms of engagement he provided, blames him for not achieving settlement, and adding to delays in her receiving her entitlement under her mother's will. She believes it was unsatisfactory for him to suggest she fire him, and says that communication between them was poor.

Role of the LCRO

[20] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of review

[21] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review hearing

[22] Ms IG attended a review hearing in [City] on 27 May 2015. Mr HC was not required to attend, and the hearing proceeded in his absence.

Review issue

[23] The issue on review is whether there is good reason to depart from the Committee's decision that further action on Ms IG's complaint was unnecessary or inappropriate. For the reasons discussed below, the answer to that question is no.

Discussion

Delay

[24] The only matter of substance arising from Ms IG's concerns about delay in achieving settlement arises from a delay of two months between the English lawyers sending an email to Mr HC, and him becoming aware of its absence. The question is whether that delay constitutes a disciplinary issue. For conduct to be unsatisfactory it must fall within one of the definitions in s 12 of the Act which says:

Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer...that occurs at a time when he...is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer... that occurs at a time when he... is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer..., or of any other Act relating to the provision of regulated services...

[25] The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 relevantly say:

- 3 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.

[26] Mr HC's explanation for the delay in identifying the email is that it was overlooked in his absence, and may have been deleted.

[27] Ms IG considers Mr HC should have been quicker to follow up on his earlier correspondence with the English lawyers, rather than leaving her matter to languish for two months.

[28] However, Ms IG says she was in contact with her brother throughout. Furthermore, her instructions to Mr HC were that she would attempt to progress her own matter and instruct him when she needed his assistance.

[29] There is no evidence that Mr HC's conduct was lacking in diligence or competence. Although deleting an email is unfortunate, in the circumstances, it does not raise a disciplinary issue. Nor is the delay of two months a contravention of rule 3 in a situation where, to reduce her costs, Ms IG was pursuing her own matter independently of Mr HC's efforts.

[30] The evidence also does not support a finding that Mr HC's conduct was such that lawyers of good standing would regard it as unacceptable. His conduct therefore does not fall below the standards in s 12(a) or (b), and does not fall within the definition of unsatisfactory conduct in s 12(c).

[31] In the circumstances the Standards Committee was correct to determine this aspect of Ms IG's complaint on the basis that further action was unnecessary or inappropriate.

Inability to act in an English court

[32] Ms IG says Mr HC did not tell her he could not act for her with respect to proceedings in England. In essence the allegation is that he misled her as to his ability to assist her.

[33] Ms IG's initial instructions to Mr HC were for him to amend a letter she had drafted, and send that out under his signature on his firm's letterhead. Ms IG's intention was to use Mr HC's involvement to buttress her negotiating position. Once the letter had gone out under Mr HC's letterhead, the English lawyers corresponded with him. The possibility that Mr HC might assist in resolving the situation through negotiation remained open through to December 2011. That much is apparent from Ms IG's email to Mr HC on 7 December 2011.

[34] It is also apparent from Mr HC's first letter to Ms IG's brother dated 15 February 2011, that Ms IG intended to take court action if a solution could not be negotiated. It is also clear from Ms IG's email to Mr HC dated 7 December 2011 that she knew by then that Mr HC could not act in respect of English matters.

[35] Mr HC says he "had always informed Ms IG that he was not able to issue proceedings in English courts and that she would have to instruct separate

representation to do that". He has not produced any other evidence in support of his assertions.

[36] The conflict of evidence is to be resolved on the balance of probabilities, which calls for an assessment of which version of events is more likely.

[37] Ms IG described the early stages of her professional relationship with Mr HC as one of colleagues, discussing her situation over coffee, which was later formalised when she asked him to write a letter on his firm's letterhead, and then continued with the negotiations. As Ms IG said at the review hearing, she "expected settlement to happen", and that was the basis on which she instructed Mr HC. It is also clear that Ms IG wanted to keep her costs to a minimum, and intended to take care of herself in the English court proceeding.

[38] Clearly the question of English court proceedings was on the table from early on in their formal professional relationship, and I consider it highly unlikely in the circumstances that Mr HC would have overlooked telling Ms IG that he could not act in English proceedings. There was, however, nothing preventing him from corresponding with the English lawyers in an attempt to negotiate settlement outside of a court process. In the circumstances, the Committee was correct to take no further action with respect to this aspect of Ms IG's complaint.

Fees

[39] Ms IG also considers Mr HC should not charge her for the work he did, bearing in mind how disappointed she was with the lack of an outcome, and the fact, she says, that she told him at the outset that she would struggle to pay according to his terms of engagement. Ms IG's view remains that Mr HC's refusal to agree to be paid from the proceeds of settlement was unreasonable.

[40] There is no evidence to the effect that Mr HC had agreed to act on the basis that he would only be paid if Ms IG was paid. His terms of engagement record the basis on which he was acting. He was entitled to render an invoice either monthly while work was in progress, or when the work was completed. Neither option was specified, but there is nothing unreasonable in Mr HC waiting for eight months before rendering an account to Ms IG, particularly as it was becoming increasingly evident that Ms IG's matter would not settle without court proceedings, which would have to be commenced in the English courts.

[41] After acting for Ms IG for over eight months without rendering an invoice, Mr HC rendered an invoice containing a fee of \$800, plus GST and disbursements.

[42] Standards Committees, and this Office, lack jurisdiction to consider complaints relating to bills of cost unless there are special circumstances, where the fee does not exceed \$2,000 excluding GST.³

[43] The term “special circumstances” is not defined, but has been considered in a number of cases, including the leading authority *Cortez Investments v Olphert and Collins*.⁴ That case involved an application to the Court under s 151 of the Law Practitioners Act 1982 for an order that a bill of costs be referred for revision, where the bill had already been subject to revision. Section 151 of the Act provided that the Court shall not make an order for the reference of a bill for revision *except in special circumstances* (emphasis added).

[44] The Court of Appeal rejected the trial judge’s finding that a serious risk of injustice was required. Although the three members of the Court produced three different tests, they provide some guidance when considering “special circumstances”. Woodhouse P, said that “if the issue is to be related to perceived injustice then the simple risk of injustice should be sufficient”.⁵ Richardson J, considered that “it is a question of where the interests of justice lie in all the circumstances”.⁶ McMullin J’s view, was that “all that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary” and “if there is a perceived risk of injustice I do not think that anything more is required”.⁷

[45] The facts of this matter raise no risk of injustice to Ms IG. Mr HC did work for Ms IG in 2011, on her continuing instructions, for which he did not bill for eight months, and for which he has been paid nothing to date. Despite Ms IG’s protestations to the contrary, there is nothing “abnormal, uncommon, or out of the ordinary” about her situation. There is accordingly no jurisdiction for this Office to review Mr HC’s \$800 fee.

[46] In the circumstances, the Committee was correct to take no further action with respect to this aspect of Ms IG’s complaint.

³ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 29.

⁴ *Cortez Investments v Olphert and Collins* [1984] 2 NZLR 434.

⁵ At 437.

⁶ At 439.

⁷ At 441.

Firing

[47] Ms IG expressed concern at Mr HC's suggestion that she might sack him. The purpose of her doing so was to enable her to communicate directly with the English lawyers. It appears from discussions at the review hearing that Ms IG did not appreciate that New Zealand lawyers are under a professional duty not to communicate with one another's clients. Having clarified that, Ms IG said she understood why Mr HC had suggested she might terminate his retainer. The Committee was correct to take no further action with respect to this aspect of Ms IG's complaint.

Outcome

[48] In all the circumstances, there is no good reason for me to interfere with the Committee's decision.

Decision

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

DATED this 3rd day of June 2015

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:

Ms IG as the Applicant
 Mr HC as the Respondent
 Mr EN as a Related Person
 Standards Committee
 The New Zealand Law Society