LCRO 11/2012

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 5
BETWEEN	**CCO (UB)** Applicant
AND	**OZ** Respondent

DECISION

Background

[1] The Practitioner, OZ, undertook work for UB's business, CCO (the Applicant) throughout November 2010 to February 2011, but did not complete the work contemplated by the retainer after UB failed to pay his fees. Thereafter the Practitioner took steps to recover the outstanding debt.

[2] The Applicant filed a complaint that the Practitioner demanded payment of his fees without having done the work he was instructed to do.

[3] The Standards Committee dealt with the complaint in terms of the Practitioner having terminated the retainer, and considered whether this raised disciplinary issues. With reference to the duty of a lawyer to complete a retainer, the Committee's focus was on reasons why the retainer had not been completed. After considering Rule 4.2(c) Rules of Conduct and Client Care, the Practitioner's explanation, and the evidence provided by the parties, the Committee concluded that it had 'no doubt' that the Practitioner had properly terminated his retainer in accordance with the rules. The Committee resolved to take no further action pursuant to section 132(2) of the Act.

Application for Review

[4] The Applicant sought a review because in her opinion the Standards Committee had not considered her complaint under the headings she had provided, but had allowed the complaint to be redefined by the Practitioner as concerning simply the termination of services due to unpaid accounts. This was not what the complaint was about, she said, but rather, that it related to matters of conduct and poor service including fees. She explained that the Practitioner had failed to carry out her instructions throughout the professional relationship, that he was aware of how critical this was to the financial viability of her business, and that he had not achieved any of the outcomes she had sought for the fees charged. The following extract from her letter fairly summarises the core of the matter:-

> *What my complaint to the Law Society was largely based on, is that* [the Practitioner] *was unprofessional in that he did not carry out my instructions - even before invoices were overdue, and certainly before any invoices were well overdue.*

[5] She contended that the Practitioner could have taken steps to terminate the franchises as from 7 January 2011, and there were no overdue or very overdue invoices at that time. She explained that her complaint was nothing to do with the Practitioner having terminated his services, but was because he had not carried out her instructions.

[6] She considered the bill of costs was too high for the services provided, in that the services provided did not complete or come near to completing or following her instructions. In relation to this allegation the Practitioner noted that the Applicant was raising a new complaint, namely aimed at the quantum of his fees, which was not part of her original complaint, to which the Applicant responded that excessive fees were included in her original complaint.

[7] A review hearing was held on 6 September 2010, attended by the Applicant, who was accompanied by a colleague. The Practitioner also attended with counsel.

[8] The review hearing provided an opportunity for further clarification of the background leading to the complaints, the scope of work done by the Practitioner, and the full extent of the Applicant's complaints.

[9] Notwithstanding that the complaints were confined to the instructions to terminate the franchises, the remedy sought by the Applicant was to have most of the Practitioner's invoices nullified, including those that had been billed in relation to other

work done by the Practitioner. Her view was clear, that no fees were payable because the Practitioner had not carried out her instructions to terminate two franchises.

[10] The Practitioner had provided services in relation to other matters in addition to terminating the franchises, having opened five different files for the different areas of work. Two of the invoices related to the review of (and redrafting if necessary) the Applicant's existing franchise agreements. The Practitioner had also been instructed to review and provide advice on her franchise agreement with the head franchisor (situated off-shore).

[11] The Applicant's position was that due to the Practitioner's failure to have terminated the two franchises as instructed, the other work he did was no longer of any benefit to her, and therefore not payable. She nevertheless agreed that she was liable for fees arising in a fifth invoice which related to another file where a barrister had been instructed. However, she was of the view that she should not have to pay all of it because she herself had done so much work for it.

Considerations

[12] The nub of the matter from the Applicant's point of view is that the Practitioner "*did not carry out my instructions*", which she stated were to terminate two franchise agreements. However, the evidence shows that this was not the full scope of services that the Practitioner was asked to provide.

[13] In the time that the Practitioner acted for the Applicant, these franchises were not, in fact, terminated. Because she did not get the outcome she had sought, she considers that there should be no liability to pay the Practitioner's fees for virtually any of his work. Her complaint is less about quantum of the fee than not having got the outcome she wanted.

[14] The Applicant set out her complaints in considerable detail under '24 Points' and the additional information that was attached. With regard to terminating the two franchises, she considered that her legal position, and what was required to be done, was fairly straightforward, and she disagreed with the Practitioner's advice that this was 'a complicated matter'. What was abundantly clear is that her view is diametrically opposed to that of the Practitioner, who she now blames for financial losses resulting from the failed franchises.

[15] This complaint is being considered in a disciplinary forum. The professional standards which apply are set out in the Lawyers and Conveyancers Act and the Rules

of Conduct and Client Care. Generally, disciplinary consequences do not arise for a lawyer if the client does not succeed in achieving the outcome sought, since outcomes cannot be guaranteed. Complaints about a lawyer's professional conduct cannot be resolved by reference to whether the client got the outcome they wanted, but concerns whether the lawyer has failed in his or her professional obligations to the client. When such failure has been demonstrated on the evidence, then orders can be made as are appropriate to that failure (including any adjustment to the fees).

[16] There is no question that a lawyer has a professional obligation to carry out the client's instructions. The Applicant sees this simply as a matter of having instructed the Practitioner to terminate two franchises but which were not terminated while he acted for her. She asked that the complaint be perceived from the perspective that she had instructed the Practitioner to terminate two franchises which he failed to do. This explained her dissatisfaction with the approach taken by the Standards Committee.

[17] It appears that the Applicant expected that this involved little more than a lawyer writing letters to the franchise holders. This was not the immediate course taken by the Practitioner, as discussed below. Clearly there was a gap between what the Applicant had expected would be involved, and the Practitioner's approach to carrying out the instructions of his client.

[18] After their first meeting (in November 2010) the Practitioner sent a Notice of Breach to one of the franchise holders (A). To the other franchise holder (T), the Practitioner sent a letter signalling that there had been breaches of the franchise agreement, including a proposal that the franchise holder consider selling the franchise back to the Applicant. The evidence shows the following:

Franchisee A

[19] The Practitioner sent the formal Notice of Breach of franchise agreement to A on 15 December 2010, giving 30 days notice to remedy the breach or confront termination.

[20] On 16 December 2010 A's lawyer sent a response to the Practitioner. In a six and a half page letter A's lawyer challenged the allegations and assertions that had been made by the Applicant, in some cases contending that the Applicant herself had caused or contributed to some failures. Allegations were also raised against the Applicant which were enumerated under eight points. There was also an allegation of bullying by the Applicant's representatives (which appeared to have led to A declining a proposal to mediate). In short, the position outlined by A's lawyer was that the actions

and the representations of the Applicant had prevented A from enjoying the promised returns of the franchise agreement. It was clear from the reference to prior correspondence that there had been prior exchanges between the Applicant and the franchisee's lawyer, which referred to failed efforts to resolve the dispute, and that the Applicant had rejected a settlement offer contained in an earlier letter. The letter finally noted that A was considering which of its legal remedies against the Applicant and its directors it would have recourse to.

[21] After receiving this letter the Practitioner perceived that the Applicant may be in a vulnerable position and he advised against sending a Notice of Termination at that time. In the course of a meeting between them on 17 February 2011, the Applicant accepted the Practitioner's advice. However, by the end of that month the Applicant had changed her mind. She telephoned the Practitioner, instructing him to nevertheless send the Notice of Termination, as she was of the view that A was bluffing.

[22] From the above it may be concluded that the Practitioner carried out the Applicant's initial instruction to send the Notice of Breach to A, and that she was willing to accept his advice to defer any further steps at that time. It may also be concluded that the Practitioner was instructed, at the end of February 2011, to send a Notice of Termination to A. In the normal course of events it would have been expected that the Practitioner would act on his client's instructions, even if that was against his advice. I shall return to the Practitioner's reasons for not doing so.

Franchisee T

[23] The Practitioner's first letter sent to T (15 December 2010) outlined the breaches that had been observed by the Applicant, and proposed a remedy of selling the franchise back to the Applicant. The letter was first sent to the Applicant in draft form, and she made some changes to it before the Practitioner sent it to T. There followed direct communications between the Applicant and T who were trying to negotiate a resolution. The Practitioner was not party to these exchanges. When the Applicant did not achieve an outcome satisfactory to her, she resurrected the matter of terminating that franchise at the 17 February 2011 meeting between her and the Practitioner. The Practitioner's contemporaneous file note refers to the exchange of correspondence between the Applicant and T, and his request that these be sent to him for assessment to allow him to consider whether there were issues relevant to issuing a formal Notice.

[24] The Applicant agreed to forward that correspondence to the Practitioner, but when eleven days had passed with no further word from her, the Practitioner contacted the Applicant again to remind her that he was still waiting for the information. In reply, the Applicant told the Practitioner that she had reviewed the information and had formed the view that it was all irrelevant, and she asked him to proceed with taking steps towards terminating that franchise. There is also evidence that she was still considering an alternative course of action with regard to the franchise. By this time it was the end of February 2011.

Summarising the above...

[25] The above evidence does not support the complaint concerning the Practitioner's failure to have terminated the franchises in January. In both cases the Applicant's explicit instruction to the Practitioner to proceed to take steps to terminate the franchises was given at the end of February. It was part of the Practitioner's professional obligation to advise the Applicant and there is nothing to suggest that the Applicant was not in agreement with the steps taken by the Practitioner to that point. Materially, she accepted his advice and this resulted in the letter of termination not being sent immediately. Although the Applicant later took a different view, and later described that advice as 'wrong', there is no evidence that the Practitioner's advice or caution was negligent.

[26] There is nothing to indicate that the Practitioner would not have completed the retainer had the non-payment of fees not intervened. Although the Applicant does not wish to see the Practitioner's failure to complete the retainer in terms of her non-payment, what cannot be ignored is the direct relationship between the Applicant's failure to make any payment and the Practitioner taking no further steps to complete the retainer. I return to that below.

Quality of the Practitioner's service

[27] A constant theme of the complaint includes allegations of poor quality service from the Practitioner. I noted in particular the extensive information that the Applicant provided (in support of her complaint) which included a commentary on the Practitioner's responses to her, as well as her 'expectations' which were, in the main, not met. These are retrospective observations. I have seen no part of the contemporaneous correspondence where the Applicant substantially challenged the processes that were being followed, or expressed her dissatisfaction, even though her frustrations about the process became more apparent as time went on. I have not

overlooked the clear messages in the Applicant emails which clearly signalled her desire to get on with terminating the franchises (particularly in the February emails), but there is also evidence that she was prepared to be guided by the Practitioner.

[28] A pivotal timeframe appeared to have occurred in mid-February. In a 14 February email the Practitioner conveyed his opinion (to the Applicant) that to terminate a particular franchise at that point in time would be illegal. He suggested a meeting, (presumably the 17 February meeting), at which time it appears that the Applicant was prepared to accept the Practitioner's advice (to not terminate A's franchise immediately). Although the Applicant has described this as 'incorrect' advice, without further explanation this is not useful. The Practitioner was expressing an opinion, and would no doubt have explained his reason/s for that opinion at their meeting. It is not necessary to enquire further because in any event, if an opinion is honestly and reasonably held, there is no disciplinary consequence if that opinion subsequently proves to be incorrect. In my view the Practitioner's caution based on the position taken by A could not be considered unreasonable.

[29] Also at that meeting the Applicant had agreed to send further information to the Practitioner for review to decide whether there was now a basis for lawfully terminating the T franchise. I see no basis for criticising the Practitioner's caution in respect of this request, and the Applicant's own inaction delayed matters by another eleven days.

[30] It is fair to comment that the Applicant's anxiety and concerns must have been apparent to the Practitioner, particularly as March arrived, at which time she was confronted by pressures from the head franchisor, an investigation by the Commerce Commission, and the Practitioner pressing her for payment**.**

[31] The Practitioner's professional responsibility to the Applicant included providing advice and guidance through the legal processes (and risks) of terminating the franchises. While I cannot agree that there was any professional failure on the part on the Practitioner in not having terminated either of the franchises in January, I do not accept as correct her statement that there were no overdue or very overdue invoices in January (discussed below). Overall there is nothing to show that the advice given by the Practitioner was negligent in the circumstances as they unfolded. That other or different courses of action may have been available or followed is not evidence of professional wrongdoing on the part of the Practitioner. I can find no instance of the Practitioner having acted in a manner inconsistent with the Applicant's objectives or without her agreement.

[32] That the Practitioner did not take further action on terminating the franchises at the end of February was directly related to the Applicant's failure to make any payment towards his fee. The next enquiry is whether the termination of the retainer by the Practitioner raises disciplinary issues.

Termination of the retainer

[33] The evidence on the file shows there had been regular dialogue between the Practitioner and the Applicant (mostly in the form of emails) concerning fees, and that the Practitioner had repeatedly expressed his concerns about non-payment. The Practitioner's email to the Applicant of January 25 referred to an amount of over $12,000 then outstanding with a request for payment by the end of January. A further email was sent by the Practitioner a week later (February 2011), asking for something to be paid that day. The Applicant replied that she was not quite in a position to make a payment that day but that his account was a "*high priority*", adding that she needed to see that *"... for the money we are spending on legal process, we are making clear progress on terminating the two franchisees*".

[34] In further emails throughout February, the Practitioner repeated his requests for some payment, noting that nothing of the outstanding debt had been paid. By 28 February 2011 the debt stood at $14,683. In a 28 February 2011 email the Applicant responded to the Practitioner's concerns about unpaid fees, referring to expected funds, adding "*I have therefore budgeted to use some of this money on your outstanding accounts as I do value the work you are doing.*" The Practitioner's reply referred to his prior requests for payment, and sought her confirmation of payment from the requisite funds. On 2 March the Applicant wrote to say she was still awaiting the funds.

[35] Meanwhile the Practitioner continued to carry out other work for the Applicant and on 7 March again enquired when payment would be made. In reply the Applicant referred to an off-shore client who was in the final stages of transferring funds to NZ, and she waited daily for news. He wrote again on 23 March, repeating his concerns about fees which by then stood at $14,683. He wrote, *"as previously advised, I have said that something rather than nothing would be appreciated but you have paid me nothing*", adding that he could undertake no further work for her until he had received a substantial payment.

[36] The Applicant replied that the problem was exacerbated by the situation of the failed franchises which had produced no revenue, also expressing a concern that no

outcomes had been achieved, which was met with an immediate response from the Practitioner who expressed his disappointment at her criticisms of his efforts, and advised he would draft the letters of termination on payment of $4,000. The Applicant replied that there was no money to pay the Practitioner, but she would make payment as soon as she could.

[37] In further emails the Applicant expressed her views that the Practitioner's inaction in not terminating the franchises was causing loss to her business, and the Practitioner was expressing concerns about non-payment, and making reference to the Applicant's advice that she expected to "*hear something very soon*". He sought a substantial payment to be made by 29 April time being of the essence, and in a 2 May email the Practitioner repeated his disappointment that he had not been paid anything, and that as there had been no payment, or arrangements made for payment, his firm could no longer act for her.

[38] The above emails do not appear to comprise the full exchange between them but provide an insight into the background leading to the termination by the Practitioner of his services.

[39] A lawyer's right to withdraw his or her professional services is very limited. The relevant rule states:

> Rule 4.2.
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> A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless –
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> ...
>
> (c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.
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> 4.2.1 good cause includes -
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> ...
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> (b) the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time.

[40] Where the client is unable, or has failed, to pay their fees on an agreed basis, the lawyer is nevertheless required to give notice in advance to the client before so terminating. There is a large body of evidence here that shows the Practitioner's repeated concerns about not having received payment, and that he warned the Applicant of the consequences.

[41] At the review hearing the Applicant said she was not in the position to pay the $4,000 as she had no money to do so, and also that she did not pay the Practitioner because she had not had any results. She added that the Practitioner was aware that her source of revenue depended on (or was linked to) the franchises being terminated.

[42] Although the Applicant claims that the Practitioner was always made aware of her financial circumstances and that fees were linked to results (i.e. termination of the franchises), the evidence shows that the Applicant did not signal any difficulty about her financial position until after more than $12,000 worth of fees had accrued, nor indicate to the Practitioner that she would not pay unless or until she got certain outcomes. She could not have been mistaken about fees being payable when invoices were rendered (this was stated in the terms of engagement), and there were many instances where she led the Practitioner to believe that payment was being arranged or would be made imminently, and continued to seek his services. The evidence shows that the Practitioner continued to provide services at her request in reliance on those assurances.

[43] Any expectation on the part of the Applicant that the Practitioner would continue to provide services without receiving any payment was, in my view, unrealistic. There is evidence of some forbearance on the part of the Practitioner in consideration of the circumstances outlined by the Applicant concerning delayed payment, and I have no doubt that he would have continued providing services had she paid something towards the overdue account (this is evidenced by various proposals he put to her), but still no payment was forthcoming.

[44] The Applicant asked whether lawyers are required to follow their client's instructions. The answer is clearly yes. The Practitioner was instructed to terminate the franchises, and he took steps that were aligned with those instructions. (This was in addition to other work done by the Practitioner.) This was not a case where the Practitioner failed to commence implementing the client's instructions, but rather, a case where the job was not completed. The fact that the work was not completed before the retainer was terminated was not, in my view, due to any culpable failure on the part of the Practitioner. He is entitled to be paid for the work that was done.

[45] The Practitioner also reminded me that there were five different jobs and five files that he had opened, only two of which concerned the termination of franchises. As instructed, the Practitioner reviewed the Applicant's franchise agreement, and also reviewed (and made suggestions) in respect of the agreement between the Applicant and the head franchisor.

[46] The Applicant explained that the changes proposed by the Practitioner were wholly rejected by the head franchisor. In her view this cancelled any liability on her part to pay the Practitioner's fee. In other words, because the letter did not have the desired affect the Applicant considered she should not have to pay. The Applicant has not raised any breach of the lawyer's professional obligations in relation to this matter and there is no basis for considering it any further.

[47] A further file related to the Practitioner having redrafted the franchise agreement between the Applicant and her local franchisees. The Applicant said that when the franchises were not terminated her business collapsed and she has not been able to benefit from the redrafted agreement and accordingly does not feel obliged to pay this either. Again this does not raise any professional breaches by the Practitioner and I consider it no further.

[48] The final bill concerns another matter which the Applicant accepts liability for, but stated that she would only be willing to pay part of it because she contributed a considerable amount of work. Again, the reasons raised by her do not raise professional conduct matters and I consider it no further.

[49] Having considered all of the evidence, I am unable to find any basis for taking a different view of the matter than that taken by the Standards Committee.

Decision

Pursuant to section 211(1)(c) of the Lawyers and Conveyancers Act 2006, the Standards Committee decision is confirmed.

DATED this 11th day of October 2012

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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:

CCO (UB) as the Applicant
OZ as the Respondent
OY as Representative for the Respondent
The Auckland Standards Committee 5
The New Zealand Law Society