

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X]

BETWEEN

UA

Applicant

AND

VB

Respondent

DECISION

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

Introduction

[1] Mr UA has applied for a review of the determination by [City] Standards Committee [X] to take no further action in respect of his complaints about Mr VB.

[2] In 2002 Mr UA and his wife entered into an agreement to purchase a block of land from a property developer (Mr XF). Mr VB did not act for Mr and Mrs UA in relation to that agreement.¹

[3] Mr VB was instructed to act for Mr and Mrs UA in relation to the sale of the property in 2006 and his complaints relate to events that occurred at that time.²

¹ Mr WD acted for Mr and Mrs UA at the time of purchase.

² Mr and Mrs UA had separated and it is apparent that Mrs UA has also made similar complaints to those of Mr UA. There has been no application for review of the Standards Committee determination of her complaint.

[4] In his application for review Mr UA poses five questions and the outcome of the review sought by him requests answers to those questions. They will be answered only to the extent they are relevant to this review.

[5] In addition, Mr UA seeks as an outcome of the review that he be required to pay Mr VB's costs only if an application made to the Official Assignee in the bankruptcy of Mr XF is successful in claiming costs. In the first instance, this Office has no jurisdiction to impose such a condition and, in any event, such an outcome is irrelevant to a complaint about Mr VB's conduct. The outcome of this review is to confirm the determination of the Standards Committee and that Mr VB's costs are payable by Mr and Mrs UA without condition.

Background

[6] The following facts need to be noted at the commencement of this decision:

- It is apparent the original agreement to purchase the property was complex.³
- Mr and Mrs UA agreed to purchase a block of land containing 9,000 square meters. The vendor was Mr XF or an entity controlled by him.⁴
- At the time of purchase the property had not been subdivided. The head title comprised some 7.2 hectares.
- Ultimately Mr and Mrs UA become registered as the proprietors of a 489/500th share of the head title with the remaining 11/500th shares being held by Mr XF or a company owned and controlled by him.
- It would seem the agreement provided that Mr XF would then proceed to effect a subdivision of the property to provide a separate title for the block purchased by Mr and Mrs UA.
- The whole property, including the block purchased by Mr and Mrs UA, was subject to a buy back arrangement by virtue of the terms of a lease.
- The block purchased by Mr and Mrs UA was landlocked. This needed to be remedied before any subdivision could be achieved.

³ There is no copy of the purchase agreement on the Standards Committee file and it is not relevant to this decision to cite it. This decision would not be affected if any of the assumed facts recited above are incorrect. Mr VB was not instructed until Mr and Mrs UA wanted to sell the property.

⁴ Hereafter the vendor will be referred to as Mr XF.

- The title to the property was complex with numerous interests protected by numerous documents registered against the title.
- Mr XF had reserved an option to buy the property back if the subdivision could not be effected.
- Mr VB was first instructed when Mr and Mrs UA wanted to sell the property. At the time Mr VB was instructed it would seem that little progress had been made in effecting the subdivision.
- Mr YG QC was instructed by Mr VB to advise Mr and Mrs UA and it would seem that proceedings were commenced against Mr XF. A settlement was reached at a judicial settlement conference. Mr XF did not comply with the terms of the settlement agreement.
- Mr and Mrs UA were therefore in the position of endeavouring to sell a property which did not have a separate title and remained subject to multiple easements and adverse interests.

[7] The above summary does not record all the difficulties with the title to the property, but it is sufficient for the purposes of this review to record they were numerous and varied.

[8] Mr UA advises that “relatively quickly an offer of \$730,000 was made; it was at this point in time that we discovered serious title defects via the buyers’ lawyer”.⁵ Mr UA advises the problems were:⁶

1. A \$10 buy back clause was in place to buy back the entire block of land including our new home.
2. XF had become a part owner of [Mr and Mrs UA’s] title.
3. Land Information NZ had registered [Mr and Mrs UA’s] title without a legal ROW. They had made a mistake, if this had been picked up at the time it would have been rectified prior to going unconditional. Furthermore [Mr and Mrs UA] would have asked WD to reject the title and probably [subject to his accuracy] discovered the other defects which would have been rectified prior to going unconditional.

[9] As noted above, Mr YG was instructed and a settlement reached at a judicial settlement conference. The issues that require to be addressed are described by Mr VB in the following way:⁷

⁵ Supporting documentation from Mr UA to complaint and application for review – “justice in NZ – the wild west”.

⁶ Above n 5.

- a. It had been intended that the UAs would own a one hectare section and that at one stage in the future when sub-divisional consent was obtained the balance would be sold back to Mr XF. Unfortunately the documents were not properly drafted or scrutinised and the \$10 buy back clause applied to all the land.
- b. The section was landlocked and needed a right of way over a strip of land to provide road access.
- c. XF had registered one of his entities as a 11/500th owner of the property using a power of attorney the UAs had signed.

[10] It would seem that Mr XF defaulted in complying with the terms of the settlement agreement and during the course of events was made bankrupt, which caused further difficulties.

[11] The background recited above only details a broad outline of the many and varied issues arising in the course of Mr and Mrs UA's dealings with Mr XF.

Mr UA's complaints

[12] Mr UA's complaints are recorded in the Standards Committee determination as follows:⁸

- Allegation that Mr VB was negligent and incompetent to the extent that he failed to properly identify issues with the title of a section that Mr UA had purchased and failed to adequately protect his interests;
- Allegation that Mr VB overcharged, that is that he charged fees which were more than what would have been fair and reasonable in the circumstances.

[13] In addition Mr UA complained:

- Mr VB had not advised him and his wife that further costs would be incurred if it were necessary to take further action through the courts to enforce the settlement agreement.
- Mr VB had not identified the existence of a grazing right that enabled another purchaser to cancel an agreement to purchase the property.

[14] In general terms Mr UA's:⁹

complaints that lawyers for prospective purchasers picked up on issues that Mr VB and other solicitors missed despite being aware of Mr XF's reputation. [He] questions why a '*judicial hearing*' was recommended when the settlement could not be enforced without incurring additional legal fees.

⁷ Letter from Mr VB to New Zealand Law Society (NZLS) (5 December 2014).

⁸ Standards Committee notice of decision 13 May 2015 at [5].

⁹ Above n 8 at [19].

The Standards Committee determination

[15] The Standards Committee determined that Mr VB had not breached his professional obligations to Mr UA. It noted:^{10 11}

It was Mr WD and not Mr VB who acted for Mr UA and Ms ZH in respect of the original purchase of the section from Mr XF in the early 1990s. Consequently the fault if any, for failing to identify issues with the property's title lies squarely at the feet of Mr WD.

[16] The Committee specifically noted that the grazing rights had been present since the property was purchased and accepted that "... Mr UA had never instructed [Mr VB] to undertake the work to have it removed".¹²

[17] The Committee determined to take no further action in respect of these complaints.

[18] The Committee considered the fees charged by Mr VB to Mr and Mrs UA. Two bills of costs had been rendered, one of which had likely been rendered more than two years before the complaint.¹³ Nevertheless, the Committee considered the total of Mr VB's costs which amounted to \$37,067 plus GST and disbursements.

[19] The Committee reviewed Mr VB's own records and noted the following:

- Mr VB had discounted his hourly rate to \$200 per hour.
- There was "... no evidence to suggest that any time spent on any aspect of the proceedings was inaccurately recorded"¹⁴ in Mr VB's own records:¹⁵

To the contrary, [the Standards Committee] considered the fees charged were particularly modest in light of the discounted hourly rate and the protracted nature of the matter which involved extensive work on Mr VB's part over a period of some seven years.¹⁶

[20] Having considered these matters, the Committee determined that Mr VB's fees were fair and reasonable.

[21] Mr UA disagreed and applied to this Office for a review.

¹⁰ Above n 8 at [25].

¹¹ Ms ZH referred to by the Standards Committee was Mr UA's former wife.

¹² Above n 8 at [26].

¹³ The Committee was unable to ascertain the date of the first bill of costs.

¹⁴ Above n 8 at [34].

¹⁵ The first entry on Mr VB's time records is dated 14 January 2008 and the last is dated 24 February 2014.

¹⁶ Above n 8 at [34].

Nature and scope of review

[22] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Lawyers and Conveyancers Act 2006 (the Act):¹⁷

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[23] More recently, the High Court has described a review by this Office in the following way:¹⁸

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

Review

[24] This review has been completed on the material to hand with the consent of the parties.

¹⁷ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

¹⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Unsatisfactory conduct

[25] Mr UA complains about the work carried out by Mr VB and what he considers to be oversights by Mr VB. Section 12(a) of the Act defines unsatisfactory conduct as “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”. This is the relevant standard to be applied when considering Mr UA’s complaints.

[26] It must be said at the outset that it is difficult to understand how Mr UA considers Mr VB to be at fault in any way. Mr VB did not act for Mr and Mrs UA when they purchased the property. It would seem that the terms of the agreement under which they purchased may have been inadequate, but this comment is not to be taken in any way as definitive of the advice received from Mr WD.¹⁹

[27] In addition, it is simplistic to suggest that any lawyer could have achieved a “clean title” for Mr and Mrs UA.²⁰ The various rights and easements and specifically, the grazing right, were invested in many third parties. The consent and agreement of those third parties to relinquish rights would have been required. That was clearly not within Mr VB’s control.

[28] Mr XF did not fulfil his obligations pursuant to the original agreement for sale and purchase or the agreement entered into at the judicial settlement conference. Again, Mr VB had no ability to control Mr XF’s conduct.

[29] Mr UA says he and his wife opted to accept the terms of the settlement reached at the joint settlement conference but would not have done so if they had been told they would incur costs to enforce the terms of that agreement should Mr XF default. In the first instance, neither Mr VB nor Mr YG could foretell that Mr XF would not fulfil his obligations pursuant to that agreement. In any event, it is unrealistic for Mr UA to believe that in the face of resistance or non-compliance, the terms of the agreement could be enforced at no cost.

[30] After considering all of the material at issue I reach the same conclusion as the Standards Committee that no further action in respect of these complaints is either necessary or appropriate.

The bills of costs

[31] The initial observation to be made here is that Mr VB reduced his hourly rate to \$200. I have not been able to ascertain why Mr VB took this step. However, I would

¹⁹ It appears a separate complaint was made about Mr WD’s conduct.

²⁰ Mr UA asserts this is what Mr VB undertook to provide.

observe this is a particularly modest rate for a practitioner of Mr VB's experience.²¹ Mr VB retained the same rate throughout the seven year period of his instructions when rates would have increased over that period.

[32] Mr VB has said that the title to the property was "the messiest [he] had ever seen in [his] career".²² It cannot be disputed that the title was indeed particularly complicated with (as noted previously) various interests in favour of numerous people recorded by multiple documents. Under rule 9.1(f) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the complexity of the matter, and difficulty or novelty of the questions involved, is one of several factors to be considered in determining the reasonableness of the fee. There is no doubt that the complexity factor existed throughout Mr VB's instructions.

[33] The fee charged by Mr VB is based on the time expended at his discounted rate and again, I have reached the same conclusion as the Standards Committee, namely that Mr VB's fees are fair and reasonable.

Summary

[34] I have reached the same conclusions as the Standards Committee in respect of Mr UA's complaints that further action in respect of these is neither necessary nor appropriate.

Decision

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

DATED this 12th day of May 2017

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:

Mr UA as the Applicant
Mr VB as the Respondent
[City] Standards Committee [X]

²¹ It is noted Mr VB was admitted in 1984.

²² Letter from Mr VB to NZLS (5 December 2014).

The New Zealand Law Society
Secretary for Justice