

CONCERNING

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

AND

CONCERNING

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

BETWEEN

BV

Applicant

AND

RD and KR

Respondent

DECISION

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

Introduction

[1] Ms BV has applied for a review of a decision by the [Area] Standards Committee 1 (the Committee), which decided to take no further action in respect of her complaint concerning the conduct service and fees of Ms RD and Ms KR (the lawyers).

Background

[2] Ms KR acted for Ms BV in settling her relationship property issues after she and her husband separated. Ms RD became involved as Ms KR was approaching retirement and allowed her practising certificate to lapse. Ms BV signed a settlement agreement, which was certified pursuant to s 21 of the Property (Relationships) Act 1976 (PRA) by Ms RD, after a mediation. Ms BV and her former husband had difficulties giving effect to the agreement. Ms BV sought further advice from the lawyers and came to regret having signed the agreement. Ms BV believes she should have taken matters straight to the Family Court for determination because the

agreement is not fair to her. She believes one or both of the lawyers persuaded her to settle on terms that were disadvantageous to her and should not have charged her for work they did after the agreement was signed.

[3] Ms BV complained to the New Zealand Law Society (NZLS).

Standards Committee decision

[4] The Committee summarised Ms BV's complaints as relating to fees, the advice and representation she received, and Ms KR's impending retirement and lapsed practising certificate.

[5] In respect of both issues, the Committee decided further action was not necessary or appropriate. The Committee accepted that the lawyers had met their obligations to Ms BV in representing and advising her on the effects and implications of the agreement before she signed, and that the fees were fair and reasonable. With respect to Ms BV's complaint that she did not know Ms KR was approaching retirement, and had no current practising certificate, the Committee decided it could take that issue no further because the lawyers said Ms BV had been informed about both matters.

Application for review

[6] Ms BV applied for a review. She would like this Office to "undo what was wronged", on the grounds that:

- (a) she did not provide sufficient supporting information; and
- (b) the lawyers had not:
 - (i) acted competently and done the work on time;
 - (ii) followed her instructions;
 - (iii) protected and promoted her interests;
 - (iv) charged her a fair fee;
 - (v) told her about work being done and who would do it;
 - (vi) let her know how to make a complaint and deal with any complaint quickly and fairly;

- (vii) been truthful, had lied and misled her;
- (viii) ceased acting where there was a possible conflict of interest;
- (ix) provided clear information on the settlement agreement; and
- (x) treated her fairly, respectfully and without discrimination.

[7] Ms KR's reply sets out the circumstances in which she acted from December 2014. She says she would have provided Ms BV with her firm's terms of engagement in accordance with her usual practice, although there is no evidence available on review of Ms BV having signed those terms. Ms KR describes discussions with Ms BV's husband's lawyers, finalising an agreement which Ms BV and her former husband signed, and then several months passing before Ms BV consulted her again. Over the intervening months, Ms BV's situation had changed, and Ms KR had merged her practice with another firm, [Law firm].

[8] Ms BV signed [Law firm]'s terms of engagement in November 2015. Ms KR says Ms BV was advised that Ms KR was approaching retirement, reducing her working hours and limited by the lack of a practising certificate in what she could do. She says Ms RD of [Law firm] was supervising her work and covering those aspects of legal practice that Ms KR no longer could. Ms KR describes Ms BV's apparent concerns about the lapse of her practising certificate as a "complete red herring".

[9] Ms KR attended mediation with Ms BV and Ms RD. Ms BV was only charged for attendance by one lawyer. Ms RD signed and certified the agreement confirming she had advised Ms BV on its effects and implications. Ms BV said at the review hearing that Ms KR had said virtually nothing during the mediation, which is consistent with her not being the person who was giving advice on the effects and implications of the agreement. That person must be a lawyer, and without a practicing certificate, Ms KR could not provide that advice, nor could she sign or certify the agreement. Nonetheless, Ms KR considers the agreement was favourable to Ms BV, and confirms that if that had not been the case she would not have recommended settlement to her on the basis proposed.

[10] Ms KR says fees were charged up to the end of the mediation on the basis of an estimate she believed Ms BV had accepted. It is assumed that estimate was for \$7,500.

[11] Ms RD attached a copy of the letter of engagement signed by Ms BV, which covers a number of matters, and offers alternatives for the provision of more detailed information. She says a copy was provided to Ms BV.

[12] Ms RD refers to the work she did with Ms BV, including preparing spreadsheets calculating various settlement options, values attributed to relationship property, disputes over what was relationship property and what was separate property. Ms RD says she attended the mediation so that she was in a position to sign off on the agreement and that Ms BV was advised of that. She believes matters were fully explained to Ms BV, and that she understood the effect and implications of what she was signing. She also considers the negotiated outcome was favourable for Ms BV, and emphasised over the months that followed why it was important for Ms BV to market the property and bring an end to her joint obligations. She explains there were difficulties in accomplishing a sale because the council had not issued a certificate of compliance for the property, and Ms BV and her former husband did not agree how that should be addressed so the house could be sold and final effect be given to the agreement.

[13] Ms RD does not accept that any of her conduct was unprofessional, and considers the fees are fair and reasonable. She also refers to a payment plan that Ms BV did not comply with, and dismisses Ms BV's contention that the firm did not expect her to pay her fees immediately. Ms RD says \$10,000 of fees, excluding GST, are outstanding.

Review Hearing

[14] Ms BV attended a review hearing in Wellington on 11 December 2017. The lawyers were not required to attend and did not exercise their right to do so.

Nature and scope of review

[15] 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):¹

... 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

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[16] More recently, the High Court has described a review by this Office in the following way:²

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.

Analysis

No practising certificate

[17] Ms BV says that although Ms KR provided her with legal services, she had no practising certificate.

[18] Section 6 of the Act reserves certain areas of work to lawyers who hold a practicing certificate. One of those areas is giving legal advice or carrying out any other action that, by s 21F of the Property (Relationships) Act 1976, is required to be carried out by a lawyer.

[19] There is no dispute over the fact that Ms RD, not Ms KR:

- (a) provided Ms BV with independent legal advice before she signed the s 21 agreement;
- (b) witnessed the signatures of Ms BV and her former husband; and
- (c) certified that, before that party signed the agreement, she explained to Ms BV the effect and implications of the agreement.

[20] Ms KR confirms that she continued to act for Ms BV after her practicing certificate lapsed. However, there is no clear evidence that Ms KR provided advice

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

after her practicing certificate expired. At most, Ms KR, under Ms RD's supervision, appears to have continued to progress matters towards resolution for Ms BV's. The significant point is that Ms RD covered both advice and certification of the agreement reached at the mediation.

[21] The lawyers say Ms BV was aware of Ms KR's impending retirement and the conditions on which she acted. Ms BV says she was not told. Even if Ms BV is correct, her complaint would be a matter of poor communication which, in the circumstances of her complaint is not conduct that should properly be elevated to a professional standards issue. The point is that there is no evidential basis for a finding that Ms KR did reserved work when she was not a lawyer as defined in the Act.

[22] Ms BV also believes Ms KR encouraged her towards negotiation and mediation out of self-interest. The argument is that, if Ms KR had been truly independent, Ms BV would have been firmly advised to commence court proceedings against her husband immediately. That argument fails because there is no reason to treat mediation as an easy option. It can be far more economical and efficient than taking matters to Court. There is no reason to believe Ms KR lacked independence.

[23] No professional conduct issue arises.

Mediation

[24] Most of Ms BV's complaints arise from her attendance at the mediation and having signed an agreement which was difficult to give effect to. It is not a function of this Office to determine whether an agreement reached pursuant to s 21 of the PRA is fair or not. None of the concerns advanced on that basis can be advanced in this jurisdiction.

[25] Both lawyers say Ms BV was properly advised. The certificate Ms RD signed states that Ms BV was advised on the effects and implications of the agreement. Ms BV signed the agreement and must therefore be taken to have agreed to its terms and to have understood its effects and implications unless the agreement is overturned. This Office lacks jurisdiction to take that step. There is no evidence available on review that satisfies me there is any defect in the certification of the agreement, but that view would not bind the Family Court.

[26] On the present facts, there is no reason to take any further action in relation to the aspects of Ms BV's complaints that relate to the lawyers' conduct or service leading to and at the mediation, or its outcome as documented in the settlement agreement.

Fees

[27] Ms RD issued two fee invoices:

- (a) 14 October 2016 for a fee of \$7,500 which included all attendances by either lawyer from 9 April 2015 to 14 October 2016, including preparation for and attendance at mediation in September 2016; and
- (b) 28 February 2007 for a fee of \$2,500 which included all attendances relating to implementation of the agreement reached at mediation.

[28] It is noted that the letter of engagement was provided to Ms BV in November 2015 and fees were charged for work done before that date. It is assumed Ms KR's terms of engagement were supplanted by [Law firm]'s.

[29] The Committee considered both fees were fair and reasonable.

[30] Ms BV disagrees. Her arguments are based on a number of factors. First, the absence of information about how the lawyers would calculate fees. Those arguments fail because Ms BV signed the terms of engagement, which direct her to or inform her of the hourly rates and other relevant considerations in calculating and charging fees. It is also relevant that the fee was based on an estimate, according to Ms KR's unchallenged evidence.

[31] Second, Ms BV believes she should not have been charged \$350 an hour for Ms KR to represent her when Ms KR had no practicing certificate and could not go to Court. The \$350 hourly rate was disclosed in the letter of engagement Ms BV signed. There is no reason to think that, just because Ms KR was approaching retirement, the knowledge and skill she had accumulated over several decades in legal practice instantly lost its value.

[32] Third, that Ms RD did work she was not instructed to do or that was of no value to Ms BV after settlement was reached at mediation. That argument fails for two reasons. Ms BV says she only mentioned to Ms RD that she was considering purchasing the property. She did not intend Ms RD to do any work. The difficulty is that Ms RD could not ignore Ms BV's ruminations. She was obliged to act on what she understood to be her instructions.

[33] Fourth, result, in terms of Ms BV's preferred outcome, is only one factor in assessing whether a fee is fair and reasonable. The lawyers' retainer ended before Ms BV managed to sell the property. For a number of reasons, the result they secured was a good interim solution, even if Ms BV has found herself having to pay her own

way in a home she could ill-afford. She had other options, and is not prepared to concede her position, presumably because without council certification the house is unlikely to reach its potential. Ms BV has a new lawyer now so it is assumed that the options in her present situation have been explained to her.

[34] Fifth, Ms BV is critical of the lawyers for not advising her on some matters she thinks they should have covered, such as child support and other benefit entitlements. That argument fails because the lawyers were advising Ms BV on her relationship property claims, not on the entire range of matters that flowed from her separation. Ms BV says she has very little income and struggles to pay her legal fees for the representation she has had. There was no reason for the lawyers to extend their service at a cost Ms BV says she cannot afford.

[35] Sixth, Ms BV complains about the amount of time Ms RD spent attending to matters for her. A timesheet was provided recording attendances by Ms RD implementing the agreement after mediation. The fees charged reflect the time spent. There is nothing unusual that stands out from the time record that distinguishes the fee as unfair or unreasonable for the services provided, including the work relating to Ms BV's suggestion that she might purchase the property.

[36] No timesheet was provided for the work leading up to the mediation and settlement agreement being signed. Ms KR's description of the work she did is consistent with Ms BV's explanation of events leading up to settlement. Time was spent by Ms KR before and after she merged her firm with [Law firm]. The total fee is consistent with the work that might usually be expected to be done in the circumstances at the time, where Ms BV was committed to resolving matters through mediation. There is nothing unusual about Ms KR's hourly rate given her level of experience. The work was important to Ms BV. It required a reasonably high level of skill and specialised knowledge on the lawyers' part. Ms KR says the fee is in line with the estimate. In short, there is nothing about the fee that stands out as unfair or unreasonable for the work done. None of the concerns outlined by Ms BV provide a valid basis on which to reduce or cancel the fee.

[37] There is no evidence of when Ms KR sent her terms of engagement, or what they contain. For the purposes of this review, it is assumed Ms KR has a proper basis for saying she would have followed her usual practice of emailing her letter of engagement to Ms BV. There is no reason to believe she would have missed that everyday step. Supporting evidence has not been sought because Ms KR is no longer in practice.

[38] In all the circumstances, there is no reason to take further action in respect of the lawyers' fee. That aspect of the Committee's decision is confirmed.

Other review grounds

[39] Ms BV says the lawyers lied, misled her and discriminated against her. Those allegations lack cogent evidential support. There is no good reason to inquire further into them.

[40] The allegation of conflict of interest was addressed in the lawyers' response on the basis that there was no relationship that gave rise to a conflict. There is no reason to distrust that evidence and no good reason to inquire further into that aspect of Ms BV's complaint.

[41] There is no evidence that supports the allegation that the lawyers did not act competently, complete work in a timely manner, or follow Ms BV's instructions. The settlement agreement and advice on implementation strongly suggest that the lawyers did what they could to protect and promote Ms BV's interests and acted competently in doing so on the basis of her instructions at the time.

[42] The balance of the matters Ms BV raises on review relate to matters that are covered by the terms of engagement Ms BV signed in November 2015. The lawyers were obliged to provide the information to Ms BV. Ms BV's signature on the letter of engagement is evidence that they met that obligation.

Summary

[43] There is no basis on which to reverse or modify the Committee's decision, which is therefore confirmed.

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 December 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:

Ms BV as the Applicant
Ms RD and Ms KR as the Respondents
Mr QT as a related person
[Area] Standards Committee [X]
New Zealand Law Society