LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 24

Ref: LCRO 133/2019

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	**HM** Applicant
AND	**RN** Respondent

DECISION

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

Introduction

[1] Mr HM has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning conduct on the part of Mr RN, and his fees.

Background

[2] Mr RN is a barrister.

[3] On instructions from his instructing solicitor, Mr DL, Mr RN represented Mr HM on criminal charges in the District Court between 17 November 2016 and 10 October 2017, when the Court granted Mr RN leave to withdraw as counsel. Mr RN provided Mr HM with a letter of engagement dated 17 November 2016. The letter of engagement records Mr RN's hourly rate as $450, explains the usual matters, refers to the involvement of Mr DL and appears to have been signed by Mr HM at the same time

he signed an authority for Mr RN to act for him, although he does not recall having signed either document.

[4] The police Caption Summary says Mr HM sold two half-ounces of methamphetamine to two undercover police officers. Mr RN's correspondence to Mr HM refers to his instructions. Mr HM wanted Mr RN to argue that certain Crown evidence should be excluded as unfairly obtained. Mr HM instructed Mr RN that his co-accused, as an agent of police, had tricked and manipulated him into selling drugs in that quantity. His matter proceeded along the track towards a jury trial.

[5] Based on Mr HM's instructions at the time, Mr RN and the barrister assisting him, Ms MR, carried out legal research, prepared written submissions and attempted without success to obtain evidence to support Mr HM's suspicions about his co-accused. The admissibility arguments were that Mr HM had been entrapped, or that there had been some more general impropriety in the conduct of police, such that Crown evidence should be excluded.

[6] Mr RN met Mr HM on a number of occasions, recorded his instructions in correspondence, attended court, reported to Mr HM and generally advanced his position based on the instructions Mr RN had received.

[7] Mr RN's correspondence records that on the evidence and on Mr HM's instructions to him at the time, in Mr RN's view, Mr HM had no arguable defence to the charges. Mr HM instructed Mr RN to seek a sentencing indication, which Mr RN did. Mr HM's instructions remained as they had been, to maintain a not guilty plea and await a jury trial date.

[8] Mr RN considered himself unable to continue to represent Mr HM and unable to delay trial further. Mr RN sought and obtained the Court's leave to withdraw as counsel for Mr HM.

[9] Over the course of his retainer Mr RN issued three invoices, each of which was paid from funds held in Mr DL's trust account. Mr RN's fee totals $12,897.88 excluding GST and disbursements. Mr RN's invoices contain detailed narrations which explain the fee charged on each occasion. Those are consistent with Mr RN's correspondence to Mr HM at the time.

[10] Separately, Mr DL charged a fee of $241.50 as instructing solicitor.

[11] When Mr HM enquired whether he might obtain a refund of $10,000 almost a year later, Mr RN reminded HM of his instructions, and the circumstances around the end of his retainer in the following way:[1]

> I was compelled to seek leave to withdraw as your counsel. That was because you tried to reach an agreement with me whereby I would artificially delay the conduct of your jury trial to a point in time when you had served sufficient EM bail such that the sentence of imprisonment might be reduced. Effectively you asked me to mislead the court for a very lengthy period. The difficulty I had was twofold. Firstly, I had capacity to conduct your trial in a very short timeframe so that there would be no real delay unless I misled the court as to my availability.
>
> Secondly, and importantly, you had advised me on a number of occasions that you were guilty. I could not conduct your defence. You did not offer any defence. The issue of entrapment was not defence but an argument as to the admissibility of evidence.
>
> Once you rejected the sentence indication and then sought to take the matter to trial I had no choice but to seek leave to withdraw. I advised you that I could not continue to act for you.

[12] A little while later, Mr HM made a complaint to the New Zealand Law Society (NZLS).

The complaint and the Standards Committee decision

[13] Mr HM set out his recollections of the history of the retainer and provided documents in support, including Mr RN's letter of engagement, other correspondence and invoices. Mr HM is critical of Mr RN for the service he provided, his conduct of the criminal proceeding, his withdrawal from acting and his fees. Mr HM says Mr RN over-promised, under-delivered, overcharged him, and should give him a refund of $15,000. Although Mr HM added to his complaint throughout the complaint process, the substance remained the same. He was dissatisfied with the service he had received, Mr RN's conduct of his matter and the fee.

[14] Mr RN provided a preçis of the retainer, and responded to the bulk of Mr HM's criticisms. Mr RN noted that the Crown had recorded "in writing that the co-defendant… was not an agent for the police", and Mr RN had advised Mr HM accordingly that his exclusion argument was unlikely to prevail. Nonetheless, he was instructed to proceed and did so. Mr RN attached a letter from the Crown describing the entrapment challenge as "a relatively novel one in New Zealand".[2] Mr RN does not accept that his fee was other than fair and reasonable for the services he provided to Mr HM, or that his conduct or the service he provided fell short of a proper professional standard.

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[1] Letter RN to HM, 6 November 2018.
[2] Email [Law Firm] to RN, 6 May 2017.

[15] The Committee considered the materials and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that further action on the complaint was not necessary or appropriate. That determination was based on the Committee's assessment that the evidence did not support the complaints Mr HM had made about Mr RN's conduct, the service he had provided, or his fees.

Application for Review

[16] In his application for review Mr HM seeks a refund of $10,175. He attached several documents including a page headed "Financial Profile", a printout from EMBail@corrections.govt.nz which Mr HM says responds to inquiries he made about his 2017 EM Bail records, and a Certificate of Analysis from ESR reporting substances containing methamphetamine in undisclosed quantities. Mr HM, who says he had just discovered that Mr RN did not have full disclosure in his matter, says the Committee overlooked issues relating to Mr RN's conduct and fees in its decision. Mr HM:

(a) wanted an explanation for a charge of $241.50 for which Mr HM did not receive an invoice;

(b) maintains aspects of the narrations to Mr RN's invoices are incorrect;

(c) observes that one of the invoices contains a "double up" on 18 April;

(d) did not agree Mr RN's final fee would be $5,000;

(e) maintains Mr RN did not follow his instructions to:

(i) get confirmation from the Crown and Police that his co-accused was acting on instructions, encouragement and was manipulated by police into inciting his offending; and

(ii) obtain a purity test because the ESR certificate "does not show the purity of the substance".

[17] Mr HM says the reasons Mr RN gave for terminating the retainer were not valid and he did not receive notice.

[18] Mr RN's replies to the application for review were succinct. He relies on the explanation he provided to the Committee in the course of the complaint process. Mr RN says the $241.50 was accounted for in an invoice from Mr DL, and that reference to the District Court, rather than the High Court, in an invoice was a typographical error. Otherwise he makes no further comment.

Strike Out – s 205(1) of the Act

[19] This review has been determined under s 205(1) of the Act which provides for a Legal Complaints Review Officer (LCRO) to strike out an application for review if satisfied that it discloses no reasonable cause of action.

[20] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the application for review discloses no reasonable cause of action.

Nature and scope of review

[21] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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.

[22] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

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[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Discussion

[23] Mr HM says he did not receive a bill from Mr RN for $241.50 shown in Mr RN's "Financial Profile". Mr RN says that fee was charged by Mr DL. On that basis, there is no reason for Mr RN to have issued an invoice for that amount. Any such invoice would be issued by Mr DL. No professional standards issue is raised.

[24] Mr HM says Mr RN's invoices are inaccurate for a number of reasons.

[25] Mr HM says the first invoice incorrectly records his matter as being heard by the High Court, when in fact it was before the District Court. Mr RN says that is a typographical error. The typographical error has zero impact on the question of whether the fee was fair and reasonable. No professional standards issue is raised.

[26] Mr HM provided a printout of an undated email from EMBail@corrections.govt.nz which he relies on as evidence that he did not attend Court on 12 January and 28 February 2017 as Mr RN's first invoice and correspondence indicate.

[27] Mr HM did not place the EMBail email before the Committee, but he could have. In that sense it is not new evidence. To an extent the entries recorded in the EMBail email appear to be self-explanatory, reinforced by the fact that no explanation has been provided. The EMBail email records dates when appointments were booked, and when "you had court on this day". Those appear to account for Mr HM not being where his bail conditions generally required him to be on the relevant dates.

[28] The important entries, the ones for 12 January and 28 February, simply say "no absence booked". If those two entries are as self-explanatory as the others appear to be, they simply mean that Mr HM was not where his bail conditions required him to be on the relevant dates, and had not made arrangements to be elsewhere in advance. It may well be that Mr HM was in court on those dates, but that information had not filtered through to his Corrections record. The EMBail email does not demonstrate that the dates recorded in Mr RN's first invoice and correspondence, all of which was prepared well before Mr HM made his complaint, are incorrect.

[29] Mr HM is critical of Mr RN's second invoice in two respects. The first of those is that Mr RN spent 10 hours on research and drafting submissions that lacked evidential support and were never filed. Mr HM does not think he should have to pay for that work.

[30] Mr HM does not say Mr RN spent time on research and drafting without his instructions. It is clear from the materials that Mr HM's instructions were that his co-accused was in cahoots with police, and that meant there was a basis on which to exclude certain evidence. Mr RN made enquiries of the Crown and received responses indicating the co-accused did not have the kind of relationship with police that the legal arguments relied on.

[31] Mr RN could not know what evidence would be required to support the legal arguments until the research had been done, particularly since the argument Mr HM wanted Mr RN to run appears to have been a novel one in New Zealand. It takes time to competently and diligently research law and formulate legal arguments. Research generally takes more time when legal arguments have gained some traction in other jurisdictions, but are not the subject of domestic authority.

[32] The product of the research carried out for Mr HM is captured in draft submissions that are among the materials available on review. Those submissions were ready for Mr RN to sign. All that was missing was evidence that supported Mr HM's suspicions about his co-accused. That would have had to come from either the co-accused or from police, but was not forthcoming. Mr RN could not "get confirmation" from the Crown or Police to support the legal arguments if, as it appears from the Crown's reply to Mr RN, Mr HM's suspicions about his co-accused were unfounded.

[33] Mr HM added that Mr RN had misled him by giving him an assurance that he "will" be challenging the admissibility of the evidence by undercover operatives. That challenge could only be made if the evidence to support it could be flushed out. It is correct to say that Mr RN assured Mr HM that a pre-trial challenge would proceed. That assurance can only have been based on Mr HM's instructions at the time, with nothing more to support it. Mr HM's complaint that he was misled by that correspondence is belated. In the context of the retainer, it is inherently unlikely that Mr RN misled Mr HM into believing that a pre-trial challenge to police evidence was going to proceed based on nothing more than Mr HM's suspicions about his co-accused.

[34] The second criticism Mr HM levels at Mr RN's second invoice is that it contains a double charge on 18 April 2017. The relevant part of the narration to the invoice says:

> …attendance with client in Chambers on 18 April 2017 for one hour; 10 hours of research and analysis of the legal position on entrapment in New Zealand and England, research on cases of unfairly obtained evidence under s 30 of the Evidence Act 2006 generally and drafting of submissions for the pre trial;

> attendance with client on 18 April 2017 for one hour to discuss research and analysis of legal position on entrapment…

[35] It could be said from the narration that there is some overlap. However, it is inherently unlikely that the hour spent in Chambers on Mr HM's matter is the same hour that was spent with him discussing the legal research and analysis of the legal position on entrapment. The former is an appearance in Chambers. The latter is a private conversation, so not one that could have been had in Chambers. Mr HM's concern that the invoice records an hour's overlap is not supported by the narration in the invoice. In addition, there is nothing in the materials that supports the view that Mr RN's fees were calculated strictly according to formula of time multiplied by an hourly rate of $450.

[36] Mr HM has one concern about the third invoice that, like his other criticisms of the fee, has nothing to do with whether it is fair and reasonable. All Mr HM says is that he did not agree with Mr RN that the final fee instalment would be $5,000 and he wants a refund. Neither of those is a reasoned basis on which it could be said that the fee is not fair and reasonable.

[37] It is also noted that Mr RN did not charge Mr HM for any more of the work he did between June and October 2017 when the Court discharged him from his responsibilities as counsel for Mr HM.

[38] In summary, none of the criticisms of Mr RN's fees raised by Mr HM in his application for review disclose any reasonable cause of action against Mr RN.

[39] Mr HM is also critical of Mr RN for not following his instructions to obtain a purity test on the methamphetamine that was identified in the Certificate of Analysis from ESR. Mr HM notes that the ESR report identifies methamphetamine in undisclosed quantities. Mr HM has not explained how he thinks a purity test could possibly have advanced his position in any way. Logically, ambiguity over the purity of the methamphetamine Mr HM had in his possession, and had supplied to undercover police, might perhaps have been an uncertainty that could work to his advantage if he had proceeded to trial.

[40] Mr HM does not explain how he believes Mr RN's supposed lack of full disclosure in his matter worked to his disadvantage.

[41] Having carefully considered Mr HM's application for review and all of the associated materials, I am satisfied that the application for review discloses no reasonable cause of action and should be struck out in its entirety. This review is

therefore determined pursuant to s 205(1) of the Act, which leaves unaffected the Committee's decision that further action is not necessary or appropriate.

Decision

[42] Pursuant to s 205(1) of the Lawyers and Conveyancers Act 2006 Mr HM's application for review is struck out in whole because it discloses no reasonable cause of action.

DATED this 24th day of February 2020

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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 HM as the Applicant
Mr RN as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society