LCRO 149 & 150 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 1
BETWEEN	**MR WANDSWORTH** of Australia Applicant
AND	**MR DDINBYCH AND MR KEITH** of Wellington Respondent

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

DECISION

Application for review

[1] The Wellington Standards Committee 1 upheld complaints against two practitioners, Mr Keith (P1) and Mr Ddinbych (P2).

[2] The Committee found P1 had wrongfully terminated the retainer with the Applicant in breach of Rule 4.2 of the Lawyers: Conduct and Client Care Rules, and that this constituted unsatisfactory conduct. The Committee determined that the finding of unsatisfactory conduct recorded against his professional file, and an apology, were a sufficient penalty. It declined to consider the Applicant's claims for compensation.

[3] The Committee concluded that P2's conduct was unsatisfactory in that he had failed to act in a competent and timely manner and failed to keep his client fully

informed. The Practitioner was reprimanded and he was ordered to apologise to the Applicant. No compensation order was made.

[4] The review application was made because the Applicant considered that the Standards Committee was wrong to have made no monetary award. This review focuses solely on the monetary claims by the Applicant. He sought compensation under several different heads, identifying the costs and losses arising from the wrongful termination. In an affidavit of 3 August 2009 the Applicant quantified the sums he claimed under the various heads of claim.

[5] The background to the complaint relates to the Applicant's litigation in respect of a leaky home claim. P2 represented the Applicant in respect of the claim, and had taken the litigation file with him when he moved to another law firm where P1 was a partner. When disagreements arose concerning payment arrangements P1 decided that the firm would no longer act for the Applicant. The Applicant was informed accordingly. Thereafter the Applicant was obliged to find replacement counsel for the litigation. In addition to the litigation there was also some work being done for a company owned by the Applicant, namely the preparation of a document in relation to a website. This work had almost been completed when the retainer was terminated. The firm declined to act further for the Applicant in relation to both matters.

[6] By virtue of section 211 (1)(b) of the Lawyers and Conveyancers Act 2006 this office may make the same range of orders that may be made by the Standards Committee pursuant to section 156 of the Lawyers and Conveyancers Act. Section 156(1)(d) contemplates that a compensatory order may be made where it can be shown that loss has been suffered by reason of any act or omission of a lawyer.

[7] The review hearing was conducted by telephone, and involved the Applicant and both of the Practitioners. Having considered the circumstances of the termination, and agreeing that the Standards Committee correctly determined that the termination was wrongful, I expressed the view that there appeared to be a proper basis for compensation. The Practitioners submitted that the Standards Committee correctly determined that the finding of unsatisfactory conduct and the apology to the Applicant, were sufficient penalty. They further submitted that the finding was a serious one for professionals. There was discussion concerning the Applicant's various heads of claim.

[8] Despite some effort to reach a settlement, no agreement was reached. The matter to be decided by this office is what, if any, compensation orders should be made in relation to the matter, and if so the relative contribution of each of the Practitioners.

[9] Some guidance in the application of Section 156(1)(d) may be sought from a relevant key authority, *Hadley v Baxendale* 156 ER 14 which established two ways in which a defendant may become liable for a loss resulting from a breach of contract. These are damages which "*may fairly and reasonably be considered either as arising naturally i.e. according to the usual course of things from such breach itself*" (the first limb) and damages which *"may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it*" (the second limb). Thus to be recoverable the losses must naturally flow from the breach of contract, or if they do not naturally flow from the breach, then they must be shown to have been within the reasonable contemplation of the parties at the time the contract was made. It is clear from legal authorities that not all losses are recoverable, and that it would be wrong to impose a liability for risks which people entering a contract would not reasonably be considered to have undertaken. Notwithstanding the distinctions between a contract on the one hand, and a professional retainer such as arises in this case, these principles are a useful guide to approaching the remedial claims that have been made.

[10] There are four heads of compensation sought by the Applicant. The first covers the Applicant's expenditure in relation to the making of the complaints. He claims the costs of supplies and for his time drafting the complaints. He also claims for three days of lost income (NZ$3000). The second covers *"expenditure caused by abandoned retainer*". This includes a return airfare from Australia (where the Applicant was working at the time), a *per diem* claim ($200) for two days spent in Wellington, and legal fees of $400 incurred by the Applicant in relation to his search for replacement counsel. I noted that the three days lost income also covers some of the time involved to find and appoint new counsel. A third head of claim is for damages for stress and disruption to his affairs. A fourth is for disruption to the affairs of his company.

[11] Under the first head of claim the Applicant seeks compensation for 'supplies' associated with making his complaint, (AUD$60) and for his own time involved in the drafting of his claim, ($2,520 representing 42 hours at $60 p/h), referring to research and correspondence. Such costs are not normally recoverable by a claimant in a claim for compensation insofar as they are not compensatory in nature. They do not arise as

a consequence of the breach, but rather, arise in pursuit of a remedy. These are usually considered to be costs claims rather than compensatory claims.

[12] I note that the powers of Standards Committees to make orders as set out in section 156(1)of the Act includes a power to award *"costs or expenses incurred by the complainant in respect of the enquiry, investigation, or hearing by the Standards Committee."* This does not extend to hearings by a Legal Complaints Review Officer. I have considered whether the Applicant's claim for his own time spent in prepared in the complaints could properly be described as "*costs or expenses incurred*. It seems doubtful that this claim could properly be considered as a cost the Applicant has "incurred". To have been 'incurred' it seems to me that the cost must be one that the Applicant has been subjected to by a third party. Such costs are not recoverable in the courts. I have also canvassed the issue of costs awards in tribunals but I have found no instances where costs orders are routinely made in tribunals that have discretionary powers to make such awards, and none that reimburse a claimant for his or her own time in pursing their own claim. I am unable to see any proper basis for making such an order in this case. Accordingly I make no orders under this head of claim.

[13] The Applicant also claims three days of lost income. Some of this may relate to time involved in pursing his complaint (he said time taken to pursue his complaint was time her could not spend at work) but it also appears to relate to time taken off work to find and then instruct new counsel (in NZ) with regard to his litigation file. At the time of these events the Applicant was working in Australia. His further claim is for reimbursement of the airfare to NZ to meet his new counsel.

[14] The Practitioners submitted that the trip was not a necessary expenditure because the transfer of the files could have been immediately and readily arranged, and communications with new counsel could have been done via email. The Applicant responded that it was not unreasonable that he should be able to meet new counsel before entering a new retainer.

[15] I accept that it was reasonable that the Applicant should have personally met his new lawyer before entering into a professional relationship. The necessity to instruct new counsel in relation to a current litigation file naturally flowed from the wrongful termination of the retainer in this case and is therefore properly a loss suffered by reason of any act or omission of a lawyer. This in turn necessitated his travel to NZ. I therefore agree that the return airfare should be reimbursed and a reasonable

allowance be made for the time to travel for that purpose. I consider that this could have been arranged with one days loss of work. Accordingly the Applicant is to be compensated for one days loss of income from work (NZ$1,000) and his airfare. The Applicant advised that the airfare was AUD$420. Information about the exchange rate at that time was sought by this office, and I have rounded this up to NZ$520. Both of the above losses are properly be borne by P1 who was found to have been responsible for terminating the retainer.

[16] The next head of claim covers *"expenditure caused by the abandoned retainer"*. This is a cost incurred by the Applicant who had to pay new counsel in relation to taking up the litigation file, and the claim is for compensation of legal fees which represent work undertaken by new counsel in getting up to speed with the file. This is claimed as a cost arising directly from the Practitioners' conduct. This is a loss that clearly fall within section 156(1)(d) as arising by reason of an act or omission of a lawyer. I have no difficulty finding that losses that directly result from the wrongful termination should be recoverable. Following enquiry by this office the Applicant's present counsel advised that legal fees of $1,400 had been charged to the Applicant for that work. The file, which related to a leaky home claim, was described as substantial and I accept that the Applicant confronted additional costs that he would not otherwise have incurred. I consider that this is a loss that should be compensated under s 156(1)(d). This should be borne by P1.

[17] The Applicant also seeks to be compensated for legal fees he paid in connection with his search for replacement counsel. He asks to be reimbursed for the $400 he paid to a lawyer who had perused the file, but who was not in the event engaged by the Applicant. It appears from the information provided that the lawyer was not engaged only because the Applicant considered that the hourly rate of $400 was too high. However this is information that the Applicant might have obtained in advance of the lawyer examining the file. I do not accept that this is a loss that naturally flows from the termination of the retainer and no order will be made in respect of this claim.

[18] The Applicant's further claim is a per diem of $200 for the two days he spent in Wellington in relation to engaging new counsel. It is difficult to see that the claim is one that flows from the actions of the lawyers, or that it is in the nature of a compensatory claim. No order is made in relation to this claim.

[19] Under the third head of claim the Applicant seeks compensation for stress and disruption to his affairs. The ability to compensate for anguish and distress in the lawyer client relationship has been recognised in a number of cases, most recently *Heslop v Cousins* [2007] 3 NZLR 679. The Court of Appeal has recognised that such distress damages are compensatory in nature: *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at para 171. Given the purposes of the Lawyers and Conveyancers Act (which in s 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown to have occurred.

[20] I accept that the Applicant has ensured a degree of stress that is the direct result of the actions of the practitioners. However, the Practitioners are not to blame for all of the stress and anxiety suffered by the Applicant and I also take into account that litigation is by its very nature stressful. The Applicant described his stress against the background of the nature of his litigation, namely a leaky home claim. Nevertheless the actions of the Practitioner undoubtedly added to that stress.

[21] There is, however, no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory: *Air NZ Ltd v Johnston* [1992] 1 ERNZ 700; [1992] 1 NZLR 159 (CA). Such orders should also be modest in nature. In all of the circumstances I consider that an award of $1,200 as compensation for anxiety and distress is appropriate. Such an order can be made pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act.

[22] In considering how this should be apportioned as between the practitioners, I have considered the finding of the Standards Committee that failures by P2 contributed to the events leading up to the retainer being terminated. The Committee found that P2 had disowned the payment arrangements that he had made with the Applicant, that he had been tardy and had failed to raise a protest in relation to the decision by P1 to end the retainer. These factors are relevant to how the compensation under this heading should be apportioned. Having given consideration to the circumstances leading to the wrongful termination I am of the view that the contribution by P2 as to how matters ended was material, notwithstanding that the final responsibility in deciding to end the retainer lay with P1. In my view the responsibilities should be reflected in equal contributions by the practitioners.

[23] Under the fourth head of claim the Applicant seeks compensation in the sum of $15,000 for disruption to his charity fund-raising website. The claim is quantified on the basis of the loss of projected revenue arising from the delay in launching the website. It is understood that the legal work required for the company website was almost complete when the retainer was terminated. However, the completion or otherwise of that work is not cited as the reason for the delay that has lead to this claim. This claim is based on the delays in launching the company's website due to the Applicant's absence from the project. The Applicant explained that he provides most of the company's funding and manpower, and that the delays arose due to his attention and energy being diverted away from the company in the search for new counsel. He wrote that his absence caused the ground work for launching website to have '*ground to a halt for three weeks'*, and then "*limped along with no significant progress*". The Applicant said that the launch was delayed by three months, causing a projected loss of $15,000.

[24] This is clearly not a loss that directly flows from the Practitioner conduct, and thus falls outside of the first limb of *Hadley v Baxendale* insofar as the loss claimed does not naturally flow from the wrongful termination of the retainer. The second limb of that case provides guidance on damages that are less direct. Under the second limb the question is whether the loss is one that was reasonably in the contemplation of both parties at the time of the contractual relationship arising. Applying that principle to the present circumstances the Applicant would need to demonstrate that the Practitioners or either of them had special knowledge at the time of entering the retainer that this loss would be a probable consequence of a wrongful termination of the retainer. There is no evidence that this is the case here. This claim is too remote and I can see no reasonable basis for compensation to be awarded. No order is made in respect of this claim.

Costs

[25] A costs order may be made against any Practitioner in favour of the Society where the LCRO considers "the proceedings were justified and it is just to do so". (s. 210(3)). Although it was not been necessary to consider the substantive complaint, the review application was justified and the Practitioners should contribute to the costs of conducting this review. The review was straight forward and the fact that both reviews were considered together and that the review hearing was conducted by telephone

contributed to reducing costs. This is reflected in a costs order of $800, with each Practitioner contributing to half of that sum.

Decision

Pursuant to section 211(1)(a) the decision of the Standards Committee is modified in respect of orders for compensation, but is otherwise confirmed.

Orders

The following orders are made pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006.

(1) P1 is ordered to pay the Applicant the sum of NZ 3,520 as compensation. (This is made up of legal fees (1,400), one day lost income and air travel ($1000 + $520) and distress $600). This payment is to be made within 30 days of the date of the decision.

(2) P2 is ordered to pay to the Applicant compensation for distress in the sum of $600. This payment is to be made within 30 days of the date of the decision.

The making of these orders does not affect the right (if any) of the Applicant to recover damages in respect of the same loss but any sum ordered to be paid under this section must be taken into account in assessing any damages.

The following orders are made pursuant to section 210 of the Lawyers and Conveyancers Act 2006

(3) P1 is to pay $400.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

(4) P2 is to pay $400.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 5th day of March 2010

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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:

Mr Wandsworth as Applicant
Mr Ddinbych and Mr Keith as Respondents
The Wellington Standards Committee
The New Zealand Law Society