LCRO 15/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the North Island Standards Committee
BETWEEN	**MR P U** Applicant
AND	**MR R W** Respondent

DECISION

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

Introduction

[1] Mr PU applies for a review of a decision by the [North Island] Standards Committee to uphold, in part, complaints made by Mr RW about Mr PU.

Background

[2] In July 2012 Mr RW purchased a home in [B Town]

[3] His real estate agent recommended Mr PU as a suitable lawyer to do the conveyancing work on the purchase.

[4] Mr RW's agent indicated that Mr PU's costs would be in the vicinity of $1,000.

[5] Mr RW contacted Mr PU to discuss fees. A fee of $1,100 was agreed.

[6] At a meeting held in Mr PU's office on 26 July 2012, there were further negotiations over the issue of fees. A fee for the transaction was then agreed at $1,250.00.

[7] The purchase was completed.

The Complaint and the Standards Committee decision

[8] In September 2012, Mr RW lodged a complaint with the Complaints Service of the New Zealand Law Society.

[9] In his letter of complaint he alleged:

a) Mr PU had initially quoted $1,400.00 for the work.
b) A price had then been agreed at $1,100.00.
c) On receiving advice from the lending bank that the bank was advancing $3,000.00 to the borrowers to assist with costs, Mr PU increased his fee to $1,450.00.
d) Mr PU had behaved in an aggressive manner, and had threatened to withdraw his services if his revised fee was not accepted.
e) After heated discussion, a fee of $1,250.00 was eventually agreed.

[10] The committee refined and narrowed the enquiry, which had been expansively expressed in the initial letter of complaint, to three issues:

i) Had Mr PU failed to treat Mr RW with respect?
ii) Had Mr PU misled Mr RW in respect to the fee to be charged?
iii) Had Mr PU failed to provide Mr RW with a letter of engagement as required by Rule 3.4 of the Conduct and Client Care Rules?

[11] In a decision delivered on 3 December 2012, the Standards Committee determined that there had been unsatisfactory conduct by Mr PU and ordered that he be censured and pay costs to the New Zealand Law Society, and compensation to Mr RW. The committee:

a) Dismissed complaint that Mr PU had failed to treat his client with courtesy and respect.
b) Held that Mr PU had engaged in conduct that was misleading, (Rule 11.1); and
c) Held that Mr PU had failed to provide his client with information in advance.

[12] Mr PU seeks a review of that decision.

Events subsequent to filing of Review Application

[13] On 24 July 2013 Mr RW advised the Legal Complaints Review Office that he wished to withdraw his complaint.

[14] Whilst Mr RW may not wish to have any further involvement with the complaint, that does not absolve this Office of obligation to continue with the review. Mr RW has had his complaint determined by the Standards Committee. It is Mr PU's application for review of that determination which is under consideration.

[15] Nor is it the case that a complainant's decision to take no part in the review process, or to have any further engagement in any matters arising from the complaint, can disturb a Committee's decision. The Committee's decision has consequences not only for the complainant, but also markedly for a practitioner against whom adverse findings have been made. The complaints process under the Lawyers and Conveyancers Act 2006 (the Act) is aimed at both resolving disputes between lawyers and their clients (and thereby serves a consumer protection purpose), and also seeks to ensure that lawyers adhere to their professional obligations, thereby assisting to maintain confidence in the provision of legal services.

Review on the papers

[16] With the consent of both parties, this review has been conducted on the papers pursuant to s 206 of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Mr PU's Position

[17] Mr PU challenged the committee's decision on the following grounds:

a) The committee lacked jurisdiction to review his fee, being that the account was less than $2,000.00.[1]
b) The committee erred in preferring Mr RW's version of events.
c) Mr RW agreed to a fee of $1,250.00, and confirmed that agreement in writing. The written agreement is conclusive.
d) Mr RW did not become a client, until he was actively engaged under a client engagement letter.
e) He had not misled his client regarding the fee to be charged nor failed to comply with this obligation to advise his client in advance as to the basis on which his fee would be charged.
f) The Committee's reasoning is "unfathomable" and "contrary to fairly elementary law".[2]

[1] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, Regulation 29(b).

Analysis

Regulation 29 (b)

[18] It is appropriate to initially address argument that the Committee lacked jurisdiction to consider the complaint, by operation of Regulation 29(b).[3]

[19] Regulation 29(b) provides that:

> If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs -...
>
> (b) relates to a fee that does not exceed $2,000, exclusive of goods and services tax.

[20] The Regulation establishes a monetary threshold ($2,000.00) below which complaints concerning fees cannot be determined unless there are "special circumstances".

[21] Setting a threshold ensures that time and effort is not expended in addressing disputes involving relatively modest sums.

[22] There is a distinction however between argument over the amount of a fee, and argument that a Practitioner has misled a client in respect to the fee to be charged.

[23] Whilst Mr RW's complaint concerning the fee charged incorporates an element of objection to the amount he was charged, the primary focus of his complaint is allegation that he was misled as to the fee he was to be charged, and coerced into accepting a fee that was higher than what he had been initially quoted.

[24] The committee's decision, quite properly, does not focus on quantum, but on the issue as to whether Mr PU misled his client. The committee was correct to adopt that approach. Enquiry into complaint that a practitioner has engaged in misleading or deceptive conduct is not thwarted by argument that the 29(b) threshold impedes enquiry.

Failure to discharge evidential burden

[25] Mr PU submits that the Standards Committee has accepted the complainant's version of events in preference to his own without reason to do so. This argument

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[2] Letter PU to LCRO (21 December 2012).
[3] Above n 1.

reduces to submission that the committee's findings run against the tide of the evidence.

[26] Mr PU describes the committee's decision to, in his words, "[accept] the complainant's version of events" as being indicative of what he describes as a failure to discharge the "evidential burden of proof on the balance of probabilities".[4]

[27] Framing the argument in this fashion is confusing. The committee's task is to consider the evidence and decide whether any, or all, of the complaints are proven on the balance of probabilities. A committee's decision to prefer the evidence of one party over another is not indicative of a failure to apply the requisite standard of proof.

[28] It is pertinent to note that when dealing with the element of complaint which required the committee to make credibility findings (allegation that Mr PU had failed to treat his client with courtesy and respect) the committee records that it had "no reason to accept the complainant's version of events over Mr PU's",[5] a finding indicative of a committee that had a proper sensibility to the need to balance contested evidence in a fair and even handed manner, and an appreciation of the caution that must be exercised when drawing conclusions on the basis of sharply conflicting oral evidence.

[29] I do not accept that the committee failed to understand its obligation to measure and weigh the evidence by reference to the appropriate legal standard.

[30] I agree with the committee's finding that there was insufficient evidence to support a conclusion that Mr PU had failed to treat his client with courtesy and respect.

[31] Mr PU objects to the manner in which the committee has framed its reasons in paragraph 9 of its decision. In that paragraph, the committee notes that "the Committee **expects** (emphasis added) that things may well have become a little heated at the meeting".

[32] Mr PU describes the reference to "expects" in that paragraph as "somewhat odious".[6] Concern over the use of the word prompts Mr PU to conclusion that the committee harbours suspicions, despite its findings, that he had behaved discourteously. Whilst it can be problematical to look beyond the words in the decision as reported, a commonsense interpretation of paragraph 9 can fairly lead to conclusion that the committee intended to record their position as "accepts" rather than "expects"

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[4] Above n 2 at [2].
[5] Standards Committee decision dated 3 December 2012 at [9].
[6] Above n 2 at [7].

that matters may have become a little heated at the meeting. “Expects” makes little sense in context.

[33] It would not be unreasonable for the committee to conclude that there may have been some tension at the meeting, particularly in the face of competing evidence as to what transpired at the meeting. It was agreed that there was vigorous discussion over the fees issue.

Complainant agreed to fee in writing and did not become a client until actively engaged by and under a client engagement letter

[34] It is not contested that Mr RW signed a letter of engagement which recorded his agreement to pay a fee of $1,250.00.

[35] Nor is it contested that prior to execution of that agreement, Mr PU had agreed to do the work for a fee of $1,100.

[36] Mr PU advances argument that the recording of the fee agreement in writing trumps any previous representations. He invokes the parol evidence rule in support of argument that the written agreement is conclusive. Mr PU contends that the contractual relationship between the parties is cemented at the time when the letter of engagement is signed, and all discussions, negotiations prior to that point fall within the realm of pre-contractual discussion which is not binding on either party:[7]

> As far as I am concerned, somebody is not my client until they are actively "engaged" by and under a client engagement letter. That is what the ordinary interpretation of the word "engaged" usually means. Conversely, if the client has not signed a client engagement letter a lawyer has no legal recourse against that client for unpaid legal fees.

[37] Mr PU explained that, unlike most practitioners, his policy was not to charge a client for work expended on a conveyancing file if the sale or purchase did not proceed. Any work undertaken on a conveyancing matter did not attract a charge until such time as the letter of engagement was completed.

[38] The committee was not persuaded by that argument, noting that it “does not accept Mr PU’s position with respect to this and considers that Mr PU cannot honestly believe it himself”.[8]

[39] It is relevant to examine the chronology of events from the time the agreement for purchase was finalised on 4 July 2012. It seems probable that Mr RW, on the

[7] Above n 2 at [5].
[8] Above n 5 at [11].

recommendation of his real estate agent, forwarded the agreement to Mr PU's office on that day. The events which followed are:

a) Agreement for purchase finalised on 4 July 2012. Sale and purchase agreement forwarded to Mr PU's office on that date.

b) Mr PU submits that Mr RW's first contact with him was to seek a quote, and that a fee of $1,395.00 was agreed.

c) Mr PU contends that he was subsequently contacted by Mr RW and advised that Mr RW did not wish to engage his services.

d) Mr RW made further contact with Mr PU. Mr PU reluctantly agrees to a fee of $1,100.00.

e) 17 July 2012 – Bank seeks clarification from Mr PU as to revised settlement date.

f) 23 July 2012 – Mr PU advises bank that he is in receipt of bank documents, and seeks clarification as to whether the bank is making contribution towards his client's legal fees. The bank confirms on that date that Mr RW is to be paid $3,000.00 cash to be deployed by the customer 'as he sees fit'.

g) Mr PU forwards email correspondence to Mr RW requesting him to attend at his office. An appointment is confirmed for 26 July 2012.

h) A letter of engagement is executed on 26 July 2012. That document records a fee of $1,450.00 for the transaction, but a handwritten amendment, signed by both parties, confirms agreement to a reduced fee of $1,250.00.

[40] The committee concluded that Mr PU had failed to comply with his obligation under Rule 3.4[9] which imposes obligation on a practitioner to provide a client, in advance, with information in writing on the principal aspect of client service, including the basis on which fees are to be charged.

[41] Mr PU's response to the suggestion that he failed to comply with his obligations under Rule 3.4 and that he mislead his client as to the amount being charged, is to

[9] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

argue that the relationship of client/practitioner only came into play when the engagement letter was signed.

[42] The committee did not accept that argument, and was correct not to do so.

[43] The question as to whether a retainer exists is to be determined objectively.

[44] In an earlier decision of this office it was noted that the test as to whether a retainer exists is met by an assessment as to whether a reasonable person observing the conduct of the parties would conclude that they intended the Lawyer-Client relationship to apply in respect of the transaction.[10]

[45] I do not accept that the relationship of lawyer and client came into existence on 26 July 2012, and that Mr PU's obligations to comply with Rule 3.4 were crystallised at that point.

[46] The transaction has all the hallmarks of a conventional conveyancing transaction. Mr PU receives a sale and purchase agreement, instructions to act from the client and an agreement is reached with respect to fees. Loan documents are forwarded. There are discussions with the bank regarding an amendment to the proposed settlement date. Mr PU arranges for the purchaser to attend at his office, and requests that he bring photo ID to that meeting, a necessary requirement for completing the transaction. He has prepared, prior to that meeting, a letter of engagement and a bill of costs.

[47] I pay particular regard to the fact that some days prior to executing the letter of engagement, Mr PU writes to Mr RW's bank and seeks clarification as to whether the bank was making contribution to the "client's legal fees".[11] An enquiry of that nature seeks disclosure of information confidential to Mr RW and would be inappropriate if Mr PU did not consider himself to be acting for Mr RW.

[48] Rule 3.4 requires a practitioner to provide information on the principal aspects of client service 'in advance'.

[49] The words 'in advance' are not defined in Rule 3.4, nor does it define 'in advance' of *what*, but a practical and sensible interpretation would take that to mean in advance of the services being provided to the client.

[50] It is not plausible for Mr PU to suggest that he had only confirmed his preparedness to undertake the work on the 26 July 2012. It would be approaching the

[10] LCRO 69/09
[11] PU email National Bank (23 July 2012).

improbable to suggest that Mr RW approached the meeting on 26 July on the basis of anything other than a clear understanding that Mr PU was acting for him. By this time, settlement date was imminent. It would have been unsettling for Mr RW to have been put into the position of having to engage another lawyer at this late stage.

[51] I agree with the committee's finding that Mr PU is in breach of Rule 3.4. Mr PU should have provided Mr RW with the information required under Rule 3.4, well in advance of the meeting that occurred on 26 July 2012.

Misleading client as to fee to be charged

[52] The final issue to be addressed is the question as to whether Mr PU breached Rule 11.1 which provides:

> A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

[53] It was the committee's view that Mr PU had agreed to set his fee at $1,100, and had then resiled from that position. I agree with that conclusion and see no grounds to depart from the committee's findings.

[54] Mr PU concedes in correspondence to the New Zealand Law Society of 25 October 2012 that he advised Mr RW that he would charge him a fee of $1100.00:[12]

> I said I would reduce the fee to $1,250 I think it was, then $1,200 and then $1100.00 on the basis that he kept on saying he could not afford any more than that. I think I reluctantly said something like "ok, I will do this for you this one time" or words to that effect but only because he said he could not afford any more.

[55] Mr PU may, on reflection, have felt that he had been ambushed in an unguarded moment and that he had been subjected to insistent negotiation which bordered on unpleasant haggling, but the fact remains he provided Mr RW with a firm undertaking to complete the work for an agreed price.

[56] In correspondence to the North Island Law Society Mr PU further confirms that he agreed to a fee of $1,100. He argues however that this was not a "genuine consensus and true agreement by me in all the circumstances".[13]

[57] Arguments advanced by Mr PU that he was not bound by the agreed fee are unconvincing. As an experienced Practitioner he should have appreciated that once a fee is agreed, he is obliged to honour it.

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[12] PU to NZ Law Society (25 October 2012) at [5].
[13] PU to[North Island] Law Society (8 November 2012), at [7].

[58] I reject argument that in the absence of evidence to support conclusion that Mr RW was coerced into accepting a revised fee, the conclusion must be drawn that Mr RW willingly agreed to the revised fee. Argument that Mr RW agreed to accept the fee, in the absence of evidence of coercion, does not inevitably lead to conclusion that he willingly consented to accept the revised fee, or was not misled.

[59] Mr PU's accounts of his discussions with Mr RW regarding fees gives clear indication that Mr PU perceived Mr RW to be a client who was acutely sensitive to cost issues, and a person who was prepared to resolutely negotiate the best possible price.

[60] Mr RW would have had the expectation when he attended the meeting at Mr PU's office that an issue of critical importance to him, how much he had to pay, had been settled. Mr PU had agreed a fee, and Mr RW had responded to Mr PU's office confirming agreement on the fee.

[61] Rule 11.1[14] directs that a lawyer must not engage in conduct that is misleading or deceptive, or likely to mislead or deceive on any aspect of the lawyer's practice. Confirming an agreed fee, then seeking to resile from that agreement, constitutes conduct which is likely to mislead a client.

Conclusion

[62] Having completed this review, I am in agreement with the decision of the Standards Committee, and see no grounds on which the decision should be disturbed.

Decision

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

Costs of Review

Where a finding of unsatisfactory conduct is made or upheld against a practitioner costs orders will usually be made against the practitioner in favour of the Society, in accordance with the Costs Orders Guidelines issued by this Office. In the circumstances it is appropriate that an Order for Costs should be imposed in respect of this review. Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Mr PU is

[14] Above n 9.

ordered to pay the sum of $700 to the New Zealand Law Society by way of costs, such sum to be paid no later than 30 September 2014.

DATED this 4th day of September 2014

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Rex Maidment
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 PU as the Applicant
Mr RW as the Respondent
The [North Island] Standards Committee
The New Zealand Law Society