

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee 4

BETWEEN

Ms BS
of Auckland

Applicant

AND

Mr YC
of Auckland

Respondent

DECISION

Background

[1] The Applicant consulted the Respondent initially in 2007 with regard to problems which she was experiencing with a previous boyfriend [D].

[2] In June 2008 she instructed the Respondent to commence action to obtain a Protection Order. Cost was an important factor for the Applicant and consequently, it was agreed that the work would be carried out by Ms [G], a solicitor employed in the Respondent's office whose charge out rate was less than the Respondent's.

[3] Notwithstanding that Ms [G] was primarily acting, the Respondent maintained close supervision of the work being carried out by her, and was aware at all times of what was occurring in respect of the matter.

[4] The Respondent advised the Applicant that the cost to obtain the Order would be in the region of \$1,500, but if difficulties were encountered, then she would be billed for additional work at the rate of \$150 per hour.

[5] The Respondent originally intended to apply for the Order on a 'without notice' basis and the application and affidavit were filed in June 2008. The Respondent's first bill was sent on 25 June 2008, and was for \$1,200 plus GST and disbursements.

[6] The Court declined to allow the matter to proceed in this way and ordered that [D] be served with the proceedings. This proved difficult, and it was ultimately necessary to obtain an order for substituted service.

[7] [D] served a notice of defence and affidavit in support, and it was therefore necessary to proceed to a short fixture hearing which was set down for 31 March 2009.

[8] All of this meant that the original estimate of \$1,500 was exceeded.

[9] Further affidavits were filed on behalf of the Applicant, the first being an updated affidavit filed in November 2008, and the second in response to [D's] affidavit in January 2009.

[10] The Protection Order was granted following the hearing on 31 March 2009 and the Respondent sent his final account on 2 April 2009. This was for the amount of \$3,500 plus GST and disbursements.

[11] After the initial bill was sent in June 2008, the Applicant had commenced paying the Respondent \$250 per month on account of costs. The June bill was cleared by November 2008. Around that time, the Applicant was made redundant and was unable to continue with her monthly payments.

[12] There is some disagreement between the parties as to the contact between them about the non-payment of the second account, but to some extent that is not relevant for these purposes.

[13] The Respondent's account remained unpaid, and in a final attempt to obtain payment, the Respondent sent an email to the Applicant's brother on 1 September 2009 in which he said:-

"Hi [S]

Hope all is well.

Sorry to bother you but I thought I'd mention to you first before going legal on [BS] outstanding invoice.

As you know, we did work for her in respect of securing a protection order. [BS] invoice remains outstanding despite several promises on her part to pay and lately her advice that she has been made redundant and that she can't afford to pay.

We of course need payment for the work we have done and in most circumstances get the money upfront before we even start work but because [BS] was known to us we did not enforce that policy.

Could you please see into this. I would appreciate it very much. As a last resort mate, we will have to issue court proceedings against her, bankruptcy etc., something that we don't really want to do.

Cheers

[YC]"

[14] When this was unsuccessful, the Respondent instructed debt collectors to recover the debt.

[15] The Applicant lodged her complaint on 27 October 2009.

The complaint and the Standards Committee decision

[16] In a letter dated 30 October 2009 to the Respondent, the Standards Committee identified that the complaint concerned overcharging and poor service.

[17] As the investigation proceeded, the Committee identified a further and predominant aspect of the complaint, which was, that by sending the email referred to in paragraph 13 above the Respondent had breached confidence by informing the Applicant's brother that she had sought a Protection Order and also by indicating that she was in financial difficulties. She also considered that the email contained an element of threat to both her and her family, in that the Respondent advises in the email that if the account was not paid, he would be seeking to bankrupt the Applicant.

[18] After seeking further comment from both parties about the disclosure of confidential information, and conducting a hearing on the papers, the Standards Committee issued its decision. It determined, pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 (Lawyers and Conveyancers Act) that no further action would be taken.

The application for review

[19] The Applicant was not satisfied with that decision and has applied for a review thereof.

[20] In her application for review, she emphasises that the Respondent had disclosed to her brother the fact that she had sought a Protection Order, and also indicated that she may be in financial difficulties.

[21] She considers this to be unprofessional and a breach of confidentiality. She also queries how the Committee came to the view that it was highly unlikely that the Applicant's brother did not know of the general nature of the Respondent's instructions.

[22] With regard to the Respondent's costs, she advises that she had been advised that the initial estimate of \$1,500 was a standard fee for obtaining a Protection Order, and that without details of the Respondent's time records she is unable to provide evidence of what she considers to be overcharging.

The review

[23] The Standards Committee identified the elements of the Applicant's complaint as being:

- Breach of confidentiality.
- Overcharging.
- Poor service

[24] In addition to these matters, I consider that the circumstances surrounding the giving and exceeding of the estimate should be addressed as a separate element of the complaint.

Breach of confidentiality

[25] Rule 8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules) provides that "a lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship".

[26] In addition, a lawyer has a fiduciary duty towards his client the features of which "include an imbalance of power, the vulnerability of one party, a relationship of trust and confidence, and an assumption by one party of a duty to act in the other's interests". (*Ethics, Professional Responsibility and the Lawyer*, 2nd Edition, Duncan Webb, para 5.3.2). This duty remains whether or not a lawyer's bills are unpaid.

[27] I have set out above the content of the email sent by the Respondent to the Applicant's brother in full. The purpose of the email was to enlist the brother's assistance in having the outstanding account paid.

[28] The Applicant has taken strong objection to this and makes the following points:-

- When she instructed the Respondent she made it clear that her family was not to be involved, as this was her personal matter.
- At no time was her brother ever involved by her in her dealings with the Respondent.
- When her brother received text messages from [D], she did not reveal the full extent of her issues with him and instead dealt with them herself.
- By sending the email, the Respondent has revealed to her brother that she had sought a Protection Order.
- The email has also revealed to her brother the possibility that she was in financial difficulties.
- The revelations in the email have caused her mother, in particular, considerable worry.

[29] In his letter to the Complaints Service dated 10 June 2010, the Respondent states that the Applicant's brother, together with members of her extended family were aware at all times that he was acting for the Applicant in her attempt to get a Protection Order against [D]. He does not say how they were aware of this, but later in that letter states that her brother and family had been aware for a long time that the Applicant was being harassed by [D]. He says that it was only proper to infer that the family was very supportive of her attempts to put the harassment to an end.

[30] In support of this, the Respondent has referred to paragraphs in the Applicant's affidavit dated 17 November 2008, which he says indicates that both the Applicant's brother and mother already had knowledge of the fact that she was seeking protection from [D].

[31] In particular, he refers to paragraphs 8, 9, 15 and 18 of the affidavit. Having carefully considered these, it is only the content of para 15 which supports the Respondent's contention.

[32] In that paragraph, the Applicant deposes that in mid 2008, [D's] mother had called her mother "regarding my taking the matter with [D] to Court and that [D's] mother explained that she had tried to tell [D] that what he was doing was wrong, but that he would not listen to her." It is easy to see that the Respondent would assume from this that the Applicant's mother was fully acquainted with the steps that the Applicant was taking. However, that would be an assumption only and it was for the

Applicant to make the decision as to what she revealed to her family, not the Respondent.

[33] The Applicant's brother provided a statement to the Standards Committee in which he stated that he has had no involvement in the case in respect of which the Applicant had instructed the Respondent.

[34] He provided a second letter which accompanied the application for review. In that letter he recounts receiving text messages from someone called "Bobby". He knew that this was a former friend of his sister's and states that the messages were "disturbing." However, when he asked his sister what was happening, she declined to take him into her confidence and indicated that she would deal with the matter herself. He says that she did not want other people getting involved in her personal matters.

[35] He goes on to say that some months later he consulted the Respondent with regard to some property matters, at which time the Respondent asked whether "Bobby" was still harassing the Applicant. He replied by noting that he knew nothing other than that "Bobby" had sent him text messages. It was at that stage, states the brother, that the Respondent revealed the Applicant had obtained a Protection Order. Prior to this, the brother was unaware of the exact nature of the steps being taken by the Applicant with regard to her difficulties with [D] (Bobby). He did not discuss this with the Applicant as he knew that she did not want him to be involved.

[36] It seems to me that the Respondent may have drawn incorrect inferences as to the state of knowledge of the Applicant's family, and that it was not until he advised the applicant's brother that the Applicant has obtained a protection Order, that the brother became aware of this. Given that the Applicant had specifically advised that she did not want her family involved with this matter, the Respondent should have been extra diligent to ensure that any information relating to the steps being taken by him on behalf of the Applicant was not revealed by him. In this regard, it could be said that the Respondent has been careless of the Applicant's right to confidentiality.

[37] The other information provided in the email is that the Applicant had advised him that she could not afford to pay his outstanding account due to her redundancy. Although this information was provided as a reason why his bill had not been paid, it is still information which has been provided to the Respondent in the course of a professional relationship which attracts the duty of confidentiality.

[38] The fact that the bill was outstanding is not confidential information belonging to the Applicant, and the Respondent was at liberty to make this known to the brother,

and even to seek his assistance in obtaining payment. What he was not at liberty to do, was to reveal the nature of the work that he had undertaken, or that the Applicant had advised that she was unable to pay because of her redundancy, without being sure that the recipient of the email was independently aware of this.

[39] The threat of bankruptcy in the email to the brother, rather than to the Applicant herself, is of course separate from the issue of confidentiality and I take this no further, other than to note that it was inappropriate for this to be included in the email.

[40] The Standards Committee determined that there was no breach of confidentiality as the materials supplied to the Committee indicated that it was highly unlikely that the Applicant's brother did not know of the general nature of the Respondent's instructions. To reveal that a client has sought and obtained a Protection Order is, in my view, more than an indication of the general nature of the Respondent's instructions. It is advice as to a specific action taken by the Applicant, and is an indication that the Applicant was sufficiently concerned to consider that there was a need to take this step.

[41] Having considered the material provided to the Committee in some detail, I have come to a different view to the Committee and reached the conclusion that the Respondent has breached the duty of confidence owed to the Applicant. This is a breach of Rule 8 of the Client Care Rules. It follows therefore that this conduct constitutes unsatisfactory conduct by reference to section 12(c) of the Lawyers and Conveyancers Act which provides that conduct which consists of a breach of the Act or any of the regulations or practice rules made under the Act, constitutes unsatisfactory conduct.

Overcharging

[42] At my request, the Respondent supplied the time-sheet records relating to this file. These are manual records, and the Respondent advised that each file had a time sheet stapled to the inside front cover to be completed by the author as work was carried out on the file. The Respondent explained that this is the reason that the time sheet did not have any details of the client or matter recorded on it and I accept that explanation.

[43] The time recorded on this matter falls into two distinct periods of time. The first period runs from 9 June 2008 to 23 June 2008. During that time the application for the Protection Order and supporting affidavit were prepared and lodged. This resulted in a bill of \$1,200 plus GST and disbursements which was rendered on 25 June 2008.

[44] The Standards Committee did not consider that there was any evidence of overcharging, and I agree with that in relation to this bill. In addition, the period of time covered by this bill pre-dates the commencement of the Lawyers and Conveyancers Act. The relevance of this is that by reason of section 351 of that Act, any conduct relating to charging would only attract an adverse finding if it could be said to constitute conduct unbecoming in terms of sections 106 or 112 of the Law Practitioners Act 1982. There is no need to expand on this as I concur with the Standards Committee decision that there is no overcharging in this regard.

[45] The second period of time recorded is from 16 January 2009 to 31 March 2009. However, in the course of the hearing, the Respondent advised that in between the two periods of time which have been recorded, and therefore billed, there was an application for substituted service and it would also appear that an affidavit which has been supplied to the Committee dated 17 November 2008 was concluded. Additional attendances were also required as set out in the submissions prepared by Ms [G] for the hearing. No time seems to have been recorded for these matters and consequently they have not been included in the billing.

[46] These omissions could be considered to compensate for the entries where somewhat longer was taken to complete tasks than would be considered normal. I also take note of the fact that Ms [G's] hourly rate of \$150 is less than would be charged by a person who completes the task in a lesser period of time.

[47] The second period of time recorded relates to dealing with the defence filed by [D]. This necessitated the completion of a further affidavit by the Respondent. The time sheets also show that some time was spent in preparing for the hearing, and completing submissions in readiness for that. The hearing itself occupied virtually the whole of the day on the 31st March, although some of that time was waiting time. The standard of the work completed by Ms [G] would appear to be entirely satisfactory and achieved the desired result. There can be no suggestion that the quality of the work was anything other than competent. This fact, together with the fact that some of the time spent on the file has not been recorded, supports the decision of the Standards Committee that there is nothing that would lead either the Committee or myself to consider that the Applicant has been overcharged. Comments to the contrary by other persons who the Applicant has talked to about this matter should be viewed with some caution, as it is often the fact that such persons are not fully acquainted with all of the facts of the particular case.

The estimate of costs

[48] When the Applicant first consulted the Respondent she was advised that the cost of obtaining a Protection Order if it was straightforward would be in the region of \$1,500. If the matter had proceeded on a 'without notice' basis as originally intended, this would more than likely have been reasonably close to the mark. The bill rendered on 25 June 2008 represented the work required to get the matter before the Court on a 'without notice' basis, and the Court hearing time would have been much reduced.

[49] The Respondent had made it clear to the Applicant that the estimated cost would be exceeded if matters turned out differently than anticipated and extra time would be charged at \$150 per hour. As soon as the Court declined to agree that the matter should proceed on a 'without notice' basis extra costs were going to be incurred. It was necessary to serve [D] with the proceedings, and, as it turned out, this involved an application for substituted service. Following receipt of the notice of defence and affidavit filed by [D], it was then necessary to prepare and file a further affidavit by the Applicant. The fact that [D] defended the application also made for an extended hearing.

[50] The Respondent did not specifically advise the Applicant that the estimate had been exceeded, or provide a new estimate. However, she had been advised that the work was being carried out at \$150 per hour. Nevertheless, it would certainly have been preferable for her to have been specifically advised of the cost overrun.

[51] The Applicant has advised that she asked Ms [G] for an updated estimate, but was told that she would receive a final account when the matter was complete. The timing of this request is relevant. Rule 9.4 of the Client Care Rules provides that "a lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded. At my request, the Applicant has provided the email in which she made the request. That email is dated Friday 27 March 2009, four days (which included a weekend) before the hearing. The response from Ms [G] was that "we will give you the final invoice after the hearing as we will not be able to predict how long the hearing will take." It would have been preferable for Ms [G] to advise the Applicant of the costs incurred to date, leaving only the cost of the hearing to be ascertained. However, given that the request was made on Friday, with the Court hearing to be on the following Tuesday, it would be unreasonable to find that Ms [G] had breached the requirements of rule 9.4. In any event, I note that this complaint is a complaint against the Respondent, Mr YC, not Ms [G], and for that reason also, will take this matter no further.

Poor Service

[51] I have taken the Applicant's reference to poor service as relating to the failure by the Respondent to provide a breakdown of his costs as requested by the Applicant. This is largely addressed in other parts of this decision. However, in case the Applicant's complaint relates to any other aspects of the service provided to her by Ms [G] and the Respondent, it is appropriate to record the fact that I can find no evidence of this. In fact, to the contrary, the competency of the work carried out by Ms [G] (and to the extent that the Respondent was involved) is entirely satisfactory. The matter was not without some difficulties but the documentation prepared and filed by Ms [G] and the Respondent achieved the desired outcome. In this regard, I concur with the decision of the Standards Committee.

Penalty

[52] I have found that the Respondent's conduct constitutes unsatisfactory conduct in respect of the breach of the general duty of confidence and specifically contrary to the provisions of rule 8 of the Client Care Rules. The breach was limited. In the circumstances, I consider that a censure is the appropriate penalty and there is no need for anything further.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified to the extent that the conduct of the Respondent constitutes unsatisfactory conduct with regard to the breach of confidentiality for the reasons provided in paragraphs 25 to 41 above. In all other respects the decision of the Standards Committee is confirmed.

Orders

Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006, the Respondent is censured.

Costs

Where an application for review is upheld, there will be an order for costs made against the Respondent in terms of the Guidelines issued by this Office. In this review the decision of the Standards Committee has been modified. In the circumstances, it is

appropriate that there should be an Order for costs based on the extent to which the Standards Committee decision has been modified. The Respondent is therefore ordered to pay the sum of \$400 on account of the costs of this review, being one third of the amount that would be ordered where a review reverses the Standards Committee decision in full. This amount is to be paid to the New Zealand Law Society within thirty days of the date of this decision.

DATED this 13th day of May 2011

Owen Vaughan
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 BS as the Applicant
Mr YC as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society