

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Southland Standards Committee

BETWEEN

ABV

South Island

Applicant

AND

VE

South Island

Respondent

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

DECISION

[1] This is an application for review of a decision of the Southland Standards Committee declining to uphold a complaint by ABV (the Company) against VE (the Practitioner). The Standards Committee declined to uphold the complaint. The Company seeks review of that decision.

Background

[2] The Company and a 3rd party considered entering into a business arrangement whereby the Company would extract minerals from land owned by the 3rd party. The Company's lawyer drew up an "agreement granting profit a prendre - quarry rights" which included a clause whereby the Company agreed to pay the 3rd party's solicitor's reasonable costs associated with that agreement, namely the costs of the Practitioner who acted for the 3rd party.

[3] Some negotiations went on between the lawyers on behalf of their respective clients and the agreement was eventually signed. However before it was released to the Company's solicitor the Company was taken aback to receive from the Practitioner a draft share option deed. This draft contemplated the 3rd party obtaining an option to buy shares in the Company and also to be able to appoint two directors to its board.

[4] In a letter to the Company's solicitor dated 30 November 2010 the Practitioner's office advised that the quarry access agreement had been signed (and a copy emailed direct to the Company). A note of the Practitioner's costs was enclosed totalling \$4,080.64 including GST and office expenses.

[5] The Company was surprised at the size of the bill and sought and obtained a detailed breakdown. On 22 March 2011 the Company lodged complaints with the NZ Law Society (NZLS). The complaints concerned the size of the bill, an incorrect invoice reference, and the alleged "coercion" of the 3rd party by the Practitioner. The outcome sought by the Company was release of the signed quarry access agreement and the waiving of the fees charged by the Practitioner.

[6] In his response to the complaints the Practitioner explained that the fees had been incorrectly apportioned and acknowledged that the costs charged to the Company were wrong. This was amended to \$1,500.00 plus GST and office expenses, making a total bill of \$1,789.14. An apology was offered to the Company for the error. The incorrect reference at the top of the bill of costs was also acknowledged to be an error.

[7] The Practitioner denied that he had "coerced" the Company, stating, "*we gave advice to our client as to how best to get advantage from the agreement with [the Company]. Our actions were similar to those of lawyers throughout New Zealand when negotiating an agreement*". In conclusion the Practitioner submitted that there was no professional misconduct in the three issues raised by the Company in its complaint.

[8] The Company commented on the Practitioner's response, essentially rejecting the Practitioner's explanation of simple error, alleging that the charging had been deliberate. It considered the amended fee was excessive. The Company also rejected the Practitioner's denial concerning coercion, adding that the Practitioner's actions placed its business in jeopardy and also failed to be of benefit to his own client. The Company considered all fees should be waived so all fees owing should be waived.

Standards Committee Decision

[9] The Standards Committee resolved to take no further action on the complaints. The Committee acknowledged that the original bill was wrong but was now rectified and an apology made. Its view was that the Practitioner "*made a simple error with regard to the initial invoice reference being incorrect*". The Committee did not accept the allegation that the Practitioner knowingly billed the wrong company. The Committee noted that the Practitioner was being consulted by the 3rd party on a number of issues relating to mining, and accepted the Practitioner's explanation for the incorrect billing of the Applicant. The Committee found no evidence to suggest there had been gross professional misconduct as alleged in this matter.

[10] The Committee did not agree with the Company's allegation of coercion by the Practitioner, instead accepting the Practitioner's explanation that the firm was attempting to obtain enhanced benefits for its client.

[11] Finally the Committee noted that the reduced invoice did not exceed \$2,000.00 and as there was "no evidence of unsatisfactory conduct or any special circumstances that warrant(ed) further investigation" it found it had "no jurisdiction to question the amount of the account", and accordingly resolved pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on the complaint.

Application for Review

[12] The ground for review referred to concept of 'unsatisfactory conduct' with reference to a failure to observe "*a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.*" The Company considered that the Practitioner's conduct, even if it comprised errors, fell short of the expected standard. The Company reiterated the essential complaints and the reason why it considered that the Practitioner had failed to meet a satisfactory professional standard.

[13] The parties have consented pursuant to Section 206 of the Act to this review being conducted on the papers, that is, based on all of the material provided in the Standards Committee file and information provided for the Review.

Discussion

[14] It is the task of this office to review decisions made by Standards Committee's on complaints. This involves consideration of whether the decision appears to be one that the Committee could reasonably have made on the evidence.

[15] The first complaint concerned the bill which was considered to be excessive. The Committee accepted the Practitioner's explanation concerning errors in the apportionment of the fees and other errors in the information as had been set out. By implication the Committee accepted that there had been a genuine mistake that was rectified. The Company doubted this explanation.

[16] When confronted with opposing views about a matter, it is not always obvious how to resolve such conflict. The Company alleges improper motive on the part of the Practitioner. However, in the absence of any other evidence to resolve the matter there could be no proper basis for a Committee to have reached any other conclusion. The circumstances of the Practitioner's explanation were clearly considered plausible by the Committee, and I see no basis for criticising the Committee in this matter.

[17] The result of the amended bill was that it fell below the statutory threshold for review. Regulation 29 of the (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that Standards Committees must not deal with the complaint about a bill of costs not exceeding \$2,000.00, exclusive of goods and services tax unless there exist any "special circumstances" that would justify dealing with the complaint. The Committee concluded that there was "no evidence of unsatisfactory conduct" making it clear that it did not consider any special circumstances existed in this case.

[18] Concerning the alleged "coercion", the Committee accepted the Practitioner's explanation that the firm was attempting to obtain enhanced benefits for its client over and above any royalties payable under the Access Agreement/Profit a Prendre and that this did not amount to coercion of the Company.

[19] In doing so finding the Committee was confirming the fundamental obligation of all lawyers to promote and protect the interests of their clients. It would be difficult to criticise a lawyer for giving full advice to his client regarding all relevant aspects of the proposed business venture between his client and a third party. The Practitioner owes no duty to the third party. That the advice may have gone further than the Company expected would be the case is not in itself a reason to criticise the Practitioner.

[20] Although the Company considers that the Practitioner's conduct has had a negative impact on the friendship or relationship between the Company and the 3rd party, this does not appear to be supported by the 3rd party whose letter in support of the Practitioner was forwarded to the Company.

[21] Materially, the Practitioner's conduct is to be assessed in terms of the accepted professional standards that a lawyer must meet. The assessment about whether that standard had been breached is made in the first instance by a Standards Committees comprising of the lawyer's peers and also with the input of a lay member. On review a Committee's decision would need to be shown as wrong before it would be justifiable to interfere with it.

[22] In this case I can see no basis for criticising the views reached by the Standards Committee. The application for review is declined.

Decision

Pursuant to section 211(1) of the Lawyers and Conveyancers Act 2006 the decision of the Southland Standards Committee dated 13 June 2011 is confirmed.

DATED this 23rd day of September 2011

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:

ABV as the Applicant
VE as the Respondent
VD as the Respondent's Counsel
Southland Standards Committee
The New Zealand Law Society