

**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

**BETWEEN**

**ZN**

Applicant

**AND**

**CH**

Respondent

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

**DECISION**

**Introduction**

[1] Ms ZN has applied for a review of the decision by the [Area] Standards Committee in which the Standards Committee determined to take no further action in respect of Ms ZN's fees complaint against Mr CH.

**Background**

[2] Ms ZN engaged Mr CH to act for her and her daughter, and subsequently a company which they formed, concerning the purchase and conveyance of a residential property.

[3] Ms ZN initially approached Mr CH prior to the auction at which she purchased the above mentioned property. The purchase agreement allowed for a nomination. Ms ZN and her daughter incorporated a company which subsequently was nominated as "buyer". The purchase also involved bank finance and a refinance, such that a

somewhat straightforward residential property purchase enlarged into a company purchase with added security requirements.

### **The complaint and the Standards Committee decision**

[4] Ms ZN complained on 14 May 2014 to the New Zealand Law Society that:

- Mr CH did not provide her with a letter of engagement.
- Failed to advise her when the fee estimate was exceeded.
- Charged a fee that was excessive.

[5] In its decision delivered on 12 June 2014 the Standards Committee determined to take no further action in respect to Ms ZN's complaint.

[6] It was the view of the Committee that the fees charged were fair and reasonable for the work undertaken particularly when taking into account the additional work completed that had not been anticipated at commencement.

[7] The Committee noted that when the fee reduction offered to Ms ZN by Mr CH was taken into account, the fee charged was approximate to the estimate given.

[8] The Committee considered it significant that Ms ZN was made aware of the changing nature of her instructions to Mr CH and the resultant variation to the fee estimate prior to the receipt of Mr CH's invoice.

### **Application for Review**

[9] Ms ZN filed her application to review the Standards Committee decision on 15 July 2014. She submits that:

- (a) The fee estimate given by Mr CH should have included GST and disbursements.
- (b) She did not receive a letter of engagement or other client care service information at commencement.
- (c) Mr CH did not provide an estimate of fees or clarify his terms of engagement on her first meeting with him on 11 April 2014.
- (d) Fee estimates provided were represented as being inclusive of GST and disbursements.

[10] In response, Mr CH submits that:

- It is his invariable practice to give clients a copy of his engagement terms.
- He provided Ms ZN with a letter of engagement.
- The conveyancing transaction evolved from an otherwise straightforward house purchase by Ms ZN to a more complex transaction.
- Ms ZN worked in an accountants office. She was familiar with the process involved in the providing of estimates, and aware that estimates would invariably be exceeded if additional work was required from that initially anticipated.

### **Role of the Legal Complaints Review Officer on review**

[11] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.<sup>1</sup>

### **Review on the papers**

[12] The parties have consented to this review being undertaken on the papers pursuant to s 206 of the Lawyers and Conveyancers Act 2006 (the Act). This process allows a 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.

### **Analysis**

#### *Letter of engagement*

[13] Ms ZN contends that Mr CH failed to provide her with a letter of engagement at commencement.

[14] Rule 3.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) directs that a lawyer must, in advance, provide a client with information on the principle aspects of client service, including the basis upon which fees will be charged, when payment of fees is to be made, and whether fees may be deducted from funds held in trust on behalf of the client.

---

<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[15] The objective that compliance with Rule 3.4 sets out to achieve is compellingly clear. Lawyers are required to inform their clients, "in advance", how much they will be charging for the services.

[16] Mr CH has recollection that he did provide Ms ZN with a letter of engagement, and notes that it was his practice to require clients to sign the first page of the engagement letter. He would retain a copy for his records.

[17] Mr CH was unable to retrieve a copy of the engagement letter. He concedes that it appears to be the case that he had not kept a copy on his file.

[18] The desirability of practitioners ensuring meticulous compliance with the obligations imposed under Rule 3.1, are well illustrated by the concerns that Ms ZN has raised.

[19] Ms ZN's complaints that she was not provided with an estimate of fees at the outset, and that she failed to understand that the fee quoted did not include disbursement costs, could likely be quickly put to rest if Mr CH had been able to produce a copy of the letter of engagement which he recalls having provided to Ms ZN.

[20] I would expect that a practitioner of Mr CH's experience would have, when providing his fee estimate, also advised the approximate disbursement costs that would be incurred.

[21] The Standards Committee concluded that Ms ZN was made aware, during the course of the transaction, of the fee that was to be charged and concluded that Ms ZN was aware of the terms upon which she had engaged Mr CH.

[22] I do not disagree with the Committee's decision to decline to make an adverse disciplinary finding against Mr CH in respect to complaint that he failed to provide a letter of engagement, but disagree with the reasoning followed in reaching that conclusion.

[23] The Committee accepts Mr CH's submission that it was his long standing practice to provide clients with a letter of engagement, but argument as to established practice does not go any distance to verifying that Mr CH complied with his obligations in this case.

[24] The fact that he is unable to produce a file copy of his engagement letter must present as powerful evidence to support Ms ZN's contention that she was never given an engagement letter.

[25] When challenged by Ms ZN as to the basis for authority to remove funds from her account, Mr CH provided Ms ZN with his standard client care engagement letter, which included an authority for deduction of funds. This, in my view, simply reinforces the importance of Mr CH ensuring that Ms ZN did receive a letter of engagement. That engagement letter not only provided information on the services to be provided, and the fees to be charged, but also importantly, the necessary authority for deduction of fees.

[26] Whilst I am of the view that it is probable, on this occasion, that Mr CH failed to fulfil his obligations to provide a letter of engagement and likely committed a breach of Rule 3.4, I do not consider it appropriate that a disciplinary sanction should follow.

[27] A breach of a Rule, if established, does not automatically attract a disciplinary sanction.

[28] Importantly, the legislation which governs the disciplinary process,<sup>2</sup> does not direct that a breach of the Rules must result in a penalty being imposed. That approach, if followed, would overlay the disciplinary process with a rigidity and inflexibility that is not sanctioned by the legislation.

[29] After receiving a complaint, the Standards Committee may, at first step, exercise its discretion to take no action, or no further action on a complaint.<sup>3</sup>

[30] If the Committee does decide to proceed with inquiry into a complaint, after completing its investigation, the Committee may elect to take no further action with regard to the complaint or any matter or issue involved in the complaint.<sup>4</sup>

[31] In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings.<sup>5</sup>

[32] In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>6</sup> the Court considered the scope of the discretion vested in a Standards Committee and noted that “there are no hard and fast rules and that the discretion vested in the

---

<sup>2</sup> Lawyers and Conveyancers Act 2006.

<sup>3</sup> Section 138.

<sup>4</sup> Section 152(1).

<sup>5</sup> Section 211(1)(6).

<sup>6</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401, [2012] NZAR 1071.

Standards Committee to decide what action (if any) to take is to be exercised flexibly as appropriate to the circumstances".<sup>7</sup>

[33] The seriousness of the conduct is a significant factor when assessing appropriate penalty. Offences at the more serious end of the spectrum, for example breaches of undertakings or failing to comply with trust accounting regulations, will generally attract a professional sanction even in the presence of factors which present as exculpatory for the practitioner.

[34] In determining not to impose a disciplinary sanction, I pay particular regard to the following factors:

- The first meeting between Mr CH and Ms ZN took place in the context of Ms ZN seeking advice on a property she was proposing to purchase at auction.
- There was uncertainty as to whether Mr CH's services would be needed to be engaged.
- Ms ZN's initial instructions related solely to the straightforward purchase of a residential property. Those instructions changed significantly as matters progressed.
- There is clear evidence that Mr CH discussed his revised fee with Ms ZN when circumstances changed and it became apparent that significant additional work would need to be done.
- Ms ZN was not an unsophisticated purchaser. She had some experience in the sale and purchase of properties. I consider it probable that she would have been aware that a conveyancing transaction attracts significant disbursement costs.

#### *Fees*

[35] The Standards Committee's view was that the fee charged by Mr CH was fair and reasonable for the legal work he undertook. None of the material I have considered persuades me to depart from the Committee's findings.

[36] Standards Committees are comprised of practicing lawyers, familiar with the general area of law that is the subject of the complaint. A Standards Committee also

---

<sup>7</sup> Above n 4 at [48] [later corrected to n 6].

includes a lay-member. It is common practice for Standards Committees to include amongst its panel, members who have a particular knowledge and experience in the area of the law which is encompassed by the complaint.

[37] I also agree with the Committee's finding that the relatively modest increase in fees charged by Mr CH did not constitute an unreasonable variation to the fee estimate which was initially accepted by Ms ZN.

[38] I consider it probable that Ms ZN understood that the estimate of fees provided did not include GST and disbursement costs, but acknowledge that it would have been best practice for any uncertainty to have been addressed by the providing of an appropriate letter of engagement.

[39] I do not consider that Mr CH can be fairly criticised for revising his estimate. There was an evolving aspect to the transaction which would have made it difficult for him to have predicted the extent of the work that he was ultimately required to complete.

[40] I see no evidence to persuade me to depart from the Committee's decision to take no further action on the complaints.

### **Decision**

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

**DATED** this 19<sup>th</sup> day of December 2014

---

**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:

ZN as the Applicant  
CH as the Respondent  
The [Area] Standards Committee  
The New Zealand Law Society