

LCRO 17/2014

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

SM

Applicant

AND

TR and DH

Respondents

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

DECISION

Introduction

[1] SM has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of its complaint concerning the conduct of Mr DH and Mr TR (the lawyers). The conduct complained of related to the release of files when the retainer had concluded, and the fees the lawyers had charged.

Background

[2] SM was the plaintiff in litigation before the High Court that commenced in 2009 against DC and HR (the proceeding).

[3] In January 2010 SM terminated its retainer with its then-current lawyer, Mr D, and instructed the lawyers, who provided regulated services in relation to the litigation until May 2011.

[4] The lawyers' letter of engagement to SM is dated 3 February 2010. It refers to the work the lawyers will do, describing it as advising and representing SM in relation to the claim. The letter says the lawyers were not in a position to provide an estimate at that stage, but advised that SM could request an estimate at any time and if possible the lawyers would provide one. The terms of engagement attached to the letter of engagement include reference to the way fees will be calculated and charged, and explains that any applicable estimate, fixed fee, or hourly rates will be included in the letter of engagement. Mr DH says no estimate was requested or provided.

[5] In May 2011 SM terminated the retainer apparently because it had concerns over costs and the likelihood of recovery from the defendants, and changed lawyers. When Mr DH's fees were paid, he passed the files on to the new lawyers. SM then attempted to renegotiate the fee without success.

Complaint

[6] In May 2013 SM laid a complaint to the New Zealand Law Society Complaints Service (NZLS) alleging four bills dated 26 February, 31 March and 29 April 2010, and 12 May 2011 for fees totalling \$22,250 were excessive for the services provided. SM requested a refund of \$18,871.07 from the lawyers and in subsequent correspondence questioned the integrity of the lawyers' timesheets and objected to the lawyers having taken time to become familiar with the file when they took over conduct of the proceeding from the former lawyer.

Lawyers' Response

[7] The lawyers say the proceeding involved complex causes of action and a substantial number of documents to be sifted and reviewed in preparation for trial. Discovery was not straight forward and not complete when they took over conduct of the matter. Witnesses had not been briefed, nor evidence prepared. The matter was nowhere near ready for trial. Any suggestion that the timesheets may not be an accurate record is adamantly denied.

[8] The lawyers observe that, other than the last bill, SM paid the fees without comment as the matter progressed, and suggest SM underestimated the time that had to be devoted to the matter to provide the necessary legal services in a diligent and competent way. The lawyers say they wrote off time they value at \$8,765 in an effort to ensure the fee was reasonable given the prospect the defendants would be unable to pay. They say they claimed a lien, then released the files when their fees were paid. Any wrongdoing is denied.

Standards Committee Decision

[9] The Committee decided it lacked jurisdiction to consider fees billed more than two years before the date of the complaint, based on the restrictions imposed by reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations). It considered the last of the four invoices and concluded it was fair and reasonable. The Committee also considered the other three invoices over which it considered it lacked jurisdiction, and concluded that they also appeared fair and reasonable for the services provided.

[10] SM contended the matter was ready for trial when the lawyers were first instructed in January 2010, and they could therefore not justify charging a fee for any services provided preparing for trial. The Committee did not accept that, formed the view the lawyers had probably told SM they would have to do work and had acted on instructions.

[11] SM alleged the firm had not provided time records in support of the invoices, and had altered the time transactions before providing them. The Committee did not accept either allegation was proven.

[12] SM contended the firm had capped its fee at \$25,000, and said the lawyers had undertaken only to do work on confirmed instructions from Mr HR of SM. The Committee concluded this aspect of the complaint was vague and was not supported by evidence.

[13] SM said the lawyers had refused to hand materials over to its new lawyers unless their outstanding fees were paid. The Committee considered the lawyers' conduct complied with the Rules.

[14] As no conduct was found to have raised disciplinary concern the Committee decided, pursuant to s 138(2) that further action was not necessary or appropriate.

Application for review

[15] SM applied for a review on the grounds:

- (a) the lawyers capped their fee at \$25,000;
- (b) all the fees should be considered on review;
- (c) Mr DH is a poor time manager;

- (d) the lawyers were not instructed to provide any services from 11 May 2011 onwards because Mr HR had terminated the retainer with SM;
- (e) the lawyers should refund the fees and GST paid for invoices issued between 26 February 2010 and 12 May 2011;
- (f) the lawyers did work without obtaining Mr HR's specific instructions;
- (g) the lawyers' approach was wrong after it became clear the defendants may be unable to pay if judgment was entered against them;
- (h) the lawyers amended SM's claim without instructions; and
- (i) Mr HR did not receive information or have discussions as the lawyers contend.

Lawyers Reply

[16] The lawyers say:

- (a) the fees were not capped;
- (b) the fees are fair and reasonable;
- (c) the lawyers billed for no work after SM terminated the retainer;
- (d) the lawyers did no work after the files were handed over to SM's new lawyer;
- (e) no refund is on offer;
- (f) there is no basis for any allegation of wrongdoing;
- (g) SM's expectations are misplaced; and
- (h) the claims were amended to refine the points that would be considered by the High Court as a response to discovering the defendants had limited means.

Review Hearing

[17] The parties attended a review hearing in [Area] on 3 October 2017. An interpreter attended to assist communication with Mr HR of SM.

Nature and scope of review

[18] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Lawyers and Conveyancers Act 2006 (the Act):¹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[19] More recently, the High Court has described a review by this Office in the following way:²

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[20] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Discussion

Acting without instructions

[21] The allegations that the lawyers did work without obtaining Mr HR's specific instructions, took the wrong approach, amended SM's claim without instructions and did not provide Mr HR with information or discuss matters with him are all matters that have emerged with more substance on review. They were not clear from the complaint, the focus of which was primarily on the fees.

[22] I am conscious that Mr HR is representing DN's interests, and that English is not his first language. However, the allegations as they were put on review appeared to be quite specific and distinct, linking back to the allegation that the claim was amended without instructions. This firming up of DN's position appears also to be partly the result of the proceeding having concluded, and the Court giving a clear indication that the first head of claim, which was deleted while the lawyers had conduct of the matter, was not something DN could then rely on. It could also have been in response to the Committee's comment that some of the allegations were "vague".

[23] On the basis that the allegations were part of the original complaint, the suggestion DN appears to be making is that the lawyers negligently amended the pleading. That is not an allegation that can be properly explored or determined on review. In the circumstances, I decline to make any further inquiry into that aspect of the complaint pursuant to s 205 of the Act. The balance of the review addresses the allegation that the lawyers' fees were not fair and reasonable.

Fees

[24] The Committee decided it lacked jurisdiction to consider fees billed more than two years before the date of the complaint, based on the restrictions imposed by reg 29 which says:

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—

- (a) was rendered more than 2 years prior to the date of the complaint;
or
- (b) relates to a fee that does not exceed \$2,000, exclusive of goods and services tax.

[25] As three of the four invoices SM complained about had been rendered more than two years prior to the date of the complaint, the Committee considered whether there were special circumstances that would justify it dealing with the complaint. Although it found there were no such circumstances, it considered all of the invoices in the context of rr 9 and 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and concluded the fees included in all four invoices appeared fair and reasonable for the services the lawyers had provided.

[26] The approach generally taken by this Office where only some of the fees charged were billed more than two years before the complaint was laid, is to aggregate the fees so the whole of the fee can be assessed. That is effectively what the Committee did by considering and confirming the fee contained in all four invoices.

[27] SM contends those fees were not fair and reasonable for several reasons.

[28] First, SM says it was not fair to charge a fee without telling SM in advance what it was, and the amount of the fee was not reasonable because SM believed it was capped at \$25,000.

[29] Both contentions are addressed by reference to the lawyers' terms of engagement which set out how the fee would be calculated, and did not provide an estimate or fix a cap. Mr DH is certain no estimate was requested, and says the circumstances were such that no estimate could or would have been provided. The cap appears to have been discussed between Mr HR and Mr TR, but it is not part of the written agreement pursuant to which the lawyers agreed to act.

[30] There is no evidence, beyond what Mr HR says was discussed, that supports the assertion there was a cap. As there is no evidence SM requested an estimate, it is not necessary to consider whether one should have been provided.

[31] Second, SM contends the lawyers should not have charged a fee of around \$7,000 for becoming familiar with the file. If SM's expectation was that work would be free, it should have negotiated and agreed that condition before the lawyers began work, otherwise there is no basis for that expectation. There is no evidence that the parties made any such agreement.

[32] Third, SM alleges there are inaccuracies in the lawyers' time sheets, and that the time records have been tampered with. Mr DH denies both allegations.

[33] There is no reason to believe the time sheets are inaccurate or that they have been tampered with. There is nothing that stands out as unusual in the time records,

which appear to be a fairly routine record of the process of litigation in the expectation that if settlement negotiations fail, it is likely that a trial will, eventually, proceed. The settlement offer Mr DH made after the judicial settlement conference is noted, as is the counter-offer made by the defendants. There were only two ways the proceeding was going to resolve; either SM would discontinue, or the matter would proceed to trial. As discontinuance does not appear to have been an acceptable option for SM on the terms offered by the defendants, fees at this sort of level were more or less inevitable as preparations for trial continued.

[34] The allegation that the lawyers provided services after the retainer was terminated is supported to a very limited extent by the timesheets. It is not entirely clear when the retainer ended. Without necessarily accepting that the retainer had ended, Mr DH evidence at the review hearing was that the lawyers would have had to provide those services because of the residual fiduciary obligations to DN and the Court. Mr DH's evidence is accepted. It is noted that the lawyers did not charge a fee for attendances after 12 May 2011.

[35] None of SM's arguments constitute a proper basis on which to reach a different conclusion from the Committee. There is no other basis on which to conclude the lawyers' fees are anything but fair and reasonable.

[36] In the circumstances the Committee's decision is confirmed.

Decision

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

DATED this 6th day of October 2017

D Thresher
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:

SM as the Applicant
Mr DH and Mr TR as the Respondents

[Area] Standards Committee
The New Zealand Law Society