

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee 3

BETWEEN

MR AL

Applicant

AND

MR ZK

Respondent

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

Application for review

[1] Mr AL seeks a review of a decision by Auckland Standards Committee 3 in respect of a complaint made by Mr ZK. The complaint related to the conduct of Mr AL in work done administering the estate of Mr ZK's late father.

[2] Mr ZK originally complained about various aspects of the administration of the estate including delay. Mr AL responded in detail to the complaint. He charged the estate for the time spent in responding to it.

[3] Mr ZK then raised with Mr AL the fact that he had charged the estate for his time in dealing with the complaint. Mr AL sought the guidance of the Committee who referred him to the decision of this Office *Shrewsbury v Rothesay*.¹ In that case the LCRO indicated that it was not appropriate for a lawyer to charge his client (also an estate) for attendances in dealing with a complaint.

[4] On being informed of this Mr AL reversed his invoice relating to those matters and credited the estate with the corresponding amount. However, the Committee resolved to consider, as part of the complaint, the issue of whether or not Mr AL should

¹ *Shrewsbury v Rothesay* LCRO 99/2009.

have charged the estate for time spent dealing with the complaint. Mr AL was invited to respond to this issue in the Notice of Hearing dated 7 May 2012.

[5] The Standards Committee found that Mr AL had acted appropriately in respect of the administration of the estate. However it considered that his conduct in invoicing the estate for the time taken to respond to the complaint was unsatisfactory. It made no punitive orders, but imposed costs of \$500.00 on Mr AL.

The application for review

[6] In his application for review Mr AL notes:

- a. He was not aware of the guidance of the LCRO in the decision referred to above.
- b. The invoice was reversed immediately on being notified of the relevant authority.
- c. He was following the advice provided through his firm, EC, of which he was an employee.
- d. When the complainant queried the issue of the invoice it was agreed with the complainant that the guidance of the Standards Committee would be sought and followed.
- e. It was EC and not he who charged the fee and then reversed it.

[7] It is also relevant that this position is supported by Mr ZK whose lawyer noted in a letter to this Office of 22 August 2012 that it was accepted that it was EC and not Mr AL who charged the fee and then reversed it, and that they have no objection to the decision of the Standards Committee being reversed.

Change of nature of EC

[8] A director of the incorporated law firm EB wrote to this Office on 19 December 2012. In that letter it was noted that the partnership of EC had been dissolved and that the company had replaced the partnership as the employer of Mr AL. It was suggested that there could be no adverse finding against a dissolved partnership. For reasons which will become apparent this is not strictly necessary for me to decide but some observations are appropriate.

[9] First, there was never a complaint against the partnership. The complaint was against Mr AL. Any change in the identity of his employer will not alter the basis upon which his conduct at the relevant time is considered.

[10] Second, the regulatory framework recognises an ability to make findings against both lawyers and against incorporated law firms. In the event that there is culpability on the part of a partnership the Standards Committee will have to consider whether one or more (or possibly all) of the members of the partnership have fallen short of acceptable standards. Where there has been conduct within an incorporated law firm the Standards Committee will need to decide what legal persons that conduct can be attributed to. That may include both the incorporated legal practice as well as one or more of the lawyers who work in it (whether directors or shareholders or not). In this case the only lawyer whose conduct has been scrutinised is that of Mr AL. No complaint was put to any other lawyer of EC.

Analysis

[11] 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 – (see s 3(1)(b) of the Act), and also seeks to ensure that lawyers adhere to their professional obligations (and thereby maintains confidence in the provision of legal services – (see s 3(1)(a) of the Act). While these purposes will usually be consistent, there will be some cases where tension arises.

[12] Where the matter is a consumer complaint about the quality of services provided by the lawyer to the client the purposes of the Act will generally be met if the issue can be resolved in a way which is fair and also acceptable to the client without the need for an adverse decision of the Standards Committee. To this end the Act promotes the resolution of complaints where appropriate by negotiation, conciliation, or mediation (see s 130(b), s 143, and s 201 of the Act). If such a process reaches a satisfactory conclusion the Standards Committee may record the agreement reached in its decision (s 143(4) of the Act). Further, a Standards Committee may decide to take no further action on a complaint for a number of reasons including that “the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued”.²

[13] Standards Committees should therefore be mindful of the importance of encouraging complainants and lawyers to resolve their own differences where possible. In the present case it appears that the parties settled on a way to resolve the difference

² Lawyers and Conveyancers Act 2006, s 138(1)(d).

about the fees (though it is accepted that this does not appear to have been clearly communicated to the Committee). It is certainly the case that the complainant does not seek to support the order of the Committee against Mr AL.

[14] Where the complaint raises serious questions about the conduct of the lawyer, it is unlikely that it will be appropriate for a Standards Committee to take no action on the complaint. In this regard I refer to the case of *BI v CW*³ where I noted: "...Standards Committees and this Office must be careful not to allow lawyers whose bills are complained about, to "buy" their way out of a finding of unsatisfactory conduct..."

[15] While it is impossible to draw a definitive line, there is a distinction to be made between complaints that are fundamentally consumer complaints and those which touch on the core obligations of lawyers. This is a distinction which will have to be made on the facts of each case.

[16] It is understood that in some cases relating to the quantum of an invoice where a costs assessment has been undertaken, Standards Committees have taken a particular approach. They have taken the view that where a lawyer has adjusted his or her invoice in accordance with the cost assessment then (having regard to all the circumstances of the case) any further action is unnecessary or inappropriate. Accordingly in those cases where there are no other aggravating factors no further action is taken and no adverse finding made, pursuant to the power found in s 138(2) of the Act.

[17] This would appear to be a pragmatic way to resolve disputes about costs where there is no suggestion that there is any gross overcharging. In those cases there is simply a difference of view about the amount that is fair and reasonable in accordance with Rule 9 of the Conduct and Client Care Rules.⁴ In the absence of any aggravating factor it would seem proper to take no further action where the wrong complained of (overcharging) has been remedied by the lawyer.

[18] The present case is somewhat different. In particular the dispute was not simply one of overcharging, but rather whether the lawyer was entitled to render the bill for the work at all. To approach the issue as a matter of principle, it is appropriate to consider whether the wrongdoing went to the core of the obligations of the lawyer and his relationship with his client. In considering that I note:

³*BI v CW* LCRO 23/2012 at [46].

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

- a. There is no suggestion of dishonesty or lack of good faith. There appears to be no doubt that the lawyer mistakenly considered that he could charge the estate with the costs of meeting a professional complaint from one of the beneficiaries.
- b. When challenged on the point the lawyer agreed to take the professional guidance of the Standards Committee.
- c. The lawyer promptly followed the guidance given by the Committee.
- d. The conduct does not appear to have been of a kind to strike at the heart of the lawyer-client relationship. There was no breach of the duty of loyalty or confidence, or any other conduct which reflected poorly on the integrity of the lawyer.

[19] In addition, I take note of the fact that Mr AL acted at the direction of the partners of the firm.

[20] I also consider the underlying policy in the Act to provide a responsive regulatory regime (s 3(2)(b) of the Act) and one in which complaints can be resolved expeditiously and, in appropriate cases, by negotiation, conciliation, or mediation (s 120(2)(b) of the Act) to be relevant in considering whether an adverse finding should be made. Where any question of compensation or fees reduction has been dealt with adequately either by agreement between the lawyer and complainant or by following guidance from the Committee there is no need to make a finding of unsatisfactory conduct as a precondition of any compensatory order (as would otherwise be required under s 156(1) of the Act). Conversely if such an order is needed to put the complainant in the position they are entitled to be in, this will be a factor strongly weighing in favour of such an order.

[21] Finally, I consider that in exercising its discretion as to whether or not to make an adverse finding against a practitioner it is appropriate for the committee to consider whether such a finding would be disproportionate to the conduct engaged in. In this regard I refer to paragraph 10.9 of the Practice Note provided by the New Zealand Law Society to Standards Committees:

Standards Committee members must bear in mind that an adverse finding against a lawyer in the context of a fee complaint is a finding of unsatisfactory conduct, and therefore has a significant stigma associated with it in addition to the penal consequences and the reduction of the fee itself. It follows that there should be an

adverse finding on a fee complaint only where the fee is found to be significantly excessive and is beyond tolerable limits suggesting only a minor adjustment.

[22] Taking these matters into account I consider that a finding of unsatisfactory conduct against Mr AL is unwarranted.

[23] Nevertheless, the inquiry into the matter by the Standards Committee was wholly appropriate, and as such it was proper to make a costs order (albeit under s 157(2) rather than s 156(1)) and therefore I do not propose to alter the order of costs, although this is something which Mr AL's employers may consider is their responsibility.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the finding of unsatisfactory conduct is reversed, and the order as to the payment of costs is confirmed.

There is no order of costs in respect of this review.

DATED this 19th day of March 2014

O W J 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:

AL as the Applicant
EA as the Representative of the Applicant
ZK as the Respondent
HV as the Representative of the Respondent
GW as a related person or entity
The Standards Committee
The New Zealand Law Society