LCRO188/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 1
BETWEEN	**Mr BQ** of Wellington Applicant
AND	**Mr YE** of Wellington Respondent

Background

[1] In 1996, the Applicant commenced correspondence with the Wellington City Council to ascertain whether the Council would sell an area of land adjacent to his property designated as a road reserve.

[2] In December that year the Council advised that the Roading Department of Council could see no reason why the land should be retained as road. However, the author of that letter noted that the Roading Department was only one department of Council with an interest (albeit the most significant) but that other divisions of Council, underground surface authorities, adjoining property owners and the general public had (and may have wanted) the opportunity to object to the road being stopped.

[3] In August 1997, the Environmental Control Business Unit of Council wrote to the Applicant advising that it was unable to support his application for the purchase and that his request would not be advanced.

[4] The Applicant corresponded with the Environmental Business Unit for the remainder of that year and into early 1998, but to no avail. During the course of that correspondence Council identified several factors which it had taken into account in coming to its decision. Amongst these were:

- That the sale of the portion of reserve would allow the Applicant to build a house closer to the street, which in Council's view would be undesirable as it would be out of character with the existing pattern of development in the street.

- That the sale would result in a loss of developmental potential for the owners of another property in the street as a reduction in the width of the street would increase the front yard requirement for that property.

- That an encroachment licence rather than a sale would satisfy car-parking requirements.

- That a sale could restrict Council's options to construct the street to a better standard in the future.

[5] The last piece of correspondence with Council provided to the Standards Committee was in February 1998.

[6] Some 10 years later, the Applicant noted an article in the Dominion Post reporting a situation whereby the Council had been obliged to consent to an application to construct a property in [Suburb] due to the fact that its discretion was restricted to those matters identified in the District Plan. Those matters did not include factors relating to appearance such as colour scheme and design, and accordingly the Council could not take those matters into account when exercising its discretion.

[7] The Applicant formed the view that this assisted his application to purchase the land from Council and approached the Respondent (who I shall refer to hereafter as "the Practitioner") for assistance.

[8] He followed up a telephone call to the Practitioner with a letter dated [date] September 2009, in which he (a) referred to the *Dominion Post* article; (b) outlined the history of his attempts to purchase the road reserve; and (c) commented in some detail on the various factors raised by Council.

[9] On [date] September 2009 the Practitioner acknowledged receipt of the letter and related correspondence and provided the information that he was required to provide by the Client Care Rules, together with the firm's terms of engagement. In that letter he recorded the work that the firm would undertake.

[10] On [date] October 2009, the Practitioner provided his opinion, which in general terms was not optimistic of the Applicant's chances of success.

[11] The Applicant was dissatisfied with the opinion and entered into correspondence with the Practitioner seeking further comment and advice on matters which he considered should have been addressed. Amongst other things, he considered that the Practitioner should have provided a detailed discussion of the various factors raised by Council in opposition to the sale as well as provided options to counter the opposition by Council.

[12] After some correspondence with the Practitioner, the firm's correspondence was continued by Mr G, the Client Services Manager of the firm (M K). The Practitioner and Mr G indicated that they would be happy to expand on their initial advice on the basis that it would be charged at the firm's usual charge-out rates.

[13] The Applicant considers that this further advice should have been included in the firm's initial opinion and that therefore no extra charges should be incurred.

[14] This disagreement developed to the position where the Applicant considered that the Practitioner had not provided him with advice on the matters sought by him, and that therefore that the Practitioner's account [$ ~700.00] should be withdrawn and a further opinion provided.

[15] The Practitioner considered that that he had fulfilled his obligations to the Applicant and refused to meet the Applicant's demands.

Complaint and Standards Committee's decision

[16] The Applicant lodged a complaint with the Complaints Service of the New Zealand Law Society. He outlined again the history of the matter and the issues arising.

[17] On page 3 of the letter accompanying the complaint he identified six problems on which he says he had sought clarification. These are expressed as distinct questions. (I observe at this point that these questions were not included in the letter of instructions to the Practitioner dated [date] September 2009.)

[18] The complaint concerns the perceived shortcomings in the opinion provided by the Practitioner. The Applicant does not agree with the advice provided and considers that the opinion has not addressed the issues in sufficient detail, or presented the Applicant with options.

[19] Having considered all of the matters relating to the complaint, the Standards Committee resolved, pursuant to Section 138(2) of the Lawyers and Conveyancers Act

2006 and Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standard Committees) Regulations 2008, to take no further action in respect of the complaint, for the following reasons:-

(a) the Applicant was advised in the letter of engagement that the firm was to undertake a preliminary view;

(b) the charges are not unreasonable for such a view;

(c) that the Applicant does not agree with the preliminary view does not mean that the view is not accurate;

(d) in the Committee's view there were no special circumstances that would justify dealing with the complaint about the bill of costs.

Application for review

[20] The Applicant has applied for a review of that decision.

[21] He advises that he expected the opinion would take regard of all the facts provided by him in his letter dated [date] September 2009 and make some remarks as to the effect those facts would have on any possible course of action.

[22] He notes that the letter of engagement undertook to review the papers, consider the situation and provide a preliminary opinion. He further notes however that this summary of the work to be undertaken was imposed unilaterally and was in conflict with his request for an accurate opinion based on the facts provided.

[23] He also notes that the opinion did not make any reference to the facts provided and was therefore of no value to him. He continues by observing that "in fact, the opinion contended that any action would fail and that an approach to the High Court would not succeed".

[24] He contends that (a) the preliminary review did not address the facts given in his letter dated [date] September 2009; (b) that the opinion does not provide any information in respect of those facts; (c) that the preliminary opinion does not give any information as to why the information provided would not be successful; (d) that the bill of costs for the opinion does not deal with the matters he had asked to be considered, and is therefore not appropriate.

Review

[25] The basis of this complaint is that the Applicant considers that the Practitioner did not provide the service required by the Applicant and therefore the fee should be withdrawn and a new opinion provided.

[26] A review of this complaint needs to consider two questions:-

(a) what work did the Practitioner agree to undertake?

(b) did the Practitioner fulfil those obligations in that regard?

If the fee is not to be withdrawn as required by the Applicant, then the next question is whether there are exceptional circumstances as required by regulation 29 of the Complaints Service and Standards Committee's Regulations, such as would allow the Standards Committee to consider the complaint as to quantum.

What work did the Practitioner agree to undertake?

[27] The Applicant made initial contact with the Practitioner by telephone and followed that up with a letter on [date] September 2009 in which he outlined the problems he was having with the Wellington City Council.

[28] He set out the details of the steps he had taken to date in his attempts to purchase from the Council an area of land designated as "road reserve", which adjoined a vacant site owned by him. His contention was that, as the Roading Department of Council had advised in December 1996 that it could see no reason why the land should be retained as road, the Council was therefore obliged to sell the land to him pursuant to the provisions of the Public Works Act 1981.

[29] He also contends that the various reasons provided by Council for declining to exercise its discretion to sell the land to him could be challenged and considered that his position was similar to the position with regard to the [Suburb] property.

[30] The Practitioner acknowledged his instructions by letter of [date] September and summarised the work which the firm intended to carry out for the estimated fee.

[31] In paragraph 2 of that letter the Practitioner recorded that, "we understand that the work you want us to do is to advise you of your rights in regard to requiring Council to sell the reserve to you". In paragraph 4 of that letter the Practitioner recorded, "we estimate that we will be able to review the papers you have sent to us, consider your situation, and provide a preliminary written legal opinion for a fee of $650 plus GST and

disbursements". He then went on to record the hourly rates of the persons who would be engaged in working on the matter.

[32] In his letter accompanying the application for review, the Applicant says: "The review referred to in the letter of engagement was unilaterally imposed by M K and was in conflict with my request for an accurate opinion based on the facts given".

[33] I have carefully reviewed the letter of [date] September 2009 to the Practitioner. In that letter the Applicant refers to the *Dominion Post* article and records his contention that based on that, the Council had a responsibility to sell the land to him. He recounts the long history of correspondence with Council about the matter and records his responses to the issues raised by Council. At the foot of page 3 of his letter he states:- "I am therefore consulting you with regard to my application and how it applies to the [Street], [Wellington Suburb] situation".

[34] I cannot find anywhere in the letter of [date] September 2009 the six questions which the Applicant says he requested advice on. The only specific matter referred to in the [date] September letter was the request for advice as to how the Applicant's position relates to the [Suburb] situation.

[35] The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, require a solicitor to provide certain information to a client prior to commencing work on a retainer. This information includes a summary of the work to be done. The letter of [date] September sent by the Practitioner was therefore not only complying with these requirements, but also adopting good practice in defining what it was that he would be providing.

[36] The Applicant did not respond to the Practitioner's letter of [date] September 2009. Had he done so, the Practitioner may have realised that the Applicant was requiring something in greater depth than the Practitioner was anticipating providing. This may also have resulted in an amendment to the estimate of costs.

[37] Because the Applicant did not communicate any disagreement with the scope of the work to be provided as set out in the Practitioner's letter of [date] September, the Practitioner therefore proceeded on the basis that this correctly recorded the Applicant's requirements.

[38] As matters developed, it is apparent that a preliminary legal opinion was inadequate to meet the Applicant's needs. The Applicant had been corresponding with Council since 1996 and had developed some firm views with regard to the Council's

position. As he notes, he was seeking a discussion of the various factors raised by Council and to be presented with options or possibilities.

[39] Whilst the opinion did not contain a detailed discussion as to the various factors, the Practitioner did implicitly address these when he expressed the opinion that he was not optimistic about the chances of success in a High Court action for Judicial Review. This is the only means by which a decision of Council can be challenged and if an application were to be made, the various reasons provided by Council would be subject to scrutiny. By implication therefore, the Practitioner was expressing the view that he did not consider that the arguments put forward by the Applicant would be sufficient to achieve a successful outcome.

[40] The Practitioner's approach, in line with the summary of the work provided in the [date] September letter, was to give an indication in a general sense as to the likelihood of the success of a legal challenge to the Council's position before embarking upon a detailed consideration of the various factors.

Did the Practitioner fulfil his obligations?

[41] In the letter of opinion dated [date] October 2009, the Practitioner summarised the relevant legal framework, the Council policy with regard to road stopping, and reviewed the Council decision.

[42] In paragraphs 5, 6, and 7, he addressed the [Suburb] decision, and concluded that it could not be applied to the Applicant's situation.

[43] In paragraph 4 he addressed the Public Works Act issue.

[44] In paragraph 12 he comments on what would be involved to counter Council's view with regard to the pattern of development in the street.

[45] In paragraph 13 he provides an overview of the legal option available to the Applicant which is to apply to the High Court for Judicial review on the basis that the decision made was "unreasonable" and was based on a procedural error. He opined, however, that "this is often difficult to prove, and we do not believe you could expect to succeed based on the information summarised above."

[46] All of this constitutes what fairly could be described as a preliminary legal opinion.

[47] The key issue in this matter lies in the statement made by the Applicant in his letter accompanying the application for review when he states: "I therefore do not

agree that the opinion provided addressed the matter at *the "appropriate level of detail*." This is the crux of the matter. The Applicant was expecting more than the Practitioner was intending to provide.

The Applicant's response

[48] There then ensued a series of correspondence between the parties in which the Applicant engaged in a debate with the Practitioner as to the application of the Public Works Act, and the reasons for rejecting the grounds on which Council declined to agree to the sale.

[49] The Practitioner was happy to consider the various issues further in some depth, but indicated that these attendances would be charged at the hourly rates applicable. The Applicant however contended that he should not be charged anything further as the letter of [date] October had not fulfilled his requirements.

[50] It is, of course, the prerogative of a client to challenge and debate advice provided by a solicitor, and indeed to require the solicitor to proceed with a course of action that the solicitor is not necessarily supportive of. However, it is also the right of a solicitor to be paid for this work. In his letter of [date] November 2009, the Practitioner noted that "we would be glad to provide further advice in respect of those issues, but that work would not be covered by our initial estimate which related to our preliminary legal opinion."

[51] In fact, by reason of the ongoing correspondence, Mr G did provide further discussion and advice in his letters of [date] March and [date] April 2010. The Applicant still remains dissatisfied.

Summary

[52] To summarise therefore, it is apparent that the Applicant's expectations of what the Practitioner was going to provide for the estimated fee of $650 plus GST and disbursements, exceeds what the Practitioner intended to provide, which was clearly set out by him in his letter of [date] September. I consider that the Practitioner has met his obligations in terms of that letter, and indeed exceeded those obligations by virtue of the further correspondence with the Applicant. For these reasons I concur with the decision of the Standards Committee to take no further action.

Regulation 29

[53] Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that:

> "If a complaint relates to a bill of costs rendered by a lawyer …, 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 –
>
> (b) relates to a fee that does not exceed $2,000 exclusive of Goods and Services Tax.

[54] The Applicant says that there are exceptional circumstances which would justify the Standards Committee considering the bill of costs because the opinion supplied by the Practitioner implied that there were no factors to further his position with the Council and that the only other option was an application to the High Court.

[55] This is the same position as is advanced by him in support of his contention that the bill should be withdrawn, and as I have indicated, I do not consider that there are reasons to make such an order; it follows that there are no exceptional circumstances which would justify a consideration of the Practitioner's bill of costs.

[56] By virtue of regulation 29 therefore, the bill is not subject to scrutiny. Having said that, having become familiar with the material and issues addressed by the Practitioner in relation to this matter, it is my view that the fee rendered does represent a fair and reasonable fee in the circumstances.

Decision

[57] Pursuant to section 211(1)(b) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 1st day of April 2011

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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:

Mr BQ as the Applicant
Mr YE as the Respondent
The Wellington Standards Committee 1
The New Zealand Law Society