

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee 3

BETWEEN

FP

North Island

Applicant

AND

UW

of Auckland

Respondent

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

Background

[1] In 2006, a company incorporated by FP and FQ purchased a ABW Station. The station had apparently not been profitable for its previous owners, but FP and FQ considered that there were reasons for this which would not affect their ability to run the station at a profit.

[2] They received legal and accounting advice prior to entering into the various contracts with ABW.

[3] They also relied on what they considered were representations by a ABW area manager that they would achieve a minimum income of \$75,000.00 per annum and that if they did not achieve this, then ABW would assist them financially to ensure this income was achieved.

[4] They also advised that ABW agreed the site would not be retanked, which would cause significant interruption to the operation of the site.

[5] Shortly after commencing business, FP was diagnosed with cancer resulting in him being unable to attend to the business for a period of time. On returning to work late in 2006, he was dismayed to find that steps were underway to retank the site, contrary to what had been agreed.

[6] By the end of their first full financial year (31 March 2007) the company had incurred a loss of \$72,000.00.

[7] In July 2007, FQ was also diagnosed with cancer, and did not return to work until December of that year. By 31 March 2008, the company had incurred a further loss of \$70,000.00.

[8] These losses were unsustainable, and a cheque issued by FP and FQ's company for fuel was declined by the bank. This resulted in immediate action by ABW, which terminated its agreement with FP and FQ's company, and subsequently the site was sold at a loss to them.

[9] In September 2008, FP consulted UW to whom he had been referred by the ABW Retailers Association. A telephone discussion took place between FP, UW, and a member of UW staff (UV) on 12 September 2008, in which all aspects of the case were discussed. That resulted in UW firm (ABX Associates) being engaged to act on behalf of FP and FQ and their company to pursue a claim against ABW, and also to resist a claim by ABW against them.

[10] It was made clear to UW that FP and FQ had limited funds to pursue a claim and could not fund extensive litigation. Instead, the strategy was to formulate the claim which would then be put to ABW, in the hope that it would be sufficient to cause ABW to enter into negotiations.

[11] Following delivery of the documents which FP had in his possession, and after reviewing the files of the solicitor who acted for the FPs when the business was purchased, it became clear to UW and UV, that the claim was not as straight forward as had been anticipated during the telephone conversation on 12 September.

[12] UV undertook a full review of all of the material provided, and a barrister, UU, was briefed in mid October, to provide an opinion as to whether there was a cause of action against ABW.

[13] It is not necessary to recount the detail of the work undertaken by UV and UU, but suffice to say, UU was unable to recommend contact with ABW in the way that had

been anticipated. By mid November 2008, in response to a direct question from FP, UU advised that they did not have a claim.

[14] Rather than abandon the claim at that stage, UU suggested that FP and FQ apply for legal aid to enable further investigations to continue. UW and his firm were not legal aid providers, and it was arranged that they would cooperate to enable another firm to be instructed, so that legal aid could be applied for and the work proceed.

[15] By that time, three accounts had been rendered by ABX Associates totalling \$14,758.32. In addition, UU had presented his account for \$5,625.00. UW wished to ensure that these accounts would be paid before he released the files to the new solicitor, and accordingly sought confirmation from FP that they were accepted. This was provided by FP and the files were released.

[16] The accounts were paid and it was not until later that FP sought the time records relating to the bills from UW and lodged his complaint.

The Complaint and Standards Committee Decision

[17] FP lodged his complaint in April 2010. He complained that the costs were exorbitant. He noted that “in house” discussions indicated the costs seemed high, and noted various charges which he considered constituted overcharging.

[18] The outcome sought was a refund of the “overcharged and exorbitant fees”.

[19] The Committee considered all of the material provided to it, FP’s complaint, and UW’s explanations. It did not appoint a costs assessor, but came to the view that UW costs and charging policy were not so unreasonable as to raise any professional standards issues.

[20] It is important to note the way in which this determination is expressed, as it signals the approach taken to costs complaints under the Lawyers and Conveyancers Act 2006. This differs from the cost revision process which applied under the previous legislation, which often resulted in what has been described as “tinkering” with bills of costs.

[21] FP has applied for a review of that decision.

Resolution by Negotiation Conciliation or Mediation

[22] Prior to the hearing, I wrote to the parties noting that the option of pursuing resolution of the complaint by negotiation conciliation or mediation had not been previously formally put to the parties. All lawyers are required to establish a complaints process and this was referred to in the terms of engagement provided by UV to FP at the outset of the firm's instructions. However, this process does not seem to have been activated by either party before the complaint was lodged with the Complaints Service.

[23] However, by the time of the review hearing, UW in any event, did not wish to engage in any process which would further delay the matter being finalised.

Review

[24] A review hearing took place in Auckland on 4 October 2011. In attendance were FP and FQ, UW and his counsel, UT.

Scope of Review

[25] UT provided written submissions at the review hearing in which he submitted that the review function of the LCRO is to correct any errors that may have been made by the Standards Committee. He submitted that a review was not a re-hearing as such and that FP's application for review raised nothing new, alleged no error by the Committee, and appeared to be a collateral attack on the Committee's decision to take no further action by asking the LCRO to re consider the same issue.

[26] I did not respond to UT's submissions at the hearing, as the course of the hearing was not affected by them. However, it is appropriate that I comment on these submissions, which are similar to those which have been made on a number of occasions in respect of previous review applications.

[27] The Lawyers and Conveyancers Act does not require any specific grounds for a review application. The provisions of the Act relating to the review process empower the LCRO to revisit all aspects of a determination by a Standards Committee. Section 203 of the Act makes it clear that the scope of a review is confined to the Standards Committee final determination but allows the LCRO to review any and all aspects of any inquiry or investigation relating to that determination.

[28] The scope of an LCRO review is confined to matters relating to that and cannot extend to new complaints at the review stage. Subject however to this limitation, there is no such restriction as submitted by UT to a review by the LCRO.

The telephone conference of 12 September 2008

[29] The first contact between FP and ABX Associates took place on 12 September 2008. It seems that FP may have first sent an email to the firm which was considered by UV. A telephone conference then took place between FP, UW and UV during which a range of matters were discussed. These included:

- the facts
- the issues
- potential causes of action
- strategy
- costs.

[30] UV made a file note of the content of that discussion which UW referred to at the hearing. A copy of that file note was provided to me at my request following the hearing. The file note is in UV's handwriting and it is apparent that it was made as the discussion proceeded, as the content is in some cases abbreviated. Nevertheless the file note is a useful record of what was discussed at this time. In the following paragraphs I refer to sections of the file note which are particularly relevant. The words contained within quotation marks represent the content of the file note.

[31] “[UW] - costs of recovery in litigation + risks + stress etc = risky

- speculative to start with
- put budget on it = spend and see how far it gets
- approx 4k + GST - review docs and where docs got to point of letter to [ABW]
- [ABY] misrepresented business, breached FTA, break K - shut down business and force them out of sight when prepared to talk.”

[32] I understand from these notes that UW was referring to the documents which FP had in his possession and indicated that the cost to review these to the point where a letter could be sent to ABW would be approximately \$4,000.00 plus GST. This

coincides with FP's expectation when he refers to a review of the documents as the initial "discovery".

[33] "Options – [UW]

(1) Put claim in letter to [ABY] but short of litigation

- outcome is to try have a mediation
- probably \$15k to \$20k costs."

[34] I understand this note to record that one option suggested by UW was to establish the basis of the claim and communicate that in a letter to ABW in the hope that this would result in mediation. The costs of getting to this stage, including presumably the mediation, would be "probably" \$15,000 to \$20,000.

[35] "(2) Statement of claim - gets corporate's attention

- say instructions are to file it, but giving opportunity to discuss first
- process could be expensive
- useful if have stomach and financial resources behind it to file in Court
- will get their attention
- then discovery re all docs
- litigation = expensive"

[36] This option required the preparation of a statement of claim, which would then be forwarded to ABW with advice that it was to be filed within fourteen days unless there was a satisfactory response from ABW. It is important to note that no estimate was provided with this option, but there was reference to the process being expensive, the need for financial resources, and that engaging in litigation was expensive.

[37] "[FP] - what's [UW]'s gut feeling about those guys

[UW] - It's a gamble, in other case were close to achieving nothing and then turned around and HOA produced.

- have to do it in a disciplined way
- what's amount prepared to spend to dispose of \$90k claim and preferably get some compensation?

[FP] - he removed some stock and shelving for business

- got \$15k for it but worth \$60k
- he has freehold house - don't want to lose
- boat and Porsche - can sell to fund litigation - about \$25k to \$30

[UW] - worth to do something but not worth putting all yr life savings

[FP] - prepared to go forward, copies of all docs and info to LA, Morton's analysis etc"

[38] I understand from these notes that FP was indicating he wanted to proceed and would make arrangements to deliver the documents which were in his possession to ABX Associates. I also understand that FP had indicated that he had \$15,000 available immediately, with the option to realise assets to provide a further \$25,000 - \$30,000. In his correspondence with the Complaints Service, and with his application for review, FP advises that he had indicated he had approximately \$20,000 to fund this litigation. This is not recorded in the notes of the telephone conference on 12 September.

[39] "[UW] - need to make decision if:

- (1) letter or
- (2) SOC

[FP] - go for SOC"

[40] I understand this to mean that FP's instructions were to proceed with the option of preparing a statement of claim with a view then to providing ABW with a copy of that prior to filing in the hope that this would generate negotiations. It is to be noted that this is different from option (1) recorded in [31] above which was to conduct an initial review followed by contact with ABW for which a cost of \$4,000.00 + GST had been estimated. Instead, FP's instructions were to proceed with preparation of a statement of claim. This was option (2) as recorded in [35] in respect of which comments were made that such a course was expensive and needing financial resources.

[41] "Next step

- prepare SOC
- instruct barrister - pick and choose right one for the job

[FP] - will drop off docs about 10.00 am [Tuesday next week]"

[42] There is no other record of any discussion about a barrister other than this. It may be that UW assumed FP understood that barristers were independent and did not explain the relationship between a law firm and a barrister any further but the statement that one could “pick and choose the right one for the job” could not have led to the conclusion that the barrister was part of UW’s firm. There is also no record of any discussion as to the likely costs.

[43] From the final comments made and recorded above it is quite clear that FP was engaging ABX Associates at that time and instructing them to proceed to review the documents and prepare a statement of claim to put before ABW. To get to this stage would necessarily involve establishing the causes of action and also the evidence that was available to support those causes.

[44] On the same day, UV sent FP the firm’s letter of engagement which included the following:

Services to be provided

The following is a summary of the legal services we expect to be providing you:

1. A review of all relevant documentation relating to your dispute with ABY and compiling a claim against ABY either:
 - a) By way of a letter detailing the claim and the basis for it; or
 - b) By way of a draft statement of claim
2. File the proceedings if you instruct us to and to take the ensuing litigation steps, and enter into any negotiations as you instruct from time to time;
3. Any legal matters incidental to the above and any additional matters you instruct us to attend to.

[45] This is somewhat out of step with the instructions to prepare the statement of claim, but confirmation of those instructions is evidenced by the fact that UV commenced drafting the statement of claim on 29 September as recorded in the project matter timesheets.

[46] FP records in a letter to UW, his understanding that “[ABX] Associates offices had indicated that an initial outlay of up to \$10,000.00 could be required to the level of the statement of claim being placed before the Courts, at which time it may be hoped that [ABW] would come to the table for discussions in resolving this matter. A decision can then be made to proceed or not.” I can find no indication in the file note made by UV of any discussion that supports this understanding.

[47] The terms of engagement were signed by FP and FQ and dated 12 September 2008 in their own handwriting. FP has argued that he did not formally engage the firm until after the telephone conference on that day and that therefore he did not expect to be charged for that telephone conversation. It is clear from the date on the terms of engagement, that ABX Associates was engaged immediately after the telephone conversation, and since the conversation included advice on the claim and a discussion of the strategy to be applied, there is no reason to consider that the time relating to the conversation should not be included.

UU

[48] It does not seem that there was any specific discussion with FP as to the costs of engaging UU. UU agreed to undertake a review of the material provided to establish whether there were grounds for a valid claim for a fixed fee of \$5,000.00. FP says that he understood the barrister's fee was included in the sums that were being discussed in the initial telephone conversation, and as there were no discussions with FP as to the cost of engaging UU that I have noted, it seems that ABX Associates may have adopted this approach as well. From the notes made of the 12 September telephone conference it could be assumed that ABX Associates were carrying out the work on the basis that FP had \$15,000 readily available with the possibility of raising further funds from the sale of assets. They say they were working within a budget of \$30,000.

[49] Be that as it may, having expended something in the region of \$20,000.00, FP was disturbed that matters had not reached the stage where contact had been made with ABW.

Were the estimates adhered to?

[50] All of the discussion above centres on what estimates had been provided by UW, and whether they had been adhered to. From my review of the record of the telephone discussion on 12 September, it seems to me that FP's expectations as to the likely costs related to a course of action that is different from the course of action ABX Associates were instructed to follow. He records his expectations as being that for \$5,000.00, an initial "discovery" was to be undertaken and depending on what was ascertained at that stage a further \$5,000.00 may be required to complete further discovery. Elsewhere, as noted in [46] above, he records his expectations that for the sum of \$10,000, matters would have reached the stage where a statement of claim had been prepared. FP's statements as to his expectations are inconsistent.

[51] It is my view, that ABX Associates proceeded in accordance with their record of the telephone conversation, whereas FP's understanding and expectations differed. This misunderstanding could have been corrected had the terms of engagement included reference to the discussions with regard to costs in the telephone conversation. However, monthly accounts were rendered so FP was aware of the costs incurred at the end of each month. I note that these had exceeded the sum of \$5,000 by the time the second account was issued on 28 October 2008. In mid November, when there had been no apparent progress towards making contact with ABW FP sought a "yes" or "no" answer as to the validity of his claim. UU replied by advising that "at this point... they do not have a claim".

[52] Having reached this position, the most that ABX Associates could be accused of is that they had been somewhat "loose" as to their estimates of the potential costs to reach a specific point, and that these costs had not been revised as matters progressed. Costs were only ever loosely expressed, based on the information received during the initial telephone conversation and it would have been apparent that there were evidential difficulties with the Irvings' claim. UU had in fact expressed the view that they did not have a valid claim.

[53] There is nothing to support the view that UW breached any of the rules relating to estimates and variations from those figures. The estimates as such were only ever a general assessment of the likely costs based on the information to hand, ABX Associates were instructed to proceed on a course of action for which no estimates had been specifically provided, the correspondence provided would indicate FP was kept fully advised as to what issues were preventing the formulation of a statement of claim, and finally, FP was aware of the costs incurred by reason of the monthly accounts.

Were the fees fair and reasonable?

[54] This then leaves a consideration of whether or not the fees charged were fair and reasonable. Under examination are three bills of costs dated 26 September 2008 (\$2,073.94), 28 October 2008 (\$6,525.00) and 28 November 2008 (\$6,159.38) totalling \$14,758.32. FP includes UU's costs of \$5,625.00 in the total costs he refers to, but that bill is not subject to scrutiny in this review.

[55] Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that "a lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1". If this rule is

breached and there is a finding that the bill is not fair and reasonable, then this would result in a finding of unsatisfactory conduct against UW, as a result of which the bills may be adjusted.

[56] Rule 9.1 includes the factors which a lawyer may take into account when establishing his or her fee. One of these is the time expended on a matter. UW uses a time recording system commonly used by law firms, whereby time is recorded in six minute units. The majority of the time recorded is attributed to UV whose hourly rate was \$310.00 + GST. UW hourly rate is \$475.00 + GST. I offer no comment on these rates but note UW submissions that those hourly rates are some 15% to 20% lower than the rates that would be charged by lawyers of similar experience employed by major firms, and that he considered the rates to be reasonable for this matter which he describes as a "complex commercial dispute".

[57] I also note that the Standards Committee comprises both lawyers and lay persons and in determining to take no further action in respect of this matter, it is implicit that the members of the Committee considered that the rates charged were acceptable.

[58] The Standards Committee contemplated engaging a costs assessor to review the bills of costs but determined to proceed without doing so. The Committee also no doubt took note of the fact that UW had waived the time recorded for December and January which he advises was in the region of \$3,937.00. UW advises also that he did not fully record the time he was involved in the file and refers to this in some detail in his response to the Standards Committee dated 28 May 2010.

[59] UW agreed to release his files before the accounts were paid in reliance on an acknowledgement from FP that he accepted the bills and would make payment of them as soon as possible. In his email dated 14 January 2009, FP expressed appreciation for UW patience and consideration.

[60] The fees billed by ABX Associates were based on the time recorded. None of the other factors referred to in rule 9.1 were taken into account when establishing the fee to be charged. One of these factors is the importance of the matter to the client and the result achieved. FP's complaint includes a complaint that nothing had been achieved. However, in the circumstances, the lack of result stemmed from the difficulties in establishing a credible cause of action which could be supported by evidence. This is not something for which UW can take responsibility.

[61] FP advises that it was not until he discussed the matter with a local solicitor that he sought copies of ABX Associates' timesheets. It would appear that the solicitor passed comment that it did not seem right for FP to have incurred costs of \$20,000.00 without achieving anything. Such comments however, cannot be relied upon as they are made without reference to the file or a full review of the matters in question.

[62] Having reviewed the time records in respect of this matter in a general way, and having been informed of the issues which developed in connection with the matter, it seems to me that FP overlooks the realities of what work was undertaken on his behalf by ABX Associates in stating that nothing was achieved. The final outcome of the proposed action is unknown, and largely irrelevant to this enquiry. I resisted UT's request to ascertain the outcome, but whether it has been successful or not, to have made contact with ABW without establishing a credible cause of action would have damaged the possibility of a successful outcome irreparably.

[63] In the circumstances, the calculation of the fee based on the time expended represented a fair and reasonable approach to take when billing this matter.

Summary

[64] In summary I therefore consider that the fees rendered by UW were fair and reasonable and the decision of the Standards Committee should stand.

Decision

[65] Pursuant to section 211 (1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

DATED this 11th day of October 2011

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:

FP as the Applicant
UW as the Respondent

UT as the Respondent's Counsel
The Auckland Standards Committee 3
The New Zealand Law Society