

CONCERNING

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

AND

CONCERNING

a determination of [City] Standards Committee

BETWEEN

BR

Applicant

AND

CS

Respondent

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

Introduction

[1] Mr BR has applied for a review of the determination by [City] Standards Committee to take no further action in respect of his complaint about an opinion provided by CS. Whilst the Standards Committee determination was made with reference to regulation 29 of the Complaints Service and Standards Committees Regulations¹ Mr BR's complaint was that the advice provided by CS was "unreliable, ill-advised, incorrectly labelled as realistic and negligent ..."²

Background

[2] The background to this complaint is best recorded by incorporating part of an email from Mr BR to the Lawyers Complaints Service:

...

The writer, on behalf of many dispossessed landowners, has been pursuing a land matter through the [Country] Courts from 2001 and has been rejected by all (the Land Court, the High Court and the Court of Appeal of the [Country]).

Undeterred [sic] and believing unquestionably in the merits of our case we applied for leave to appeal to the Privy Council which was granted but before proceeding to taking the matter there considered it prudent to seek further opinion on our chances before incurring the considerable expense associated with such an exercise.

¹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

² Invoice 24 October 2012 rendered by BR to CS.

Through our attorney we approached a senior Auckland QC for an opinion as to our chances and placed all relevant material before him.

His advice was that we needed realistic advice and that was that we would be wasting our time taking the matter further.

I challenged some of his findings but in a supplementary [sic] opinion he confirmed his earlier one.

He subsequently rendered a bill for these two opinions for \$6500 which we duly paid in full on 23 November 2009 which you will observe is more than two years ago.

However we decided to ignore his advice and proceeded to file our appeal with the Privy Council. This was the first case ever heard from the [Country].

It was heard on 22 October 2012 just six months ago and was allowed.³

...

[3] Following receipt of the judgment Mr BR sent an invoice to CS by which he sought repayment of the fee rendered by, and paid to, CS. The basis for doing so was that Mr BR considered the opinion received from CS was defective.

[4] CS declined to refund the money.

Review

[5] This review was completed on the material to hand with the consent of the parties pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006.

Regulation 29 Complaints Service and Standards Committees Regulations

[6] Regulation 29 provides:

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 two years prior to the date of the complaint; or

(b) relates to a fee which does not exceed \$2,000, exclusive of goods and services tax.

[7] Mr BR made contact with Mr MN of the Lawyers Complaints Service to discuss his complaint. He referred to regulation 29 and questioned whether the circumstances giving rise to his complaint constituted “special circumstances”. Mr MN advised him to lodge his complaint so that the Committee could determine the issue.

[8] The Committee reached the view that “the lack of agreement of the Privy Council with the opinion of CS is not a special circumstance”.⁴

³ Email BR to MN (Lawyers Complaint Service) 28 April 2013.

[9] Mr BR argues that it was not until the Privy Council issued its judgment on 22 October 2012 (nearly 3 years after the bill was rendered) in favour of Mr BR and the persons he represented that he/they formed the view that CS's opinion was deficient.

[10] There is some merit in Mr BR's argument. However, I do not consider that a consideration of regulation 29 is pivotal in determining Mr BR's complaint.

[11] Mr BR's complaint is that CS's opinion was deficient. In the context of the Lawyers and Conveyancers Act 2006, his complaint is that CS's advice constituted "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".⁵

[12] There is no time limitation against bringing a complaint that a lawyer's conduct constitutes unsatisfactory conduct in terms of s 12(a) and if a complaint were found to be proved then a Standards Committee (or this Office) could make an order requiring CS to cancel or reduce his fee.⁶

[13] I must therefore consider whether CS's conduct constituted unsatisfactory conduct in terms of that section.

Did CS's advice fall short of the necessary standard of competence?

[14] The relationship between the tort of negligence and unsatisfactory conduct as defined in s 12(a) is close. In the Introduction to the chapter on negligence in *The Law of Torts* the authors state:⁷

Negligence is a relatively straightforward and well-understood concept in lay terms. It is defined in the Concise Oxford Dictionary simply as a lack of proper care and attention or carelessness. This broad notion of carelessness is undoubtedly an integral part of negligence as a foundation for legal liability, but other elements are also involved. If one or more of those elements is lacking then an action will fail, even though the defendant may have been careless, even grossly so, in a popular sense.

[15] Those seeking compensation based on negligence should look to the general law for a remedy. Standards Committees and this Office have many times stated that the complaints process is not to be considered an alternative to court proceedings and s 138(1)(f) of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee:

⁴ Standards Committee determination 12 June 2013 at [7].

⁵ Lawyers and Conveyancers Act 2006, s 12(a).

⁶ Lawyers and Conveyancers Act 2006, s 156(1)(e) and (f).

⁷ Stephen Todd (ed) *The Law of Torts in New Zealand* (6th Edition, Thomson Reuters, Wellington, 2013) at [5.1].

... may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee, –

...

there is in all the circumstances an adequate remedy ... that it would be reasonable for the person aggrieved to exercise.

[16] In this instance, it could be argued that it would not be reasonable to expect Mr BR to institute proceedings to recover \$6,500. Nevertheless, Standards Committees and this Office will not be drawn into acting as a de facto civil court when determining complaints about a lawyer's standard of competence.

[17] Having made these observations, it is useful to have regard to judgments of the courts in negligence cases when considering whether a lawyer has reached the standard required by s 12(a).

[18] CS is considered to be more than a "reasonably competent lawyer" as evidenced by his having been appointed a QC. The immediate question arises as to whether or not CS should be considered to fall into a general category of a "reasonably competent lawyer" or is a higher standard of performance expected? In other words, is the "reasonably competent lawyer" referred to in s 12(a) divided into different groups so that the test is measured against what a member of the public could expect of (in this instance) a reasonably competent QC? This is not what the legislation provides, but if that approach was not applied, then it would follow that a member of the public could have no greater expectation of a QC than of a lawyer in general practice. If that approach were to be applied, then obviously issues will arise as to how groups of lawyers are to be identified.

[19] I do no more than to raise those questions at this stage, as even if a higher standard of competence and diligence were to be applied, I have no difficulty in reaching the view that CS's conduct does not come within the definition of unsatisfactory conduct. This is simply because the Land Court, the High Court and the Court of Appeal of the [Country] all reached the same view as CS. In *Client C v Lawyer H*⁸ the LCRO observed:⁹

It is well established that the bare fact that a court reaches a conclusion that differs from an opinion provided by a lawyer does not show negligence. The question is whether the opinion provided is one which a reasonable practitioner could have arrived at after competent and diligent research.

⁸ *Client C v Lawyer H* LCRO 49/2009 at [11].

⁹ The LCRO may have meant to refer to the mere fact in the first line of this quotation, and to have referred to a reasonably competent practitioner, rather than a 'reasonable' practitioner.

[20] The LCRO also referred to the Court of Appeal Judgment in *Bannerman Brydone Folster and Company v Murray* where the Court of Appeal stated:¹⁰

[a lawyer] is not liable "for mistake in a nice and difficult point of law" but he must measure up to the degree of professional competence which would be exercised by the reasonably competent and careful solicitor in the particular circumstances.

[21] That was echoed in the judgment of the Privy Council¹¹ in the present case at [63] where the Law Lords refer to the case as being an "unusual and difficult case". CS cannot be considered to have provided unsatisfactory advice just because his view differed (and differed only in some respects) from the collective views of the five members of the Privy Council sitting in this case.

[22] That disposes of the complaint. CS gave a carefully considered opinion and there is no evidence he was cavalier or dismissive in the level of care and attention he gave to his consideration of the issue. It cannot be said from an objective viewpoint that it was incompetent. The fact that the Privy Council did not agree with him does not mean that CS has failed to meet the standards required by the Lawyers and Conveyancers Act 2006.

[23] In the circumstances I confirm the decision of the Standards Committee to take no further action in respect of this complaint but for the reasons expressed above.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the outcome of the complaint as determined by the Standards Committee is confirmed but the reasoning is modified as set out in this decision.

DATED this 20th day of October 2014

OWJ Vaughan
Legal Complaints Review Officer

¹⁰ *Bannerman Brydone Folster and Company v Murray* [1972] NZLR 411 (CA) at 429.

¹¹ *Descendants of Utanga and Arerangi Tumu v Descendants of Iopu Tumu* [2013] 5 LRC 152 (PC).

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr BR as the Applicant
CS as the Respondent
The [City] Standards Committee
The New Zealand Law Society