

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

TS

Applicant

AND

KN

Respondent

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

DECISION

Introduction

[1] Mr TS has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning the conduct and fees of his former lawyer, Mr KN.

Background

[2] Mr KN acted for Mr TS in parenting and relationship property matters before the Family Court in 2011/12 and again in relation to the care of the children from 2013 to 2015. Mr TS' former wife was legally aided. The parents each alleged the other had been violent towards the children. Mr TS says care was effectively shared between him and the children's mother at least from 2011 onwards. The Court appointed a lawyer for the three children, and arranged for psychologists to prepare reports on them.

[3] Mr KN appeared for Mr TS at a three-day hearing before the Family Court in late August 2015, after which Mr TS says he immediately instructed Mr KN to make an

application for costs against his former wife. Mr KN advised Mr TS that there were potential disadvantages as his former wife was legally aided, and little real advantage in applying to the Family Court for interim costs orders. Mr KN recommended that Mr TS think carefully before instructing him to make such an application. Although an application for costs was foreshadowed to the Court and leave granted before the Family Court delivered its decision, no application for costs was made while Mr KN was acting.

[4] Mr TS contacted Mr KN twice in September 2015. On 11 September 2015 he requested a copy of the transcript from the hearing, and on 14 September 2015 an update on costs and “IRD applications”. Mr KN did not respond immediately.

[5] [Judge] made interim parenting orders on 19 October 2015 and ordered the children’s lawyer to report back.

[6] On 30 October 2015 Mr KN told Mr TS he had not taken steps to advance Mr TS’ instructions on costs or the IRD application, and, with Mr TS’ former wife being in receipt of legal aid, suggested pursuit of costs was pointless.

[7] Mr KN sent his final invoice, and Mr TS responded by contacting the firm to make a complaint. Mr TS spoke to Mr KN’s colleague and a meeting followed in early December 2015 at which Mr TS raised his concerns over costs and Mr KN’s allegedly poor communication in response to the issues he had raised in relation to interim bills.

[8] With his concerns unresolved, and the firm pressing for payment, on 17 February 2016 Mr TS complained to the New Zealand Law Society (NZLS).

Complaint

[9] Mr TS complains that Mr KN overcharged him, did not keep him informed as to progress of the retainer, did not act in accordance with his instructions, and treated him unfairly as a result of the complaint he raised. Mr TS said that Mr KN had decided not to ask for costs even though [Judge] had specifically agreed to Mr TS making an application. He says Mr KN’s failure to apply for costs deprived him of a considerable sum of money, and “yet his firm demands payment and threatens collection”.

[10] For the reasons set out in the decision, the Committee assessed Mr KN’s fees as fair and reasonable, and decided there was no reason to take further action in relation to any of Mr TS’ complaints.

Application for review

[11] Mr TS has applied for a review on the grounds that:

- (a) he was charged for work not done;
- (b) Mr KN did not follow his instructions or keep him informed about the application for costs and pursuing recovery of overpayments of child-support during the Family Court proceeding; and
- (c) Mr KN acted without instructions in 2011 by offering to pay spousal maintenance of \$10,000.

Review hearing

[12] Mr TS attended a review hearing in [City] on 31 October 2017. Mr KN did not exercise his right to attend.

Nature and scope of review

13 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.

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

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].

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.

Analysis

Fees

[15] Mr TS says Mr KN charged him for work he had not done. Mr TS says Mr KN accepted he had charged fees over a "period of inactivity".

[16] Mr KN denies having overcharged on any basis. He says that his hourly rate was considerably higher than the rate charged to Mr TS, which has resulted in a significant reduction based on a simple time and hourly rate formula.

[17] Although time and hourly rate are a factor in charging fees, Mr KN explained how he had calculated fees with reference to all of the relevant factors set out in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[18] The Committee considered the complaint, Mr KN's response, his invoices and the time records from the start of the retainer in June 2013 to its end in 2015. The Committee aggregated the fees, which is consistent with the approach recommended by this Office, then considered and applied the reasonable fee factors set out in r 9.1. It noted the reduced hourly rate, found no evidence to suggest any of the work undertaken was unnecessary, and was satisfied Mr KN's time records were accurate. At paragraph 41 of the decision the Committee recorded its view:³

As concerns the skill and specialised knowledge required, the Standards Committee was satisfied that Mr KN possessed the level of skill and specialised knowledge needed to properly handle Mr TS' matter. There was a degree of complexity to the COCA proceedings given that they arose against the backdrop of the breakdown of earlier parenting arrangements and in circumstances where there was concern about the children's wellbeing. Two further factors, being the importance of the matter and the degree of risk assumed by Mr KN, are relevant in this regard. The COCA proceedings were naturally of great personal importance to Mr TS and he was dependent on Mr KN to protect and promote his interest in what were challenging circumstances, adding a degree of risk. The Standards Committee took the view that Mr KN provided Mr TS with high quality representation and concluded that, having regard to the reasonable fee factors, the fees charged were fair and reasonable in all the circumstances. It followed that in respect of this allegation Mr KN had not breached his professional obligations under Rule 9 and following of the RCCC or any Rule or enactment.

³ Standards Committee determination, 29 August 2016 at [41].

[19] The committee's approach to the assessment of whether Mr KN's fees were fair and reasonable was orthodox, and nothing in the materials to suggest any reason to form a different view. There is no evidence to support the contention that Mr KN charged fees for work he did not do, even though there may have been periods of relative inactivity on the file.

[20] As there is no reason to reach a different conclusion to that reached by the Committee, that aspect of the decision is confirmed.

Not following instructions

[21] Mr TS says Mr KN did not follow his instructions in respect of a \$10,000 settlement offer, or keep him informed about the application for costs and pursuing recovery of overpayments of child-support during the Family Court proceeding.

[22] Mr TS says that during the relationship property proceeding in 2011, before interim orders for the care of children were made by consent, Mr KN offered to pay Mr TS' former wife \$10,000 in spousal maintenance. Mr TS says he considers paying spousal maintenance effectively rewarded his former wife for her bad behaviour. He believes it was an inducement to persuade his former wife's lawyer to make up for delays on the part of Mr KN. Mr TS also says this aspect of Mr KN's conduct is an example of his propensity for ignoring Mr TS' instructions.

[23] Mr KN is unable to recall events at the time, but recognises the allegation as serious, doubts it is correct, and says he is unable to recall events with any accuracy.

[24] Mr KN says his former wife received a payment that was sufficient to allow her to purchase real estate and disqualify her from receiving legal aid. It appears the relationship assets for division were substantial. It is assumed the offer of \$10,000 was a concession offered as part of a broader attempt to settle matters between Mr TS and his former wife. The precise breakdown of the relationship property and how that was divided up is not available. However, it is not accepted that Mr KN was not authorised to offer \$10,000 as part of the overall settlement of relationship property issues.

[25] The fact that the \$10,000 payment may have been labelled in a way that Mr TS found objectionable is not sufficient to constitute a professional standards issue. Nor does it support the contention that Mr KN ignored, or did not obey Mr TS' instructions to the letter. There is also no reason to be concerned if, as Mr TS contends, the payment was offered to placate his former wife when filing deadlines were looming in the relationship property proceeding. There is no suggestion that the Court or the other party expressed any concern about unmet deadlines, only a

suggestion that Mr TS should be preparing a formal response, presumably about the time the \$10,000 was offered.

[26] As to the costs and child support issues, Mr KN has explained his reasons for advising Mr TS as he did in respect of both issues.

[27] First, that the risks of pursuing a costs application would outweigh the potential benefits. Particularly that as Mr TS' former wife was legally aided, in his view it was highly unlikely that Mr TS would actually receive any costs. The best he could hope for was an assessment of the costs that might have been ordered if legal aid had not been granted. However, Mr TS wants to take that matter further, to have the grant of legal aid overturned and to have his former wife meet his costs. He understands that any money she may be ordered to pay to him is likely to have an impact on her finances that flows on to affecting the interests of any child or children in her care.

[28] Second, that Mr KN's assessment of the most viable approach to recovering overpayment of child support was to take recovery action against IRD independent of the child care proceeding. Mr TS also understands that pursuing IRD for recovery of overpayments is likely to affect the financial position of his former wife and the interests of any child or children in her care.

[29] For his own reasons Mr TS did not accept Mr KN's advice in respect of either matter. That does not mean the advice was wrong, or unsupported. It is also not the case that Mr KN was obliged to act on instructions he considered were not in Mr TS' best interests. Mr KN was obliged to act in a timely manner consistent with the terms of the retainer⁴ and to exercise his professional judgment solely for the benefit of Mr TS.⁵ He was obliged to give objective advice based on his understanding of the law,⁶ and to protect and promote Mr TS' interests.⁷ Mr KN complied with those obligations.

[30] The Committee noted and agreed with Mr KN's advice that the proper time to apply for costs would be at the conclusion of the proceedings and that the circumstances at the time were such that a costs application was unlikely to succeed.

[31] Mr TS' does not recall Mr KN making "a vigorous submission" at the end of the hearing, but says "there was a lot of conversation" between Her Honour and the lawyers present, which included the children's lawyer Mr N. Although Mr TS said at the

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

⁵ Rule 5.2.

⁶ Rule 5.3.

⁷ Rule 6.

review hearing that he was busy writing notes at the time, he is certain Mr KN did not make vigorous submissions.

[32] The Court would not have dealt with an application for inter parte costs in a vacuum. There are a number of reasons why a costs application would have been risky for Mr TS, certainly before the Court had made a decision. The evidence indicates Mr KN took matters as far as he reasonably could at the hearing. He accepts that Her Honour granted Mr TS leave to apply for costs. There is no reason to accept the opportunity is lost to Mr TS.

[33] It does not strike me as unusual that costs would await a final determination of the issues between Mr TS and the mother of his children. Mr TS says he and his former wife are now back before the Family Court in a dispute over their youngest child, and that another psychological report has been ordered. It therefore appears there is still room for an expert to form a different view of parental influence. If the present matter resolves in a manner that is not favourable to Mr TS, and costs orders had been made, it could well be argued that those costs orders were made prematurely and should be reversed.

[34] One of the main issues for Mr TS relates to whether Mr KN was obliged to pursue the application for recovery of overpaid child support from IRD in the course of the hearing regarding the care of the children. There was no application regarding child support before the Court. Mr KN did not take the opportunity at the hearing to challenge Mr TS' former wife on what she had told IRD. Mr TS believes that was a missed opportunity.

[35] Mr KN had advised Mr TS that he needed to discuss the matter with his colleague Ms M. Mr TS did so and was advised that he had two options. He could seek a minute from the Family Court to the effect that his former wife had lied to IRD, or he could make a formal application.

[36] I am not persuaded that Mr KN failed in his obligation to Mr TS in this regard. Mr KN considered the proper process was to commence a proceeding against IRD on the basis that the children's mother had misrepresented the care arrangements to the IRD. The child support issue was not directly relevant to the COCA proceeding and would have been a distraction from the central issues.

[37] I am not persuaded that there are grounds to form a different view to that formed by the Committee, and am mindful that it is not the role of this Office to “closely analyse and second guess every move of counsel during each piece of litigation”.⁸

[38] This aspect of the Committee’s decision is confirmed.

Summary

[39] After considering all of the material available on review, there is no evidence of any reason to take any further action on any of the concerns raised by Mr TS.

[40] 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 2nd day of November 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:

Mr TS as the Applicant
Mr KN as the Respondent
Mr C as a Related Person
Ms T as a Related Person
Ms W as a Related Person
[Area] Standards Committee
The New Zealand Law Society
Secretary for Justice

⁸ *Auckland Standards Committee 3 v EMJ Castles* [2013] NZLCDT 53 at [177].