

CONCERNING

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

AND

CONCERNING

a determination of [North Island] Standards Committee

BETWEEN

MR BI

Applicant

AND

MS CW

Respondent

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

Introduction

[1] Mr BI has applied for a review of the determination by [North Island] Standards Committee that Mr BI's conduct in relation to the account rendered to his client constituted unsatisfactory conduct.

[2] The Standards Committee censured Mr BI, ordered that he reduce his bill from \$30,620 plus GST (\$34,447.50) to \$17,354.49 plus GST (\$19,411.31) and imposed costs of \$1,500.

[3] Mr BI was concerned by the finding of unsatisfactory conduct against him, given that he had sought advice prior to rendering his account, and had offered to reduce his fee following Ms CW's complaint. The issues addressed in this review deal with the nature of a finding of unsatisfactory conduct.

Background

[4] Mr BI was instructed in April 2008 by Ms CW to act on her behalf with regard to various issues concerning her son. Mr BI went on leave from June 2008 and the file passed to Ms BK (who at that stage was employed by Mr BI), who continued to act for Ms CW until December 2008 when the firm's instructions were withdrawn.

[5] Ms CW first complained in June 2010. Her complaints at that time were that she had not received a bill from Mr BI, she had been asked to agree to an amount without reviewing a draft account, and she had not been kept apprised of costs as they accrued.

[6] The Standards Committee issued its determination on 3 November 2010 and found that Mr BI's conduct in not rendering a final account for more than 21 months after his instructions had ceased, amounted to a breach of Rule 9.6 of the Conduct and Client Care Rules.¹ The Committee also found that Mr BI had not kept Ms CW informed during the course of his retainer of the level of accruing costs.

[7] The Committee determined that Mr BI's conduct constituted unsatisfactory conduct, censured Mr BI and ordered him to pay costs of \$750 to the New Zealand Law Society.

[8] Following receipt of Mr BI's account for \$30,620 plus GST and disbursements in January 2011, Ms CW lodged a complaint about the fee and also referred to issues that had been addressed in the previous complaint.

[9] The bill of costs was referred by the Standards Committee to Mr CX to provide a costs assessor's report who recommended that Mr BI's fee be reduced to \$17,254.49 plus GST. The Committee accepted Mr CX's report, censured Mr BI, and ordered that he reduce his fee to the amount recommended by Mr CX. The Committee also ordered that Mr BI pay costs in the sum of \$1,500 to the NZLS.

[10] It is the later determination which is the subject of this review.

Review

[11] An applicant only hearing took place in Napier on 11 June 2013 attended by Mr BI and Ms BK. Ms CW was not required to attend and did not do so.

[12] Mr BI provided extensive submissions with his application for review and provided further written submissions at the hearing. As noted in the introduction to this decision, Mr BI was concerned at the finding of unsatisfactory conduct against him particularly as he had taken considerable steps to avoid a complaint about the fee. Before addressing the essence of his concerns it is pertinent to address some preliminary matters.

The complaint

[13] Ms CW complained about the quantum of Mr BI's account. The account was rendered in January 2011, but related to legal services provided from April to December 2008. In carrying out his investigation, Mr CX necessarily had regard to the work undertaken by Mr BI and commented on various aspects of that work. However, the finding of unsatisfactory conduct was in respect of the act of billing, and not in respect of the legal services provided. Consequently, the complaint falls to be considered in terms of the Lawyers and Conveyancers Act 2006 and the Conduct and Client Care Rules, both of which came into force on 1 August 2008, and the transitional provisions of the Act do not

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

apply.

The Standards Committee determination

[14] The Standards Committee determined that Mr BI's conduct constituted unsatisfactory conduct for the following reasons:²

- a) The practitioner's conduct in failing to keep the complainant informed of the cost of legal services being provided to her fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- b) The practitioner admits that his experience is in commercial law and that he had little or no previous experience in parenting proceedings and in particular, that he has no experience in cases involving allegations of sexual misconduct by one parent against another. The committee is of the view that the practitioner ought to have advised the complainant at the outset that this was a case requiring the services of an experienced family law practitioner who had dealt with these sorts of cases in the past.
- c) The committee does not accept that the complainant's email to the practitioner to the effect that she and her partner were prepared to suffer financial hardship in pursuing their case amounted to a suggestion that the complainant had an open cheque book.
- d) An independent Costs Assessor appointed by the committee to review the practitioner's bill of costs dated 14 January 2011 for a fee of \$30,620.00 (GST exclusive) recommended that the invoice be reduced to \$17,254.49 for the reasons set out in the report, and the committee accepts that recommendation.

[15] However, in its earlier determination the Standards Committee had also found:³

Mr [BI] does not appear to have kept Ms [CW] informed, during the course of his retainer, of the legal costs being incurred by her. On enquiring, Ms [CW] does not appear to have been advised of the total costs incurred on a time and attendance basis to enable her to make an assessment in a constructive and fully informed manner, of a fair and reasonable fee for the services provided by Mr [BI] and his firm.

² Standards Committee Determination dated 13 December 2011 at [4.1].

³ Standards Committee Determination dated 3 November 2010 at [3.2].

[16] Consequently, the findings in 4.1 (a) and (b) of the determination dated 13 December 2011 (being the determination under review) had already been included in the November 2010 determination, and should be disregarded, both in respect of the conduct finding, and the penalty to be imposed.

Mr BI's conduct in regard to the bill of costs

[17] Prior to rendering his account, Mr BI sought an opinion from Mr BJ, an experienced Rotorua practitioner. Mr BJ reviewed Mr BI's files and advised that he considered the proposed account to be fair and reasonable. Mr BI then rendered his account.

[18] Following the complaint, the matter was referred to Mr CX for a cost assessor's report. Mr CX commented that the letter from Mr BJ did not assist him in his task, as Mr BJ had provided no analysis for his conclusions.

[19] Following receipt of that report, Mr BI referred the matter again to Mr BJ who then provided a more detailed four page letter to support his views. He provided details of his experience:⁴

I have been in practice for almost 39 years and throughout that time I have been involved with Family Law work. I receive regular appointments as Lawyer for Child in both Care of Children Act and Child Young Persons & their Families Act proceedings. I have acted for both the [North Island location] District Law Society and the New Zealand Law Society in disciplinary proceedings, and I was a Costs Reviser under the previous legislation. I am now a Costs Assessor under the 2006 Act.

[20] At paragraph 14 of his letter, Mr BJ commented:⁵

Regrettably, it seems to me that the Costs Assessor here has placed far too much emphasis on the time recording and time audit rather than (with respect) fully considering the other factors in Rule 9.1.

[21] He then concluded:⁶

Having reconsidered matters following receipt of the documents which you sent me, I consider that the original account was a fair and reasonable fee, though I acknowledge that you have indicated to me that you would accept the recommendation of the Costs Assessor simply to resolve matters once and for all.

⁴ Letter from Mr BJ to Mr BI (25 October 2011) at [16].

⁵ Above n4.

⁶ Above n4 at [15].

Irrespective of that, it does not appear to me at all that there has been any issue of unethical or improper conduct on that part of you (and [Ms BK]).

[22] The relevance of Mr BJ's comments in the context of this decision, is that an experienced practitioner such as Mr BJ did not take issue with the quantum of Mr BI's bill of costs, and that Mr BI had consulted with him prior to rendering his account. These factors are particularly relevant in connection with my comments subsequently in this decision with regard to the censure imposed by the Standards Committee, and the finding of unsatisfactory conduct itself.

[23] During the course of the meeting with Mr CX, attended by Mr BI, Ms BK, Ms CW and (I believe) Mr CW, Mr BI voluntarily proposed a reduction of the fee to \$20,000 plus GST and disbursements. This was not acceptable to Ms CW and Mr CX recorded in his report disappointment that the matter had not been able to be resolved.⁷

[24] Following receipt of the report, Mr BI provided comments to the Standards Committee in a letter dated 25 October 2011. In that letter he made the following proposal:⁸

Although we do not agree with all of Mr [CX]'s summations, we do not wish to argue over a few dollars and are prepared to accept his recommended Fee.

[25] These attempts by Mr BI to resolve the matter are also addressed in my subsequent comments as to the findings of unsatisfactory conduct and censure.

The finding of unsatisfactory conduct

[26] At the heart of Mr BI's application for review is his dismay at the finding of unsatisfactory conduct, and the censure imposed by the Committee. He states that he is willing to accept the reduction in his account ordered by the Committee and, as noted, has made that proposal to the Standards Committee.

[27] Mr BI's reaction reflects the concerns of many practitioners at the prospect of a finding of unsatisfactory conduct against them in connection with a fees complaint. This concern arises due to the fact that a finding of unsatisfactory conduct is perceived by many practitioners as an adverse disciplinary finding.

[28] A finding of unsatisfactory conduct ranges from conduct which falls short of a standard of competence and diligence that a member of the public is entitled to expect of a

⁷ Cost Assessor's report dated 11 July 2011 paragraph [3].

⁸ Letter from Mr BI to NZLS (25 October 2011) at [5.4].

reasonably competent lawyer,⁹ through to conduct which would be regarded as unacceptable to lawyers of good standing.¹⁰

[29] Section 12(c) of the Lawyers and Conveyancers Act defines unsatisfactory conduct as being conduct which breaches any one or more of the Conduct and Client Care Rules. Those Rules cover the fundamental obligations of lawyers:¹¹

- to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- to be independent in providing regulated services to clients:
- to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interests of clients.

[30] Rule 9 of the Conduct and Client Care Rules requires that:¹²

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.

[31] Prior to the Lawyers and Conveyancers Act coming into force on 1 August 2008, complaints about fees carried with them no element of judgment about the conduct of the lawyer involved, unless it involved gross or dishonest overcharging. The vast majority of fee complaints were dealt with by way of referral to a costs reviser, who formed a view of what constituted a fair and reasonable fee for the services provided and adjusted the fee accordingly. Such a process did not carry with it any disciplinary finding.

[32] Under the Lawyers and Conveyancers Act, however, complaints about fees are treated in the same manner as any other complaint about a lawyer's conduct. If a Standards Committee forms the view that the fee charged has not been fair and reasonable, then the lawyer's conduct constitutes unsatisfactory conduct in terms of s 12(c) of the Act by reason of the breach of Rule 9 of the Conduct and Client Care Rules.

[33] Although it is accepted that as a result of this change, lawyers' bills are not subject to adjustment by small amounts, many lawyers perceive that a finding of unsatisfactory

⁹ Lawyers and Conveyancers Act 2006, s 12(a).

¹⁰ Above n9, s 12(b)

¹¹ Above n1 Preface.

¹² Above n1.

conduct carries with it an unacceptable stigma. This is reflected in 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.

[34] In this regard some discussion about the nature of the finding of unsatisfactory conduct is appropriate and I refer to an article by the former LCRO, Duncan Webb.¹³ He described a finding of unsatisfactory conduct as being:

...conduct that is not so egregious as to amount to misconduct but is still deserving as being marked out as falling below the standard of behaviour that clients and the public are entitled to expect. It is a professional lapse.

[35] With regard to a finding of unsatisfactory conduct by reason of a breach of the Conduct and Client Care Rules, he notes:¹⁴

It is important to note that a breach of the rules will be unsatisfactory regardless of significance. While there is a power under s 137 to dismiss a complaint that is trivial (or frivolous, vexatious or not made in good faith), the starting place must be that any breach of rules is a matter for concern.

[36] He further notes:

Unsatisfactory conduct is clearly a professional standard. Professional consequences flow from a breach of that standard. However, it is fundamentally different from a finding of misconduct. A finding of misconduct has connotations of a serious failure of professional standards.

[37] By contrast, he notes that:

...the [Lawyers and Conveyancers Act] makes it quite clear that a finding of unsatisfactory conduct may be made on the basis of mere negligence of a practitioner (s 12(a)) or an implied unintentional (and minor) contravention of one of the new rules or regulations (s 12(c)).

¹³ Duncan Webb ““Unsatisfactory Conduct” under the Lawyers and Conveyancers Act 2006” (2008) 717 LawTalk 18.

¹⁴ Above n13.

[38] He then comments that:

It is also perhaps useful to look at the term itself. To mark out conduct as unsatisfactory is hardly a damning condemnation. To state the obvious, lawyers' conduct can either be satisfactory or not. It is suggested that the choice of the only faintly damning description of 'unsatisfactory' indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the practitioner in question "must try harder".

[39] In summary, he concludes:

...the term "unsatisfactory conduct" covers a range of conduct from the mere slip or oversight that is less than satisfactory, to conduct on the border of misconduct that is deserving of serious sanction.

This discussion by Duncan Webb points out the difficulties which face a lawyer whose conduct is subject to a finding of unsatisfactory conduct. It clearly is not, and is not intended to be, a matter to be dismissed lightly. The range of orders that can be made include some significant penalties. In addition, a finding of unsatisfactory conduct is a black mark against a lawyer's professional record and deserves to be and is, treated seriously.

[40] A finding of unsatisfactory conduct in the context of a fee complaint is, however, problematic. It has been recognised that determining a reasonable fee "is an exercise in assessment, an exercise in balanced judgment, not an arithmetical calculation".¹⁵ However, even a fee which exceeds the tolerable limit, does not necessarily reflect conduct which is deserving of the stigma referred to.

[41] That this is the case is starkly evident in the present instance. Mr BI referred his files to Mr BJ for an opinion as to whether or not his proposed fee was fair and reasonable. Mr BJ's credentials and integrity cannot be challenged, as is evident from the summary of his experience referred to in [19]. The fact that his firm was also a member of [X], of which Mr BI's firm was (is) also a member, is of no relevance. Such groupings of lawyers exist for mutual support and assistance and are particularly helpful for small firms. Mr BJ's opinion was not sought to support a fee that had already been rendered. Instead, Mr BI was using Mr BJ as a sounding board as to whether or not his fee was acceptable. There was no point in Mr BJ giving Mr BI advice that was going to lead to a complaint. Mr BI was seeking the opposite.

¹⁵ *Property and Reversionary Investment Corporation Ltd v The Secretary of State for the Environment* [1975] 2 All ER 436, 1 WLR 1504.

[42] Mr BJ's advice was that he thought Mr BI's intended bill was fair and reasonable.

[43] Mr CX thought otherwise. He considered that "the amount of the invoice [was] not consistent with market rates for preparation and representation at such a hearing as is set out in the general analysis of [the] report."¹⁶

[44] Mr CX also noted that Mr BI was "pragmatic in seeking to resolve the costing dispute"¹⁷ and to this end voluntarily offered to reduce the bill to \$20,000 plus GST at the hearing with Mr CX. Ms CW did not agree.

[45] Similarly, after Mr CX had delivered his report, although he did not agree with the recommendation, Mr BI advised the Standards Committee that he was prepared to accept the recommended fee. Ms CW however preferred to leave the matter to the Committee to determine.

[46] An option open to a Standards Committee where the difference between the fee charged and what the Committee considers represents a fair and reasonable fee is not as significant as in the present instance, is to seek an undertaking from the lawyer to reduce his or her fee to the recommended figure and take no further action in respect of the complaint. However, the 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 and in the present instance the difference between the fee charged and that considered by the Committee to be a fair and reasonable fee, was too great for that to be an appropriate option.

[47] I am mindful that in *Auckland Standards Committee v Hart*¹⁸ the Lawyers and Conveyancers Disciplinary Tribunal found that a fee of \$35,000 was grossly excessive when a fair and reasonable fee was accepted as being \$15,000 to \$16,000 and found that this constituted misconduct pursuant to s 7(1)(a)(iv) of the Lawyers and Conveyancers Act 2006.

[48] In the light of this, the Committee was correct in not adopting the approach that Mr BI would have preferred. The difference between the fee charged and Mr CX's recommendation was too large to allow the complaint to be determined without a finding of unsatisfactory conduct.

[49] Where this particular matter differs from many others, are the extraordinary lengths that Mr BI went to in an effort to ensure that the very scenario that has unfolded did not occur. He sought a peer review of the proposed bill from a senior practitioner who reviewed all of his files. At the meeting with the Costs Assessor he voluntarily proposed a

¹⁶ Cost Assessor's Report (11 July 2011).

¹⁷ Above n16 at [37].

reduction of his bill to \$20,000. After Mr CX's report had been issued, he again offered to reduce his bill to the figure recommended. He could have done no more to avoid an adverse outcome.

[50] I am satisfied that all of Mr BI's conduct has been driven by a genuine desire to do the best for his client, and then to resolve any differences amicably. Somewhat ironically, this desire to do the best for his client has resulted in a higher level of attendances on the file than was accepted by Mr CX as being necessary. At various places in his report, Mr CX has made observations to this effect. For example, at paragraph 36, Mr CX states, "[i]t was apparent that Mr BI had been genuine and professional at all times..."¹⁹

[51] In essence the criticism is that Mr BI was unrealistic in terms of what could be achieved, the zeal he applied and the fact that he did not communicate costing realities. Elsewhere Mr CX noted that "Ms [BK] emphasised that Mr [BI] did everything in his power to assist his clients and left no stone unturned."²⁰ Mr CX noted that "this too can be a proper role for a lawyer".²¹

[52] Factors which Mr CX considered needed to be taken into account, however, when determining that Mr BI's fee was too high, was the fact that this was Mr BI's first opposed parenting proceeding, notwithstanding his extensive experience in other fields and the outcome of the litigation achieved little for Ms CW.

Mr BI's concerns

[53] Mr BI's concern is to dispel any notion that his conduct lacked integrity and professionalism. He does not wish to dispute the outcome of the Standards Committee decision with regard to the level of his fees. He does not necessarily accept all of the comments in the report on which the Committee relied, but in the interests of disposing of the matter, he is prepared to accept the outcome.

[54] His concerns lie, as noted, with the suggestion that any part of his conduct, either in acting for Ms CW, or the setting of the fee, should in any way be perceived as reflecting badly upon his professional character.

[55] I accept without reservation that no part of Mr BI's conduct can be impugned in any way in this manner. For this reason, therefore, I consider that the censure imposed by the Committee was wholly inappropriate. In addition, the issue of failing to inform Ms CW about the level of accruing costs had already been dealt with by the Standards Committee in its previous decision and should not have formed any part of the Committee's

¹⁸ *Auckland Standards Committee v Hart* [2012] NZLCDT 20.

¹⁹ Above n20.

²⁰ Above n20 at [38].

²¹ Above n20.

considerations in the present decision. Insofar as the censure related to this it could be considered to constitute “double jeopardy”. The censure will therefore be cancelled.

[56] In addition, the circumstances of this case, and the steps that Mr BI took to avoid a complaint about fees, demand some specific comments to remove any element of doubt as to Mr BI’s integrity. I therefore take the opportunity to record that the finding of unsatisfactory conduct in this instance does not carry with it any element of adverse judgment of Mr BI’s professional character and integrity, and that the work that he undertook for Ms CW was not in any way considered to be substandard or lacking in professionalism. His actions were at all times driven by a desire to achieve the best outcome for Ms CW and for her son, and to provide all of the protection that could be provided by the law in the circumstances.

[57] However, given the significant disparity between the fee charged, and the fee accepted by the Committee as representing a fair and reasonable fee, the finding of unsatisfactory conduct must remain to avoid the perception that adverse findings in fee complaints can be avoided by agreeing to a reduced figure.

[58] This outcome and these comments are in accord with my discussion with Mr BI at the review hearing. The option of commissioning a second cost assessor’s report was discussed and considered, but again, Mr BI’s pragmatism in wishing to have this matter finalised, indicated preparedness to accept this outcome. His co-operation with both the Standards Committee and this Office are noted, as too is Ms BK’s co-operation and her involvement with the process when she was not the person complained about.

Disbursements

[59] One final matter needs to be addressed. The Standards Committee has throughout its decision referred to Mr BI’s “fees”. The position is that his fee should be reduced to \$17,254.49 (GST exclusive). In his report, Mr CX made comment about disbursements charged by Mr BI, and in particular photocopying charges. The Committee did not refer to those comments in its determination and for that reason the level of disbursements charged by Mr BI remain unchanged. To clarify this issue, the effect of the Standards Committee determination is that Mr BI’s fee is reduced to \$17,254.49 plus GST plus disbursements as charged.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is modified by cancelling the censure imposed in paragraph 5.1(2) of the Standards Committee determination.
2. In all other respects, the determination of the Standards Committee is confirmed.

DATED this 12th day of September 2013

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:

Mr BI as the Applicant
Ms CW as the Respondent
The [North Island] Standards Committee
The New Zealand Law Society