

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee

BETWEEN

MS VR

Applicant

AND

MS AL

Respondent

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

DECISION

Introduction

[1] Ms VR has sought a review of the Standards Committee determination to take no further action in respect of her complaints against Ms AL whom she had instructed to act for her to conclude an agreement pursuant to s 21 of the Property (Relationships) Act 1976. This review reflects the tensions that can arise when a lawyer endeavours to ensure that he or she meets the requirements placed on certifying lawyers by the Property (Relationships) Act and the Courts.

Background

[2] Ms VR entered into a relationship with her husband in June 2010, whom she married in March 2011. In August 2011 she instructed Ms AL that she wished to enter into a contracting out agreement pursuant to s 21 of the Property (Relationships) Act 1976 with her husband.

[3] On 1 December 2011 Ms VR approved a draft letter to her husband's solicitor (Mr VS) rejecting amendments to the draft agreement proposed by him and returning the draft with tracked changes.

[4] On 7 December 2011, Ms VR sent an email to Ms AL. It read:

Hi [Ms AL]

I know we spoke last week about some more changes to be made to the agreement and you then sent a letter to [Mr VR's] lawyer, [Mr VS], with those changes.

However, I have given it much thought and I am happy to and would like to sign the agreement now as it is pre the above changes.

Could I please arrange a time to come to see you to do so?

[5] Following email correspondence between the parties on 12 December 2011 (in which Ms AL noted that she wished to explain the terms of the Agreement to Ms VR) an appointment was then made for Ms VR to attend at Ms AL's office on 19 December.

[6] Following that meeting Ms AL made a file note in which she recorded her advice to Ms VR, particularly her advice with regard to the terms of the Agreement which provided for property to be divided in the event of separation according to contribution unless the couple had a child, in which case the equal sharing provisions of the Act would apply to property acquired after the commencement of the relationship.

[7] Ms AL recorded:¹

We agreed to sign the Agreement in the form that was acceptable to [Ms VR] and send to [Mr VR]'s lawyer for them to think about over the Christmas break. If they were not prepared to accept the Agreement in that form then I would not be involved in certifying the Agreement. Whilst [Mr VR's] lawyer considered that I was obliged to certify, I explained to [Ms VR] that I believed it was more complex than that.

[8] She further recorded that she:²

would not collude in a process which involved her being pressured to sign an Agreement and that the very essence of independent advice was that she was entitled to make up her mind in an independent fashion free from such pressures. She would be left in the position where she would need to take the Agreement to another lawyer who may be prepared to certify it but I would be very surprised if they would do so.

¹ File note made by Ms AL dated 19 December 2011.

² Above n 1.

[9] Ms AL then prepared a draft letter to Mr VS in which the Agreement signed by Ms VR was to be sent. In that draft she intended to advise Mr VS that “the Agreement has been finalised in accordance with the tracked changes version I sent to you on 1 December 2011.”³

[10] At the same time as sending that draft to Ms VR for approval, she sent a bill for work carried out between 31 October 2011 and 19 December 2011 for \$1,405 plus GST and an administration fee. The fee was prepared in accordance with time records which were attached to the bill.

[11] On the same day (23 December 2011) Ms VR sent an email to Ms AL: “I have had a bit of a think and I think I would rather leave this to send in the New Year if that is ok?”

[12] On Ms AL’s return to the office on 23 January 2012 following her Christmas break, she noted an email from Ms VR which had been sent on 16 January:

Hi [Ms AL] / [AM],

Happy New Year to you both! I hope you both had a lovely break.

[Ms AL], I asked [AM] to hold off sending the attached last year before Xmas in the end as I decided that I wanted a bit of time to think about things first, as it all felt a bit rushed. I had a big think about things over the break and I also talked to [Mr VR] about it. [Mr VR] is still in the position where he will not sign the attached Agreement - he will only sign the Agreement prior to these changes.

I know we had a talk about all of this when I met with you last in December [Ms AL] - and I know I agreed with you at the time that we should make the changes but at the end of the day this is having a huge impact on my marriage by dragging out too long and I would rather just sign it and be done with it! Compromise has already been made for me which I am happy with (thanks to you for that!) and I think that it is a very unlikely situation that [Mr VR] & I will have a child. I plan to have a strong career and make my own money (as much as or more than [Mr VR]) therefore the Agreement is not going to disadvantage me if we did happen to break up later on down the track.

I am not sure whether you will want me to come back in and meet with you - or if you will even sign me up on the Agreement prior to the attached changes (as you had mentioned in our last meeting that you might not if I were to ask you to). This is really my final position on the subject and I am 100% certain that it is what I want. I

³ Letter from Ms AL to Mr VS, 23 December 2011.

don't feel under any pressure anymore (as I did last year) after having had a good amount of time to give it some serious thought and think about what I want.

Thank you once again for all your time and help with this.

[13] Ms AL responded by email on 26 January and strongly recommended against the proposal by Ms VR to sign the Agreement in its original format. She advised that she would be happy to meet and discuss the matter with Ms VR.

[14] Ms VR then replied noting that the Agreement to which she was referring did in fact include the provisions that Ms AL wished to have incorporated into the document. In response, Ms AL noted that this was the form of the Agreement which Ms VR had instructed her not to send on 23 December.

[15] Subsequently, Ms AL advised Ms VR that she wanted to meet with her to ensure that she fully understood the terms of the Agreement that she wished to sign and that she would then record that advice in writing. In her email of 13 February she noted:

I do not expect that it will take long to do so but you will appreciate that I take my certification responsibilities seriously and that your position has changed. Part of my role and responsibility is to ensure that your understanding of the legal position is clear and that you are not under pressure which might affect that understanding.

[16] Very little occurred subsequently, other than Ms VR advised that she considered Ms AL's bill of 21 December to be too high after Ms AL's office had made contact seeking payment of the account.

[17] Ms VR lodged her complaint on 2 April 2012.

Ms VR's complaints and the Standards Committee determination

[18] Ms VR's complaints are encapsulated in the first paragraph of her letter accompanying the complaint form. She stated:⁴

I engaged [Ms AL's] services in August 2011 in relation to a Property Relationship Agreement with my husband [Mr VR]. The whole matter was dragged out unnecessarily and was never resolved. [Ms AL] did not follow my instructions in this matter and on numerous occasions I wanted to sign the Agreement but [Ms AL] would not sign me up. [Ms AL] failed to inform me on the work she was undertaking (particularly in relation to the period she has billed me for in her latest bill), there have been unreasonable delays in the provision of [Ms AL's] advice and

⁴ Complaint letter from Ms VR to NZLS, 2 April 2012.

on several occasions she failed to reply to my phone calls and emails . I constantly had to chase [Ms AL] to reply to my emails and she often replied with incorrect information or would not answer my queries.

[19] The Standards Committee summarised Ms VR's complaints as being:⁵

- i. Failure to keep the client informed.
- ii. Failure to respond to client queries and provide accurate information.
- iii. Overcharging.

[20] The Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in connection with the complaints on the grounds that further action would be inappropriate. It concluded that the fees charged by Ms AL were fair and reasonable in relation to work appropriately undertaken in the matter. With regard to Ms VR's other complaints the Committee determined:⁶

The Committee did not find any evidence to support claims that Ms [AL] had failed to follow instructions or had failed to keep the client informed. The onus was on Ms [AL] to ensure that the client understood the legal implications of any change of heart and Ms [AL] acted appropriately in the circumstances.

[21] In addition to the complaints recorded by the Standards Committee Ms VR had also complained that:⁷

Ms [AL] made it clear to me on several occasions that if I tried to engage another solicitor that she would make sure that no one would touch it now that she had become involved. She intimated that she would rely on my having seen two previous lawyers in support of any action she took. For the record, of the two lawyers seen, one was a casual meeting with my mother's employer (conflict of interest) and the second did not seem interested in taking a family law matter. What would have been in my interests were if Ms [AL] had followed my instructions to conclude this matter, rather than delaying, failing to respond to queries, providing poor advice, and generally chalking up legal fees far in excess to the task required of her.

[22] This issue has not been referred to in the Standards Committee complaint, but I will address that in the course of this decision.

Review

⁵ Auckland Standards Committee 4 determination, 30 August 2012 at p 1.

⁶ Above n 5 at p 2.

⁷ Letter from Ms VR to NZLS, 28 May 2012.

[23] A review hearing was initially scheduled for 2 May 2013. However, this Office had difficulties communicating with Ms VR until immediately prior to the hearing when an email was received from Mr VR advising that Ms VR no longer resided in New Zealand. He requested advice as to whether or not a telephone conference was possible.

[24] In a direct communication with Ms VR by the Case Manager, it was initially arranged that she would attend the hearing by telephone. However, she subsequently advised that this was not possible and requested that the matter proceed without a hearing.

[25] Ms AL then consented to the review being completed on the papers and the review proceeded in that manner.

Was Ms AL obliged to follow Ms VR's instructions?

[26] In general terms a lawyer must follow instructions provided by his or her client after the client has been fully advised on all of the issues impacting on that decision. However, a lawyer cannot be required to act in accordance with those instructions, when to do so would mean that he or she would thereby be in breach of any other obligations or duties imposed on the lawyer.

[27] As alluded to in the introduction to this decision, lawyers are charged with ensuring that contracting out agreements pursuant to s 21 of the Property (Relationships) Act 1976, are properly explained to their clients. Failure to do so can result in the Agreement being set aside by the Courts thereby exposing the lawyer to a claim in negligence.

[28] In Fisher on *Matrimonial and Relationship Property*, the author notes with regard to the lawyer's certificate to a s 21 agreement:⁸

As well as being "no mere formalism", each party must receive professional opinion as to the fairness and appropriateness of the Agreement at least as it affects that party's interests. The touchstone will be the entitlement that the Act gives, and that requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms of the Agreement. The implications must be explained as well. In other words, the party concerned is

⁸ Robert Fisher *Fisher on Matrimonial and Relationship Property* (3rd ed LexisNexis, Wellington, 2002) at [5.71].

entitled to an informed professional opinion as to the wisdom of entering into an agreement in those terms.

[29] It is not uncommon that a client who is happy to accept the terms of an Agreement entered into at the beginning of a relationship, subsequently forms the view as time goes by and/or the relationship disintegrates, that the Agreement entered into is unfair. In those circumstances, the quality and soundness of the advice provided by the certifying solicitor comes under scrutiny as that often provides grounds to set the Agreement aside.

[30] Lawyers who agree to advise on such agreements are well advised to be particularly cautious to ensure that their clients not only fully understand the Agreement, but are entering into the Agreement free from compromising influences. This is particularly so when the Agreement departs from what is usually considered to be acceptable in the circumstances that apply to the parties to the Agreement.

[31] Ms AL considered that Ms VR was surrendering significant rights afforded to her by the law by reason of the Agreement drafted by Mr VS for Mr VR. Previous solicitors engaged by Ms VR had also formed this view and Ms AL has produced copies of letters to Ms VR from those solicitors which confirm this.

[32] Ms AL also suspected that Ms VR was coming under undue pressure from her husband to accept what she considered was a grossly unfair agreement, and this view was supported by comments made by Ms VR that the delays in completing the Agreement were having a “huge impact” on her marriage.⁹ Ms AL’s advice was that Ms VR should simply decline to enter into the agreement and rely upon the rights provided to her by the law.

[33] She also considered that her “independent” advice had been compromised by reason of the fact that Mr VR had viewed emails from Ms AL to his wife.

[34] Ms VR did not wish to accept Ms AL’s advice which has led to these complaints.

[35] Contrary to Ms VR’s view that Ms AL was not following her instructions, Ms AL was in fact fulfilling the obligations imposed on a diligent and competent lawyer. She was required to be absolutely satisfied that she had met her obligations to her client. Indeed, she also assumed obligations to Mr VR to ensure that the certificate endorsed

⁹ Email from Ms VR to Ms AL, 16 January 2012.

on the Agreement as required by the Act was correct. In *Coxhead v Coxhead*,¹⁰ Hardie Boys J said with regard to a s 21 certificate:

The certificate is in the nature of a representation by the solicitor upon which the other party is entitled to rely (see *Connell v Odlum* [1993] 2NZLR 257) but a certificate given wrongly or negligently cannot bind the party the solicitor has undertaken to advise under the Act.

[36] In this regard, I also note the provisions of Rule 2.5 of the Conduct and Client Care Rules:¹¹

A lawyer must not certify the truth of any matter to any person unless he or she believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.

[37] In summary, the complaint against Ms AL that she failed to follow instructions simply cannot be sustained when to do so would mean that the lawyer is in breach of other Conduct and Care Rules or obligations imposed by the law.

Did Ms AL's bills constitute overcharging?

[38] The bill which Ms VR referred to when lodging her complaint was the bill dated 21 December 2011 for \$1,405 plus GST and disbursements.

[39] In her response to the complaint, Ms AL referred to Regulation 29 of the Complaints Service and Standards Committee Regulations 2008 that provides:¹²

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 it otherwise, the Committee must not deal with the complaint if a bill of costs –

- (a) was rendered more than two years prior to the date of complaint; or
- (b) relates to a fee that does not exceed \$2,000 exclusive of goods and services tax.

[40] In addition to the bill about which Ms VR had complained, she advised that she had previously paid to Ms AL bills totalling \$2,392. Ms AL has not taken issue with this statement and I therefore take it to be correct.

¹⁰ *Coxhead v Coxhead* [1993] 2 NZLR 397.

¹¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹² Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[41] Where there have been a number of bills rendered on an interim basis, this Office has taken the approach that the bills should be aggregated for the purposes of Regulation 29 as they all relate to the same matter. On this basis therefore, Regulation 29 does not prevent the Standards Committee from considering the account.

[42] The Standards Committee did not refer to Regulation 29 but reached the view that the bill of costs rendered by Ms AL was fair and reasonable. In doing so, it has wrongly attributed an observation that if a fee was within 20% of what could be considered to be a fair and reasonable fee, then no action should be taken, to Priestley J in *Chean v Luvit and Kensington Swan*.¹³ I believe that suggestion has been made in a commentary provided to Standards Committees by Mr Burcher. In the case referred to, the statement by Priestley J that is commonly referred to is that:¹⁴

a practitioner who is using time and attendance records to construct the bill, [must] take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[43] Ms AL's bill was based on the time recorded by her. Her charge-out rate was \$450 per hour which is within an acceptable range for barristers of her experience. She was diligently endeavouring to protect Ms VR from what had been described by one of her previous solicitors as a "lopsided" Agreement, but the position adopted by Mr VR and his lawyer resulted in somewhat greater attendances than would have been necessary for a more "standard" agreement.

[44] The Standards Committee did not see the need to appoint a costs assessor for an independent review of Ms AL's account. Members of the Committee include lawyers who practice in family law and lay persons. They considered the bill was fair and reasonable and having complied with the direction by Priestley J in *Chean*, I see no reason to come to a different review.

Failing to inform and respond

[45] I can see no evidence of any failure on Ms AL's part to inform Ms VR of the work that she was carrying out, or a failure on her part to respond to communications from Ms VR. Due recognition must be taken of the fact that the period the complaint refers

¹³ *Chean & Luvit International Ltd v Kensington Swan* HC Auckland, CIV 2006-404-1047, 7 June 2006.

¹⁴ Above n 13 at [23].

to is December to February, which is always a particularly busy time of the year for most lawyers.

[46] Ms VR sent an email to Ms AL on Wednesday 7 December 2011, which Ms AL replied to on Monday 12 December. An appointment was made for Ms VR to meet with Ms AL on the following Monday, 19 December, and further communications were received from Ms AL on 23 December.

[47] She did not return to her office after the Christmas break until 23 January and the chronology supplied by her with respect to events after that date does not show any period during which it can be alleged that she was particularly tardy in responding to communications.

[48] In addition, the communications from Ms AL related to the matters that she was attending to in respect of Ms VR's agreement and I do not consider there is any foundation for the complaint that she failed to inform or reply to Ms VR.

Summary

[49] Overall, after having considered all of the material presented in connection with this complaint, I reach the same conclusion as the Standards Committee, namely that no further action is appropriate or necessary in respect of Ms VR's complaints.

Decision

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

DATED this 31st day of May 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:

Ms VR as the Applicant
Ms AL as the Respondent

The Auckland Standards Committee
The New Zealand Law Society