

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 2

BETWEEN

MR OL

Applicant

AND

MR PS

Respondent

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

DECISION

Introduction

[1] This review arises out of a complaint by Mr OL (the Applicant) against Mr PS (the Practitioner) which the Standards Committee declined to uphold. The complaint alleged overcharging by the Practitioner. The Standards Committee decision noted that the Practitioner's response (to the complaint) had been sent to the Applicant for his comment and response, but no further response was received.

[2] The Committee considered all of the information before it and accepted the Practitioner's explanation, deciding to take no further action pursuant to Section 138(2) of the Lawyers and Conveyancers Act.

[3] The Applicant sought a review on the basis that "*[i]t would be a miscarriage of justice not to have this heard with all details and fairly on facts*

supplied." He attended an Applicant-only hearing where he was able to discuss the reasons for his review application. The Practitioner was entitled to attend but not required to do so, and in the event decided he would not come.

Background

[4] The Practitioner is a barrister who, on the instruction of lawyer E, represented the Applicant in certain court proceedings. The Practitioner performed services and issued three invoices. The first and third invoices included discounts for prompt payment. The first two invoices were paid.

[5] The third invoice dated 28 May 2010 was partially paid, and there remains an outstanding amount of \$5,062.50. This invoice was sent out with a covering letter (of same date) wherein the Practitioner had written that he would not charge anything more from that date until the end of the settlement conference (which was scheduled a week hence for June 3) providing the bill was paid immediately. This meant that the Practitioner's preparation and attendance at the proposed half day settlement conference would not be charged.

[6] However, on that same day (28 May) the Applicant terminated the retainer with his instructing solicitor, E, and also contacted the Court to inform it of that event. In these circumstances, without an instructing solicitor, the Practitioner could no longer provide services to the Applicant. The Practitioner and E both appeared in the Court on 3 June seeking leave of the Court to be removed as solicitors on the record. Their applications were granted. The settlement conference was adjourned as the Judge decided that more time was needed than only the half day that had been scheduled. Thereafter the Practitioner provided no further services to the Applicant.

[7] The original complaint alleged that the Practitioner had continued to charge the Applicant for services after the 28 May.

[8] The Practitioner informed the Standards Committee (and provided supporting information) that he had not charged the Applicant any further fees after the 28th May.

[9] The Practitioner's response was sent to the Applicant but he did not comment further. In these circumstances the Standards Committee could see no basis for further enquiry. The complaint was not upheld.

Review application

[10] The Applicant raised a number of matters for the review. These included his dissatisfaction that the Court had excused the Practitioner from acting further for him. He also referred to an overpayment on the 3rd (28 May) invoice, but I noted that this was a credit (to the Applicant) that was accounted for in the Practitioner's calculations.

[11] The Applicant's position is that he should not be required to pay the remaining fee claimed by the Practitioner. On his analysis and reasoning, he claimed to be entitled to a refund from the Practitioner. This was explained with reference to a discount that had been anticipated by the Applicant but which did not eventuate. The Applicant referred to the Practitioner's 28 May letter, and the agreement to not further charge the Applicant for attending the judicial conference, which the Practitioner had calculated would result in an overall discount to the Applicant over some 23-24%.

[12] The Applicant interpreted this as the Practitioner offering to discount all of his invoices by 23-24%. On the Applicant's calculation not only is he not indebted to the Practitioner for the outstanding amount of the 28 May invoice, but that the Practitioner owes him a refund from payments already made in relation to earlier invoices which had been discounted by only some 18%.

[13] The Applicant seeks to have the entire fees that he paid discounted by 23-24%, on which basis he contends that the Practitioner owes him a refund.

Considerations

[14] The original complaint was that the Practitioner had continued to charge fees after 28 May. In my view the Committee was correct in dismissing the complaint as it is abundantly clear from the documentation that the invoice covers a period up to and including the 28 May and that no further charges were made after that date.

[15] For the review the Applicant added further reasons why he should not have to pay the outstanding account. His main argument was that the Practitioner had, and still has, an ongoing obligation to him (the Applicant) to provide free legal services in relation to the settlement conference, and that the Practitioner's failure to have provided that service nevertheless entitles him (the Applicant) to the benefit of the legal services that were offered for free but valued

at a 23-24% discount. On that basis he claims to be entitled to a discount of 23-24% off all of the fees charged by the Practitioner, including the 28 May invoice.

[16] I do not agree that the Practitioner has any ongoing duty to represent the Applicant. The Court granted the applications by the Practitioner and his instructing solicitor to be removed on the record having satisfied himself his applications were properly made. Moreover, it was an act of the Applicant himself that led to circumstances wherein the Practitioner could no longer represent him. No disciplinary issues arise for the Practitioner in ceasing to act.

[17] None of the additional grounds advanced for the review had been put to the Standards Committee when it considered the complaint. It is clear from the file that the Applicant had the opportunity to comment on the Practitioner's response to the complaint and decided not to do so. That would have been a sufficient ground for declining to consider the new explanations in support of the complaint. However, the Applicant's submissions were discussed at the review hearing and it is appropriate to record that I have considered these matters.

[18] The Practitioner's last invoice is dated 28 May 2010, and is clearly based on services provided up to, and including, that date. The Practitioner's covering letter discussed the charges in the accompanying invoice (which included a discount), and informed the Applicant that there would be no additional charges made until after the settlement conference. It appears from that letter that the Practitioner anticipated that the additional work to be performed (and not charged) was worth some \$10,000 and on that basis he quantified the discount "*would amount to over to [sic] something like 23-24%.*"

[19] When that May invoice was sent the Practitioner expected to act for the Applicant at the half day settlement conference scheduled for the following week. Thus, the rendering of that account had no bearing on the events that then followed, which led to the Applicant terminated his retainer with E, and the Practitioner's authority to act also disappearing.

[20] The result was that the services that the Practitioner anticipated would be provided without charge did not eventuate. The Applicant nevertheless claims to be entitled to the benefit of the anticipated discount. He claims to be entitled to a credit to the value of the percentage discount, assessed by the Practitioner as being the value of the free services.

[21] There are a number of difficulties with his arguments. The work that the Practitioner had offered to perform at no charge was future work (re the settlement conference) that was neither undertaken nor charged for. The 28 May invoice covered fees already incurred to that date, and it was payable when invoiced to the Applicant. That invoice included a discount if prompt payment was made. All fees invoiced to that date were payable as set out in the invoices.

[22] There was no offer from the Practitioner to confer a retrospective discount on all fees paid to date or then payable, and there is no part of the Practitioner's 28 May letter that could be reasonably interpreted in the various ways that the Applicant suggested. What the Practitioner's letter amounted to was an offer for some future work for no additional charge. Quantifying the value of that future work in terms of the overall percentage discount that would result could not confer any rights on the Applicant in relation to debt already incurred to that date.

[23] The Applicant's position did not change as a result of that offer, and that the services were not in the event provided did not entitle the Applicant to claim the value of those services in other circumstances. I do not accept the Applicants argument concerning his claim to discount the fees.

[24] At the review hearing I explained to the Applicant that I could see no reason why he should not pay what he owes to the Practitioner. The Applicant made it clear that he does not agree with my analysis, continuing to the end to insist on an entitlement to a greater overall discount. I must conclude that he is unable to be persuaded otherwise.

Additional complaint

[25] The Applicant raised the additional complaints that the Practitioner had not fulfilled his contract to attend the settlement conference, contending that the Practitioner had an obligation to attend that meeting which was re-scheduled for October.

[26] This was not a complaint that had been brought to the Standards Committee and being a new complaint, could not be considered in the course of the review. It is nevertheless worth noting that, having heard in full the Applicant's grievance, I have found no basis for any wrong-doing by the Practitioner in relation to this matter. He could not have continued acting for the Applicant without an instructing solicitor, further noting that the Applicant did not instruct another solicitor for some five months. While the Applicant sought to lay

at the Practitioner's door some of the responsibility for the delayed appointment of a new solicitor, I have found no evidence that this is the case.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act, the Standards Committee decision is confirmed.

DATED this 14th day of August 2012

Hanneke Bouchier
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 OL as the Applicant
Mr PS as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society