

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee No [x]

BETWEEN

MG

Applicant

AND

HJ

Respondent

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

DECISION

Introduction

[1] Mr MG applied for a review of a decision by the [city] Standards Committee [x] dated 24 July 2013 in which the Committee decided to take no further action against Mr HJ, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr HJ acted for Mr MG and his brother during 2009. The brothers wanted to contest their uncle's will. Mr HJ took steps towards initiating a High Court proceeding aimed at challenging the will, including briefing witnesses, and pursuing an application for pre-commencement discovery in the High Court. The application was unsuccessful.

[3] Mr HJ issued invoices, totalling \$27,500, and requested payment from Mr MG before he undertook further work. Mr MG refused to pay, saying he had agreed to pay no more than \$10,000 for Mr HJ's work. No proceeding was filed challenging the will.

[4] In due course, Mr HJ commenced a proceeding to recover his fees, which was subsequently stayed after Mr MG had made a complaint to the New Zealand Law Society (NZLS) about Mr HJ's competence, conduct and fees.

Complaint

[5] Mr MG's complaint included allegations of incompetence, unethical and unprofessional behaviour, and overcharging. Mr MG says he had not given Mr HJ carte blanche with respect to his fees, having capped them at \$20,000, and that only half of that was payable by Mr MG. Mr MG says that Mr HJ assured him he had excellent prospects of success, gave him no advice on how long the proceeding would take, or how much it would cost, and improperly suggested registering a mortgage against Mr MG's property to secure his fees, before he would continue to act.

Standards Committee

[6] The parties provided information to the Committee, and the Committee appointed a Costs Assessor to consider the fees aspect of the complaint. Delivery of the Costs Assessor's report took over a year, largely because the parties found it difficult to attend a hearing with the Costs Assessor. The Costs Assessor delivered his report on 30 May 2013, having formed the view that it was not necessary for him to hear from the parties, and completing the cost assessment on the papers.

Costs Assessor's Report

[7] The Costs Assessor provided a detailed, thorough and comprehensive report¹ in which he noted that the materials on Mr HJ's file were consistent with the time he had recorded,² that Mr MG had been advised of Mr HJ's hourly rate, which the Costs Assessor considered reasonable for his level of experience,³ and that Mr MG had instructed Mr HJ on the basis set out in the terms of engagement provided to him.⁴ The Costs Assessor was unable to identify any evidence of Mr HJ providing an estimate, or capping his fees,⁵ and identified advice he had provided before December 2009 on the difficulties and risks inherent in proceeding with the claim.⁶

[8] The Costs Assessor reported experiencing some difficulties in understanding how Mr HJ had calculated his fees, and considered that "the bills when rendered, were just something of a guess as to the amount of time that might have been incurred in respect of periods".⁷ However, having considered the time records, invoices rendered, Mr HJ's file, and the work he had done, the Costs Assessor recorded his view that the fee of \$27,500 was fair and reasonable in terms of rule 9, taking into account the relevant

¹ Costs Assessor's Report to Standards Committee (30 May 2013).

² At [63].

³ At [64]-[65].

⁴ At [66].

⁵ At [67].

⁶ At [69].

⁷ At [73]-[77].

factors in rule 9.1.⁸ The particular factors he considered relevant were the time and labour Mr HJ had expended on the matter for the brothers, the full value of which the Costs Assessor estimated at \$53,834,⁹ and Mr HJ's experience, which was reflected in his hourly rate.¹⁰ The Costs Assessor also considered the value of the fee to Mr MG in the pre-commencement context within which the work was done.¹¹

Standards Committee Decision

[9] The Committee considered Mr MG's complaint within the framework of rules 9 and 9.1 as to fees, and rule 3 with respect to the competence and timeliness of the work Mr HJ had done. The background to the complaint is recorded in the decision, and as there is no challenge to the accuracy of that, there is no need to repeat it here.

[10] The Committee considered Mr HJ's invoices, his discussions with Mr MG and his brother, including reference to the \$20,000 fee cap alleged by Mr MG, and the work he had done in preparation for commencing a proceeding to challenge the will. The Committee also considered Mr MG's comments in that regard, before deliberating, taking into account the rule 9.1 factors, and having regard to rule 9. The Committee also considered the Costs Assessor's report and recommendations, and reached the conclusion that Mr HJ's fees were fair and reasonable, and decided to take no further action in respect of Mr HJ's fees, pursuant to s 138(2) of the Act.

[11] It then considered the complaints made about Mr HJ's conduct and competence, and again concluded that further action on those aspects of Mr MG's complaints was unnecessary and inappropriate, pursuant to s138(2) of the Act.

[12] Mr MG was dissatisfied with the decision, and applied for a review.

Review Application

[13] In his review application Mr MG says that he did not instruct Mr HJ, but instructed his wife. He repeated his complaints that he had not been properly advised on the costs and risks of proceeding, and that Mr HJ had not given him proper advice on the difficulties associated with the pre-commencement discovery application. He expressed the view that Mr HJ "must have known" that the pre-commencement application could not succeed, and says the application cost him thousands of dollars without returning a result. He repeated his assertion that Mr HJ had capped his fees at \$20,000, said he had not signed terms of engagement, and repeated his concerns about the level of Mr HJ's fees. He was critical of Mr HJ for not applying for an injunction, or taking steps to register a caveat against certain properties against which he may have had a claim, to

⁸ At [58].

⁹ At [73]-[81].

¹⁰ At [65].

¹¹ At [82]-[87].

prevent the properties being sold. In his view, Mr HJ was incompetent, and incapable of conducting this type of litigation.

Review Hearing

[14] Mr MG declined his consent to the review proceeding in his absence, so an applicant-only hearing was scheduled. A notice of hearing was sent to Mr MG by email and post to his last known address. The email could not be delivered, and no response was received from Mr MG indicating whether he would attend or not on the scheduled date. This Office was unsuccessful in its attempts to obtain a response from Mr MG throughout 2014. When the review hearing occurred on 16 December 2014 Mr HJ attended, and the review proceeded in Mr MG's absence.

Role of the LCRO

[15] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the standards committee, without good reason.¹²

Scope of Review

[16] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Issue

[17] The issue on review is whether there is any good reason to interfere with the decision by the Standards Committee. For the reasons discussed below, the answer to that question is no.

Discussion

Conduct

[18] Although Mr MG says that he did not instruct Mr HJ, but instructed his wife, after that initial approach to the HJ's practice he continued to instruct Mr HJ. No professional conduct issue arises for Mr HJ from that aspect of Mr MG's review application.

¹² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[19] The Committee was satisfied that Mr HJ had provided adequate advice on the implications of proceeding,¹³ that neither the failure of the pre-commencement discovery application or any other aspect of the complaint raised any professional standards issues for Mr HJ.¹⁴

[20] On review, I have been unable to identify any reason to depart from that aspect of the Committee's decision. Mr MG speculates that Mr HJ "must have known" that the pre-commencement application could not succeed, but in reality the outcome was not the foregone conclusion Mr MG perceives. It is often not possible to predict the outcome of litigation with a high degree of certainty. Although the outcome of the application was costly and unfavourable for Mr MG, there is no evidence to support a finding that any deficiency in Mr HJ's conduct or competence was responsible for the outcome or the costs.

[21] Mr HJ responded to MG's concerns about him not applying for an injunction, or taking steps to register a caveat against properties Mr MG says he wanted secured against sale. Mr HJ said in correspondence,¹⁵ and at the review hearing, that before applying for an interim injunction to prevent the fruits of any judgment from being disposed of, it would have been necessary to commence a proceeding. As Mr MG did not pay Mr HJ, the proceeding was never commenced, so no application for injunction proceeded. That is a reasonable explanation bearing in mind the limited circumstances in which a court will grant injunctive relief, and the fact that Mr MG did not pay.

[22] With respect to the suggestion that he should have registered a caveat against the titles to two properties, Mr HJ said in his correspondence¹⁶ and at the review hearing that, in his view, Mr MG had no interest in either property that would have supported the registration of a caveat. That is also a reasonable explanation, bearing in mind the limited interests that support registration of a caveat.

[23] Mr MG also expressed concern that it was improper and unprofessional for Mr HJ to have proposed securing his fees by registering a mortgage over Mr MG's property. Securing fees by registering a mortgage is a common enough proposition in litigation where significant fees can accumulate, and a lawyer risks not being paid for work he or she has done. There is nothing improper in Mr HJ having made the suggestion.

[24] There is no evidence to support Mr MG's assertions that Mr HJ was incompetent, or incapable of conducting litigation of this type, and no reason to believe his conduct was improper or unprofessional. It follows that there is no reason to interfere with the

¹³ Standards Committee decision dated 24 July 2013 at [42].

¹⁴ At [43].

¹⁵ Email HJ to LCRO (16 September 2013).

¹⁶ Above n 15.

Committee's decision that further action on this aspect of Mr MG's complaint was unnecessary or inappropriate, pursuant to s 138(2) of the Act. That aspect of the Committee's decision is confirmed.

Fees

[25] The amount that a lawyer may charge by way of fees is regulated by rules 9 and 9.1 which say:

- 9 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.

Reasonable fee factors

9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

- (a) the time and labour expended:
- (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
- (c) the importance of the matter to the client and the results achieved:
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
- (f) the complexity of the matter and the difficulty or novelty of the questions involved:
- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.

[26] In determining this aspect of the review, I have considered the amount of Mr HJ's fees, the work he did for Mr MG, the Committee's decision, and the Costs Assessor's report. Mr MG does not say that Mr HJ did not put in the time, or that his fees are unfair or unreasonable for reasons other than the alleged cap, and the deficiencies he perceived in the level of service Mr HJ provided. As there were no deficiencies in the level of service, that aspect fails. As to a fee cap, I have considered the material provided on review, and been unable to identify any evidence of an estimate or cap on Mr HJ's fees that would support Mr MG's position.

[27] I have been unable to identify any reason to depart from the Committee's decision that the fees Mr HJ charged were fair and reasonable, and in accordance with rules 9 and 9.1. My view is reinforced by the comprehensive and careful analysis carried out by the Costs Assessor which does not contain "any obvious error" and "should not be lightly dismissed".¹⁷ In the circumstances, there is no reason to interfere with the Committee's decision that further action on this aspect of Mr MG's complaint was unnecessary or inappropriate, pursuant to s 138(2) of the Act. That aspect of the Committee's decision is also confirmed.

Outcome

[28] The Committee's decision is confirmed on review.

Costs

[29] The LCRO has jurisdiction to order costs on review pursuant to s 210 of the Act.

[30] Mr MG requested a hearing, but did not attend.

[31] Mr HJ attended voluntarily, but would have been content for the matter to have been determined on the papers, in his absence.

[32] Mr HJ did not seek an order for costs against Mr MG.

[33] As mentioned above, this Office has experienced difficulties in obtaining any response from Mr MG, since his last communication of 4 December 2013. He appears to have been adjudicated bankrupt, and correspondence from the Official Assignee indicates that there are no funds available for distribution to creditors.¹⁸

[34] In the circumstances, there appears to be little point in making any costs order against Mr MG, and there is no reason to make any order against Mr HJ.

[35] In the circumstances, no costs orders are made on review.

Decision

Pursuant to s 211(1) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 19th day of December 2014

¹⁷ LCRO 128/2012.

¹⁸ Email MBIE to LCRO (17 November 2014).

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:

MG as the Applicant
HJ as the Respondent
RV as the Representative for the Respondent
[City] Standards Committee [x]
New Zealand Law Society