

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 4

BETWEEN

FZ
of Auckland

Applicant

AND

UL
of Auckland

Respondent

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

Background

[1] In October 2006 FZ instructed UL to act on his behalf with regard to separation, custody and relationship property matters following the breakdown of his marriage.

[2] In December 2006 UL sent a draft agreement encompassing all of these matters to FZ's wife (GA) advising her to seek advice in connection with the document. The draft agreement provided that GA was to have custody of the child of the marriage and referred only to two motor vehicles as relationship property.

[3] Subsequently, UL received correspondence from GB, the solicitor who GA had consulted. GB sought disclosure of FZ's interest in a residential property which had not been referred to in the draft agreement. GA claimed an interest in FZ's share of that property.

[4] FZ denied that he had any interest in the property, notwithstanding that he had until recently been registered as a proprietor of the property together with his parents, and his parents remained as the registered proprietors.

[5] The explanation provided for this by FZ was that he had been required to be a registered proprietor of the property by the lending institution from which funds had been borrowed to complete the purchase. Without this, FZ's parents were otherwise unable to secure the necessary finance.

[6] Following continued denial of any interest in the property by FZ, GA lodged a caveat against the title to the property and also filed relationship property proceedings in the Family Court.

[7] UL applied to the Registrar of Lands to lapse the caveat, following which GA filed in the High Court for an Order that the caveat not lapse.

[8] UL was a general practitioner and required assistance in respect of those proceedings. He engaged UK, a barrister, for this purpose.

[9] A judicial settlement conference took place on 10 July 2008 in respect of the Family Court proceedings. Immediately prior to the conference FZ met with UL and UK. He had not until then met UK. At that meeting, it was agreed that FZ would offer a maximum sum of \$25,000.00 to GA to settle her claim.

[10] In the course of the settlement negotiations, FZ came under pressure to increase his offer, and ultimately agreed to pay the sum of \$35,000.00 to GA. Matters were settled on this basis, and subsequently a relationship property agreement was entered into.

[11] During this time, problems had arisen with respect to GA's custody of their child. Suspicions were raised that she was physically abusing the child, and FZ laid complaints with the police and CYFs.

[12] Because the property agreement did not address the separation or custody issues, FZ was obliged to instruct another solicitor to attend to these matters, as by that time he was dissatisfied with UL's charges.

[13] In that regard, UL had collected the following amounts on account of fees:

- 16 February 2007 - \$700.00
- 14 March 2007 - \$1,200.00

- 10 April 2007 - \$10,000.00
- 19 June 2007 - \$1,500.00
- 3 July 2007 - \$10,000.00
- 30 June 2008 - \$7,000.00

Total: \$30,400.00

[14] He had also deducted fees as follows:

- 13 February 2007 - \$700.00
- 14 March 2007 - \$1,200.00
- 13 April 2007 - \$2,300.00
- 17 April 2007 - \$3,375.00
- 4 May 2007 - \$2,250.00
- 3 July 2007 - \$4,752.49
- 30 July 2007 - \$1,150.00
- 8 February 2008 - \$525.61
- 4 July 2008 - \$1,125.00

Total: \$17,378.10

[15] Payments had also been made to UK as follows:

- 3 May 2007 - \$3,571.88
- 28 June 2007 - \$3,206.25
- 23 July 2007 - \$1,575.00
- 28 August 2007 - \$365.63
- 29 October 2007 - \$253.13
- 29 November 2007 - \$393.75
- 29 February 2008 - \$421.88
- 11 July 2008 - \$3,234.38

Total: \$13,021.90

[16] In addition, UL had collected and paid the sum of \$35,000.00 pursuant to the relationship property settlement.

[17] No statement of account had been provided to FZ, and it was not until he pressed for same that one was provided in October 2008.

The Complaint and Standards Committee Decision

[18] In July 2010 FZ lodged a complaint against UL. In the complaint FZ raised the following issues:

- 1) The UL had overcharged him and exceeded his quoted costs of \$15,000.00;
- 2) That UL had not completed the matters in respect of which he had been instructed - namely separation, custody and relationship property;
- 3) That UL did not advise him he could apply for legal aid;
- 4) That UL refused to continue to represent FZ at a time when a joint settlement conference was imminent unless further funds were paid on account of fees;
- 5) That UL did not provide him with a statement of account until October 2008 and did not provide receipts and invoices for funds paid;
- 6) That UL did not properly represent his interests at the judicial settlement conference.

[19] Following consideration of the complaint the Standards Committee determined pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action.

The law

[20] The major part, if not all, of the conduct complained of occurred prior to 1 August 2008 which was the date the Lawyers and Conveyancers Act 2006 came into force. Consequently, as the complaint was made after that date, it fell to be dealt with in accordance with the transitional provisions of the Act. These provide that if a lawyer is alleged to have been guilty of conduct before 1 August 2008, in respect of which proceedings of a disciplinary nature could have been commenced under the Law

Practitioners Act 1982, a complaint about that conduct may be made after 1 August 2008 to the Complaints Service.

[21] The relevant standards of the Law Practitioners Act 1982 provide that disciplinary sanctions may be imposed where a lawyer is found guilty of misconduct in his or her professional capacity, or conduct unbecoming of a barrister or solicitor. Further provisions relating to negligence and criminal convictions are not relevant here. Further guidance can be obtained from the Rules of Professional Conduct for barristers and solicitors which were the applicable Rules at the time.

[22] The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high. Misconduct is generally considered to be conduct of sufficient gravity to be termed “reprehensible” (or “inexcusable”, “disgraceful” or “deplorable” or “dishonourable”) or if the default can be said to arise from negligence, such negligence must either be reprehensible or be of such a degree or so frequent as to reflect on a solicitor’s fitness to practice. (*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; Complaints Committee 1 of the *Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming has a slightly lower threshold. The test is whether the conduct is acceptable according to the standards of “competent, ethical and responsible practitioners” (*B v Medical Council* [2005] 3 NZLR 810, 811).

[23] With regard to billing, only complaints of gross overcharging could justify the commencement of proceedings of a disciplinary nature under the Law Practitioners Act.

[24] The Standards Committee did not consider that the costs or conduct matters reached the threshold required before proceedings under the Law Practitioners Act could have been commenced. The Committee therefore determined to take no further action in respect of the complaint.

[25] FZ has applied for a review of that determination. He asks that the whole case be reviewed and generally covers the matters complained of to the Standards Committee.

Review

[26] A hearing took place in Auckland on 11 October 2011 attended by FZ and his parents, and UL.

Did UL provide a quotation?

[27] FZ alleged that UL quoted \$15,000.00 to carry out all of the work associated with the initial instructions from FZ in connection with the separation, custody and relationship property matters. He says he asked for a quote because he had limited funds and needed to know what the costs were going to be before UL proceeded. He says that being advised of an hourly rate would have been of no assistance to him.

[28] In his response to the Complaints Service, UL says that he did not recall giving FZ a fixed quotation and this would have been unlikely because he did not know at the outset of his instructions how long it would take to complete the matters. In addition, it was not his firm's practice to give fixed quotes in circumstances where costs were unable to be controlled.

[29] Both parties repeated their positions at the review hearing. In addition, FZ advised that his parents were present when UL gave the quote. They confirmed at the review hearing that this was the case and that UL had indeed provided the quotation.

[30] Nothing in the way of evidence could be produced by either party to support their position. I am therefore required to assess the factors which support each party's position and come to a view as to which position to accept.

Factors supporting FZ's position

[31] The only factors which support FZ's position are his own evidence and the confirmation by his parents. I do not doubt his logic for seeking a quote and agree with his contention that being advised of an hourly rate would not have given him any indication as to how much was required for UL to complete his instructions.

Factors supporting UL's position

[32] A fee of \$15,000.00 to complete the matters as presented to UL would be excessive. The agreement was a simple agreement and no substantial relationship property was disclosed. UL's initial bill was for \$700.00 rendered on 13 February 2007. This included the initial instructions as well as preparing the agreement which was signed by FZ and forwarded to GA. If the terms of the agreement had been accepted by her as drafted, little more would have been required, and a bill in the region of \$700.00 would have been all that was appropriate. I cannot therefore accept that UL would have provided a quotation of \$15,000.00 for work to this extent.

[33] FZ says that the quote was provided at the second meeting with UL. It is not clear when that took place, but UL's timesheets record a meeting on 1 February 2007. There must have been at least one meeting in 2006 where FZ provided instructions for the agreement. That would mean that the meeting of 1 February 2007 was the second meeting to which FZ refers. The caveat lodged by GA was lodged on 21 February 2007 i.e after the second meeting. The lodging of the caveat resulted in High Court proceedings and as well, GA filed the Family Court proceedings. These actions on her part would have rendered any quotation given by UL at the second meeting, obsolete, given these developments.

[34] At the time the initial instructions were provided, GA was to have custody of the child. Subsequently, FZ developed concerns that GA was abusing their child and the proposed custody arrangements became contentious. This would necessarily have resulted in additional costs which would not have been contemplated at the outset.

[35] In general terms, it would be highly unusual for a lawyer to commit to a fee when acting in relationship property matters, unless the work to be carried out was agreed and circumscribed. That was not the case and once GB indicated that GA claimed an interest in the property, as well as the development with regard to her treatment of the child, then any initial indications of fees would have been rendered obsolete.

Standard of proof

[36] The standard of proof to be applied in disciplinary proceedings is the civil standard of proof (the balance of probabilities) applied flexibly according to the degree of seriousness of the matter to be considered (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55.) The standard of proof therefore requires an assessment of the factors referred to above, and a decision to be made on the balance of probabilities.

[37] Applying this standard of proof I do not accept FZ's contention that UL had provided a quote of \$15,000.00 to complete all of the work necessary to conclude the separation, custody and relationship property matters regardless of developments.

The fees billed

[38] The question to be determined is whether UL's fees were more than fair and reasonable. FZ will no doubt consider both UL's fees and those of UK as representing the total cost to him. However, this review concerns only the Standards Committee

decision in respect of UL, and therefore it is only his fees which are to be considered.

[39] FZ says that UL did not advise them that UK was to be instructed. UL says that he would have advised FZ that he was going to instruct UK, but there is nothing in writing that UL can produce to show that he did so advise FZ. In addition, the failure referred to subsequently in this decision to provide the various bills of accounts, including those of UK, did not alert FZ to the fact that UK had been instructed. He says that the first time he met UK was at the judicial settlement conference. He did not however seem to express undue surprise at that time that another lawyer was to attend, so I am overall left in some uncertainty as to when he became aware of UK's engagement.

[40] However, for the purposes of this review, I am constrained to consider only UL's fees, and if FZ wishes to complain about UK's fees, then he will need to lodge a separate complaint in respect of those.

[41] UL's fees are supported by his timesheets. FZ casts doubt on those timesheets, and implies that they have been constructed by UL to justify the fees charged. I do not think that I can agree with that contention. Manual timesheets are still used by lawyers who for a variety of reasons do not have a computer based time recording system. There is nothing to be taken from the fact that UL's time recording system was a manual system.

[42] In addition, a brief examination of the timesheets tends to support the inference that they were completed as matters proceeded, as dates for various events and correspondence can be checked off against what is known to have happened. To try to construct a timesheet after the event which coincides and matches the dates of various events would be extremely difficult.

[43] UL's hourly rate is \$350.00 - that is not unreasonable. The time expended on all matters is recorded as 43.2 hours. This produces a fee of \$15,120.00. UL refers to total fees of \$17,378.10 - this includes GST and disbursements.

[44] The Standards Committee comprises lawyers and lay persons who would have been able to assess in a general sense whether the fees charged by UL were fair and reasonable, or whether they felt the matter should be referred to a costs assessor. The Committee did not take that step.

[45] It must also be remembered that by reason of this matter falling to be dealt with pursuant to the transitional provisions of the Act, only charging which is grossly excessive would justify disciplinary intervention. The Committee did not consider that this was the case, and there is nothing that I can see that would lead to a different conclusion.

[46] Accordingly, I concur with the Committee's determination in respect of these matters.

Failure to complete work Instructed

[47] FZ submits that UL was engaged to complete all work required in respect of his separation, custody and relationship property matters. Instead, the only matters attended to were the relationship property matters.

[48] By that time, the circumstances had changed with regard to custody of the child. FZ considers that custody issues could or should have been addressed at the judicial settlement conference. Instead, that issue remained to be dealt with later and FZ engaged another lawyer at further cost to complete the work.

[49] I do not understand that UL refused to do the work - my understanding is that when UL indicated that extra costs would be incurred to deal with the issue, FZ then chose to instruct an alternative lawyer at cheaper cost.

[50] This matter is linked with FZ's expectation that all work was going to be completed for \$15,000.00. By 19 June, FZ had paid \$13,400.00 to UL, so that when he was asked for a further payment of \$10,000.00 on 3 July, his budget had been considerably exceeded. Subsequently, he was required to pay a further \$7,000.00, and was dismayed to be told that further funds would be required to complete the custody matters. Leaving the matter of the costs aside, which is dealt with elsewhere in this decision, the professional standards issue is whether UL refused to undertake the work. That is not the case. It would seem that he would have been prepared to complete the work provided his fees were met. FZ did not want to pay any further funds to UL and instructed an alternative solicitor.

Legal Aid

[51] When FZ first consulted UL he asked if he qualified for legal aid. He says that UL told him that he did not qualify. UL says that his response would have been that his

firm only accepted private briefs and that if FZ wanted to have the work done on legal aid he would need to consult a different lawyer who was approved for legal aid.

[52] Commentary 5 to Rule 1.02 of the Rules of Professional Conduct in force at the time, provides that “if a client is eligible for legal aid the practitioner has a duty to draw the fact to the client’s attention”.

[53] FZ advised at the review hearing that he had approximately \$30,000.00 in the bank at the time he instructed UL. I am not sure if that could be considered to be accurate information given FZ’s uncertainty at the hearing, and I note that in an affidavit sworn on 26 July 2007, FZ listed his cash resources as being \$9,498.00 together with \$1,037.00 in a joint account with GA. I am not certain as to the legal aid criteria, but would expect at the commencement of instructions, FZ would not have qualified for legal aid. However, by the time the relationship property matters had been concluded, it would have been apparent that his personal funds had been exhausted.

[54] At that time he instructed another lawyer and was approved for legal aid.

[55] UL is a general practitioner who is not approved for legal aid. He cannot therefore be expected to know the details of what is required to qualify for legal aid, but has a duty to be aware of the general criteria to enable him to fulfil his obligations to his client. Simply advising a client that a lawyer does not do legal aid work, would not be enough to meet the obligation which is now incorporated into rule 9.5 of the Conduct and Client Care Rules. However, it is a fine point, and I would be reluctant to make a finding of unsatisfactory conduct against a lawyer in these circumstances even under the current rules.

[56] As noted above, these events took place prior to the commencement of the Lawyers and Conveyancers Act 2006 and therefore conduct as described in [22] is required before any disciplinary proceedings could be contemplated. In the circumstances, the conduct relating to the advice as to legal aid is not such as would support any disciplinary proceedings being brought against UL.

Refusal to continue to represent the client until further payment received

[57] The judicial settlement conference was scheduled for 10 July 2008. By that time, all monies paid by FZ had been exhausted, and further funds were required to meet the anticipated costs of UL and UK. Indeed, it may be useful to consider UL’s trust account records in this matter, but it seems to me that if UK’s fees had been paid,

and UL's fees for 8 February and 4 July posted, there would have been insufficient funds to pay these. In any event, FZ was asked to pay a further \$7,000.00 sometime towards the end of June 2008. The payment was made on 30 June 2008.

[58] FZ says that it was put to him that unless he paid these fees, UL would not act any further for him. He says that put him under immense pressure as it was too late to instruct another lawyer at that stage. In any event, another lawyer's fees would have to be funded. This evidence is supportive of at least the fact that the matter of fees had not been properly addressed by UL with FZ, and this is considered further in the section of this decision relating to fees and billing.

[59] This situation evidences the tensions between the Rule requiring a solicitor to act and a solicitor's entitlement to be paid for work done. The Rules of Professional Conduct or indeed the current Conduct and Client Care Rules do not address this situation specifically. However, Rule 4.2.3 of the current Conduct and Client Care Rules provides that a lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has

- a) had due regard to his or her fiduciary duties to the client concerned; and
- b) given the client reasonable notice to enable the client to make alternative arrangements for representation.

This Rule encapsulates the general duty that UL would have had to FZ at the time even though the Rules were not at that stage in force. The proceedings with GA were reaching a critical stage with the judicial settlement conference scheduled for 10 July. The question is whether it was proper for UL to advise FZ that he would not continue to act for him unless further funds were paid in prior to the settlement conference.

[60] FZ objected, more because he considered he had already paid enough, but presumably UL repeated his intention to withdraw unless funds were paid.

[61] UL would have been aware from the affidavit sworn on 27 July that FZ had funds to meet the required payment. If FZ did not pay in the funds as requested, it was not unreasonable for UL to assume that there could be difficulties in collecting payment of his accounts rendered subsequently. Given that FZ did in fact have funds available, UL's statements were designed to ensure his fees were paid. FZ had it within his own control to make sure that UL continued to represent him, and in the circumstances, I do not consider that UL acted improperly in this regard.

Provision of receipts, bills and statements

[62] There does not seem to be any assertion that FZ did not receive receipts for monies paid by him to UL.

[63] However, I have considerable doubt that UL has provided his bills of account to FZ as required. FZ says that other than the first two bills of account (\$700.00 dated 13 February 2007 and \$1,200.00 dated 14 March 2007) he received no other bills of account until these were provided with the statement of account in October 2008.

[64] The statement that he received the first two bills of account would seem to be supported by the fact that payments were made on 16 February 2007 (\$700.00) and 14 March 2007 (\$1,200.00).

[65] Thereafter, payment of "lump sums" were made periodically, presumably as requested by UL when the previous sums paid on account became depleted. This is borne out by an examination of the statement dated 16 October 2008.

(a) On 10 April 2007 FZ paid in \$10,000.00.

(b) Deduction of the bills recorded from and including 13 April to 4 May 2007 would have resulted in a debit balance of \$1,496.88.

(c) This was cleared by a further payment by FZ of \$1,500.00 on 19 June. FZ appears to be reasonably financially careful and astute. He would not have paid more than was required. This sequence of deductions and the payment made by him supports the view that UL had not provided his bills of account to FZ for payment.

(d) On 3 July 2007, a further payment of \$10,000.00 was made and receipted. Deduction of the bills recorded from and including 3 July to 30 July would have resulted in these funds being depleted which promoted UL's request for payment of a further sum of \$7,000.00.

(e) The final payment of \$7,000.00 became depleted when applied to payment of subsequent bills rendered by UL and UK.

[66] None of the bills provided by UL have an address. UL advises that he has no covering letters under which the bills were posted out and instead advises that he would have handed the bills to FZ when FZ was in his office. I have some doubt that this was the case. For example, UL's timesheets show that there was no meeting with

FZ between 10 April 2007 and 3 July 2007. During that time various bills rendered by UL and UK dated 13 April, 17 April, 3 May, 4 May and 28 June were all deducted from funds held.

[67] The next meeting between FZ and UL took place on 3 July and thereafter at reasonably regular intervals.

[68] However, it is clear that no bills could have been handed to FZ for the period between the two meetings on 10 April and 3 July. FZ says that he received no bills other than the first two until he made demand for a statement which was finally provided in October 2008.

[69] In addition, the pattern of payments made into the trust account would support an inference that bills had not been provided.

[70] UL does not dispute that his fees would have been deducted at the time they were prepared. To do so without providing the bills to the client constitutes a breach of regulation 8 (2) of the Trust Account Regulations 1998.

[71] In addition, Rule 5 (8) of the Solicitors' Trust Account Rules 1996 required that "each solicitor shall provide to each client for whom trust money is held a complete and understandable statement of all trust money handled for the client, all transactions in the client's account, and the balance of the clients account –

(b) in respect of all transactions which are not completed within twelve months, at intervals of not more than twelve months."

[72] UL started acting for FZ in late 2006 and received the first payment from him on account of costs on 16 February 2007. He provided no statement of account and it is my view that he provided no bills of account other than the first two until pressured by FZ to do so. The statement and the bills were then provided in October 2008. This is a breach of the Trust Account Rules.

[73] These breaches do not in themselves however support disciplinary action under the transitional provisions of the Act. In addition, I do not have the benefit of an audit report. I do however have serious misgivings that the shortcomings in the delivery of the bills and accounting to his client may be indicators of a lack of proper administration by UL of his trust account. I therefore urge the Complaints Service to draw these comments to the notice of the Law Society audit inspectors to take such action as they consider appropriate.

The judicial settlement conference

[74] FZ says that he was left to fend for himself at the judicial settlement conference. Prior to the meeting he met with UL and UK to discuss the case and the strategy to be engaged at the conference. It appears that between them they came to the view that GA was entitled to some payment, and that the figure would be \$25,000.00. From the rough figures FZ was able to provide me at the review hearing it would seem that this was less than an equal division of FZ's equity in the property which it seems had by then been accepted he held.

[75] It also appears that some discussion took place as to the consequences of not settling and that it was made clear to FZ that further legal costs would be incurred if settlement did not take place. I did not question UL as to whether or not FZ had a defensible position, but given the intent to try to settle the matter, it would seem that this was not the case.

[76] GA's lawyer apparently adopted a position whereby she required more than \$25,000.00 and spoke directly to FZ in Cantonese. While UL could understand, UK couldn't. FZ is dismayed that UL did not speak up for him and he feels that he was left to fend for himself. UL says that essentially it was a decision for FZ to make and that little could be said to negotiate on the figure. In the end, FZ agreed to accept the figure of \$35,000.00 and UL says that FZ in fact thanked UK for the outcome of the case.

[77] If FZ had felt pressured at all, he had two lawyers there acting on his behalf. It does not seem to me that he would have felt so pressured by what was being said to him that he could not have asked to consult with UL and UK. Instead he agreed to the figure of \$35,000.00 and the matter was settled.

Summary

[78] Having considered all of the matters raised by FZ and heard both him and UL, I do not consider that UL's conduct has been such as would support disciplinary proceedings. I draw the attention of the Standards Committee however to the comments made by me in [73] as to the administration of UL's trust account and recommendation that this be referred to the Law Society's audit inspectors.

Decision

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

DATED this 17th day of October 2011

Owen 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:

FZ as the Applicant
UL as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society