

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

BETWEEN

MR AL

Applicant

AND

MR BW

Respondent

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

Introduction

[1] The Standards Committee declined to uphold complaints made by Mr AL against Law Practitioner, Mr BW (the Practitioner) who acted for his wife after they were separated in 2010. Mr AL (referred to as the Applicant) seeks a review of that decision.

The complaint

[2] The Applicant alleged that the Practitioner's conduct "cumulatively has amounted to substantial fees being generated for both myself and [his former wife]."¹ Further detail revealed that the allegation included unwarranted delays and conduct on the part of the Practitioner that the Applicant saw as having caused or contributed to matters being prolonged. In summary the Applicant wrote:²

The approach of [the Practitioner] to the matters at hand was misleading, drawn out and generally not handled in a professionally expedient manner. I suspect [the Practitioner] from the outset under-estimated how much time he would have available to work in and around his obviously hectic and over committed workload. The consequence of this is that I have had to take on

¹ Original complaint to Auckland District Law Society dated 27 February 2012.

² Above n1.

considerable additional borrowings and the \$22,000 relationship funds referred to above in [wife's] possession has also been exhausted as a consequence of [the Practitioner's] billing.

Practitioner's response

[3] The Practitioner responded in some detail to matters raised by the Applicant. Rejecting all of the allegations, he explained that the issues were more complex than as was stated by the Applicant, and he outlined how he perceived matters to have proceeded. He particularly mentioned his regret in not insisting that the mediation not take place (due to incomplete information having been provided) but wrote that at the time his client was under considerable pressure from the Applicant and saw the mediation proceeding as the better of two evils.

[4] The Practitioner said that if there was delay (as alleged), it was only on one occasion when he was involved in a number of long hearings and also away from Auckland because of other professional roles. He noted that at the particular time there was a delay of three to four weeks before he could give his full attention to the file, but otherwise there was usually a 24 to 48 hour turnaround in response to many of the emails received. The Practitioner noted that his client took a position in negotiations which was not accepted by the Applicant and that his role as her counsel was to endeavour to obtain a settlement that he could recommend to her as a fair and reasonable one. The Practitioner also suggested that the Standards Committee may consider making any further enquiry from the Applicant's lawyer who might be able to provide a further context for his comments.

[5] The Applicant's comments on the Practitioner's response do not appear to have been sent to the Practitioner.

Standards Committee decision

[6] On the basis of the information before it, the Standards Committee concluded that there were no professional conduct issues arising from the complaint and accordingly, the Committee decided to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[7] The Committee noted that a lawyer's duty is to his (own) client whose interests he was required to protect, and that the Practitioner did not act for the respondent. The Committee acknowledged the Applicant's frustration, but the fact that the parties were

unable to reach agreement did not give rise to professional conduct issues, and that the Court was the appropriate venue to resolve such matters.

Review Application

[8] The Applicant sought a review of the Standards Committee's decision on a number of grounds, raising some concerns about the Standards Committee's approach to the complaint, also contending that the Practitioner had provided "grossly inaccurate"³ information to the Committee, and reiterating aspects of his earlier complaints, which he summarised:⁴

I feel strongly that [the Practitioner] did not conduct himself in a professional manner at all and because of this a huge amount of stress, frustration and expense was incurred. [The Practitioner] at no stage exercised his duty to promote settlement, instead opting to be tardy in his responses, muddled in his thinking and often destructive in his whole approach to promoting settlement.

[9] The outcome sought by the Applicant was a written apology from the Practitioner and a partial refund of \$10,000 (payable 50/50) to his trust and his former wife's trust, for the benefit of their two children.

[10] The review application was notified to the Practitioner whose response was forwarded to the Applicant.

[11] The Applicant then forwarded to my office copies of correspondence from the file (I understood these came from his lawyer), which comprised letters and emails relating to the matter, but clearly not the entire file.

[12] The Practitioner had the opportunity to inspect those documents and did not consider it necessary to add more information but reserved the right to do so if necessary or if I had any further queries.

[13] On the basis of my assessment of the Standards Committee file, together with the information provided by the Applicant for the review, and the comments and submissions of the parties, I considered there was sufficient information to allow me to conduct the review on the basis of the information available to me without the necessity of hearing from the parties. The parties consented to this review being conducted 'on the papers' pursuant to s 206 of the Act.

³ Application for review to LCRO dated 8 October 2012.

⁴ Above n3.

Discussion

[14] A review by the Legal Complaints Review Officer provides the opportunity to have a complaint reconsidered anew, as well as reviewing the way that the Standards Committee dealt with the complaint. In undertaking this review I have carefully considered the original complaint, all of the correspondence provided by both parties to the Standards Committee and to my office, and I also considered the (copied) correspondence provided to me by the Applicant, which were from the original file. This information has allowed me to form a clear view about the specific issues that I am required to address, which is whether any part of the Practitioners' conduct raises disciplinary concerns.

[15] This is a complaint made against a lawyer who acted for the Applicant's former wife. In making his complaints the Applicant did not identify any particular professional duty or obligation the Practitioner had failed to meet. No complaint has been made by the Practitioner's client, (the wife), nor does the Applicant purport to be also complaining on her behalf. I must therefore deal with this complaint as one having been made only by the Applicant.

[16] Given that the Applicant was never a client of the Practitioner, my starting point must be to note that the Practitioner owed no professional duty to the Applicant who was represented by his own lawyer. Although from time to time the Applicant contacted the Practitioner directly, this did not give rise to any professional obligations on the Practitioner's part. Throughout the Practitioner's duties were owed only to his client. This was clearly pointed out by the Standards Committee but the Applicant has not addressed this aspect of the Committee's decision.

[17] Any duty owed by a lawyer to a third party is very limited indeed and only in a very few particular situations (which do not arise in this case) could a lawyer owe a professional duty to a third party. There are, however, duties of integrity, respect and courtesy owed to third parties (Rule 12 of the Rules of Conduct and Client Care (RCCC),⁵ but these do not form the essence of the complaints.

[18] With this obvious limitation in mind I have nevertheless considered the complaint and reviewed the information, focusing on the way that the Practitioner conducted his representation of his client in the light of the allegations that have been made. I consider this to be a proper approach to take because if any part of the

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Practitioner's conduct raises professional practice concerns, then it would be appropriate for these to be considered in terms of professional duties as are owed by a lawyer, to the Court and the client, or in terms of proper professional practices identified generally in the RCCC. In that light I have also considered whether the Practitioner provided misleading information to the Standards Committee.

Conduct issues arising in the complaint

[19] The evidence shows that the Practitioner commenced acting for the wife in January 2011, and in a lengthy letter sent directly to the Applicant (dated 25 January) he set out the wife's position on matters of custody and relationship property. The Applicant engaged his own solicitor in mid-February, who responded to the Practitioner's January letter on 1 April, setting out the Applicant's position, and seeking agreement to mediation.

[20] The Applicant had informed the Standards Committee that he had disclosed all necessary information (and borne the costs of discovery) by 1 April 2011. His complaint was that a request for a substantive response was never received from the Practitioner.

[21] These allegations are not supported by the above evidence. The letter sent to the Practitioner by the Applicant's lawyer did not ask for a substantive response, but rather, anticipated the next step to be mediation, the letter concluding with suggestions for possible dates. Nor is there anything to support the Applicant's contention that full disclosure had been completed by 1 April, it being clear that information continued to be sought and provided in the following months. I also note there was a delay of some six weeks before the Applicant's lawyer provided a substantive response to the Practitioner's 25 January letter.

[22] In further complaints, the Applicant wrote that a mediation date was agreed but had stalled, that the Practitioner (or his client) had not provided any substantive response prior to the mediation but that a document tabled by the Practitioner that set out the wife's position (of sorts) was set aside in favour of "the substantive proposal from myself which was methodically worked through and agreement was made on all financial matters".⁶

⁶ Above n1.

[23] The evidence shows that the delay in the mediation meeting taking place was due to the mediator having to reschedule her time table. This delay was about two weeks, and does not suggest that the mediation process was 'stalled'.

[24] The evidence does not support the Applicant's contention that no response was provided by the Practitioner prior to mediation. The Practitioner wrote to the Applicant's lawyer on 21 April which answered some issues, but adding that he would write the following week as he was working on finalising a draft response for his client's approval. The Practitioner sent a further detailed letter on 6 May, at that time 'flagging' a number of issues for discussion at the mediation, most involving the source of funds for, and timing of, repairs to relationship property. There was no unreasonable delay here and I see no basis for criticism of the Practitioner's response which, in its terms, could not be considered unexpected.

[25] The Practitioner had further occasion to write to the Applicant's lawyer before mediation (on 16 May) about a text message the Applicant sent to his former wife, raising his concerns about pressure on his client that she found hard to bear, also with reference to other occasions where the Applicant had applied pressure on his client. It is not necessary to include details but I mention this to note that there was communication between the lawyers prior to the mediation.

[26] The evidence does not support the Applicant's contention of "the substantive proposal from myself which was methodically worked through and agreement was made on all financial matters".⁷ Agreement was reached on the custody issues. While some progress was made on the financial matters, it is clear from the correspondence that no final agreement was reached on those matters at the mediation, and the Practitioner's client was to reflect on matters overnight. Materially, the Practitioner sent regular and timely responses thereafter to keep the Applicant's lawyer informed and there is nothing to suggest that any reservations on the part of the wife were not genuine. I can find no evidence that the conduct of the Practitioner caused or contributed to delays thereafter in the parties reaching an agreement. The Practitioner's absence from his office for a week is not a professional conduct issue.

[27] The Applicant further alleged that he had been misled by the Practitioner with regard to the signing of an Agreement (by the wife), reiterating (in his review application) that agreement had been reached at the mediation. As already noted I have not found that to be so, and I find no evidence of the Practitioner having misled

⁷ Above n1.

the Applicant as to the wife's signing of an Agreement. He had made clear that his client needed time to reflect. The Applicant may have assumed that an agreement would be signed soon after the mediation but there is no basis for criticism of the Practitioner by reason of his client taking time to consider the proposals. The correspondence makes clear that the Practitioner perceived his client to be under significant strain, describing her as 'fragile'. Any question of the Applicant's settlement proposal being acceptable to the wife was ultimately in her hands, whether at the Practitioner's advice or otherwise. It is the responsibility of lawyers to protect the interest of, and provide sound advice to, their client. There is nothing to indicate that the Practitioner did anything other than ensure his client and her interests were protected.

[28] Several days post-mediation the Applicant informed the Practitioner that he intended to sell part of the relationship property (shares) to pay repair bills, and in response the Practitioner put the Applicant on notice of litigation if he followed through with the proposal. This generated further correspondence between the Practitioner and the Applicant's lawyer. The Applicant alleged that the Practitioner had chosen to "[in]flame matters"⁸ by threatening litigation. If this is intended to support the allegation that the Practitioner was destructive in his approach to promoting settlement, then I cannot agree with the Applicant. The threat by one party to dispose of relationship assets is often met with a warning of litigation, and the correspondence generated in this brief episode does not raise professional conduct issues for the Practitioner

[29] The steps following mediation is evidenced by the correspondence, and suggests that the Applicant was frustrated by the lack of progress. On 13 June he sent (directly to the Practitioner) three options for resolving the property issues, wanting a response by the end of the same day. The Practitioner did not respond to the Applicant, but instead wrote to his lawyer seeking a meeting of counsel only. Having received no response from the Practitioner or the wife, the Applicant instructed his lawyer to file proceedings.

[30] The Applicant's lawyer wrote a very lengthy email to him (17 June) dissuading him from the litigation path, and stating that his demand for a same-day response was not reasonable. The content of that email is instructive insofar as his lawyer counselled the Applicant that the wife had not taken the separation well, and that the Practitioner was under an obligation to ensure she was capable of making a sound decision.

⁸ Above n1.

[31] The Applicant further criticised the Practitioner's proposal for a meeting of only counsel and referred to the burden of increasing costs. The Applicant's consent to his lawyer meeting the Practitioner was conditional on the wife first providing a written proposal for resolving the property issues. The Practitioner questioned this, also making clear that his client would not be making a prior counter-offer. This was described by the Applicant as the Practitioner not having a grasp of the fact that an agreement had been reached between him and his former wife, and that the Practitioner was handling matters in an "ad hoc"⁹ way.

[32] I have already concluded that no property agreement was reached at the mediation, and the Practitioner's suggestion for a meeting between counsel is not unusual in the kinds of circumstances that prevailed at that time (the correspondence referred to the parties having reached an impasse). While these steps inevitably incur costs, they can often short-circuit matters and save legal fees in the long run. There is no basis for criticism of the Practitioner for having suggested this step, or for his response to the Applicant's suggestions. I note that the Applicant's lawyer made no criticism of the Practitioner's proposal.

[33] At around this time a number of discussions and letters were exchanged between the lawyers during June and July (recorded in file notes and correspondence) which identified the areas of difference between the parties. The evidence also shows that the Applicant halted his own lawyer's involvement for a short period of time in mid July and communicated directly with his former wife. By the end of July it appears that terms of an agreement had been reached by the parties. There is evidence that many (but not all) of the final terms reflected the Agreement discussed at the mediation, and it may be that this ultimate outcome led to the Applicant's insistence that agreement was reached at the mediation. However, the evidence on the file clearly shows that the wife needed more time to reflect on the proposals and that the final Agreement reflected earlier proposals, cannot be taken as evidence that interim steps or discussions were unjustified. I find no evidence that the Practitioner's handling of the matter was unprofessional or unjustified in the circumstances existing at that time.

[34] The Applicant was further critical of the Practitioner for failing to have drafted the s 21 Agreement. The evidence does not provide support for that criticism. It was originally agreed (on 28 July) that the Applicant's lawyer would draft the s 21 Agreement document (with agreed costs to be shared between their clients). On August 4 the Applicant informed the Practitioner that he had instructed his lawyer to

⁹ Above n1.

undertake no further chargeable work, and this being the case he agreed to the Practitioner doing the draft. The Practitioner agreed, but made clear that finding time to do so would be difficult. The Practitioner's existing work commitments and planned leave meant that by 19 August the document had not been drafted and the Practitioner approached the Applicant's lawyer to seek the Applicant's agreement to her drafting it, which he noted incurred no additional cost. The email was copied to the Applicant.

[35] The Applicant's lawyer was in the difficult position of having been instructed to not do any further work (recorded on a file note dated 22 August), and a suggestion that another barrister might be able to draft the document. The Applicant described this suggestion as "ludicrous"¹⁰ and one which would have cost many thousands of dollars. No information supports this claim, but any effort on the Practitioner's part to expedite the drafting of the Agreement does not give rise to conduct concerns.

[36] The Applicant's lawyer appears to have prepared the Agreement and when the Practitioner contacted the Applicant's lawyer on 14 September he commented that the Applicant had had the Agreement for a week, and the Practitioner sought a time frame. By late September there was still some 'too-ing and fro-ing' between the Practitioner, the Applicant, and the Applicant's lawyer, with changes being made to the Agreement; the Practitioner expressed his preference to communicate with the Applicant's lawyer, and also noted his professional obligations to refrain from communicating with her client.

[37] Discussions were still continuing about the Agreement as drafted by the Applicant's lawyer but no finality was reached before the month ended, and a copy letter from the Applicant's lawyer dated 20 October, informing the Practitioner that the firm was no longer instructed by the Applicant, included an invoice for the wife's half share of the drafting cost.

[38] Taking into account that an Agreement might have been drafted and signed by the end of July or by mid August, I do not see any delays thereafter that were caused by the Practitioner. The decision by the Applicant to terminate his lawyer's involvement, while perhaps understandable from a financial perspective, resulted in delays when the Practitioner reluctantly agreed to draft it, after making clear that there would be difficulty finding time. Finalising the detail can be time consuming but there is nothing to suggest that delays were caused by the Practitioner, and at some stage the Applicant decided to defer matters into the new year.

¹⁰ Above n1.

[39] I have traversed the steps involved in the Practitioner's representation of his client in respect of those matters that gave rise to the complaints, and discussed the complaints in the light of the evidence on the file and through the lens of a lawyer's professional obligations. For reasons set out I have found no basis for criticism of the Practitioner's conduct.

[40] More generally, the Applicant contended that the Practitioner's conduct added to the delays, stress and expense incurred in finalising matters. The Committee's focus was on the question of whether professional conduct issues arose from the complaint, and having accepted that the Practitioner owed a duty to his own client, and not the Applicant, and having perceived the Practitioner had taken all reasonable steps to attend to matters professionally and efficiently whilst acting in the best interests of his client, the Committee concluded that no further action was considered necessary.

[41] The Standards Committee was correct to approach the complaint in terms of the Practitioner's duty to his own client. In considering the complaints *de novo*, I have examined whether any part of the Practitioner's conduct raised professional conduct issue in relation to his own client. While there was some delay in progressing the matter, the delays were by no means unreasonable or unrealistic in the circumstances that prevailed. In particular I do not agree that the Practitioner was in any way obstructive to the finalising of an agreement between his client and the Applicant, or that any part of his conduct aggravated progress.

[42] What is plainly evident from the file is the Applicant's frustration with achieving a resolution. To some extent his expectations very likely arose from his misunderstanding of the legal process, but he also made assumptions that were not supported by the factual situation, and to a large extent he held unrealistic expectations.

[43] The Applicant also appears to have overlooked how his own actions contributed to the delays and increased legal costs. Several instances have been mentioned in the above discussion. There were also a number of occasions where the Applicant by-passed his own lawyer (to save fees) and liaised directly with the Practitioner (perhaps adding to hers), which the Practitioner found was not conducive to progressing matters and which he tried to discourage. These observations are not intended as criticisms of the Applicant, because these are exactly the kinds of frustrations that arise, but lawyers are left to deal with these matters as best they can, and attendances are charged for. It is clear that the Applicant was under a great deal of stress and was finding it

increasingly difficult to manage the financial burden of lawyer fees which led to significant frustration.

Additional matter

[44] I now consider the remaining review issue, whether the Practitioner provided misleading information to the Standards Committee. The Standards Committee's decision had included extracts from the Practitioner's letter and the Applicant identified those parts of the Committee's decision that he considered supported the complaint.

[45] In comparing these extracts with the entirety of the Practitioner's letter, I find insufficient support for the allegation. The Practitioner's response was tailored to the complaints that were notified to him, and the brief opening paragraphs of his response were elaborated in the remainder of his letter which provided further clarification. That the Standards Committee elected to include only a portion of the Practitioner's letter in the decision may have provided a misleading impression of the Committee's approach to the matter, but there is nothing to suggest that the Committee did not take into account the Practitioner's whole response. There is no foundation for this allegation.

[46] Having carefully considered all of the information, including the views presented by the parties, I do not find any part of the complaint gives rise to professional conduct concerns on the part of the Practitioner. The Committee properly focused on the issue of the Practitioner's duty to his own client, and the Applicant's dissatisfaction with the legal processes leading to a resolution was immaterial to this question. I therefore conclude that the Standards Committee was correct to dismiss the complaint pursuant to s 138(2) of the Act.

Decision

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

DATED this 24th day of July 2013

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 AL as the Applicant
Mr BW as the Respondent
The Auckland Standards Committee
The New Zealand Law Society