LCRO 293/2011

CONCERNING	An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury-Westland Standards Committee 1
BETWEEN	**RU** Applicant
AND	**MW** Respondent

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

DECISION

[1] This is an application for review of a decision of the Canterbury-Westland Standards Committee 1 which considered a complaint by RU (the Applicant) against MW (the Practitioner). The Standards Committee declined to uphold the complaint, and the Applicant seeks a review of that decision.

Background

[2] The Applicant was convicted of assault in 2006, a decision which he unsuccessfully appealed to the High Court and the Court of Appeal. It appears that as part of the result of a later complaint to the Judicial Conduct Commissioner he was advised that the avenues open to him at that stage was either judicial review or appeal.

[3] In the words of his complaint to the New Zealand Law Society (NZLS) Complaints Service dated 4 July 2011, because he "had already appealed the original decision it seemed evident to (him) that a judicial review was the most appropriate avenue". Therefore he approached a local law firm, meeting with the Practitioner on 30 May 2011.

[4] The Practitioner read the various Court decisions and other relevant material, including the Applicant's summary of his "fresh evidence" and provided him with an opinion to the effect that the Applicant had *"no prospect whatsoever of a successful application for re hearing*", nor did he think that the Legal Services Agency (LSA) *"would be prepared to fund any kind of criminal or civil procedure based on the events which [had] occurred*". (The LSA is now part of the Ministry of Justice but for convenience sake it still will be referred to in this review as the Legal Services Agency/LSA.)

[5] The basis for this conclusion was that *"the merits of the matter [had] been fully traversed in the three Courts which [had] had to consider the proceedings*". The Practitioner indicated his view that no further time need be spent on the matter, and included a note of his costs. His final sentence was as follows:

> *As we advised you, it is not possible for us to agree to undertake work on a legal aid basis from a first interview where we need to make an assessment as to whether the Legal Services Agency would even support such proceedings and in this case we are satisfied that... you would not obtain a grant of legal aid and we therefore bill your privately according to the time spent on the matter.*

The bill with disbursements and GST totalled $452.50. On the same day as the Practitioner's opinion was sent to the Applicant he was sent the Practitioner's Terms of Engagement and Information for Clients.

[6] The Applicant was unimpressed with the Practitioners opinion, and in particular receiving an invoice, and informed the Practitioner that it was his understanding that the billing period would only commence once the Practitioner had decided to apply for legal aid on the Applicant's behalf. The Practitioner replied immediately, repeating his view that there was not "*any realistic possibility of a [successful] appeal or judicial review"*, and reminded the Applicant that the payment arrangements had been made clear from the outset, in particular that legal aid was not available for the initial consultation since until it was known what the Applicant had in mind, it could not then be known whether Legal Services Agency would approve funding, and that this had been agreed to by the Applicant.

[7] In his correspondence to the Standards Committee the Applicant did not dispute the above, but was of the view that the Practitioner had not advised him in any manner that promoted the interests of the Applicant in the circumstances that there was 'new evidence'. He advised the Standards Committee that he had obtained a "second legal opinion" which apparently informed him that (a) under legal aid, legal representation was decided and supplied by or through the Legal Services Agency, and (b) that he

could make an application himself without the need of a lawyer. (There is no copy of this second opinion on file so presumably this advice was verbal.)

[8] He considered that the Practitioner's bill was not fair and reasonable because the Practitioner "*had not acted in [the Applicant's] best interests and had given [the Applicant] poor service...and had misrepresented the terms of his billing system at [the] original interview*". The outcome he sought was cancellation of the Practitioner's invoice.

[9] In its decision the Standards Committee identified two issues in the complaint: the fact that the Applicant had been billed, and that legal aid had not been applied for on his behalf.

[10] Regarding the billing issue, the Committee decided to take no further action, relying on Regulation 29(b) of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations) which states that without "special circumstances that would justify otherwise" Standards Committees must not deal with complaints relating to fees below $2,000. Underlying this decision is the Committee's acceptance that the Practitioner had "*made it very clear*" to the Applicant that "*he would need to pay privately for the initial consultation and the amount charged of one hour for his time [was] fair and reasonable*". It did not discuss the question of whether or not there were in this case "special circumstances".

[11] Regarding the non-application for legal aid issue the Committee referred to the Practitioner forming the view that the LSA was unlikely to fund the Applicant's proposed litigation, and that it was a "*fair assessment given the background to [the] proceedings*". The Committee found that no criticism could be made of the stance taken by the Practitioner, so held the complaint "unfounded" and resolved to take no further action.

Application for Review

[12] The Applicant sought a review of the Committee's decision and an outcome "*which [would] suitably reprimand*" the Practitioner. He complained that the Standards Committee did not address "*the main body*" of his complaint, which he explained was twofold: that the Practitioner deliberately attempted *"to discourage any form of litigation from proceeding"*, and that the Applicant was given *"misleading or inappropriate information"* by the Practitioner to discourage him from proceeding, and had added "*insult to injury*" by billing him.

[13] The outcome sought by the Applicant is cancellation of the Practitioner's bill on the basis that the Practitioner had "*given [him] poor service and [had] not acted in [his] best interests*".

Review

[14] This review has been conducted on the papers in accordance with section 206(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) with the consent of both parties. It is the task of this office to review decisions of Standards Committees. The review includes consideration of how the Standards Committee dealt with the complaint and whether its decision is soundly based on the evidence before the Committee. The review must focus only on the initial complaint and the Standards Committee's decision.

The Practitioner's bill

[15] The Applicant's fundamental complaint appears to be about the bill of costs – its cancellation is the outcome he seeks. The Practitioner's bill is less than $2,000. Regulation 29(b), under the heading of "Complaints relating to bills of costs", makes it clear that a Standards Committee must not deal with a complaint if the bill of costs relates to a fee that does not exceed $2,000, unless it decides that there are "special circumstances" that would justify otherwise.

[16] I have assumed that the Applicant's criticism of the Practitioner's advice is advanced as the 'special circumstances' that would justify consideration of the bill even though it is below $2,000. I have therefore considered the quality of the Practitioner's advice.

[17] It appears from the information that the Applicant considers that he should not have to pay the bill because the Practitioner did not act in the Applicant's best interests. The Applicant contended that the Practitioner discouraged progress in the matter and failed to discuss with the Applicant how his objectives could be achieved, and instead diverted his attention to secondary considerations.

[18] The term "special circumstances" is not defined but it was discussed in the context of the equivalent section of the Law Practitioners Act 1982 (section 151) by the Court of Appeal in *Cortez Investments Limited v Olphert & Collins* [1984] 2 NZLR 434 (CA). In that case a solicitor missed a filing deadline which resulted in the appellant losing its right to challenge an adverse outcome relating to a bill of costs, a factual situation quite different to the present case.

[19] All three members of the Court rejected the trial judge's finding that "serious risk of injustice" was needed to succeed in showing "special circumstances", but all produced different "tests". Woodhouse P opined that "*if the issue is to be related to perceived injustice then the simple risk of injustice should be sufficient*" (at 437), while Richardson J considered that "*it [was] a question of where the interests of justice [lay] in all the circumstances*" (at 439). McMullin J's view was that "*[a]ll that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary*" (at 441). These comments provide some guidance in ascertaining "special circumstances".

[20] On the basis of the Applicant's information I have understood that his dissatisfaction related to the advice given to him by the Practitioner, which includes the advice that a legal aid application needed to be done via a lawyer, and that the Practitioner failed to make an application for legal aid, instead informing the Applicant that legal aid was unlikely to be approved. These were service-related issues.

[21] The information on file shows that the Practitioner was asked by the Applicant to provide advice about judicial review, an option that had been suggested to him by the Judicial Complaints Commissioner (who had noted his previous appeals had failed). The Applicant had sent the Practitioner information about his appeal to the High Court and his application for leave to apply to the Court of Appeal (both declined) and other information (including 'new' information) by which he hoped to make a good case for challenging prior legal processes.

[22] The Practitioner's advice was that any application for judicial review was unlikely to be successful, and accordingly, that the LSA was unlikely to grant legal aid. The Practitioner explained this to the Applicant in a letter which also informed the Applicant that in the Practitioner's view the additional information would not have made any critical difference to the decision that the judge had to make. The Practitioner concluded that no further time was warranted, and enclosed a note of his fee.

[23] It was part of the Applicant's complaint that he understood that the Practitioner would apply for legal aid which he had not done, and that the Practitioner had misrepresented the terms of billing at their original interview. The Applicant advised that he has since applied for legal aid himself (without the necessity of a lawyer). The details of his application were not included.

[24] It is material to note that the procedures for applying for legal aid differ between criminal or civil litigation. Judicial review is a process which is part of the civil (not

criminal) jurisdiction of the High Court. A grant of civil legal aid is sought on behalf of a litigant by his or her lawyer. By comparison, criminal legal aid is applied for directly by the litigant to the LSA; if the application is successful, depending on the appropriate criteria either a lawyer is selected and appointed by the LSA or the litigant in serious matters can choose counsel.

[25] The evidence provided by the Applicant suggests that the 'second legal opinion' he obtained was directed at the criminal jurisdiction (further pursuit of an appeal) since he advised that he had been given a legal aid form to fill in himself and told that legal aid would be supplied from a legal services roster.

[26] The Practitioner's advice about legal aid related to the Legal Services civil jurisdiction (judicial review), and I can find no professional wrongdoing in the advice that was given by the Practitioner in relation to the availability of civil legal aid, nor in respect of the Practitioner's failure to have made an application for that purpose.

[27] The Practitioner's responsibility in the first instance was to provide advice about judicial review, and he advised that the Applicant's prospects of succeeding were poor, adding that the Legal Services Agency would be unlikely to fund *"...any kind of criminal or civil procedure based on the events which have occurred if it has full knowledge of the District Court hearing and the subsequent appeals.*" That this did not accord with the Applicant's view does not mean that the Practitioner failed to protect the Applicant's interests. The Practitioner was required to give the Applicant his professional advice on a specific legal remedy that the Applicant had sought. The advice was realistic, practical and professional. In my view there is nothing about the advice that raises disciplinary issues for the Practitioner.

[28] The Applicant's information suggests he is pursuing a further appeal, which indicates his acceptance that judicial review is unlikely to offer a remedy. That he is apparently able to do this with the assistance of legal aid applied for by himself does not mean that the Practitioner's advice about civil legal aid was wrong. From another point of view the Practitioner could have been criticised had he made (and charged for) an application for civil legal aid which had little prospect of success, and was declined. My impression from the Applicant's review application was that he saw the Practitioner's advice as being "*the polar opposite*" of the second legal advice he was given. It will hopefully be clear from this discussion that the two lots of legal advice he received did not relate to the same kind of proceedings.

[29] My conclusion is that there is nothing "abnormal, uncommon or out of the ordinary" in the circumstances relating to the bill. It also appeared that the Applicant's objection to the bill rested on his view that the Practitioner had given him the wrong advice, and that the bill added insult to injury, especially since the Practitioner had not made an application for legal aid.

[30] To the extent that the Applicant claims he was misled as to the billing (he says he had understood *"...the billing period would only commence once [the Practitioner] applied for legal aid on my behalf*"), I prefer the Practitioner's advice (supported by his file note) that that the Applicant was told that the original interview could not be on legal aid as he (the Practitioner) had no awareness of whether the client would be entitled to legal aid for review proceedings and the Applicant "*understood that*." In any event, my impression is that the Applicant's objection to the bill mainly arises from his view that the Practitioner gave him incorrect advice, which I do not accept was the case.

[31] In summary, I do not find that there were any 'special circumstances' in this case that would have justified the Committee giving further consideration of the fee-related complaint. In the circumstances the Standards Committee was correct to take the complaint no further.

Decision

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

DATED this 18th day of October 2012

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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:

RU as the Applicant
MW as the Respondent
The Canterbury - Westland Standards Committee 1
The New Zealand Law Society
Secretary for Justice (redacted)