

LCRO 03 /09

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 No 4

BETWEEN N of Auckland

Applicant

AND K of Auckland

Respondent

DECISION

Background

[1] The applicant, Ms N, complained in respect of the conduct of Ms K concerning legal work she undertook for Ms N relating to certain relationship property proceedings. Ms N complained that communication and service was poor, particularly in light of the amount charged by Ms K.

[2] The complaint was made on 29 October 2008 to the Law Society. The Society referred the matter to the Auckland Standards Committee No 4 for consideration. That Committee dismissed the complaint by a decision of 27 November 2008. The decision was communicated to the parties on 8 December 2008. The applicant made application to this office on 9 January 2009 for that decision to be reviewed.

[3] By s 202 – 204 of the Act the Legal Complaints Review Officer has wide powers to review the inquiry of the Standards Committee and to undertake enquiries of his or her own. In this matter the application review was made to this office on 9 January 2009. Ms K responded to that application Ms K on 4 February 2009. Ms N replied to that response from Ms on 15 February 2009. This review was conducted on the basis of that correspondence and the file of the Standards Committee which was also made available to me. The parties have consented to this matter being considered without a

formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act 2006 this matter is being determined on the material made available to this office by the parties and without a hearing in person.

The fees complaint

[4] Ms K has not directly complained about the fees she was required to pay. Rather she has complained that the service received was not commensurate with the fees. She did, however, consider in her original complaint that it would be appropriate to reduce the fees payable to better reflect the level of services provided. Overall it is fair to say that the amount of the fees was one of the issues raised by Ms N.

[5] The bill of costs complained about in this matter relates in part to work completed before 1 August 2008 and in part to work completed after than date. However, the charging occurred on 10 October 2008 when the bill was rendered. Rule 9 of the Rules of Conduct and Client Care for Lawyers provides that "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 ...". Rule 9.1 sets out various factors which may be taken into account when determining that reasonableness.

[6] In the present case the Standards Committee made an explicit finding that "it could find no indication that the costs were unreasonable". The basis of this finding was explained in subsequent correspondence from Mr Laubscher of the Law Society to Ms N. In an email of 10 December 2008 Mr Laubscher stated that the Committee which dealt with the complaint comprised lawyers that are experienced in the field of family law and relationship property matters and that they exercised their professional judgement as to the reasonableness of the fees on the documents and information made available to them.

[7] The assessment of reasonableness of fees professional peers is an appropriate approach to the question of fees in a professional setting. I have reviewed the file and the further submissions of the parties. I find no reason to depart from the finding of the Standards Committee on the matter of fees. While it may have been helpful to Ms N to have been given more detail as to how the finding of reasonableness was reached in the decision itself, this was not a serious flaw in the decision.

Right of response

[8] In the application for review the complainant repeats her original complaint, and further notes that she was given “no opportunity to respond/disagree with the lawyer’s complaint prior to Standards Committee decision”. In this she is referring to Ms K’s letter dated 17 November. That letter was not provided to her until 12 December 2008, some considerable period after the Standards Committee had resolved not to enquire into the matter further and to take no further action.

[9] The procedures to which the Standards Committee is required to adhere are set out in the Lawyers and Conveyancers Act and in the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. Section 141(a) of the Act required the Committee to inform a lawyer complained about of the complaint and to invite the lawyer to make a written response to that complaint. This occurred in the present case. There is no corresponding statutory duty to give the complainant a right of reply to that response. While in some cases this may be appropriate, s 137(1)(c) explicitly contemplates that on receiving a complaint the Standards Committee may resolve to take no action on it. The complaints framework is therefore of an explicitly summary nature. This is appropriate in light of the statutory purposes of the complaints and discipline framework found in s 120 of the Act which are focussed on expeditious disposal of complaints.

[10] I am satisfied that the Standards Committee is permitted to cease its enquiries once the person complained against has been given an opportunity to respond to the complaint. A decision to cease any further enquiries must of course be reasonable in all of the circumstances. In this case the matters raised were relatively narrow, were fully set out in the complaint, and addressed in the response of Ms K. I am satisfied that the Standards Committee was not obliged in this case to give Ms N an opportunity to reply to the response of Ms K.

[11] It would seem unusual, however, in a proceeding where the rights of the parties may be significantly affected if Ms N were not entitled as of right to see the response made by Ms K. If this were not the case Ms N would be unable to ascertain the basis upon which the decision was made and consider her rights subsequent to that decision. I note that in light of the fact that the letter in question was subsequently provided to Ms N little turns on this point as no prejudice resulted. However it would seem prudent as a matter of practice to provide responses (from either party) to the other party and to inform them whether a right to comment on it exists or not.

The conduct complaint

[12] Ms N's complaint was framed by her as "problems with communication and quality of legal service provided but particularly when the large bill is considered as well". This is a complaint about the quality of legal service. There is no suggestion in the reasons given by the Committee that the core aspect of the complaint of "problems with communication and quality of legal service provided..." were addressed by the Committee. By section 139(2)(a) of the Lawyers and Conveyancers Act the Committee in notifying a party of its decision is required to state not only the decision but also the reasons for it.

[13] In this case the Committee has not given reasons for its decision to not enquire into the complaint about communication and quality of legal service further and to take no further action on that aspect of the complaint.

Conduct: applicable standard

[14] This review concerns conduct which in part occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service since that date may be the basis for a regulatory response by the professional body.

[15] In the present case the complaint relates to communication and the quality of service. In so far as the complaint relates to conduct prior to 1 August 2008, the only relevant category of conduct in respect of which discipline could follow that of negligence or incompetence under s 106(3)(c) of the Law Practitioners Act 1982. In cases of negligence or incompetence discipline will follow only where the negligence or incompetence "has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor, or as to tend to bring the profession into disrepute." This is clearly a very high threshold.

[16] However, in this case some of the events complained of occurred after 1 August 2008. It was on that date that the Lawyers and Conveyancers Act 2006 and the rules made under that Act (including the Rules of Conduct and Client Care) came into

force. The rules made under that Act provide that a lapse in the proper level of service may elicit a regulatory (if not disciplinary) response from the Standards Committee. See for example rule 3 of the Rules of Conduct and Client Care:

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

The Complaint

[17] I have not considered the substance of the complaint from Ms N in respect of the communication and quality of legal service provided by Ms K. These are matters which are best considered by her professional peers (with the assistance of the lay members) on the Standards Committee.

Decision

[17] I direct that the Auckland Standards Committee 4 reconsider and determine the specific matter of whether the complaint of “problems with communication and quality of legal service provided” is upheld in accordance with s 209(1)(a) of the Lawyers and Conveyancers Act.

[18] I note that both parties have provided further information to me in the course of this review. In light of this I will provide to the Committee my file on this matter to assist with their consideration of the matter.

DATED this day of March 2009

Duncan Webb
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:

Ms N as Applicant
Ms K as Respondent
The Auckland Standards Committee 4
The New Zealand Law Society