

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

BETWEEN

CA

Applicant

AND

BD

Respondent

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

DECISION

Introduction

[1] BD acted for CA in late 2010, with respect to a franchise agreement that CA intended to enter into with two other parties. CA says she wanted BD to provide her with a quote and a completion timeframe, but she did neither.

[2] When a draft of the franchise agreement was sent to the other parties' lawyers CA says that the feedback from the other lawyers was highly critical, the agreement was not what their clients needed, and would need to be substantially re-drafted.

[3] Having been told of the advice the other parties had received from their lawyers, CA says she contacted BD to explain the problems with the agreement. BD did not accept that the criticisms of her or the agreement were valid, on the basis of CA's instructions to her. When CA also raised concerns with her over the size of her bill and the timeliness of her work, BD declined to reduce her fees, and did not accept the criticisms around timeliness.

[4] CA was not satisfied with BD's responses to her concerns, so when BD's firm attempted to recover her fees, CA she laid a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[5] The Standards Committee considered CA's complaints that BD had failed to provide a quote, drafted an agreement which did not meet CA's requirements, and did not complete the work within the timeframe CA required. The Committee also considered CA's complaint that BD's fees were unreasonable and unfair because of the failings CA perceived in the work she was being billed for.

[6] The Committee considered the materials before it, including the two draft franchise agreements prepared by BD, the other materials the parties had provided, CA's criticisms of BD's work, and her proposal to pay a reduced amount.

[7] The Committee considered the timeliness of the work BD had done, examined her attendances, and was unable to find any basis for criticism. The Committee looked at the draft agreements, and noted CA had not identified what the alleged shortcomings of the agreement were. It appeared to the Committee that BD had consulted extensively with CA over the contents of the agreement, and had amended the draft accordingly. The Committee's view was that the agreement was competently drafted, and noted its expectation that:¹

...the other side to an agreement will want to modify the agreement to better suit their client and it may well be that the prospective franchisees had quite different expectations about what the arrangement was to be.

[8] The Committee had no concerns over BD's competence, and decided to take no further action on that aspect of CA's complaint.

[9] In considering CA's complaint that BD had failed or refused to provide a quote, despite her repeated requests, the Committee made reference to the terms of engagement CA had signed, saying there was nothing objectionable in BD not providing a quote after CA had agreed how work would be charged in the terms of engagement. Furthermore, the Committee observed, it would be exceptional for a lawyer to provide a quote, and CA's instructions would not have suited a fixed fee. The Committee decided that further action was unnecessary or inappropriate.

[10] Overall, the Committee resolved to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[11] CA was dissatisfied with that outcome and applied for a review.

¹ Standards Committee decision dated 19 December 2011 at [28].

Review application

[12] In her review application, CA referred to the impact the [city] earthquakes had had on her ability to produce evidence to support her complaint, reiterated her original complaints, and added complaints about BD's customer service and the peculiarity of her having been provided with an interim bill when she had never received such a thing from the firm before when she had previously instructed it.

Role of the LCRO

[13] The role of the 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.²

Scope of Review

[14] 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 hearing

[15] The parties attended a review hearing in [city] on 16 October 2014.

[16] In the course of the review hearing it became apparent that BD may not have interrogated the whole of the history held by her office with respect to CA's matter. CA also referred to the difficulties she had experienced in obtaining copies of correspondence she had wanted to put before the Committee which she says would have supported her assertion that from her first contact with BD in October 2010 (not December as BD says), she had requested a quote, and advised BD of the time constraints involved.

[17] BD was given the opportunity to check her records for any further relevant material, and given that CA primarily attributed her difficulties to various consequences arising from the [city] earthquakes in 2011, she was also allowed further time to obtain any further relevant information she wished to provide.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[18] BD subsequently confirmed that she had checked her firm's records, and had no further information to add. CA advised this Office that she had chosen not to progress her retrieval of her documents, and that she did not request any further extension. Both parties provided further submissions, which have been considered in the course of this review

Review issue

[19] In her review application, CA added complaints about interim billing and customer service, which had not been the subject of her original complaint. Neither of those additional complaints alleges professional conduct that warrants further consideration on review. Neither matter will be considered further in the course of this review.

[20] The issue on review is whether there is any reason to depart from the Committee's decision.

[21] Having heard from CA and BD, considered the complaint and all of the other information available in the course of this review, I have been unable to identify any reason to depart from the Standards Committee's decision that further action was unnecessary or inappropriate pursuant to s 138(2) of the Act. That decision is therefore confirmed on review.

Discussion

Quality of Drafting

[22] CA says that the quality of the agreement BD provided was deficient, although she did not realise that until she had been advised of the other parties' lawyers' comments on the agreement.³

[23] BD says that there was nothing wrong with her drafting of the agreement. It covered all of the matters she considered necessary, and complied with CA's instructions. She notes that "[i]t was always anticipated that in making an offer to the purchasers that their lawyers may come back with counter offers to maximise their clients' position".⁴ On that basis, she did not accept the criticisms levelled at her or her work.

[24] The Standards Committee observed that CA had not identified what the alleged deficiencies were in the agreement. The Committee reviewed the agreement, recording its view that it was "a thorough and comprehensive commercial document and reflects the client's initial instructions to prepare a *standard franchise*

³ Complaint CA to NZLS (29 June 2011).

⁴ Letter MT to NZLS (20 July 2011).

agreement”⁵ and was competently drafted. The Committee noted that they “expected that the other side to an agreement will want to modify” it to suit their own client, so the other lawyers’ views carry little weight. In the circumstances, the Committee decided to take no further action in respect of that aspect of the complaint.

[25] The Standards Committee is comprised of experienced practitioners with a wide range of expertise. Complaints about the quality of lawyers’ work are “matters which are best considered by [the lawyer’s] professional peers...”⁶

[26] Nonetheless, for the purposes of this review, I have read the agreement to ascertain whether I can identify any obvious flaws that would support me taking a different view to that of the Committee. I have been unable to identify any such flaws. I am also conscious that there is no dispute that the agreement was drafted as the basis from which negotiations would proceed with the other parties. It is therefore predictable that other lawyers would find fault with its terms. I have also been unable to identify any obvious departure from what CA says her instructions to BD were.

Request for quote

[27] CA says she repeatedly requested a quote from BD.

[28] BD says she discussed costs with CA, advised her that the firm did not give quotes but would bill on the basis of time, and did not provide one. She says that by oversight she did not provide detailed written information until after she had done some work, and that once she had identified that oversight, she remedied it by sending the requisite written information to CA.

[29] The Committee considered that once CA had signed the terms of engagement, it was unrealistic for her to expect BD to provide a quote, and act on that basis. The Committee also observed that “it would be the exception, not the rule, that quotes would be provided for legal services, except where the scope of work required was very clear and confined”, and that this was not such a case.

[30] The relevant part of rule 3.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 says:

A lawyer must, in advance, provide a client with information in writing on the principal aspects of client service including the following:

- (a) the basis on which the fees will be charged...

[31] The footnote to that rule says:

⁵ Above n 1 at [26].

⁶ *N v K*, LCRO 03/09 at [17].

The expression “in advance” is contained in section 94(j) of the Act. Accordingly, lawyers are recommended to provide the information set out in rule 3.4 prior to commencing work under a retainer.

[32] Although it is best practice to provide the information on the matters covered under rule 3.4 before doing any work for a client, the rules do not impose an absolute obligation to do so. There is no rule that requires a lawyer to provide a quote at any stage.

[33] In all the circumstances, this aspect of CA’s complaint does not warrant any adverse disciplinary outcome for BD.

Request for a timeframe

[34] CA says that when she initially contacted BD in October 2010 she specifically asked for the work to be completed by 23 December, at which point one of the other parties’ lawyers was due to leave the firm, and that party either wanted the work to be complete by then, or be able to instruct her lawyer to transition her file to another lawyer.

[35] BD says she was formally instructed in early December 2010 to provide the franchise agreement to the other parties’ solicitors by Christmas, and that she provided a draft accordingly.

[36] The Committee’s view was that “BD diligently worked towards having a draft agreement ready before this deadline and it is difficult to see how she could have advanced the matter more quickly”,⁷ that she prioritised the work, dealt with the preparation promptly, and observed that “the date of 23 December 2010 did not appear to be an absolute deadline, but simply desirable from the point of view of one of the potential franchisees”.⁸

[37] CA maintains that she emailed BD in early October 2010, explained what work she wanted done, asked whether BD could meet the December timeline, requested a quote, and asked if she could recommend someone else, if she were unable to undertake the work.⁹ She does not say she received any response. CA said she was unable to produce a copy of her email, because of technical difficulties she explained at the review hearing, which she attributes to the [city] earthquake and its after-effects.

[38] There is no suggestion by CA that she followed up on her October email, or that BD ignored or evaded her instructions until early December. BD was given time to check the emails received by her office, and has not identified any relevant email from

⁷ Above n 1 at [19].

⁸ Above n 1 at [22].

⁹ Letter CA to LCRO (13 November 2014).

CA preceding 6 December 2010. There is no apparent reason for BD to conceal any earlier correspondence, and it may simply be that CA's email was not received. In any event, CA elected to proceed on the basis of a draft agreement she provided to BD in early December, and she had had time between October and December to instruct another lawyer if she was concerned about BD's lack of response or timeliness.

[39] There is no evidence of a lack of timeliness by BD in carrying out CA's instructions, and nothing of substance appears to turn on the date of CA's initial approach to BD. In the circumstances, no conduct issue arises.

Other allegations

[40] CA speculates that BD had improper motivations for rendering her invoice on an interim basis immediately before Christmas, and says she was "totally shocked, angry and disappointed as it was Xmas Eve and could not contact anyone". She says the firm was prompt to follow-up on the unpaid invoice, and she found that objectionable, so she emailed the firm saying so. She was not satisfied with the responses she received. Then the earthquake followed in February, throwing her life into turmoil, and making it difficult for her to pay the firm's bill. When the firm threatened her with court proceedings to recover its fees, she laid her complaint.

[41] While I have no doubt that CA's reaction to receiving the invoice was genuine, nothing in the material before me on review suggests that any deficiency in BD's professional conduct is responsible for that reaction.

Outcome

[42] Having carefully considered all of the material available on review, I have found no reason to interfere with the Committee's decision that further action on CA's complaint is unnecessary or inappropriate, pursuant to s 138(2) of the Act. The Committee's decision is therefore confirmed.

Costs

[43] The LCRO has discretion under s 210 of the Act and the LCRO's Costs Orders Guidelines to make orders for costs on review.

[44] CA was entitled to apply for a review, and has done so. She has not conducted herself in a way that would attract an adverse costs order.

[45] No adverse finding has been made against BD, and there is no other reason that she should be ordered to pay costs on review.

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

Decision

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

DATED this 5th day of December 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:

CA as the Applicant
BD as the Respondent
[city] Standards Committee
The New Zealand Law Society