

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

PR

Applicant

AND

RW

Respondent

DECISION

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

Introduction

[1] Mr PR has applied for a review of the determination by [Area] Standards Committee to take no further action in respect of his complaints about Mr RW.

Background

[2] In 2010 and the years following Mr RW acted as counsel for Mr PR on a number of matters which included:

- (a) An application under s 94 of the Land Transport Act 1998.
- (b) Defending Mr PR on a loss of traction charge.
- (c) Defending Mr PR on other charges.

[3] On 27 July 2010 Mr RW provided a letter of engagement which read in part:

Services to be provided

The following is a summary of the legal services we expect to be providing to you:

Receiving initial instructions to act;
 Correspondence;
 Telephone and personal attendances;
 Liaising with Police and Police Prosecutions;
 Receiving, reviewing and advising on full Police disclosure; and
 Attending [Area] District Court as required.

Fee

\$325.00 + GST.

[4] In July 2011 Mr PR was convicted on drug charges and sentenced to a period of imprisonment. Mr RW did not act for Mr PR in defending those charges but did act for him on various matters thereafter including:

- (a) A variation of bail application.
- (b) Recovery of property seized by the police.
- (c) Issues to do with medication required to be administered while Mr PR was in prison.
- (d) Issues arising out of the transfer of Mr PR from Prison A to Prison B.

[5] Mr PR wished to appeal his conviction and sentence and initially engaged Mr DS to advise him as to possible grounds of appeal. Mr DS undertook that task and advised Mr PR that he could not identify any viable grounds of appeal. Nevertheless, Mr PR asked Mr DS to undertake an appeal. Mr PR had been legally aided and Mr DS did not accept instructions on legal aid.

[6] Mr PR then engaged Mr RW to pursue the appeal. The appeal was unsuccessful and Mr PR was dissatisfied with the service provided by Mr RW.

[7] During the course of acting for Mr PR on the appeal Mr RW had the use of a Porsche motor vehicle (the vehicle) provided by Mr PR. There is disputed evidence on a number of matters relating to the vehicle:

- (a) Whether it was given to Mr RW to offset against fees or whether it was loaned to Mr RW to enable him to visit Mr PR in Prison B, as Mr RW had no vehicle of his own.
- (b) Ownership of the vehicle.¹
- (c) The value of the vehicle.

[8] Following the unsuccessful appeal Mr PR asked Mr RW to render his account. Mr RW rendered an invoice dated 17 July 2012 for \$14,025 plus GST (total \$16,128.75) and when asked to provide a breakdown of the bill he provided the following information:

Fee breakdown estimate as requested.

To: Holden Senator attendances = 3 hours (CL, [Area] Police, QS).

Bail variation pending sentencing – 3 hours (DS, Crown Solicitor, [Area] District Court Trial Section, QS).

Medication – 3 hours
([Area] Medical Centre, Serco, QS, one prison visit).

Seized Property – 2 hours
(Serco, QS).

Review of Trial and Appeal attendances – 39 hours
(Court of Appeal, Crown solicitor, Mr T Barrister, Mr W & Mr H (Serco re Mr K) file transfer and debrief to Mr Z Solicitor. QS, 6 prison visits).

[9] Mr PR insisted that the vehicle be returned by Mr RW before the bill would be paid. Mr RW refused and it would seem that Mr RW changed the ownership details of the vehicle to himself. The bill has not been paid and Mr RW continues to hold the vehicle.

[10] Subsequently, Mr PR's daughter changed the vehicle ownership details to herself and various other events occurred with regard to the vehicle, which have no relevance to this review.

Mr PR's complaints and the Standards Committee determination

[11] Mr PR complained to the New Zealand Law Society Lawyers Complaints Service about Mr RW's conduct and the Standards Committee identified three issues to

¹ Mr PR's daughter claims the vehicle belongs to her.

be addressed:²

- (a) Whether Mr RW's fees were fair and reasonable.
- (b) Whether it is inappropriate for Mr RW to retain the vehicle as payment or as security for the fees.
- (c) Whether Mr RW advised Mr PR the fees would be funded by Legal Services Agency (LSA).

[12] In respect of each of these the Committee made the following observations and determinations:

- (a) The Committee considered the material provided, including submissions by both parties. The Committee considered legal attendances for the invoice and the fee breakdown and noted that the fees were charged at a reduced rate of \$275 per hour. The Committee took into account Mr RW's attendances on the appeal which included a scrutiny of paperwork relating to the three week High Court trial and Mr RW's assessment of issues such as: whether a motor vehicle dealer defence should have been made by the trial counsel; whether the trial counsel had ignored specific instructions; whether the cross-examination of the Crown witness was adequate; and whether the trial counsel had prior knowledge of the co-accused counsel's closing remarks identifying Mr PR as the supplier of the drugs. It was noted the only ground of appeal available was whether the trial judge should have directed an inquiry of the two jurors supposedly known to Mr PR.

In the circumstances, the Committee was satisfied that nothing in the material before it disclosed any unfairness and/or unreasonableness of the fees for the work undertaken by Mr RW. Accordingly, the Committee determined to take no further action pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act).³

- (b) The Committee considered the direct conflict of accounts as to the agreement. The Committee noted that the issue of [the vehicle] arrangement arose after Mr PR's appeal was dismissed by the Court of Appeal, as noted in Mr PR's letter to Mr RW of 21 May 2012. It was noted that Mr PR expressed his dissatisfaction with Mr RW in the same letter. Whilst the Committee acknowledged that no rule in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 expressly prohibits such arrangement, in the Committee's view, such an offset arrangement is to be discouraged [sic] as being unwise and potentially fraught with difficulty, as demonstrated in the context of this complaint.

Although the Committee did not condone Mr RW's conduct, it did not consider that the conduct reached the threshold to be considered unsatisfactory conduct. Accordingly, the Committee determined to take no further action with regard pursuant to section 152(2)(c) of the Act.⁴

² Standards Committee determination (4 October 2014) at [14].

³ At [24]–[25].

⁴ At [35]–[36].

- (c) The Committee considered Mr PR's belief that the legal fees would be funded by the LSA and that he was not advised by Mr RW otherwise. However, the Committee accepted consistent evidence provided by Mr RW that he made no indication to Mr PR that the matter would be funded by the LSA. The Committee took into account the engagement letter, Mr RW's correspondence with the Court and the absence of any confirmation from the LSA on the application. In the Committee's view, there was insufficient evidence produced to support the issue of complaint.⁵

Review

[13] This review progressed by way of an applicant-only hearing in [City] on 6 July 2017 attended by Mr PR, represented by Mr GH. Mr RW was not required to attend and did not exercise his right to do so.

[14] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

Discussion

[15] Mr PR and Mr GH agreed that the Committee correctly identified the issues to be addressed and these are the matters considered on review.

Fees

[16] Mr PR's complaint about the quantum of Mr RW's bill was considered by the Standards Committee and it reached the view that the fees charged were fair and reasonable. Mr GH took no issue with an hourly rate of \$325 for Mr RW which is seemingly the rate charged by him.

[17] Mr RW has not provided any timesheets and so there is no evidence to support the breakdown provided by Mr RW. The breakdown of the bill provided by Mr RW records 39 hours being spent on the appeal. Thirty-nine hours at the (accepted) rate of \$325 per hour amounts to \$12,675. Mr RW's total bill is \$14,025 plus GST, leaving \$1,350 to be applied to the other matters included in the bill. The question

⁵ At [42].

arises as to whether or not a fee based on 39 hours for the appeal is fair and reasonable.

[18] The first matter to note is that Mr DS had been asked to assess whether there were any viable grounds of appeal. This involved reviewing all of the material and transcripts associated with the three-week trial.

[19] Mr PR advises that Mr DS rendered an account for \$25,000⁶ for this work. He subsequently reduced this bill to \$10,000 after Mr PR objected but the inference to draw is that Mr DS considered \$25,000 represented a fair and reasonable fee for this work.

[20] I acknowledge Mr DS's hourly rate would likely be considerably in excess of \$325 but nevertheless it is reasonable to assume that Mr DS would have spent at least the same period of time, if not more, than that charged for by Mr RW. Mr RW's fee, of course, included preparing the case on appeal, and appearing in support.

[21] Although the Standards Committee did not request a costs assessor's report, the view of the Committee (which includes lawyers and lay persons) was that the fee was fair and reasonable. That view cannot be discounted.

[22] The balance of \$1,350 for all the other matters referred to is fair and reasonable for the work identified.

[23] Stepping back, and taking an overview of the matter, there is not enough evidence or issues of concern that convince me of the need to appoint a costs assessor to review Mr RW's files or to otherwise reach a view that Mr RW's fee was not fair and reasonable.

[24] The conclusion I have reached is that no further action on this issue is appropriate. This coincides with the outcome as determined by the Standards Committee and for simplicity, this decision will be recorded as confirming the determination of the Committee, although the reasons for reaching that view on this issue may be different from those of the Committee.

Other fee related matters

[25] Mr GH noted that although attendances in respect of the Holden Senator vehicle had been provided in November 2010, and the other matters included in the

⁶ I am unsure whether this includes or excludes GST.

account related to attendances following Mr PR's conviction in July 2011, Mr RW had issued only the single invoice in July 2012.

[26] Rule 9.6 of the Conduct and Client Care⁷ Rules (the rules) provides:

A lawyer must render a final account to the client or person charged within a reasonable time of concluding a matter or the retainer being otherwise terminated. The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

[27] That is not a matter that was the subject of complaint and was not addressed by the Standards Committee. Consequently it is not an issue which can be addressed on review.

[28] Another matter that was not addressed by the Standards Committee (and cannot be considered on review) is the (unchallenged) statement by Mr PR that he made cash payments direct to Mr RW. Mr PR says no invoices were rendered by Mr RW for these payments and he received no receipts. What those payments were for is beyond the scope of this review.

Legal aid

[29] Mr PR asserts that he instructed Mr RW on the basis that fees were to be paid by legal aid. He says he completed the legal aid form and included this with the files received from Mr DS which were sent on to Mr RW.

[30] Mr GH readily acknowledged that there is conflicting evidence about this matter which is not able to be resolved.

[31] In response to the allegation Mr RW says he made it clear to Mr PR that he would be charging the same rate as he had charged for previous matters, and relies on the letter of engagement provided in July 2010. Mr PR had not of course received any invoices from Mr RW at that stage, but nevertheless, he does not assert that all previous matters were also carried out on legal aid. He says in fact that he had made cash payments to Mr RW previously.

[32] Mr PR acknowledges he had previously been granted legal aid for other legal work. He acknowledged that he was aware that when legal aid is granted, the Legal Services Agency or (now) the Ministry of Justice will notify the client of the grant. Mr PR did not receive any such notification in this instance.

⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

[33] In addition, Mr PR's evidence is somewhat contradictory when he says that he asked Mr RW to render his account and insisted the vehicle be returned before the bill would be paid. These are not the actions of a person expecting a lawyer's bill to be paid by legal aid.

[34] Putting the conflicting evidence to one side, it is difficult to discern what professional standards are at issue. It seems to me that this matter may be nothing more than a misunderstanding between Mr PR and Mr RW.

[35] Taking all of these matters into consideration, I have reached the view that this complaint cannot be sustained.

The vehicle

[36] The complaints relating to the vehicle can only be resolved in a forum better suited to determining conflicting evidence than the complaints procedure. The police declined to pursue this matter on the basis of a report of theft of the vehicle from Mr PR's daughter and consequently, this is a matter that is best resolved in a civil arena. In this regard it would seem to be suited to being resolved before the Disputes Tribunal.

[37] In any event I am unable to ascertain what professional standards Mr RW is alleged to have breached, although I endorse the doubts expressed by the Committee as to the wisdom of becoming involved in this type of transaction.

[38] Further action is neither necessary nor appropriate in respect of this matter.

Other matters

[39] At the review hearing Mr GH expressed an element of unease about issues arising out of this complaint. I share Mr GH's concerns and refer to the following matters:

- (a) Only one invoice was rendered covering a number of different instructions carried out over a period of two years.
- (b) The statement by Mr PR that he made cash payments direct to Mr RW and for which no receipts were issued.

- (c) The allegations that Mr RW transferred ownership of the vehicle without any corresponding confirmation by the owner of the vehicle.
- (d) Mr RW's compliance with the rules relating to the relationship with an instructing solicitor.

[40] However, I do not intend to formally direct that these matters be investigated further by the Standards Committee as they are unrelated to the matters complained about by Mr PR. I therefore leave it to the discretion of others as to whether or not they are pursued.

Conclusion

[41] Having considered the matters raised in this complaint, the evidence provided, and having heard from Mr GH and Mr PR, I have reached the view that further action is neither necessary nor appropriate.

Decision

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

DATED this 17th day of July 2017

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:

Mr PR as the Applicant
Mr RW as the Respondent
Mr GH as the Respondent's Representative
[Area] Standards Committee
The New Zealand Law Society