LCRO 333/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [North Island] Standards Committee
BETWEEN	**MR ZA** Applicant
AND	**MR YB** Respondent

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

Introduction

[1] Mr ZA, a lawyer, engaged Mr YB to act for him personally and on behalf of a company under his control to defend a claim against him and the company as purchaser under an Agreement for Sale and Purchase which he was unable to settle. He was dissatisfied with Mr YB's services, particularly at a judicial settlement conference, and the level of his fees.

[2] The Standards Committee determined to take no further action in respect of Mr ZA's complaints and he has applied for a review of that determination.

Background

[3] Mr ZA incorporated a company which entered into an agreement to purchase a property in [town] for $1,022,000 plus GST. A deposit of $107,310 was paid but the company was unable to arrange the necessary finance to complete the purchase.

[4] The vendor alleged that Mr ZA was personally liable for performance of the purchaser's obligations and at that stage Mr ZA engaged Mr YB to assist him in defending the claims or at least to assist him in reaching a settlement of the claim. His instructions were initially directed through his firm but subsequently, on advice from Mr YB, he agreed that instructions should be through Ms XC.

[5] The work included defending a summary judgment application, preparing a defence and counter-claim to proceedings following withdrawal of the summary judgment application, completion of discovery inspection, a judicial settlement conference at which the matter was settled and then subsequently resisting requests by the plaintiff for further discovery.

[6] During the period of his instructions (21 July 2009 to 27 June 2011) Mr YB rendered five accounts for a total fee of $45,003.33 plus GST and disbursements. In March 2011 an order for costs in the sum of $4,584 was made against Mr ZA and Mr YB paid this out of his own funds.

[7] From the outset Mr ZA had difficulty in meeting payment of these accounts and when Ms XC declined to enter into a funding facility referred to as "fee smart" payments on account of the sums outstanding were made by Mr ZA from time to time. The last payment made by him is recorded in the final statement issued by Mr YB as being $319.38 on 19 June 2011.[1] That statement recorded the balance outstanding as being $24,044.46 which includes the costs paid by Mr YB on Mr ZA's behalf.

[8] Ms XC finally advised Mr ZA that unless payment was received by 14 October 2011 she would be issuing proceedings for recovery of the fees. Mr ZA lodged his complaint on 17 October 2011.

The complaints

[9] Mr ZA's complaint was mainly about Mr YB's fees. Coupled with this however was dissatisfaction with Mr YB's performance at the settlement conference where Mr ZA says Mr YB did not present any of the defences and arguments in his favour to the extent that Mr ZA realised he would have to settle the matter, and took matters into his own hands to achieve a settlement.

[10] Mr ZA also complained that he did not receive any terms of engagement until October 2010 and despite requests for estimates he did not receive any indication of costs until mid-2010.[2]

[1] Statement YB (27 June 2011).
[2] Mr ZA's complaints vary from getting no indication of costs, to receiving an estimate when Mr YB was initially engaged of $30,000 - $40,000, to receiving an estimate of $15,000 at the outset, or, not receiving any estimate until mid 2010.

The Standards Committee investigation and determination

[11] The parties initially agreed to mediate the complaint although it is noted that Mr ZA was not particularly cooperative in agreeing to a suitable date. The mediator who initially agreed to conduct the mediation then had to withdraw for personal reasons and a new mediator was appointed.

[12] A date and time for the mediation was fixed but unfortunately the mediator then became committed to a court fixture which meant the mediation was unable to proceed in the morning as scheduled. Mr ZA was unavailable during the afternoon and consequently the scheduled date was abandoned.

[13] At that stage Mr YB expressed an unwillingness to continue with mediation and the Complaints Service appointed a costs assessor to review Mr YB's fees.

[14] The assessor provided his report in September 2012 and confirmed that Mr YB's fees were fair and reasonable. He made the following observations:

(a) The time recorded by Mr YB was within the time allocations for the various steps undertaken in the litigation by Mr YB as set out in Schedule 3 of the High Court Rules which are intended to reflect a reasonable time for completion of such steps.

(b) Mr YB's hourly rate of $450 was an appropriate rate for counsel of Mr YB's experience.

(c) The actual amount charged by Mr YB is less than the time recorded at his "hourly rate" resulting in an effective hourly rate of $372 for the time recorded.

[15] The assessor also expressed the view that it was "inherently improbable",[3] that Mr YB provided an estimate of costs (as asserted by Mr ZA) at the initial meeting because there was insufficient information available at that time.[4]

[16] In its determination dated 19 November 2012 the Committee accepted and endorsed the costs assessor's report and did not see any aspect of Mr YB's conduct which could give rise to a finding of unsatisfactory conduct.

[3] Colthart Report dated 25 September 2012 at [13].
[4] Refer [31] and [32] of this decision.

The application for review

[17] Mr ZA applied for a review of the determination by the Standards Committee and raised the following issues:

(a) The delay in providing a letter of engagement

(b) His assertion that Mr YB had provided an estimate of $15,000 including GST up to and including summary judgment.

(c) His assertion that he was then advised there was a 60/40 chance of success and to get to Court would probably incur further costs of $20,000 - $25,000.

(d) Alleged poor performance by Mr YB at the settlement conference.

[18] In the review application Mr ZA accepted that further fees were owed to Mr YB but the amount of the fees was an issue.

[19] Finally, Mr ZA advised that he was "at a bit of a loss" about the costs order.[5]

Review

[20] On receipt of the review application this Office sought a response from the parties as to whether or not they wished to attempt to resolve the matter by mediation given the fact that the proposed mediation had not taken place. Mr ZA confirmed agreement but Mr YB declined.

[21] The matter was then scheduled for a hearing with both parties but they were urged to resolve the matter between themselves. I understand that Mr ZA did make contact with Mr YB. I do not know the content of the communications between them but Mr YB adopted the view that he required payment of his account in full and he confirmed that position at the review hearing which took place on 7 August 2014.

Has there been unsatisfactory conduct?

[22] Before either a Standards Committee or the Legal Complaints Review Officer (LCRO) can make orders against a lawyer, there must first be a finding of unsatisfactory conduct. Section 12(a) of the Lawyers and Conveyancers Act 2006 defines unsatisfactory conduct as being "conduct that falls short of the standard of

[5] Application for review dated 18 December 2012.

competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".

[23] At the review hearing Mr ZA conceded that whilst he personally considered Mr YB's conduct unsatisfactory he could not argue, nor wished to argue, that a "member of the public" would necessarily consider this to be the case.

[24] This frank concession by Mr ZA is somewhat disturbing and reinforces the impression that Mr ZA has used the complaints process as a tactical weapon to attempt to negotiate down Mr YB's fees. The disturbing feature of this concession is that it would seem Mr ZA has abused the complaints process without regard to the fact that firstly, the complaints procedure (and this Office) is funded by the legal profession and secondly, without regard to the impact and effect on Mr YB.

[25] Even if Mr ZA had argued his case it is difficult to accept on the evidence provided that his complaint would have succeeded. In the main, Mr ZA complains that Mr YB did not perform adequately at the judicial settlement conference. In the first instance the parameters of the case and the negotiating position for a settlement conference are established by the pleadings already filed. The costs assessor had regard to all of the material on Mr YB's file and did not in any way suggest that Mr YB's work was substandard. In addition, the outcome of the settlement conference was positive for Mr ZA and it seems to me that he and his wife formed the view as the conference proceeded that they would be better to settle the matter rather than continue to trial. Whether this was a result of a realisation of what was before them or an acceptance that they no longer wished to run the risk associated with trial or incur the additional costs of doing so, the decision to settle may very well have been driven by the effect of the conference focusing Mr ZA's attention on the issues in a way that had not occurred prior to this.

[26] Before there could be a finding that Mr YB's conduct constituted unsatisfactory conduct as defined in the Lawyers and Conveyancers Act 2006, there would need to be convincing evidence that his presentation of Mr ZA's case at the settlement conference was so substandard that it could be said on the balance of probabilities that his conduct was unsatisfactory. Without evidence or negative comment from any third party it is impossible to countenance a situation where a Standards Committee or the LCRO would be able to reach an adverse finding against Mr YB.

Abuse of the review process

[27] The impression that Mr ZA has abused the complaints procedure is further reinforced by the fact that he has not made payment to Mr YB of undisputed amounts. He advised at the hearing that he was able to pay Mr YB and could write a cheque immediately to pay him. He advised that he had not done so because he had just "dug his toes in" and refused to pay because of an antipathy towards Mr YB. This is a surprising acknowledgement by a lawyer of conduct towards another lawyer.

[28] There is something in the order of $4,600 outstanding in respect of Mr YB's accounts rendered prior to the settlement conference. In addition Mr ZA acknowledged that he expected to pay something in the region of $6,000 -$8,000 for the work after that date. Finally, there is the amount of $4,584 paid by Mr YB on behalf of Mr ZA in respect of the costs order against Mr ZA. This results in an amount of some $15,000-$17,000 outstanding which Mr ZA has not disputed – yet he has not made any further payment towards this amount to Mr YB for some three years. That is not conduct which would encourage Mr YB to consider any attempt to settle or negotiate favourably and is conduct towards another practitioner which does not reflect well on Mr ZA.

The issues

[29] Other issues raised by Mr ZA in his complaint and in this review have a "make weight" flavour about them. Mr ZA complained that he had not received terms of engagement until mid-2010. Mr YB rightly points out that he was first instructed by Mr ZA's own firm when he was contacted by a member of Mr ZA's staff. There is nothing that would indicate that this was anything other than a proper instruction on which Mr YB could rely.

[30] Ms XC was instructed in mid-2010 and she promptly sent her terms of engagement to Mr ZA. It took several reminders for these to be signed by him although signature of the terms of engagement is not a requirement of the Conduct and Client Care Rules.[6] In any event this complaint is one to be made against Mr YB's instructing solicitor. It is not a complaint which could be levelled at him.

[31] The other aspect of Mr ZA's complaints refers to the lack of an estimate or to an estimate that was not adhered to. In this regard Mr ZA's complaints vary. In an email dated 12 October 2012 to the Complaints Service Mr ZA says:[7]

> …I was told that his costs to get me to trial would range in the $30-$40,000 range - all up.

[6] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[7] Email ZA to NZLS (12 October 2012) at [2] and [3].

> We discussed the costs at our first meeting at our offices and I felt I could live with that.

[32] The costs assessor has pointed out that no proceedings had been issued at this time so it is inconceivable that Mr YB could have given an estimate based on conclusion of matters through to trial.

[33] In his follow-up letter to the initial complaint,[8] Mr ZA notes that an estimate of $30,000-$40,000 was given mid-2010.

[34] In the application for review Mr ZA asserts that "initially when I first discussed the problem with the building and settlement of the contract Mr YB estimated a cost of $15,000 (inc. GST) up to and including Summary Judgement".[9] He then goes on to assert that Mr YB advised that to go to court would incur a further $20,000 -$25,000.

[35] These inconsistencies only served to highlight the unreliability of Mr ZA's recall and undermine his credibility to the extent that there could be no adverse finding against Mr YB on the basis of this evidence.

Decision

For the reasons set out above and pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

Costs

At the conclusion of the hearing Mr YB made an application for costs to be awarded to him. Section 210(1) of the Lawyers and Conveyancers Act 2006 provides that the LCRO "...may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit". There is the potential for costs orders against Mr ZA both in favour of the New Zealand Law Society and Mr YB. Mr YB is a self-represented party and the general principles relating to awards of costs to such a person apply.

At the review hearing I indicated that if I was minded to consider costs awards I would give each party the opportunity to make submissions. I therefore invite both Mr ZA and Mr YB to make submissions with regard to costs. These submissions are to be provided by no later than 5 September 2014 I will then proceed to issue a supplementary costs decision.

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[8] Letter ZA to NZLS (3 November 2011) at [5].
[9] Above n 5.

DATED this 15th day of August 2014

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O W J Vaughan
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:

ZA as the Applicant
YB as the Respondent
[North Island] Standards Committee
The New Zealand Law Society