

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 MK

Applicant

AND

MR PB

Respondent

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

Introduction

[1] Mr PB has applied for a review of the determination by North Island Standards Committee in which it affirmed an earlier determination which it had recalled, and determined that Mr PB's conduct constituted unsatisfactory conduct in that "he had failed to act in accordance with the arrangements reasonably inferred by Mr PB from the terms of [a letter dated 24 March 2011]".¹

Background

[2] Mr MK was the supervising partner of several solicitors in the firm of DE who had acted for Mr PB.

[3] In November 2008 Mr PB instructed DE to act on his behalf in relation to a dispute with PSALimited and was provided with the firm's terms of engagement.

[4] Initially the matter was dealt with on the basis that PSA had no defence to the claim against it by Mr PB and a statutory demand was issued. Although DE successfully defended an application to set the demand aside, it became clear that the

¹ Standards Committee determination 16 August 2012 at [35].

liquidation proceedings based on the demand would not succeed and it would be necessary for the matter to be progressed by way of proceedings in the District Court.

[5] By March 2011 Mr PB had incurred fees to the extent of \$10,113.86 and the lawyer who was handling the file at the time (FH) wrote to Mr PB and outlined three options. In paragraph 2(c) of the letter he wrote:²

We will prepare and do this claim for you on the basis that you agree to provide us with adequate security for all of our fees rendered and unrendered (if you have any) e.g. a mortgage over your property. Alternatively, you agree that our fees will be payable from the proceeds of the claim if you succeed at Court or settle beforehand. You will also need to pay all the disbursements such as filing fees when required.

[6] With that letter Mr FH also included again the firm's terms of engagement.

[7] Mr PB responded:³

Let's run with option C thanks and ask the judge to award full costs when we win.

[8] In early April Mr FH advised that he was in the process of drafting a notice of claim and an initial letter of demand. He left the firm shortly afterwards and the file was assigned to Ms RA. On 1 July 2011, Ms RA advised Mr PB that she had referred the drafts to Mr MK for checking.

[9] After follow up communications Mr PB was advised that the file was still with Mr MK. Mr PB eventually made phone contact with Mr MK, following which Mr MK wrote to Mr PB.⁴ He pointed out that Mr PB's debt to the firm had been overdue for a period in excess of 120 days and he was not prepared to undertake further work unless Mr PB provided security over his property.

[10] In response, Mr PB referred to the letter from Mr FH dated 24 March 2011, and his response to that letter. He required Mr MK to adhere to what he understood the arrangement to be, namely that DE would be paid from the proceeds of a successful outcome of the litigation i.e. no success no fee. Mr MK declined to act on this basis.

Mr PB's complaints and the Standards Committee determination

[11] Mr PB complained to the New Zealand Law Society Complaints Service in November 2011. His complaint was that Mr MK had refused to acknowledge the terms set out in Mr FH's letter and had declined to continue to act for him unless Mr PB provided security for the firm's fees.

² Letter DE to PB (24 March 2011).

³ Email PB to FH (25 March 2011).

⁴ Letter MK to PB (5 October 2011).

[12] The Standards Committee initially issued a determination on 16 August 2012 in which it reached the view that Mr MK “had failed to act in accordance with the arrangements reasonably inferred by Mr PB ...”.⁵

[13] The Committee noted however “that it would not be appropriate to seek to compel Mr MK or his firm to resume acting for Mr PB in the circumstances that now pertained”.⁶

[14] Following receipt of the determination Mr MK noted the comment by the Committee (in paragraph 16) that no submissions had been received from him. He had in fact sent submissions on the morning of the day of the Standards Committee meeting but these had not been considered by the Committee in its deliberations.

[15] The Committee therefore recalled its determination and set the matter down for a further hearing on the papers. Having reconsidered the matter, including Mr MK’s submissions, it made the following observations:⁷

The Committee carefully reconsidered this matter, and Mr MK’s submissions. They did not consider that Mr MK had satisfactorily addressed the question of the interpretation of the relevant paragraphs in Mr FH’s letter to Mr PB of 24 March 2012. The Committee also noted that there had been no invoices rendered during the course of the retainer; it was understandable that this conduct would have led Mr PB to infer that the fees would be paid out of the proceeds of successful litigation, particularly as no security was requested over his property.

Having reviewed the submissions, the Committee considered that the specific wording in the letter of 24 March 2011 could reasonably be seen to have overridden the general policy and usual billing procedure of DE in this instance.

[16] Having made these observations, the Committee then reaffirmed its decision in the earlier determination that there had been unsatisfactory conduct on the part of Mr MK, imposed a fine of \$500 and ordered Mr MK to pay the sum of \$750 on account of costs.

[17] Mr MK has applied for a review of that determination.

The review

[18] A review hearing took place in Auckland on 3 July 2014. Mr MK attended in person accompanied by one of his partners, and Mr PB attended by telephone.

[19] On the morning of the hearing, Mr PB sent through a series of emails which consisted of a number of attachments. Copies of these were provided to Mr MK at the

⁵ Above n 1.

⁶ Above n 1.

⁷ Standards Committee determination dated 19 November 2012 at [22] – [23].

hearing. Following the hearing, Mr MK reviewed this material and subsequently indicated by email that “most of the documents are unrelated or unremarkable”.⁸

[20] I record specifically here Mr MK’s advice at the hearing, that he would make copies of the firm’s files available to Mr PB so that he can continue with his action against PSA. The outcome of this review is that the determination of the Standards Committee is reversed, and DE will be entitled to retain its original file until outstanding fees are paid.⁹

Standards Committee errors

[21] In his submissions for the review, Mr MK drew attention to the following:

- The Standards Committee recorded that Mr FH had sent the firm’s terms of engagement under cover of his letter dated 24 March 2011.¹⁰ However, the firm’s terms of engagement had been handed to Mr MK on 19 November 2008 and this had been confirmed in the firm’s letter to him of 24 November 2008. The terms of engagement provided on 24 March 2011 was the second time Mr PB had been provided with these.
- Although the Committee stated it had carefully considered Mr MK’s submissions to the Committee dated 2 August 2011, this error (referred to above) raised the possibility that the Committee had not in fact “carefully considered” those submissions.
- Invoices had been rendered by DE during the retainer leading to the situation where Mr PB was indebted to the firm in the sum of \$10,113.86. However, the Committee noted that “there had been no invoices rendered during the course of the retainer”.¹¹
- Having (wrongly) noted that no invoices had been rendered, the Committee then went on to note that “it was understandable that this conduct would have led Mr PB to infer that the fees would be paid out of the proceeds of successful litigation, particularly as no security was requested over his property”.¹²

⁸ Email MK to LCRO (3 July 2014).

⁹ This is not to be taken as a requirement for the firm to release its complete original file if the fees are paid. Release of the file is subject to the usual practice adopted by the law firm in accordance with Law Society guidelines.

¹⁰ Above n 7 at [3].

¹¹ Above n 7 at [22].

¹² Above n 11.

- Having provided the firm's terms of engagement at the commencement of the retainer, the Committee's statement that Mr MK "rendered an invoice for costs on a time and attendance basis in the absence of a clear understanding that such was the basis of the retainer"¹³ was wrong.
- In addition, this statement was wrong with regard to the period after 24 March 2011 as no invoices had been sent after that date.

[22] I accept that these errors have been correctly identified by Mr MK.

Discussion

[23] Mr PB's complaint is that Mr MK has failed to provide legal services in accordance with the contract between him and DE. The resolution of this complaint therefore rests on an interpretation of the terms of the contract.

[24] There are many principles of interpretation that apply where there is a dispute between the parties to a contract. Oral communications between the parties which may affect the interpretation of the contract also need to be taken into account. For example, Mr PB asserts that Mr FH was aware that he no longer owned property against which fees could be secured. That is a matter of evidence and Mr NC¹⁴, Mr FH and Ms RA have not been involved in this complaint.

[25] Mr FH was writing as a representative of his employer. The contract was between DE and Mr PB. One principle to be applied when interpreting contracts is that the parties must have intended the same obligations to result from the arrangement entered into. The Committee determined that the assertion by Mr MK that the firm did not carry out work on a contingency basis "did not operate to overcome the interpretation that one possible method of payment of the firm's fee would be from the proceeds of a successful litigation".¹⁵ An alternative view is the fact that the firm did not carry out work on a contingency basis (and this is a matter of evidence) and is an indicator that the parties to the contract were not "*ad idem*" - or both intending the same obligations to arise from the contract. Mr MK has advised that the letter of 24 March 2011 did not correctly reflect the firm's policy.

[26] Interpretation of contracts is the province of the courts. The issues raised above with regard to the interpretation of the contract reflect the fact that a full argument on the principles may not result in the same outcome on which the Standards Committee has based its decision. For that reason, it is unfair that Mr MK should have an adverse

¹³ Above n 1 at [35].

¹⁴ Mr NC was the solicitor at DE who initially acted for Mr PB.

¹⁵ Above n 1 at [34].

finding against his professional record based on an interpretation that may not be correct.

Mr PB's position

[27] Mr PB instructed DE to act for him on the basis of the terms of engagement provided to him in 2008. He incurred liability for fees to the extent of \$10,113.86. No invoices were rendered for work done after 24 March 2011 and I do not expect DE to do so.

[28] Mr MK made it clear when he became directly involved in 2011 that the letter as interpreted by Mr PB did not correctly reflect the firm's position. Mr PB is therefore in no different position than he would have been had Mr FH correctly recorded the firm's requirements – i.e. that that the firm required security for its fees.

[29] Mr PB advised at the review hearing that he had not had cause to instruct solicitors with any degree of frequency such that he was not familiar with the fact that it was highly unusual for lawyers to act on a contingency basis.

[30] Contrary to Mr PB's assertion, Mr MK advised of several matters that he was aware of where Mr PB had been involved in litigation. Mr PB did not dispute this. I do not therefore accept that Mr PB would not have been aware that it is highly unusual for a lawyer to provide legal services on a contingency basis.

[31] Mr PB's response to Mr MK and his demand that Mr MK continue to act on a contingency basis reflect a somewhat opportunistic approach by Mr PB and again it would be unfair for this to be visited on Mr MK by way of an adverse finding against him.

[32] I intend to reverse the determination of the Standards Committee. There can therefore be no requirement that Mr MK continue to act for Mr PB, and in any event, I agree with the Standards Committee when it noted that it would not be appropriate to order Mr MK to do so.

[33] The practical outcome of this review is that Mr MK has indicated he would make a copy of the firm's files available to Mr PB on request so that Mr PB can continue with his action against PSA.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed. For the sake of clarity,

this decision relates to both determinations of the Standards Committee. It follows therefore that the fine and costs order against Mr MK are also reversed.

DATED this 11th day of July 2014

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:

Mr MK as the Applicant
Mr PB as the Respondent
TG as a related person
North Island Standards Committee
The New Zealand Law Society