

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

VS

Applicant

AND

CN

Respondents

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

DECISION

Introduction

[1] Mr VS has applied for a review of a decision by [Area] Standards Committee which determined his complaints about Mr CN's fees on the basis that further action was not necessary or appropriate.

Background

[2] Mr CN is a partner with CR Law (the firm)

[3] On 28 September 2015 Mr VS discussed with Mr CN a proposed purchase/lease of premises of a hotel business that Mr VS was entering into in Queenstown with Mr DL. Mr DL is Mr VS's brother-in-law.¹

¹ Evidence of VS, review hearing.

[4] By mid-October Mr VS had obtained a copy of an agreement for sale and purchase of a business (the agreement), and sent a copy of that with the associated lease (the lease) and other documents to Mr CN. At the time Mr DL was “located in China”,² but said he had a residential address in Auckland, and a New Zealand permanent residence visa.³ Mr VS described himself to Mr CN as Mr DL’s partner, although Mr DL was to be the sole signatory of the memorandum of lease.⁴

[5] Mr DL described Mr VS as “co-owner of this business”, and said he had delegated all of the matters relating to the purchase and operation of the hotel business to Mr VS, who would be acting as general manager.⁵

[6] After some discussion regarding the purchasing entity, whether it should be a company or a limited partnership,⁶ Mr CN sent terms of engagement dated 19 October 2015 through to Mr DL, care of Mr VS (the letter of engagement). The letter of engagement described the services Mr CN and his team would provide as “to act on your behalf in relation to the purchase and lease of QL Hotel”, and said that the instructions had been received from Mr VS.

[7] Mr CN received the agreement and lease, and emailed Mr VS and Mr DL explaining that the documents were moderately complex because of the “large number of conditions precedent on the sale and purchase” and the lease being a “non-standard” New Zealand lease.⁷ Mr CN requested further information, and said he would provide a full report.

[8] Mr CN and a solicitor on his team, Ms TR, then undertook a careful review of the agreement and lease and provided their comments to Mr VS and Mr DL by email dated 20 October 2015. The lawyers’ advice included reference to the requirement for the purchasing entity to be named, flagged issues around GST and tax, types of entity, asset valuation, transfer of employees, due diligence, various conditions to be satisfied, and liquor licensing. Separately, they also made detailed comments on the lease, including observations on the rights, obligations, responsibilities and liabilities on lessee and lessor. Further instructions on the agreement and lease were requested.⁸

² Email VS to JK (28 September 2015) and (16 October 2015).

³ Email DL to CN (19 October 2015).

⁴ Above n 2, 16 October 2015.

⁵ Above n 2.

⁶ Email CN to VS (19 November 2015).

⁷ Email CN to VS/DL (19 October 2015).

⁸ Email TR to VS/DL (20 October 2015).

[9] Mr VS replied saying the purchaser would be GN Limited (the company), and responded to various issues raised by the lawyers.⁹ He described an eight-year commitment to liabilities after the end of the lease as “very unreasonable”, and asked for advice on the chances of renegotiating that with the lessor.

[10] Ms VR responded, confirming that Mr VS’s instructions did not extend to doing due diligence work for him and Mr DL, and explained the reasons for the eight-year commitment. She asked for further instructions.

[11] On 29 October 2015 the landowner’s lawyer, Mr PL, sent an email to Mr CN regarding the landowner’s agreement to the vendor’s assignment of the lease to the company. Mr PL’s clients were undertaking credit and other checks, and said they would require personal guarantees from the company directors to support the company’s obligations.

[12] The lawyers prepared their first invoice and despatched that on or about 30 October 2015. The fee was \$3,260.

[13] Mr PL sent an email to Mr CN confirming his clients would consent to the assignment if the directors provided personal guarantees.

[14] Mr VS advised Mr CN that he had received verbal confirmation that Mr PL’s clients were satisfied with the credit checks.

[15] Mr CN’s advice to Mr VS and Mr DL on 2 November was that if they were “happy with the guarantees”, it looked as though Mr PL’s clients and the vendors were approaching satisfaction of all of the conditions attached to the agreement and lease.

[16] Ms TR prepared guarantee documents, and asked Mr PL if those were acceptable to his clients. He confirmed his approval, as did the vendor’s lawyer.

[17] Shortly before 5 pm on 3 November Mr CN confirmed with the vendors’ lawyer that the agreement was unconditional, and advised Mr VS and Mr DL accordingly.

[18] Mr VS said he was finding it difficult to keep track of the various emails between the lawyers on 3 November,¹⁰ then on 4 November Mr VS emailed a copy of a deed of guarantee (presumably signed) to Ms TR.

[19] The lawyers requested payment of the deposit into the trust account in cleared funds. Mr VS questioned why the bank or the lawyers needed to be involved. Ms TR

⁹ Email VS to TR/CN (22 October 2015).

¹⁰ Email VS to CN (3 November 2015).

explained. Mr VS says he paid the deposit from his own money to the vendors' lawyers direct.¹¹

[20] The firm issued its second invoice on or about 30 November 2015. That contained a fee of \$2,724.

[21] Mr VS paid the first invoice on 26 November 2015.¹² When the second invoice had not been paid by mid-January, the firm's credit manager followed up with Mr VS. He said he thought the second bill was a duplicate of the first and requested a comprehensive breakdown of the charges for both invoices, saying he considered the lawyers' fees were excessive for the services provided.

[22] Mr VS sought to transfer the company's instructions on settlement to other lawyers so that could proceed according to the terms of the agreement on 29 February 2016. He requested the files from the firm, and the firm's response was that it would expect payment of the outstanding account before forwarding files.

[23] Mr VS contended that he had not received a thorough breakdown of the charges in support of both bills, and made a complaint to the New Zealand Law Society (NZLS).

[24] Ms TR provided a breakdown of the fees charged in both invoices by email to Mr VS on 5 February 2016. The firm released the file on 9 February 2016.

Complaint

[25] Mr VS complained about the lawyers' fees saying that he had never received a bill for fees in that amount in all his years of experience as a real estate agent and property developer. He considers that the lawyers expanded their brief beyond the scope he had intended, and implies they should have left him to attend to matters he was "more than capable and comfortable doing".

Committee process

[26] The Committee considered Mr VS's complaint over fees, and reviewed the invoices and documentation he had provided. It considered the relevant Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, in particular rules 9 and 9.1, which sets out the fee factors that assist in determining whether a fee is fair and reasonable. The Committee's conclusion was that the accounts rendered by Mr

¹¹ Evidence of VS, review hearing.

¹² Evidence of VS, review hearing.

CN were fair and reasonable, and determined Mr VS's complaint on the basis that further action on it was not necessary or appropriate pursuant to s 138(2) of Lawyers and Conveyancers Act 2006 (the Act).

[27] Mr VS disagreed with the Committee's view, and has applied for a review.

Application for review

[28] Mr VS repeated his concern that the fees, which total \$5,984 excluding GST and disbursements, were too high. He contends Mr CN attempted to expand the brief beyond his instructions, given Mr VS's own capabilities. Mr VS objects to the brevity of the Committee process, saying he had expected an opportunity to refute specific items. He says he still has not received a complete breakdown of the charges, and cannot assess for himself whether they are fair and reasonable, and cannot understand how the Committee can do so either. Mr VS contends that the lawyers' fees should be reviewed "to ensure Best Industry Practice has been adhered to on this occasion". Mr VS appears keen to negotiate directly with the firm. He did not request an estimate, but he does not consider that the fees reflect the work done.

Lawyers' reply

[29] Mr CN provided documents from the firm's file, and says that he and Ms TR acted for the company as purchaser. He explained his obligation to meet his duty of care and undertake legal work properly by doing what necessary. He said he was unable to know the extent of Mr VS's abilities, and in any event many of the issues were legal, and therefore matters for the lawyers to attend to. Mr CN's view was that the firm "would have been negligent to have not provided Mr DL with the advice so that he could understand the judgement calls that Mr VS was making".¹³ Although the firm was taking instructions from Mr VS, he was the minority shareholder. Mr CN's view was that:¹⁴

it was essential to complete the legal work in the same thorough manner we would if the person had no legal skills, given that Mr VS was not personally our client.

[30] He adds that, "most fundamentally of all, regardless of the skills of our client, we would be negligent if we didn't point out the issues to be considered in the transaction".¹⁵ He says having done that, it was for the client to decide how much

¹³ Submissions on review at [1.3](d).

¹⁴ Above n 3.

¹⁵ Above n 13, at [1.3](e).

further work it wanted. Mr CN says that is exactly what he did. Mr CN says that although the firm “respected the experience Mr VS had in the real estate industry”, it also “recognised that this did not mean he was necessarily have the technical legal expertise allowing him to be aware of the many issues to be considered and worked through.”¹⁶ Mr CN is confident that Mr DL did not understand the issues.

[31] Mr CN’s view is that he and his team handled the transaction in accordance with usual practice, and the work was entirely normal for a transaction of the size and complexity.

[32] Mr CN provided a breakdown of the legal services provided to the company, and the work undertaken, saying that was undertaken in an appropriate manner. Mr CN then went through the details of the attendances on the file. Mr CN refers to unexpected work around the deposit, because Mr VS did not follow the firm’s directions on payment, which resulted in the lawyers having to spend extra time to a value of about \$500 plus GST. With respect to the lease, Mr CN referred to the usual attendances and additional complexity around the assignment, which required the landlord’s consent, and directors’ guarantees.

[33] Mr CN says his hourly rate for the work was \$425, and Ms TR’s was \$150. He does not consider those are out of line with the market.

Review hearing

[34] Mr VS attended review hearing in Auckland on 22 March 2017 by telephone. Mr CN was not required to attend. The hearing proceeded in his absence with his consent.

Nature and scope of review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹⁷

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to “any review” ...

¹⁶ At [1.4].

¹⁷ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[36] More recently, the High Court has described a review by this Office in the following way:¹⁸

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[37] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Review Issue

[38] The issue on review is whether Mr CN's fees were fair and reasonable.

Analysis

[39] Rules 9 and 9.1 say:

- 9 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 and having regard also to the factors set out in rule 9.1.
- 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
 - (a) the time and labour expended:
 - (b) the skill, specialised knowledge, and responsibility required to perform the services properly:

¹⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (c) the importance of the matter to the client and the results achieved:
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
- (f) the complexity of the matter and the difficulty or novelty of the questions involved:
- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.

[40] I have carefully considered all of the concerns raised by Mr VS in the course of his complaint, and in the course of this review, including his comments at the review hearing.

[41] At the review hearing Mr VS said he did not accept that the firm respected his experience in real estate. He says he felt belittled, both by the lawyers' attempts to make the process appear harder than he believes it was, and by the lawyers approaching Mr DL directly to give him advice thereby circumventing his involvement.

[42] Mr VS also disagrees that he was a minority shareholder. He says he owns 40 per cent of the equity in the company. Although there is no evidence available on review to verify that, such as the shareholdings recorded on the Companies Office Register, it is not particularly relevant to the issues under consideration on review. It is apparent that Mr DL and Mr VS were both directors of the company. That affects where Mr CN's professional obligations lay. Mr VS also said that, although Mr DL was in business in China, he had never been involved in a company before, which suggests Mr CN's attention to Mr DL's position was prudent. It is certainly relevant that Mr DL was also investing in the venture.

[43] Mr VS referred to the negotiations he had directly with the landlord and the vendors, and describes them both as extremely helpful. He accepts that was probably because they wanted him and Mr DL to buy into the business and take over the lease, as long as, from the landlord's perspective, their interests were protected. That was Mr PL's job. Mr VS acknowledges Mr PL did a very good job for his clients, the landlords. The flip side of that is reflected in the efforts Mr CN put in to promote the company's best interests. Those in turn were not the same as Mr DL and Mr VS's personal interests when it came to the giving of personal guarantees as directors of the company.

[44] I have looked at Mr CN's invoices, and the explanations for the fees billed therein. I have looked at the evidence attached to the parties' correspondence, and all the other available materials.

[45] It is apparent from the correspondence that the matter, and in particular the negotiations between the lawyers around the assignment of the lease, was not completely straightforward.

[46] Mr CN's comments about negligence and his duty of care to both directors are well-founded. Although Mr VS may have been confident in his own abilities, that is not sufficient to release a lawyer from the statutory professional obligation to provide regulated services in a competent and diligent way.¹⁹ That is what the lawyers did.

[47] Although this was not an unusual commercial transaction, it is difficult to fix a fee for such matters, and there is no suggestion that any such agreement was suggested or reached. Given the range of issues that can arise, it would have been virtually impossible for Mr CN to have estimated a fee, and he was not asked to do so.

[48] The issues that can arise around assignments of lease, and obtaining landlord's consent can be quite controversial, and can prevent a transaction from being concluded. [Addressing such issues can be time-consuming. Negotiations take place within the context of an existing lease between the vendors and the landlord].

[49] It appears to have been at about this point, when directors' guarantees were being discussed, that Mr VS began to find it difficult to keep up with the lawyers' email traffic. That supports the view that the lawyers' attendances were both warranted and proper. At the review hearing Mr VS confirmed that although he had been involved in numerous leases and lease assignments, he had never been involved in the sale and

¹⁹ Section 12(a) Lawyers and Conveyancers Act 2008.

purchase of the business which was contingent on the assignment of a lease. He had, however, previously provided director's guarantees, although it appears Mr DL had not.

[50] Mr VS's position is that he alone kept the deal on track, and he did not need assistance from Mr CN or his team to accomplish that. However, given Mr PL's position on behalf of his clients, it appears that Mr CN and Ms TR were instrumental in keeping the deal on track at a point when Mr PL's clients wanted personal guarantees from Mr DL and Mr VS. That was the point when the directors were called upon to incur personal liabilities on behalf the company. Either of them could have refused. The deal could have fallen over. That did not happen, Mr CN and Ms TR's intervention resulted in guarantees that satisfied all parties, and resulted in the deal being secured by payment of the deposit, leaving only final settlement to be completed.

[51] I have reviewed the information that is available relating to the services provided, the invoices and the amounts charged in them within the context of rules 9 and 9.1. I am not satisfied that there is a basis on which to conclude that Mr CN's fees were anything other than fair and reasonable. While I accept that the fees were more than Mr VS was expecting, Mr CN had nothing to do with establishing that expectation. That is not to say the expectation would always have been wrong. It is simply that it was not accurate in the circumstances, when the services provided are taken into account, along with the reasonable fee factors.

[52] Having considered all of the available material, including Mr VS's comments at the review hearing, I am unable to identify any reason to form a different view to that formed by the Committee. In all the circumstances the decision that the lawyers' fee of \$5,984 plus GST and disbursements was fair and reasonable is confirmed.

Decision

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

DATED this 23rd day of March 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 VS as the Applicant
Mr CN as the Respondent
Mr ZW as a related party
Wellington Standards Committee 3
The New Zealand Law Society