

CONCERNING

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

AND

CONCERNING

a determination of Waikato Bay of Plenty Standards Committee

BETWEEN

MS AH

MR AG

Applicant

AND

MR BG

MR BH

Respondent

Introduction

[1] Ms AH and Mr AG lodged complaints on behalf of themselves personally and on behalf of ABA (in liquidation), against Mr BG and Mr BH of the firm BAB. Mr AG was the sole director of ABA. Although the company is in liquidation, any person may complain about the conduct of a lawyer¹ and consequently Ms AH and Mr AG were able to lodge complaints about the lawyers' conduct.

[2] The Complaints Service progressed the complaints together and the Standards Committee issued a single determination to take no further action in respect of either complaint.

[3] Ms AH and Mr AG have applied for a review of that determination.

[4] This review has some degree of importance, as it refers to the need for Standards Committees to be clear in the processes to be followed when conducting investigations and considering complaints, and for costs assessors to limit the content of their reports to a consideration of the bills of costs only.

¹ Lawyers and Conveyancers Act 2006, s 132.

Background

[5] Mr AG was the sole director of ABA and Mr AG and Ms AH each held 5 percent of the shares in the company.

[6] ABA was engaged to carry out extensive repairs to a property owned by Mr and Mrs AI, and a dispute arose between the company and them.

[7] Ms AH and Mr AG consulted BAB for advice as to what steps to take in respect of the dispute. Following an adverse adjudication conducted pursuant to the Construction Contracts Act 2002 further advice was sought in relation to a statutory demand issued by Mr & Mrs AI for payment of the amount ordered by the adjudication.

[8] The advice was provided primarily by Mr BH, an associate of the firm, but Mr BG, a partner, also provided advice.

[9] The complaints by Ms AH and Mr AG arise out of these attendances.

The complaints

[10] The complaints by Ms AH and Mr AG were:

- An allegation that they were advised that Mr BH's charge-out rate was \$170 + GST per hour, but were charged at \$310 + GST per hour. Included in this is a complaint that the charge-out rates of Mr BH and Mr BG were not included in the letter of engagement.
- A general complaint about the quantum of the bills of costs rendered by the firm.²
- An allegation that Mr BH had no previous experience with a Construction Contracts Act adjudication which resulted in unnecessary costs. This complaint also relates to Mr BH's charge-out rate.

² Four bills of costs were rendered to ABA:-

Invoice 122844 dated 28 January 2010 for \$6,268.48.

Invoice 122954 dated 26 February 2010 for \$5,644.73.

Invoice 123067 dated 31 March 2010 for \$14,716.78.

Invoice 123295 dated 31 May 2010 for \$1,604.53.

Two bills of costs were rendered to Mr AG and Ms AH:

Invoice 123299 dated 31 May 2010 for \$3,314.25.

Invoice 123389 dated 30 June 2010 for \$849.14.

- Failure to investigate and/or raise an allegation of a conflict of interest on the part of the Adjudicator.
- Failure to follow instructions from Ms AH and Mr AG that no information in writing was to be provided to the lawyer for Mr and Mrs AI
- Failure to listen to the clients and to address their concerns.
- Mr BH communicated with the lawyer for Mr and Mrs AI against specific instructions, thereby incurring costs.
- Incorrect advice by Mr BH as to time limits for applying to set aside the statutory demand.
- Work carried out by Mr BG exceeded the “quick look” that was approved by Ms AH and Mr BH.
- Failure by Mr BG to seek information from the company accountant.
- Failure to advise Ms AH and Mr AG within the necessary time limits (or at all).

The Standards Committee procedure

[11] It is important to acknowledge from the outset that it is common practice for a member of a Standards Committee to be designated to review a complaint in detail and to provide a report to the Committee. The report then forms the basis for discussion by the Committee. This process may be adopted in respect of complaints about conduct issues or costs. There can be no objection to this process as it facilitates discussion by the Committee in making a determination.

[12] However, where it is intended that the Committee member should assume any of the functions and powers of the Committee (for example, meeting with the parties) then a formal delegation of the Committee’s functions and powers pursuant to s 184 of the Lawyers and Conveyancers Act 2006 (the Act) is required.

[13] Upon receipt of the two complaints by Ms AH and Mr AG, the Complaints Service sought a response from the lawyers.

[14] That response was received from BAB on behalf of both lawyers by way of a letter dated 17 March 2011, and forwarded to Ms AH and Mr AG on 21 March. The

letter did not invite any response from them, but they provided a comprehensive response by way of letter dated 11 April, which was then sent to BAB on 15 April 2011.

[15] On the same day (15 April 2011), the Legal Standards Officer wrote to Mr ZC, who was the then Convenor of the Committee. That letter said:³

I enclose a copy of my small file in this matter. Unless I am reading it incorrectly, this complaint concerns costs only but covers a number of factors that give rise to the composition and structure of those bills of cost.

Both are under the statutory limit and probably are not of sufficient grounds to consider this [sic]. However the issues raised are a lot more detailed than many in such matters and you may feel it appropriate to consider these.

The bills are relatively minor and unless you particularly wanted to engage the services of a costs assessor, the Committee is able to do it themselves and you may wish to consider that yourself on the merits as to whether they are appropriate bills. Otherwise we can simply decline jurisdiction.

I have copies of all the proceedings as well.

[16] The Standards Committee files that I have been provided with include the same letter on both files – there was no differentiation between the complaint on behalf of the company and the complaint by Ms AH and Mr AG personally. This view is reinforced by a letter from Mr ZC to Mr ZF on 18 April 2013⁴ where Mr ZC says “I don’t doubt that the same letter was sent to me in respect of both complaints.”

[17] It would seem that the letter refers only to the two bills of costs which were for less than \$2,000, as it refers to declining jurisdiction to consider same as provided for by Reg 29 of the Complaints Service and Standards Committees Regulations.⁵

[18] What is important to note is that this letter was not a formal letter of delegation in terms of s 184 of the Act and did not specify exactly what it was that Mr ZC was to do. It seems to me that it was intended that the files be reviewed by Mr ZC with a view to providing a report to the Committee to facilitate discussion.

³ Letter from Mr ZE to Mr ZC dated 15 April 2011.

⁴ Letter dated 18 April 2013 from Mr ZC to Mr ZF forwarded to this Office by the Complaints Service on 23 April.

⁵ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[19] BAB replied to the further comments by Ms AH and Mr AG by letter dated 5 May 2011, and that letter was sent by the Legal Standards Officer to Mr ZC on 9 May, with a letter which read “I enclose a copy of a recent letter from the solicitors that you may wish to consider in conjunction with your report”.⁶

[20] The next item on both files is a report from Mr ZC dated 1 November 2011 the content of which is important to note.

Mr ZC’s report

[21] Mr ZC’s report is 24 pages long and is a comprehensive report. It commences “Costs assessor’s report on bills rendered by [BAB branch], to [ABA] and to [Mr AG] and [Ms AH]”.⁷

[22] It then records the four bills of costs rendered to the company and the two bills of costs rendered to Ms AH and Mr AG.⁸

[23] There is then a heading “My role” under which the following paragraph is recorded:-

3. This file was referred to me by the Standards Officer to revise the bills but, in addition to the complaints about costs, there are complaints of *unsatisfactory conduct* against [BAB] associate [Mr BH] and [BAB] partner [Mr BG]. These complaints are closely related to the costs questions and cannot be considered in isolation.

[24] In the following paragraph Mr ZC refers to a submission by BAB⁹ that the two bills of costs which were for amounts of less than \$2,000 should not be revised because they were below the threshold.¹⁰ He goes on to state “...because they are part of a sequence of regular bills on the same matter[s] I have not isolated them. This has not affected the end result.”¹¹

[25] Mr ZC convened a “brief oral hearing” with Ms AH, Mr AG, Mr BG, and Mr BH, at which the allegation that Ms AH and Mr AG were advised that Mr BH’s hourly rate was \$170 + GST was discussed.

⁶ Letter from Mr ZE to Mr ZC dated 9 May 2011.

⁷ Costs assessors report dated 1 November 2011.

⁸ Above n2.

⁹ I am unable to locate this submission in the correspondence from BAB.

¹⁰ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees (Regulations) 2008, Regulation 29.

¹¹ Above n7.

[26] Other matters explored at the hearing included the issue as to what Mr BG was instructed to do, Mr BH's perceived lack of experience, and a grievance that the work had been delegated largely to Mr BH, when Ms AH and Mr AG had engaged BAB because they had been recommended to a specific partner in the firm. I have not noted this last matter as being included in the complaints although it may have been canvassed with Mr ZC.

[27] Mr ZC also reviewed the firm's files and included in his report substantial portions of correspondence from the firm to Ms AH and Mr AG, particularly a lengthy email from Mr BG dated on 3 February 2010.

[28] At paragraph 25 of his report, Mr ZC records what he considers to be the essence of the complaints by Ms AH and Mr AG.

[29] At paragraph 26, Mr ZC states:

Many of the issues raised could be considered, individually or cumulatively, in isolation from the question of costs, as a complaint or complaints of unsatisfactory conduct but, in my opinion, both individually and cumulatively, and in respect of both Mr [BH] and Mr [BG], there has been no *conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer* (Lawyers and Conveyancers Act 2006, s 12). It will be my recommendation to the Committee that, in accordance with s 138 of the Act, no further action should be taken.

[30] He goes on to state at paragraph 27:

I nevertheless have some sympathy for Mr [AG] and Ms [AH] in that, as is so often the case within law firms, they went to [BAB] in the first place because they had been advised, and believed, that [BAB] partner [BI] was the best lawyer for the job. They had not previously even heard of Mr [BH] and, undoubtedly, were concerned when he told them that this was his own first experience of an adjudication under the Construction Contracts Act. However, for the reasons stated by Mr [BH] in his Disputes Tribunal evidence, I do not believe that they have been prejudiced by this. The situation is basically the same as, for example, where an experienced lawyer conducts a case for the first time before the Lawyers and Conveyancers Disciplinary Tribunal or any other "specialist" tribunal.

[31] With regard to the instructions to Mr BG at paragraphs 31 and 32 he says:

At the hearing on 29 June 2011 Mr [BG] was less unequivocal. He could not recall anything like this being said but, having heard from him, and having considered all the evidence available to me, I cannot entirely discount the possibility that something was said which gave Mr [AG] and Ms [AH] the impression that it would be cheaper for them in the long run for the matter to be handled by Mr [BH] rather than their preferred choice of counsel, Mr [BI].

Nor can I discount the possibility that Mr [BH] did use the expression "quick look", or words to that effect, with reference to Mr [BG]'s proposed further involvement. However, the obvious reality is that at that point the advice required was both of huge importance to the clients and involved matters requiring specialised legal expertise. I believe that the letter of 27 May 2010 (para 17 above) speaks for itself on both these limbs. Clearly Mr [AG] and Ms [AH] were expecting something less comprehensive and less expensive but, in my opinion, anything less could have exposed [BAB] to more serious subsequent criticism. They needed good advice and that is what they got.

[32] At paragraph 36 Mr ZC made the following recommendation:

Accordingly, it will be my recommendation to the Committee that no further action be taken on the costs question also and that a certificate be issued confirming the balance still owed to [BAB] at \$5,767.92 plus interest to the date of payment in terms of [BAB]'s letters of engagement.

Issues

[33] The primary concern I have with this report is that there was no delegation of the Standards Committee functions and powers pursuant to s 184 of the Act to Mr ZC. Nevertheless, he proceeded as if those functions and powers had been delegated to him, called for the Practitioners' files and conducted a hearing.

[34] This raises serious questions as to the status of that report and what notice the Standards Committee should have taken of it. Indeed, the question arises as to whether it should have formed part of the Committee's considerations at all.

[35] In addition, the report includes comments on the conduct of the Practitioners which are not part of the brief to a costs assessor, for example, a determination that Mr [BG's] advice did not exceed his brief¹² and a determination to include the two bills of

¹² Mr ZC states that "they needed good advice and that is what they got" (paragraph 32 of Mr ZC's report). That is not the issue – the issue is whether they instructed Mr BG to provide that advice.

costs which were less than \$2,000. To that extent, the report from Mr ZC proceeds as if it were a report such as was requested by the Legal Standards Officer in his letter of 11 April 2011 for the Committee to consider.

[36] However, it is clear that Mr ZC contemplated that he was providing a costs assessor's report, and the Committee treated it as such. For example, at paragraph 5 the Standards Committee states:¹³

The Committee considered correspondence that had been provided by the parties and referred the matter to Mr [ZC] for an assessment of the costs charged. On 1 November 2011, Mr [ZC] provided a costs assessment report. The report is attached to this decision. Mr [ZC] recommended that the Committee take no further action on the issue of costs.

What followed next

[37] Mr ZC's report was then sent to the parties for comment. BAB responded briefly, and acknowledged the appropriateness of the report.

[38] On 10 November 2011, a Notice of Hearing was sent to the parties requesting any submissions by no later than 22 November.

[39] On 14 November, Ms AH rang the Legal Standards Officer and expressed concern about "saying anything against [Mr ZC]".¹⁴ The reason for this comment is not recorded in the file note, but presumably was because Ms AH was aware that Mr ZC was a member (at that stage the Convenor) of the Committee. The note further records "I said he would absent himself if there is a conflict."¹⁵

[40] On 16 November, the Legal Standards Officer (different from the Legal Standards Officer who had conducted the file initially) wrote to Mr ZF, another member of the Committee who had agreed to act as Convenor for this complaint. In that letter the Legal Standards Officer noted "[Mr ZC] has provided the costs assessment on these two matters and is now conflicted"¹⁶

[41] Ms AH and Mr AG then provided further submissions for the hearing which were sent by email to Mr ZC and copied to the other Committee members. There are no Minutes of the Standards Committee hearing on the file, but it is to be assumed that

¹³ Standards Committee decision dated 3 February 2012.

¹⁴ File note by Legal Standards Officer dated 16 November 2011.

¹⁵ Above n14.

¹⁶ Letter from Standards Committee to Mr ZF dated 16 November 2011.

Mr ZC attended that meeting, as he was still the Convenor of the Committee, and delegated the role to Mr ZF for this matter only.

[42] On 2 February 2012, a draft determination was circulated to Committee members, including Mr ZC, for approval. The draft determination (and the final determination) had Mr ZC's report attached to it. Mr ZC suggested a minor amendment to the report, but otherwise approved it, as did other Committee members.

[43] The determination was then issued to the parties on 3 February 2012.

The application for review.

[44] Ms AH and Mr AG have applied for a review of the determination. BAB responded to the application,¹⁷ noting that the complaints had been categorised by the Committee as complaints about costs and referred to paragraph three of the Committee's determination:¹⁸

3. Mr [AG] and Ms [AH] filed the following complaints:

- (a) a complaint against Mr [BG] dated 1 March 2011 covering costs charged and an allegation that Mr [BG] had completed work without the complainants' consent; and
- (b) a complaint against Mr [BH] dated 11 April 2011 covering costs charged, a lack of experience and a failure to disclose a lack of experience, an unauthorised disclosure of information to the opposing lawyer and a general concern about being dealt with unprofessionally.

[45] At paragraph 6(a) of the letter to this Office, BAB noted:¹⁹

There was no complaint, and therefore no decision, that Mr [BG] or Mr [BH] was guilty of misconduct or unsatisfactory conduct in that litigation. This review should be restricted to a review of the decision of the Standards Committee.

[46] That statement is not correct as Ms AH and Mr AG had complained about conduct issues as referred to in paragraph three of the Standards Committee determination, and elsewhere in its determination. However, it would seem that the Committee has viewed the conduct complaints as being part of the costs complaints and has not addressed them separately.

¹⁷ Letter in response to Review by BAB dated 29 March 2012.

¹⁸ Above n13.

¹⁹ Above n17.

[47] In some cases, the Committee has relied on the report by Mr ZC. For example, the complaint against Mr BG for exceeding his brief, is dealt with by adopting Mr ZC's statement that "they [Ms AH and Mr AG] needed good advice and that is what they got".²⁰

[48] In addition, a number of the conduct issues have not been addressed – for example, the allegation that Mr BG had failed to provide correct advice as to the time limits within which an application to set aside the statutory demand should be made; the alleged failure to include hourly rates in the letter of engagement; the allegation that Mr BH had not followed instructions.

[49] On 3 April 2013 I wrote to the parties expressing an intention to return the matter to the Complaints Service to be reconsidered by a separately constituted Committee together with a recommendation that the Committee not be a Committee of the [North Island] branch of the Law Society.

[50] Before doing so, I invited the parties to consider whether they would agree to mediation. Ms AH responded that she and Mr AG were agreeable to mediation. She also indicated that she consented to this review being completed on the papers in the manner proposed by me.

[51] BAB responded. They declined to mediate the complaint and made a number of submissions as to why my proposed course of action was inappropriate.

[52] The firm noted that it was unclear whether the file was referred to Mr ZC, pursuant to ss 144 - 147 or 184 of the Act, but submitted that it did not matter. They pointed to the provisions of s 142 which enables a Standards Committee to regulate its own procedure, providing it acts in a way that is consistent with the rules of natural justice.

[53] The specific provisions of ss 144 – 147 and 184 cannot be ignored. In particular, s 145 requires that a Standards Committee must supply a written instrument of appointment to a person appointed as an investigator pursuant to s 144. The instrument of appointment must be in writing and comply with the requirements of the Act. The Practice Note provided to Standards Committees by the New Zealand Law Society contains a model instrument of appointment.²¹ Mr ZC was not appointed pursuant to this provision.

²⁰ Above n7.

²¹ New Zealand Law Society Practice Note, Model document 4.

[54] Similarly, s 184 requires any delegation of the functions and powers of a Standards Committee to be in writing, and again, the Practice Note contains a model appointment for costs assessors.²² Mr ZC was not appointed pursuant to this provision.

[55] BAB do not seem to differentiate between a costs assessor's or investigator's report pursuant to the provisions of the Act referred to, and a report prepared by an individual Committee member to assist the Committee in its deliberations.

[56] However, the letter of 15 April 2011 was not sufficient to delegate the functions and powers of the Committee, or to appoint a costs assessor with powers to call for files and hold hearings with the parties. It does not seem to me that this was in fact what was intended by the Legal Standards Officer but this is how the matter proceeded.

[57] I do not consider that the power for a Standards Committee to regulate its own procedure pursuant to s 142 of the Act can operate to enable a Committee to ignore the specific provisions of the Act.

[58] Having said that, I may have been minded to proceed with the review if the report had not proceeded to make recommendations to the Committee on conduct issues and if it was evident that the Committee had separately and independently addressed all of the conduct issues when reaching its determination. However I am not satisfied that it did.

[59] In addition, as recognised by Mr ZC, some of the conduct issues clearly have potential to impact on the costs charged by the firm, and decisions on those issues need to be taken into account when considering the fees charged by the firm, either with the benefit of a further costs assessor's report or not. These are decisions that need to be made by the Standards Committee.

[60] The outcome of this review is therefore to return the matter to the Standards Committee for reconsideration as foreshadowed by me in my letter dated 3 April 2013.

Decision

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

²² New Zealand Law Society Practice Note, Model document 7.

- (2) Pursuant to s 209 of the Act, the complaints by Ms AH and Mr AG are to be returned to the Standards Committee for reconsideration in general. It is recommended that the complaints be considered by a separately constituted and geographically located Standards Committee.
- (3) In reconsidering the complaint, the Standards Committee is directed to make specific findings as to the conduct issues complained of by Ms AH and Mr AG and those findings taken into account when considering the complaint as to costs. The Committee may of course make separate orders pursuant to s 156(1) of the Act in relation to the conduct issues.

DATED this 19th day of July 2013

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:

Ms AH and Mr AG as the Applicants
Mr BG and Mr BH as the Respondents
Mr BI as a related person or entity
Waikato Bay of Plenty Standards Committee
The New Zealand Law Society