

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 4

BETWEEN

IN
Of Auckland
Applicant

AND

SK
of Auckland
Complainant

DECISION

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

[1] A number of complaints were made by Mrs SK (the Complainant) against Mr IN (the Practitioner), the main one alleging that there had been overcharging. The Standards Committee found the Practitioner guilty of unsatisfactory conduct in relation to the complaint of overcharging, and in failing to keep his client informed. The Committee found that the Practitioner had breached Rules 3 and 9 of the Lawyers: Rules of Conduct and Client Care.

[2] The Committee reduced the Practitioner's bill below the amount recommended by a Costs Assessor pursuant to section 156(1)(e) of the Lawyers and Conveyancers Act 2006, and also ordered him to pay costs in the sum of \$750.

Background

[3] The Practitioner acted for the Complainant in respect of finalising relationship property matters following her separation from her husband. He had acted for the Complainant for approximately a year and a half before sending out the first invoice. This invoice was for \$10,000.00 for the work that had accumulated throughout that time.

[4] The amount shocked the Complainant and she took the matter up with the Practitioner, informing him that she intended to file a complaint against him with the New Zealand Law Society if he refused to reduce her bill to the sum of \$3,000.00, this being the sum that her husband had paid his lawyer.

[5] The Practitioner refused to accede to her proposal, but nevertheless offered a discount to resolve the matter amicably and promptly. This offer was declined by the Complainant.

[6] Subsequently the Complainant filed complaints against the Practitioner, which included allegations of overcharging, failure to respond to her emails and phone calls, failing to progress the relationship property settlement, failure to forward her file to her new lawyer and rudeness.

[7] In response to the complaints the Practitioner acknowledged that he had not invoiced the Complainant for a year and a half, stating that at their first consultation she had told him that she was unable to pay his fees until the property matter was fully settled, and that he had agreed to delay seeking payment until that time.

[8] The Standards Committee appointed a Costs Assessor, who having examined the Practitioner's files, recommended that the bill of \$10,000.00 be reduced to \$6,000.00. The Costs Assessor confirmed the existence of a file note that supported the Practitioner's submissions concerning the delayed payment arrangement.

[9] The Standards Committee was critical of the Practitioner for not having sent regular invoices to the Applicant despite the payments arrangements, and noted that he had a duty to keep the client informed, provide invoices and progress matters in a timely fashion, and that he failed to do these things.

[10] The Standards Committee took into account "all of the relevant facts" and expressed the view that "under the circumstances the fee should be reduced beyond that recommended by the costs assessor" by a further \$2,000.00. This resulted in the Practitioner's bill being reduced to \$4,000.00, and accordingly the Standards Committee issued a Certificate pursuant to section 161 of the Lawyers and Conveyancers Act 2006.

Review

[11] The main review issue concerned the reassessment of his fees. The Practitioner accepted the Cost Assessor's assessment which resulted in the overall fee being reduced to \$6,000.00 plus GST. His review application related to the Committee having reduced the fee by a further \$2,000.00, without referencing that additional reduction to fee-related factors. Whatever the reasons were for the further reduction, the Practitioner could see no

connection with the factors set out in Rule 9 of the Rules of Conduct and Client Care (the Rules) by which the reasonableness of fees was assessed.

[12] The additional review issue concerned aspects of the service-related complaint that had been upheld by the Standards Committee. While he acknowledged that it would have been preferable to have billed the Complainant periodically (and said that he had now changed his practice accordingly), he denied having failed in other respects. The Standards Committee's decision of unsatisfactory conduct had extended to the service elements of the complaint as well as the overcharging.

[13] A review hearing took place on 6 December 2011 attended by both the Practitioner and the Complainant.

Considerations

[14] A review by the Legal Complaints Review Officer (LCRO) is not confined only to those matters raised by a review applicant, and may include consideration of any matter or matters that appear to the LCRO to have been overlooked by a Standards Committee or where the Committee may have fallen into error. I have therefore considered the original complaints, how they had been dealt with by the Standards Committee, and the submissions of both the Complainant and the Practitioner.

[15] The main review issue concerns the basis of the Committee's decision to reduce the Practitioner's fees below that recommended by the Cost Assessor. Rule 9 of the Lawyers: Rules of Conduct and Client Care, requires that:

"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."

[16] The Standards Committee must decide for itself the matter of the proper level of fees, but there can be no objection to accepting the recommendation of a costs assessor if the Committee agrees with it. In this case the Costs Assessor's assessment had been done with reference to the fee factors enumerated in Rule 9.1. He recommended that the fee be reduced to \$6,000 plus GST.

[17] The explanation for the further reduction may be found in the Committee's conclusion that the Practitioner was also in breach of Rule 3 of the Rules, which require a lawyer to act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care. The Committee's decision to reduce the Practitioner's fee below that recommended by the Costs Assessor was made after taking into account all of the facts and

deciding that “*under the circumstances*” there should be a further reduction beyond the recommended amount.

[18] There was nothing on the Standards Committee file to indicate that the Committee disagreed with the fees assessment of the Assessor. The Committee nevertheless reduced the fee further. It was entitled to do this if it had disagreed with the recommendation of the assessor, and to have explained the further reduction in fees with reference to the Rule 9.1 fee factors. However, the information on the file, and the Committee’s decision, all indicate that the further reduction was unconnected with the reasonableness of the fee, but rather, related to the services matters that the Committee found wanting.

[19] It is my view that the Standards Committee erred in reducing the Practitioner’s invoice further for reasons apparently unrelated to the reasonableness of the fee.

A basis for compensation?

[20] I have also considered that the Committee intended to confer a further benefit on the Complainant. Under the Lawyers and Conveyancers Act 2006, this could only be in the form of a compensatory payment pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006, which allows compensation to be paid where there is evidence that the complainant has suffered a loss by reason of any act or omission on the part of a lawyer. (All other costs or fines are payable to the New Zealand Law Society).

[21] It was open to the Standards Committee to have awarded compensation to the Complainant where there was evidence of that loss. These matters were explained to the parties at the review hearing. Having noted that the Standards Committee did not seek any information about any loss suffered by the Complainant, she was invited to provide evidence of loss she has incurred as a result of the Practitioner’s actions or omissions.

[22] The Complainant explained that she had incurred extra costs in changing lawyers. This mainly related to the Practitioner’s refusal to forward her file to her new lawyer, which meant that she was obliged to recount the full history of the marriage and separation to the new lawyer. She said that this had resulted in additional costs because she effectively paid twice for the same service. She justified changing her lawyer on the basis that the Practitioner had failed to progress the relationship property matters for which he had been engaged and despite a year and a half passing little progress had been made. She also reiterated her conduct-related complaints.

[23] The Practitioner admitted that he did not send the Complainant’s file to her new lawyer, and confirmed that he still had the files in his possession. He considered he was entitled to

hold them until the fees were paid. He said he had informed the new lawyer of his willingness to make photocopies of the file which he would forward, providing that the Complainant paid the photocopying charges. It appears no assurance of such payment has been given to him.

[24] The Complainant said that her new lawyer had tried on many occasions to contact the Practitioner for the file, to no avail. At the review hearing she acknowledged that her new lawyer had told her that she would need to meet the photocopying charges and that they had decided between them that they would see how far they could go without the file.

[25] There was also evidence of an exchange of correspondence between the Practitioner and the Complainant's new lawyer in around March 2010. The next written communication from the new lawyer was in September 2010 at which time he asked if he might personally attend on the Practitioner's office to examine the Complainant's file. The Practitioner's hand written note on that letter records that his agreement that the new lawyer could come and view the entire file. The Practitioner said that after communicating this to the new lawyer, he heard nothing further, and has had no further contact from that lawyer up to the time of the review hearing in December 2011.

[26] The above suggests to me that if the Complainant incurred extra costs by having to relate the whole background to her new lawyer, this was not the fault of the Practitioner. There is no evidence that the Practitioner refused to provide the information on the file if the Complainant would pay the photocopying costs. She did not agree to do so. The Practitioner was entitled to ask that this cost be met. There is, in addition, the Practitioner's offer to let the new lawyer view the files at the Practitioner's office, an offer not apparently taken up.

[27] Given that the Complainant's file was available, as a photocopy or for viewing, I do not agree that any part of the Practitioner's conduct led to extra costs being incurred by the Complainant, insofar as the file was withheld.

[28] The additional aspect of this matter concerned the justification for changing lawyers due to the slow progress by the Practitioner in finalising matters. I took this to mean that changing lawyers inevitably gives rise to some additional costs, and I accept that extra costs do arise in such circumstances.

[29] The Standards Committee had found the Practitioner breached Rule 3 of the Conduct and Client Care Rules in relation to failing to keep the Complainant informed and failure to progress the file.

[30] The Practitioner denied any professional failure regarding the slow progress. He referred to the Complainant's husband proving to be difficult, and that a contributing factor was the "mixed messages" that the Complainant was giving her husband who she continued to meet from time to time. He said that together they made certain arrangements or agreements (which I understood were not necessarily consistent with her instructions), and that there had continued to be intimacy between them which the Practitioner considered explained the Complainant's reluctance to actively engage in settling the relationship property issue, she being most reluctant to issue court proceedings despite his frequent recommendations that this was the most effective way to progress matters.

[31] The Complainant confirmed that she did not wish to issue proceedings against her husband. She did not deny her encounters with her husband and could see no objection to that contact, which she considered could not be surprising as a thirty four year marriage was not so easily dissolved.

[32] In considering these matters it is understandable that a very lengthy marriage would very likely take some time to unravel. This is a complaint about delay that is being considered in a disciplinary context. I have considered the extent to which the Practitioner ought to be held responsible for the lack of progress in finalising the relationship property matters, and whether the change of lawyers (and the extra costs inevitably incurred) was justified.

[33] I have taken into account all matters discussed at the hearing, and all other information on the file. In the light of all of the information provided I have some difficulty in seeing that the Practitioner should be held responsible for failing to progress settlement of the relationship property to an extent that gives rise to a disciplinary finding. In my view there is insufficient evidence upon which to conclude that any failure to progress the retainer was the result of any professional failing on the part of the Practitioner. It was always open to the Complainant to change lawyers, but in this case I do not accept there was any failure on the part of the Practitioner that compelled this decision. To the extent that the Standards Committee's finding that there was a breach of Rule 3 is based on his failure to progress the retainer, I do not accept that there is sufficient evidence to support such a conclusion.

[34] Evidence was also given that the Complainant's new lawyer has also not issued proceedings, and despite having acted for the Complainant for over twelve months, the relationship property has still not settled.

[35] In summary, there is nothing in any of the above evidence that supports a basis for any compensatory payment to the Complainant.

[36] *Allegation of rudeness*: The Complainant added that there had been two occasions on which the Practitioner had been rude to her. One occasion related to her not having provided valuations of the matrimonial home in a timely manner, and the other concerned the Practitioner's response to her on the telephone.

[37] The Practitioner did not deny that he had used firm language, to convey to the Complainant that he had other files to attend to and could not be at her beck and call. The parties cannot agree to the exact words that were used, and given that the Practitioner acknowledged that he used firm language, I accept it as likely that his communication offended the Complainant. It appeared from the evidence that the Complainant expected the Practitioner to deal with her matters on her timetable. The Practitioner felt that her demands intruded on his other professional obligations.

[38] Lawyers are required to act with integrity respect and courtesy. Whether a lawyer has breached a professional standard cannot be tested only on the subjective basis of whether a complainant took offence which alone is not in itself sufficient basis for a disciplinary finding. The test requires some objective measure, and maybe assessed on the basis of whether the conduct would be considered by other lawyers or members of the public as being unacceptable.

[39] I accept that the Practitioner considered it necessary to make clear to the Complainant that there were limits on his availability. It seems highly likely that attending to all of her communications would have incurred higher fees.

[40] Having considered all of the evidence it is my view that the Practitioner did not cross the boundary of what would be acceptable by others having regard to the circumstances. The Standards Committee made no adverse finding in relation to the complaint of rudeness and, having heard from the parties themselves, I see no basis for doing so.

[41] *Failing to keep the Complainant informed of costs*: The Standards Committee found the Practitioner had breached Rule 3 of the Lawyers and Conveyancers Act 2006 in failing to have kept the Complainant informed as to costs. This finding was made despite the Committee's acknowledging that there was an agreement that the Practitioner would defer charging her.

[42] The Complainant confirmed that she was in no position to pay legal fees until such time as her relationship property settled, an arrangement she said she also had with her current lawyer.

[43] I agree with the Standards Committee's view that the Practitioner ought to have issued regular invoices despite the fees arrangement, but can also understand why the Practitioner did not perceive it necessary to do so given the arrangement. Although the Complainant was shocked when she eventually got the first bill, she must have been aware that legal fees were accruing throughout the year that no invoices had been sent.

[44] The Committee considered that the failure to keep the Complainant informed should attract an adverse disciplinary finding, but in my view it is at the lower end of the scale and it would have been open to the Committee to have exercised its discretion in this matter to take no further action.

[45] However, the Standards Committee's decision of unsatisfactory conduct is primarily based on the overcharging. The readjustment made to the fee as a result of this review does not alter the conclusion that there was overcharging. It is therefore appropriate to confirm the Standards Committee decision.

[46] As the Practitioner has been substantially successful in his application there will be no order for costs in relation to the review.

Decision

- Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee decision is confirmed except for the order made pursuant to section 156(1)(e) of the Act.
- Pursuant to section 156(1)(e) and 211(2) of the Act the Practitioner is ordered to reduce his fee to \$6,000 (plus GST and disbursements). This replaces the Standards Committee's decision pursuant to this section. A replacement section 161 Certificate will be issued accordingly.

DATED this 24th day of February 2012

Hanneke Bouchier
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:

IN as the Applicant
SK as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society