LCRO 54/2011

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| **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 5 |
| **BETWEEN** | **GX**<br>of [North Island]<br><br>**Applicant** |
| **AND** | **TF**<br>of [North Island]<br><br>**Respondent** |

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

## DECISION

### Introduction

[1] An application was made by Mr GX (the Applicant) for a review of a Standards Committee decision on his complaint against Mr TF (the Practitioner). The Standards Committee decided that no further action would be taken on his complaint.

[2] There were two elements to the complaint. The first concerned delays in completing the work; the second alleged overcharging by the Practitioner.

### Background

[3] The Practitioner was instructed to undertake legal work in connection with the Applicant's family trusts, and refinancing a loan facility with the bank. These were the main services that the Applicant required, but other services were provided as required which had not been anticipated at the time of their original meeting.

[4] The Applicant first met the Practitioner around November 2009. Before the Practitioner could undertake any work the Applicant's file had to be obtained from the Applicant's previous lawyer. The Practitioner prepared an appropriate authority which he sent to the Applicant for on-forwarding. There was a delay by the previous lawyers in providing the documents (about two boxes full) which arrived at the Practitioner's office around the middle of March 2010.

[5] Lawyers from the previous law firm were also the independent trustees of a trust that had been set up by the Applicant and his wife. The Applicant wanted them removed as trustees. Although the previous lawyer-trustees agreed that they would resign, when the appropriate documentation was eventually sent to them, it was not returned. Both of these factors caused delay in progressing the work for the Applicant.

[6] The work to be undertaken involved considering whether the Applicant and his wife, as settlors of all four trusts, should be sole trustees, an exploration of a suitable independent trustee and finally the appointment of an independent trustee. All of these matters took time, and the refinancing of a bank loan could not be concluded until the trust situation had been clarified as securities for bank loans were over trust owned property. All of these transactions were clearly intertwined. The documentation was finally completed at the beginning of July.

[7] The Applicant later complained about delays. He also complained about what he perceived as excessive charging.

[8] There appeared to be two elements to the second complaint. The first was that the Applicant was of the view that there had been unnecessary attendances on the part of the Practitioner; he also questioned the Practitioner's competency in matters of trusts. The second element concerned two bills that the Applicant had received after having made his complaint to the New Zealand Law Society. These concerned services that the Practitioner had provided at the early stage of the professional relationship, and which had not been billed at an earlier time. The Applicant objected to paying these two bills because they were rendered late.

**Considerations**

[9] A review hearing was held on 28 July 2011, attended by the Applicant and his support person, Mr GY. There was a detailed discussion about all of these matters.

[10] In relation to the complaint about delay, the Applicant commented that the Practitioner could have made some effort to obtain the documents from his former

solicitor. He considered that he had conveyed this expectation to the Practitioner, but there was no evidence on the file of this and, moreover, the Practitioner's involvement would have attracted more charges. The Practitioner had prepared an authority to release documents which he forwarded to the Applicant. It is my understanding that the former solicitors would have received this authority in early December 2009, but they did not forward the files to the Practitioner until the end of March 2010. The Applicant offered an explanation for the delay caused by his former law firm, but since my focus is on the conduct of the Practitioner, these were not material to this review.

[11] It appears that the Practitioner was provided with copies of the trust deeds prior to receiving the Applicant's file, but it is clear that he felt unable to progress matters until he had a full grasp of the Applicant's affairs. That information, when it finally came, comprised a large volume of material. Three weeks passed before the Practitioner took any specific steps to progress the work. It is reasonable to assume that in this time he was familiarising himself with the material on the Applicant's file. It is difficult to see that this time frame was unreasonable given the volume of information involved. It is not clear that the Practitioner could have progressed matters in any reasonable way without a full understanding of the background issues, which could only be learned from the Applicant's files.

[12] The Applicant was also of the view that the work he wanted the Practitioner to undertake was straight forward. However, having heard from the Applicant and looked at the information on the file I do not agree that the work was straight forward.

[13] The Applicant was critical of the Practitioner for not pursing an alternative way of removing the former lawyer-trustees when the lawyers failed to return the resignation document. He referred to the settlor's power of appointment and removal of trustees as contained in the Deed of Trust. This is a submission made with the benefit of hindsight. I have considered that at the time the former lawyers had indicated their willingness to resign, that appropriate documentation was sent to them, and it was anticipated by all that this would be done.

[14] Nor was this majorly responsible for delay since meanwhile more time was consumed in organising another independent trustee. The individual first proposed by the Applicant and his wife was initially willing, but then declined after receiving legal advice. More time passed while locating another independent trustee. When that was resolved the Practitioner prepared the necessary documentation. He was then able to attend to registration of name changes on the certificates of title of the trusts' properties.

[15] The Practitioner meanwhile created a "holding position" with the bank on the refinancing, pending finalisation of trust matters, because the refinancing documents needed to be signed by the trustees, and also involved personal guarantees from the Applicant's son and daughter-in-law whose business required the loans. Further delays arose in finalising that aspect of the refinancing.

[16] The Applicant measures the delays from the date that he first instructed the Practitioner, but I do not consider that this is reasonable in the circumstances. The main delay was essentially caused by the former solicitors not sending the Applicant's files sooner. This was not the fault of the Practitioner. The work that the Practitioner was required to attend to was largely done by July of that year. I do not see that there were undue delays in completing it. Many matters needed to be dealt with and there is nothing to suggest that with regard to the various steps need to be taken that there was undue delay at any point.

[17] A further aspect of the complaint concerned what the Applicant saw as unnecessary attendances. This was identified as unnecessary correspondence. The Applicant referred to the Practitioner's letter sent to the bank seeking clarification about which of the four trusts was involved in the refinancing. He said that the Practitioner ought to have known that only two of the trusts were commercial trusts.

[18] That Applicant's objection related to one sentence in a lengthy email letter that the Practitioner had sent to the bank. I cannot agree that the Practitioner's letter was unnecessary in any respect as it sought confirmation about the security required by the bank, and that was a matter for the bank to inform the Practitioner of. At the hearing, the Applicant took me through most of the items of correspondence. I have been unable to find that any part of it could be considered "unnecessary".

[19] On the matter of whether the service could have been provided more speedily, it is arguable that more energy might have been applied in moving matters along. However, given the matters that were involved, some of which were complex, and that not all requirement were under the control of the Practitioner, I do not agree that time taken in progressing the file was delayed to an extent that warrants a disciplinary finding. The entire transaction did not go as smoothly as the Applicant may have wished, but I cannot see that this was caused by any wrongdoing on the part of the Practitioner.

[20] The Applicant further contended that the Practitioner appeared more concerned about protecting his own risk than the business of the Applicant. This referred to

advice given by the Practitioner about appointing an independent trustee, and also steps taken by the Practitioner when the Applicant and his wife separated, in relation to communicating to the wife's lawyer. I can see no criticism of the steps taken or advice given by the Practitioner, which did no more than demonstrate that the Practitioner complied with the professional standards and rules of professional conduct imposed on all lawyers. There is no substance to this complaint.

[21] My impression was that the Applicant may not have fully appreciated the complexities of the legal issues involved, or may have misunderstood some parts of the information he received from the Practitioner. For example he perceived that the bank was charging penalty interest during the "roll-over" period when the loan was put into an overdraft facility. This was not the case, however, and the Practitioner's correspondence to him explained that the bank had agreed to hold the interest rate at the rate of the agreed roll-over.

[22] The Applicant also appeared to have confused the limits of a guarantee that he and his wife had provided, with the amount of indebtedness owed to the bank. The review hearing provided an opportunity to clarify these, and a number of other matters, and it is expected that the Applicant now has a better understanding of some of the aspects of the work involved.

[23] I have also considered the fact that the Practitioner did not send a letter of engagement to the Applicant until March 2010, although their initial meeting had taken in the November before. Rule 3 of the Rules of Conduct and Client Care requires lawyers to provide a letter of engagement to a client at the time of the commencement of work. In this case the required letter was sent around the time that the Applicant's information was provided. The likely explanation is that the work to be done could then be identified.

[24] However, I noted from the Practitioner's timesheets that he charged the Applicant for services undertaken during November and December 2009. In these circumstances the Practitioner ought to have provided a letter of engagement at an earlier time than March 2010, with subsequent modifications as necessary. Despite this observation, I do not consider that this is a matter that should attract a disciplinary finding against the Practitioner.

**Allegation of Excessive Charging**

[25] The invoices mainly concerned the legal work relating to trusts and refinancing. Since part of the Applicant's unwillingness to pay these fees concerned what he

perceived as unnecessary work, in light of my conclusions above I do not agree that charges were made for unnecessary work.

[26] The Practitioner informed the Applicant of his hourly rate, which I note was by no means excessive, and there is nothing to indicate in his timesheets that he charged for work that was not undertaken. In this case the Standards Committee did not appoint a costs assessor to review the bills, having formed its own conclusion that the fees appeared fair and reasonable. The Standards Committee made this observation with reference to the fair fee factors as set out in Rule 9 of the Rules of Conduct and Client Care. Having considered these matters, I see no basis for taking a different view to that of the Standards Committee.

[27] There were two smaller accounts for earlier work which the Practitioner did not invoice to the Applicant until after the complaint was filed. The Applicant's reluctance to pay these amounts, which I note were small, rested on the fact that the invoices had been rendered very late. He also questioned these charges because they had not been included in a "reminder" invoice which showed the total amount owing as excluding the two additional amounts that came later. One related to a business account and the other concerned attendances relating to a short time when the Applicant and his wife separated.

[28] The Applicant has not suggested that the work charged for was not undertaken by the Practitioner. His sole reason for not wishing to pay is the late rendering of the invoices. While it would have been preferable for the Practitioner to have billed the Applicant in a timely manner, there is no dispute that the Practitioner in fact did the work involved. The fact of late invoicing does not absolve the Applicant from this liability.

[29] In the event I sought clarification from the Practitioner as to the reasons for the late billing of the smaller amounts. He informed me that it had not been his intention to charge for the services rendered at the early part of the professional relationship but that he reconsidered this when the complaints were made. The Practitioner advised that he was willing to write off the business account for these amounts. The Applicant was informed accordingly.

[30] Having considered all of the complaint, the Standards Committee file and all of the matters raised by the Applicant at the review, for all of the reasons stated here I can see no basis for taking a different view to that taken by the Standards Committee.

**Decision**

Pursuant to section 211(1)(a) the decision of the Standards Committee is confirmed.

**DATED** this 9th day of February 2011

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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:

GX as the Applicant
TF the Respondent
Auckland Standards Committee 5
The New Zealand Law Society