LCRO 57/2012

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 5
BETWEEN	**MR IX** Applicant
AND	**MR AQ** **MR AP** Respondents

DECISION

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

Background

[1] Mr IX is the owner of a heritage property in [South Island]. Adjoining Mr IX's property is a cool store owned and operated by KW.

[2] In 2009 KW applied to the [X] District Council for retrospective consent to various buildings on the property which had been constructed without appropriate resource consents. Mr IX opposed the application.

[3] The application was successful and the appropriate resource consents were granted by the Council on 2 November 2009.

[4] On 10 November 2009 Mr IX wrote to Mr AQ who had previously acted for him. He sought advice from Mr AQ as to whether he could assist him with an appeal. He made it clear in that letter that he had no funds to pay for legal advice and that he would need to obtain legal aid to enable him to pursue the matter.

[5] The initial issue was whether Mr AQ would have any conflict of interest in acting for Mr IX. Mr AQ responded in this regard on 13 November to seek clarification of the parties involved.

[6] Mr IX responded to Mr AQ on 18 November but advised that in the meantime he had sought advice from another lawyer. He had also lodged an appeal himself against the Council decision.

[7] On 20 January 2010 Mr AQ contacted Mr IX to inquire whether Mr IX had been able to resolve the matter and indicated that he was then in a position to look at it.

[8] Mr IX responded. He advised that the advice received from the lawyer that he had consulted was not encouraging and he would welcome any assistance that Mr AQ could offer. He again reiterated that he would need to have a grant of legal aid to enable him to pursue the matter.

[9] On 28 January, Mr IX met with Mr AQ [...] and provided him with all of the material that he had on the matter as well as a legal aid application form completed as far as he could. By that stage KW had filed an application to strike out his appeal on the grounds that it had not been filed in time. In addition, the filing fee had not been paid and Mr IX had filed an Application for Waiver of payment of the fee.

[10] The outcome of the meeting on 28 January was that Mr AQ's firm, AEH accepted instructions from Mr IX and he was to be represented by Ms SE. Mr AP became involved in acting for Mr IX when Ms SE fell ill.

[11] During the course of acting for Mr IX, AEH rendered the following accounts:-

i) 3 February 2010 $756.25

ii) 10 March 2010 $10.05

iii) 1 June 2010 $15,126.62

iv) 8 September 2010 $108.35

Total = $16,001.27

[12] Mr IX made payments totalling $7,766.33 leaving a balance to be paid of $8,234.94.

[13] The proceedings were resolved at mediation but Mr IX refused to sign the documents recording what had been agreed at mediation and refused to take the firm's

advice. In the circumstances, the firm considered it could no longer act for Mr IX and thereafter he represented himself. The consent orders were made on 30 September 2010.

[14] Mr IX did not pay the outstanding amount on the AEH bills, and in due course the firm lodged a claim with the Disputes Tribunal. In his defence, Mr IX contended that he had been misled by Mr AQ and other members of the firm that the firm was undertaking the work on legal aid.

[15] The Tribunal found that the firm did not advise Mr IX definitively until 6 May 2010 that it was not doing the work under legal aid. The Tribunal also found that the firm had given incorrect advice to Mr IX as to the availability of legal aid for resource management matters. It reduced the fees owing to the firm to $4,194.12.

[16] Prior to receipt of the Tribunal decision, Mr IX had made contact with the Complaints Service of the New Zealand Law Society to advise that he intended to file a complaint about Messrs AQ and AP. The complaint was duly filed on 9 June following release of the Tribunal decision on 30 May.

The complaint

[17] Mr IX's complaint is that Mr AQ deceived him into believing that the firm would act for him on legal aid whilst at the same time having no intention of acting on that basis.

[18] He also complained that the firm withdrew its services before completion of the case leaving him in a vulnerable position.

[19] He lodged a separate complaint about Mr AP for the part that he had played when acting for Mr IX during Ms SE's absence. It is pertinent to note that he did not complain about Ms SE.

[20] Mr IX referred to the findings of the Disputes Tribunal in support of his complaints.

[21] The outcome sought by Mr IX was that Messrs AQ and AP be disciplined for their part in what Mr IX described as a "fiasco" and that all fees be cancelled.

[22] He also sought that the Law Society advise the Attorney-General and Minister for Heritage of the facts of the case with a view to setting aside the consents granted to KW on the basis that there had been "failures" on the part of "Officers of the Court."

The Standards Committee determination and the application for review

[23] The Standards Committee dealt with the 2 complaints together and identified the issues as being:

> 1. Whether Messrs [AQ] and [AP] had deceived Mr [IX] into believing that the appeal to the Environment Court would be conducted under legal aid; and
>
> 2. Whether Mr [AP] had breached rule 9.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. This rule provides that "where a client may be eligible for legal aid, a lawyer must inform a client of this and whether or not the lawyer is prepared to work on legally aided matters".

[24] After considering all of the material the Standards Committee came to the view that there was insufficient evidence to support the allegation that Messrs AQ and AP had deceived Mr IX into believing that AEH would act for him on legal aid. It noted that the evidence before it supported Mr AP's submission that AEH had advised Mr IX that they would not act for him on legal aid and that Mr IX would be liable for the firm's fees. Such evidence included various documents that will be referred to in more detail subsequently in this decision.

[25] Although the Standards Committee referred in its determination to Mr IX's complaint that the firm withdrew its services before completion of the case and left him in a vulnerable position, it did not identify this as an issue to be determined and consequently made no findings in that regard. In addition, the Committee did not make any comment as to the relevance of the Disputes Tribunal decision. Both of those issues will be dealt with in the course of this review.

[26] In his application for review, Mr IX notes that the decision of the Standards Committee is completely at odds with the findings of the Disputes Tribunal, and that in doing so the Committee had shown "absolute contempt for the Disputes Tribunal process". He noted that the Tribunal was unequivocal in its findings that he had been misled by the firm.

[27] Mr IX also refers to alleged statements by Ms SE at the Disputes Tribunal hearing that if Mr IX, acting on the firm's advice, had applied for an enforcement order, the outcome would have been different and more advantageous to Mr IX.

[28] The outcome sought by Mr IX from this review is that AEH admit their mistakes, apologise, and refund all moneys paid by him and his family including payments made to consultants. He considers that he and his family have been denied access to natural

justice and the protection afforded by the New Zealand Bill of Rights by the actions of AEH. Because of this he requests that this Office advise the Minister for Justice and the Attorney General of the facts of this case so that they may consider revisiting the whole consent matter.

Review

[29] After Mr IX had lodged his application for review he advised this Office that AEH had filed a bankruptcy application against him as he had not paid the amount ordered to be paid by the firm by the Disputes Tribunal.

[30] Section 161 of the Lawyers and Conveyancers Act 2006 provides that:-

> (1) "If under section 141, a Standards Committee gives notice to a practitioner...that it has received a complaint under section 132(2) about the amount of a bill of costs rendered by that practitioner...no proceedings for the recovery of the amount of the bill may be commenced or proceeded with until after the complaint has been finally disposed off".

[31] This section is not applicable to Mr IX's complaint, as it was not a complaint about the firm's bill of costs as such. Nevertheless, it was open to me to make an order pursuant to section 156(e) or (f) requiring the respondents to reduce or cancel their bills of costs.

[32] In the circumstances, the firm agreed to defer pursuing the bankruptcy proceedings pending completion of this Review.

[33] A review hearing took place in [...] on 2 May 2012 attended by Mr IX and his daughter, and Messrs AQ and AP.

The status of the Disputes Tribunal Order

[34] The Disputes Tribunal is established by the Disputes Tribunals Act 1988. It's primary function is to assist the parties to a dispute to negotiate an agreed settlement in relation to the claim, but where that cannot be achieved (as in this case) its function is to "determine the dispute according to the substantial merits and justice of the case" and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities".[1]

[35] It is not therefore bound to any standard of proof of alleged facts. It is important to bear this in mind when considering any findings of fact made by the Tribunal.

---

[1] Section 18(6) Disputes Tribunals Act 1988.

[36] More importantly however, it is important to recognise that neither the Standards Committee or the LCRO are bound in any way to accept the findings of the Tribunal as findings of fact to be applied to them. To the contrary, Brewer J in *Dorbu v The Lawyers and Conveyancers Disciplinary Tribunal & another (*CIV 2009-404-7381) stated at [21] that "if a Court or Tribunal has an independent obligation to determine whether alleged facts are proved or not, it cannot discharge that obligation by accepting without inquiry the findings of another Court or Tribunal as to the existence of those facts. To do that would be to abdicate its responsibility to determine the facts for itself."

[37] The standard of proof to be applied in disciplinary proceedings when determining facts, is the civil standard of proof of a "balance of probabilities" which could otherwise be described as being "more likely than not" to be correct.[2]

[38] It is also important to recognise the difference between the issue under consideration by the Disputes Tribunal, and the matters being considered by the Standards Committee and myself. The issue before the Disputes Tribunal involved a consideration of whether the firm's fees should be adjusted in any way as a result of any findings against the firm for breaches of the Fair Trading Act and Consumer Guarantees Act. The matter being considered by the Standards Committee and myself is a complaint against the lawyers that they breached the Conduct and Client Care Rules[3] which if proven, results in a finding of unsatisfactory conduct against the lawyers.

[39] There are differing views as to the seriousness of such a finding. Professor Duncan Webb in an article reproduced on the LCRO website states that "to mark out conduct as unsatisfactory is hardly damning condemnation. ... It is suggested that the choice of the only faintly damning description of 'unsatisfactory' indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the Practitioner in question 'must try harder'".

[40] Regardless of one's views in this regard, a finding of unsatisfactory conduct is noted on a lawyer's professional record and is treated seriously by most lawyers. It is a finding that the lawyer has fallen short of expected standards and is not something to be lightly dismissed.

---

[2] *Z v Dental Complaints Assessment Committee* [2008] NZC 55.

[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care)Rules 2008.

[41] It is for these reasons that a disciplinary body such as the Standards Committee (and the LCRO) must satisfy itself, that the facts of a matter are proven to the required standard of proof, rather than accepting the findings of the Disputes Tribunal (or any other Court or Tribunal) as binding on them.

Did the lawyers mislead Mr IX into thinking that they were providing legal services under Legal Aid?

[42] There can be no dispute that when Mr IX made contact with Mr AQ, he made it quite clear that he could only pursue legal action if he was granted legal aid. This was clearly stated by him in his two emails to Mr AQ on 10 November 2009 and 20 January 2010.

[43] There is disagreement between Mr IX and Mr AQ as to what was or was not said at the meeting on 28 January 2010. Mr AQ is adamant that he made it clear to Mr IX at that meeting that the firm did not undertake resource management work on legal aid and that Mr IX had responded by suggesting that he would seek the assistance of his family to pay Mr AQ's fees. Mr IX's daughter advised at the review hearing that her father came home from that meeting and reported that Mr AQ had said that although they would have to pay to get the matter before the Court, he was confident they would be able to work something out under legal aid.

[44] What was or was not said at that meeting cannot be determined to the required level on the basis of the evidence from each of Mr IX and Mr AQ. It is necessary therefore to look at other evidence to come to a view on this issue.

[45] In this regard I take note of the following:-

(a) On 29 January 2010, the day following the meeting, Mr AQ sent the firm's letter of engagement to Mr IX. This letter and the associated information contained the following terms:

> **Fees**
>
> The basis on which our fees will be calculated is [*sic]*.
>
> Fees are usually calculated on an hourly basis for the time spent on the matter. Fees may sometimes be greater than the time spent in a number of circumstances (as set out in the copy rule 9.1 Conduct and Client Care Rules attached). If secretarial or support staff are required to work out of usual office hours because of urgency you will be charged at twice the usual rate in half day units or parts thereof.
>
> **Responsibility of** [*sic*] **Services**

> The names and status of the people in our firm who will have the general carriage of or overall responsibility for the services we provide for you are:
>
> [AQ] - Partner.
>
> The present hourly charge out rate of such people is:
> [AQ] $300.00 p/h (plus GST).
> If these rates change we will notify you of the change.
>
> ...
>
> **Financial**
>
> **2.1 Fees**
>
> a) The fees which we will charge or the manner in which they will be arrived at, are set out in our engagement letter.
>
> b) If the engagement letter specifies a fixed fee, we will charge this for the agreed scope of our services. Work which falls outside that scope will be charged on an hourly rate basis. We will advise you as soon as reasonably practicable if it becomes necessary for us to provide services outside the agreed scope and if requested, give you an estimate of the likely amount of the further costs.
>
> c) Where our fees are calculated on an hourly basis, the hourly rates are set out in our engagement letter. Time spent is recorded in 6 minute units, with time rounded up to the next unit of 6 minutes.
>
> ...
>
> **2.5 Payment**
>
> Invoices are payable 14 days of [*sic*] the date of the invoice (the "due date"). If you do not pay by the due date, we reserve the right to charge interest at 16% per annum, applying from the due date until the account is paid in full.

Nowhere in these documents was it mentioned that AEH agreed to undertake the work on Legal Aid.

(b) Attached to this information was a page which contained the following statement:

> "To: AEH
>
> The above terms are accepted and you are requested to act in this matter.
> If the client is a limited liability company, incorporated society or a Trust, I personally guarantee payment of your fees."

This was signed by Mr IX and dated 30 January 2010. He also completed his contact details.

(c) The next events of significance are that on 3 February 2010 the firm rendered an account for "services" in the sum of $756.25 and a further account for $10.08 on 10 March 2010. These accounts were paid by Mr IX's daughter on 18 March 2010. At the review hearing, Mr IX responded to my inquiry about this payment by answering that he thought this payment was what Mr AQ had referred to as "payment to get the matter into Court". Mr AQ indicated that his recall was that he was referring to the filing fee on the appeal which was paid directly by Mr IX's daughter.

(d) A further payment of $2,000.00 was received from Ms IX on 18 May 2010 in payment of the consultant's fee.

(e) On 6 May 2010 Ms SE wrote to Mr IX. Her letter included the following statements:

> "In the meantime we need to address matters relating to legal and witness costs- both to date and going forward."

Later she stated: -

> "That then leaves us in a position where a decision needs to be made as to how you wish to proceed. It seems to us that there are two options available to you as follows:
>
> 1. For you to see if you can obtain the services of a lawyer who would be prepared to complete matters on legal aid. As discussed there do not appear to be any real choices in the [...] area, particularly for engaging a lawyer who is experienced in resource management appeals and who would actually [*sic*] prepared to undertake the work on a legal aid basis.
>
> 2. For us to complete matters on your behalf. Our attendances would relate to rebuttal evidence (if necessary) and then preparation for and attendance at the appeal hearing during the week commencing 31 May 2010. If we are to do that we will need to ensure that there is a plan in place to ensure that our costs can be paid.
>
> Other options available are for you to take over running the case on your own behalf or to withdraw from the process altogether. However given the point we have reached we do consider there is merit in continuing with the appeal and you having the benefit of legal services. "

(f) Mr IX responded to that letter on 10 May beginning with the statement "I received your letter on Friday and was not best pleased but had expected it". He then referred to his initial correspondence with Mr AQ noting that "from the outset I was upfront and frank about my financial position and made it clear that an appeal was only possible if legal aid was available." He referred to his raising the question of costs with Ms SE to which he says she responded along

the lines of "we will work something out". He then proposed that there was another viable course of action, which was to apply for legal aid through what he described as "your practice's existing legal aid connection"

(g) Ms SE then responded by letter dated 19 May and recorded Mr AQ's recall of the meeting on 28 January as well as updating Mr IX on developments relating to the case.

(h) Following the mediation ordered by the Court at which agreement was reached, Ms SE wrote to Mr IX on 8 July and included her further account. By that stage it was beyond doubt that the firm was not acting on legal aid. Mr IX responded by saying:- "Thank you for your letter dated 8 July 2010 containing your account. At least it gives us a starting point. I am off to [...] on Friday and will discuss this matter with my family who are closely affected and have some critical views on this matter." He included a cheque for $5,000.00 as an interim payment in the meantime,

[46] Having considered this evidence, it is not possible to come to the view on a balance of probabilities, that Mr AQ and Mr AP misled Mr IX into thinking that AEH would carry out the work on legal aid. In fact, on a balance of probabilities, I come to the view that Mr IX understood and acknowledged that the work was <u>not</u> being done on legal aid.

[47] Mr IX seemed to harbour the view that he could proceed with AEH doing the work on the understanding that it was not being done on legal aid, and then revisit the possibility of applying for legal aid at a later date. This is evidenced by his letter of 10 May, in which he suggests an alternative course of action from those proposed by Ms SE as being to apply at that stage for legal aid. This may have been as a result of a misunderstanding on his behalf, but that cannot be the basis for a finding against either Mr AP or Mr AQ that they have breached the Conduct and Client Care Rules.

[48] In this regard I concur with the finding of the Standards Committee.

Did AEH provide unsatisfactory advice?

[49] In the course of this review Mr IX promoted the view that because AEH did not take steps to secure legal aid funding, the case was conducted on a "shoe string" and the firm did not represent him in a proper and vigorous manner. This is an allegation that the advice provided by AEH was deficient. It is also based on the premise that if legal aid had been granted, AEH would have been given free rein to explore every

possible avenue available to promote Mr IX's position, and to freely engage expert evidence. Legal aid is not granted on that basis, and is tightly circumscribed.

[50] The suggestion that AEH provided an inferior service because Mr IX did not have legal aid is refuted by Messrs AQ and AP, and I would observe that it is usually the reverse hypothesis which is promoted i.e that those on legal aid receive lesser service. The basis on which fees are calculated and paid should not of course affect the service provided in any way.

[51] The Standards Committee did not consider this aspect of Mr IX's complaint because it was not specifically referred to in the complaints presented by Mr IX. It was a matter raised in the course of the Disputes Tribunal hearing, but not an issue put before the Standards Committee. As this review can only address the Standards Committee investigation of the complaint and its determination thereof, it is not a matter which I have any jurisdiction to address in this review.

[52] In his letter dated 14 May 2012 in response to comments sought by me, Mr IX noted that he had expected to be able to present the full facts relating to his complaint in person and in so doing raise the issue of the standard of the advice provided. He did not have that opportunity as section 153(1) of the Lawyers and Conveyancers Act provides that unless the Standards Committee otherwise directs, all hearings conducted by a Standards Committee are to be hearings on the papers i.e without personal attendance by the parties.

[53] Having considered this aspect of the complaint in the course of this review, I would make the comment that, having reviewed the file and noted the nature of the work carried out by AEH, it is difficult to see that such an allegation could be sustained.

[54] Finally, in connection with this issue, I note that the majority of the work carried out on Mr IX's file was provided by Ms SE. If Mr IX had a complaint about the quality of the service provided by AEH I would have expected that his complaint would also have been made against Ms SE which it was not.

[55] In summary therefore, primarily I lack jurisdiction to consider this aspect of Mr IX's complaint, but having had the issue put before me and considered the material provided, I do not consider that this aspect of Mr IX's complaint can be sustained.

Withdrawal of services

[56] Mr IX included in his complaint to the Complaints Service, that AEH withdrew their services before completion of the case and left him in a vulnerable position. As

noted above, although this aspect of the complaint was referred to by the Standards Committee, it did not include a finding in this regard in its determination.

[57] Rule 4.2 of the Conduct and Client Care Rules provide as follows:-

> 4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless -
>
> (a) The lawyer is discharged from the engagement by the client; or
>
> (b) The lawyer and the client have agreed that the lawyer is no longer to act for the client; or
>
> (c) The lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.

[58] Following the hearing, I wrote to the parties and requested further submissions and material on this aspect of Mr IX's complaint. Both parties have provided submissions.

[59] The draft Consent Orders and a side agreement which was to record the terms of the mediated agreement, were forwarded to Mr IX by Ms SE. Mr IX responded on 2 August stating that, while not ideal, the settlement was about the best that he could obtain under the circumstances.

[60] On the strength of this comment, Ms SE advised the solicitors acting for KW that the documents were acceptable provided some minor amendments were agreed. Ms SE also similarly advised the Court.

[61] However, on 23 August Mr IX advised Ms SE that his family were reviewing the documents, and indicated that he would advise Ms SE the following week whether he would sign the documents.

[62] Ms SE responded on the same day, expressing her concern that Mr IX was indicating that he might not sign the documents. She pointed out that the documents provided recorded the terms of the agreement reached at mediation and that there was no room for any further negotiation. More importantly, she had advised the Court and the other solicitors that the form of the documents was in order.

[63] From the material provided it is clear that Ms SE considered that Mr IX was resiling from the terms of the agreement negotiated at settlement and was refusing to sign the documents which encompassed those terms. That was also the view of the solicitors acting for KW.

[64] Ms SE was in a difficult position and sent an email to Mr IX on 27 August 2010 in which she stated:-

> "....if you are not prepared to sign it 'as is' then we will have no option but to advise all other parties and the Court that we are withdrawing as your solicitors and you would need to handle matters from there on in yourself or engage new solicitors for that purpose."

[65] In response, Mr IX advised that he was not prepared to sign the document "as is" because the document presented did not reflect the agreement. He then stated that "I am prepared to discuss this in the presence of the Judge if required."

[66] It must be remembered, that these discussions took place in circumstances where Mr IX was expressing some disagreement over whether he accepted responsibility for AEH's costs. It is understandable that the firm would not be wanting to incur further costs in promoting a position which they felt was untenable. In addition, Ms SE was herself going on leave.

[67] Primarily however, Ms SE was compromised by Mr IX's refusal to sign the side agreement, as she had previously indicated to the Court and to the solicitors for KW that the document was in order. Mr IX set out in some detail in his email of 24 August the reasons why he was declining to sign the document. Ms SE considered the document reflected the mediated agreement. Ms SE was therefore unable to advance Mr IX's position with any credibility and Mr IX had stated in his email that he was prepared to explain to the Judge why he was unable to sign the Order in the form presented to him.

[68] I do not draw from the correspondence a sense that Mr IX was "vulnerable" as he puts it. It seems to me that Mr IX accepted Ms SE's position and undertook to present his own argument to the Judge. That is what happened. In the circumstances, I do not consider that there has been a breach of Rule 4.2. In any event, it was Ms SE who ceased to act for Mr IX, not either of the respondents.

Summary

[69] In summary, I concur with the determination of the Standards Committee to take no further action in respect of the complaints against Messrs AQ and AP. I would observe that the majority of the issues complained of relate to legal services provided by Ms SE. This is particularly true of Mr IX's complaint about the competence of the advice provided and his complaint that legal representation was withdrawn at a critical moment. The complaints lodged by him were specifically complaints about the respondents, who did not play a large part in Mr IX's representation in this matter.

[70] These comments should not be viewed as an invitation to lodge a complaint about Ms SE. In this decision I have dealt with the issues raised by Mr IX, which invariably have included matters in which Ms SE was involved. To that extent therefore, even though Ms SE is not a respondent in this review, the outcome necessarily includes the part that she had to play in representing Mr IX.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, modified to the extent that no further action is to be taken in relation to the aspect of the complaints not addressed by the Standards Committee in its determination.

DATED this 23rd day of May 2012

_____

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 IX as the Applicant
Mr AQ and Mr AP as the Respondents
The Auckland Standards Committee 5
The New Zealand Law Society