

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 2.

BETWEEN

AR
of [North Island]
Applicant

AND

ZG
of Auckland
Respondent

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

DECISION

[1] An application was made by Mr AR (the Applicant) for a review of a decision made by the Standards Committee declining to uphold his complaint against Mr ZG (the Practitioner).

[2] The review was sought because the Applicant considered that the Standards Committee had not fully understood the grounds of his complaint.

Background

[3] The complaint essentially involved a bill of costs that the Practitioner had rendered for work he had undertaken for a Trust, in respect of which the Applicant and his wife were Trustees and the Practitioner the independent Trustee. Following the separation of the Applicant and his wife the Trust property was resettled as part of the matrimonial property distribution. The Practitioner rendered an account to the trust, which mostly related to recent services concerning the Trust property, but also included charges for historical attendances that had not previously been paid.

[4] The Applicant had obtained details from the Practitioner, which, according to the Applicant did not provide sufficient detail. He said the Practitioner was unwilling to spend more time on the Applicant's enquiries and had required the account to be paid to conclude the Trust issues.

[5] The Applicant ended up paying the full cost of the Trust's bill, but thereafter his lawyer exchanged correspondence with the Practitioner in relation to these charges. The concern as expressed by his lawyer was that some of the charges related to attendances solely for the benefit of his wife but which were charged to the Trust. The Practitioner had replied with an explanation of the charges which he claimed all concerned trust matters, and included a print out of the attendances. He denied ever having acted for the wife personally.

[6] The Applicant was dissatisfied with the Practitioner's responses and eventually laid a complaint with the New Zealand Law Society. The complaint appeared to focus on the delays by the Practitioner in providing the breakdown of the charges, but later included the complaint that the Practitioner had not obtained his consent for work done for the Trust as the behest of his wife, of which he had no knowledge.

Standards Committee decision

[7] When originally notifying the complaint to the Applicant, the Standards Committee's incomplete understanding of the essence of the complaint is reflected in its letter to the Practitioner who was informed that the complaint concerned allegations that he had failed to act in the best interests of the client and had been unprofessional in the way he handled the transfer of property owned by the Trust. Not surprisingly this was the complaint to which the Practitioner responded. When his reply was sent to the Applicant for comment, the Applicant wrote that he thought the Practitioner had not completely understood the grounds of the complaint.

[8] The Applicant re-defined his complaint to the Standards Committee in the following way:

"The essence of my complaint then is that [the Practitioner & his firm] did not inform me of the fact that they were regularly undertaking for the [Trust] on the instructions of my former wife and then required me to pay an account in respect of that work as a condition of releasing documents without which I could not complete a settlement relating to the Trust."

[9] The Standards Committee's decision summarised the issues on the basis of the material on the file, and on the basis of accepting the response of the Practitioner, exercised its discretion pursuant to section 138(2) of the Lawyers and Conveyancers

Act 2006 to take no further action. I note these matters in the light of the Applicant's review application which was based on the Standards Committee not having properly understood the grounds of his complaint.

Review

[10] My approach to the review has included considering whether the Standards Committee addressed the issues raised by the Applicant's complaints and whether its decision is properly supported by the evidence before the Committee.

[11] The parties have agreed that the Application may be determined without a formal hearing and therefore in accordance with section 206(2) of the Act the matter is being determined on the material made available to this office by the parties.

[12] An essential point raised by the Applicant is that the consent of all three Trustees was required for any decisions made by the Trust. In this light he objected to the Practitioner having undertaken work for the Trust that had been done at the request of his wife, about which he claimed to have no knowledge. This appeared to be the basis of his objection that he, the Applicant, ended up paying for a bill in relation to work in respect of which he was unaware.

[13] In reply the Practitioner rejected the Applicant's assertion that the bill to the Trust ought to have been analysed into a wife-generated quantum and a husband-generated quantum, which the Practitioner saw as artificial and incorrect. The Practitioner informed the Standards Committee that he acted for the Trust, and the costs incurred for such work ought not to be viewed in terms of being partially generated or payable by each spouse to the Trust. The Practitioner further advised the Standards Committee that the fact that the incidence of the fee ended up being borne by the Applicant was a matter of the parties' matrimonial settlement.

[14] I have considered the Standards Committee entire file and the information provided for this review. This included copies of more recent correspondence which had been exchanged between the Practitioner and another lawyer who had acted for the Applicant and wherein the Practitioner was responding to questions concerning the fees billed to the Trust. The information sent to the Applicant's lawyer included a copy of the time records. There was also a copy of an email sent to the Applicant by the Practitioner who had written, "*We have forwarded an account for work done for the [Trust] over the years. We have never had any joy getting paid by the Trust....*".

[15] In his letter of 8 October 2009 the Practitioner had explained the work that had been undertaken for the Trust, and that the bulk of fee related to a settlement of the Trust property and a proposed sale of property at an auction, both being matters of which the Applicant and his wife were aware. He also explained that a small portion of the account related to old fees billed but not paid, and that these older charges related to *“trusteeship, trust reviews, resettlement issues”*. The Practitioner had responded to the Applicant’s lawyer that to apportion the work between the parties on the basis of who instigated the instruction was artificial and uneconomic.

[16] I note that the Applicant’s objections were mainly in relation to fees charged to the Trust that had been raised between March 2000 and March 2006. The Applicant was aggrieved about the fees charged to the Trust for work of which he was unaware. The time record does not show whether the contact leading to the work was made by the Applicant or the wife.

[17] I have considered all of the material on the file. Notwithstanding that the consent of all Trustees was required for decisions made by a Trust, whether this covers every incidence of contact between a trustee and the lawyer must be doubtful, insofar as the act of a lawyer in responding to enquiries made by a trustee concerning trust matters would not necessarily qualify as a “decision being made by the Trust”. The time records noted the attendances in the form of phone calls, perusals, letters to, drafting, and miscellaneous work. The Applicant denied having been aware of these attendances, which I note stretched back some eleven years.

[18] It may not be surprising that the Applicant raised questions about the bill, given the length of time it was overdue. Whether it was simply overlooked or forgotten, or had never come to the Applicant’s attention cannot be ascertained. The Applicant had provided no response to the Practitioner’s comment that the firm had had no joy getting prior bills, and there is no reason to question that the work had been billed at some earlier time. It has not been suggested that the charges do not relate to Trust matters. The complaint essentially involves the question of who gave instructions for that work.

[19] The Practitioner noted that in relation to more recent work involving the Trust, he had also undertaken work at the instruction of only the Applicant. I noted that the Applicant has not suggested that in relation to that work the Practitioner ought to have spent time confirming the instruction with the wife. The Practitioner also explained the contact dynamics surrounding the recent auction of Trust property, noting that his contact with each was separate, but which all concerned the Trust and was properly

charged to the Trust. He noted that no objection has been raised by the Applicant about that.

[20] The question is whether the charges made to the Trust for attendances at the instruction of one trustee only should attract an adverse disciplinary outcome for the Practitioner. I am not persuaded that the work involved a 'decision' made by the Trust as contemplated by the Trust Deed, as opposed to occasional instructions. Nor can it be shown to any degree of certainty, given the lapse of time, that the Practitioner at all times acted only on the instruction of the wife, or that the Applicant was at all times unaware of the nature of the contact.

[21] Furthermore, I accept that it would be somewhat artificial and unrealistic to expect a lawyer to check with each individual trustee to confirm the authority underpinning contact that is made by one of them, particularly where the trustees are husband and wife and share a common household and where in any event the instruction may involve a minor matter or enquiry. This is to be distinguished from the situation where a decision as contemplated by a Trust Deed is made, and which requires the consent of all trustees. However, it is difficult to see that the Trust Deed contemplated that the consent of each trustee was required in relation to each and every contact or enquiry made on behalf of the Trust by an individual trustee. The fact that a solicitor might respond to inquiries by a Trustee concerning the Trust ought not to prevent the solicitor for charging a fee for that attendance.

[22] The Applicant had referred to the acrimonious relationship between himself and his wife, which in his view required the Practitioner to have obtained confirmation from him before undertaking any work for the Trust. However, the billed work which is the subject of his grievance is historical, covering attendances that occurred between March 2000 and March 2006. I have already commented on the more recent attendances.

[23] Moreover, where a complaint arises after 1 August 2008, about conduct that occurred prior to that date, the complaint falls to be considered under the transitional provisions of section 351 of the Lawyers and Conveyancers Act 2006. In respect of such conduct the applicable standard is that which applied under the Law Practitioners Act and the Rules of Professional Conduct for Barristers and Solicitors, under which the threshold for an adverse finding against a lawyer was materially higher than is the case under the Lawyers and Conveyancers Act.

[24] In such a case an adverse finding against a Practitioner could only be made if the conduct complained of could have reached a threshold that would have led to disciplinary action being taken against the lawyer. Even if there was the case for the Practitioner to answer (and I make no such finding), I have seen nothing on the file that leads me to the view that any part of the Practitioner's conduct, insofar as it relates to matters that occurred prior to 1 August 2008 (in this case charging the Trust for work undertaken, even if at the instruction of one trustee), could have led to disciplinary proceedings being taken against him in relation to the historical charges.

[25] In relation to the more recent charges, I note that the fees charged to the Trust concerned the auction and re-settlement of the Trust property. These were somewhat recent matters and there is clear evidence that the Applicant was aware of these attendances by the Practitioner, and as already noted, contact concerning those matters was made on occasions by either the Applicant or his wife.

[26] In conclusion, I am confident that the Standards Committee was aware of, and did consider, the issues arising in the complaint. I am also satisfied that the Committee's conclusion was one that was properly made on the information before the Committee. The review application is declined.

Decision

[27] Pursuant to Section 211(1)(a), of the Lawyers and Conveyancers Act 2006, the Standards Committee's decision is confirmed.

DATED this 15th day of March 2011

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:

Mr AR as the Applicant
Mr ZQ as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society