

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 3

BETWEEN

Mr BR
of Auckland

Applicant

AND

Mr YD
of Auckland

Respondent

DECISION

Background

[1] In March 2007, the Applicant approached the firm of AAV., for advice with regard to problems which had developed with his home in [City]

[2] The Respondent was assigned to act for the Applicant and on [date] April 2007 wrote to the Applicant outlining the various time limitations and identifying potential parties from whom the Applicant could seek compensation.

[3] Further reports and costings were obtained and the parties met in September to progress the claim.

[4] The immediate issue was who should be named as defendants. The Respondent advised that the best and most cost-effective course was to issue proceedings against the vendors who had sold the property to the Applicant. Those persons were also named as the builders in the Building Consent Application. The Respondent's strategy was then to wait and see who the vendors joined as third parties to the proceedings.

[5] Proceedings were filed against the vendors in October 2007.

[6] The vendors joined various other parties and ultimately a Judicial Settlement Conference was time-tabled for [date] June 2009.

[7] In April 2009 the Respondent recommended that an Amended Statement of Claim be filed whereby the third, fourth and fifth parties were joined as defendants to ensure that the Applicant did not become statute barred from proceeding against those parties.

[8] Leave of the Court was required and was granted on [date] May 2009 to be effective on [date] May 2009 unless memoranda were filed and served in opposition. That date was subsequently extended to [date] May due to the fact that the Judge's Minute had not been served in time on all parties.

[9] The Amended Statement of Claim was duly lodged with the Court on [date] May 2009 but was not accepted for filing as the Court had received letters from self represented litigants who objected to being sued. The Court staff sought directions from the Judge and because of that the Amended Statement of Claim was not accepted for filing by the [date] June deadline.

[10] The Judicial Settlement Conference took place on [date] June 2009. The Conference did not produce a settlement. Approaches were then made by the Respondent (with instructions from the Applicant) to the vendors' solicitor, suggesting that the matter could be settled by the vendors purchasing the property back from the Applicant.

[11] By this stage, the Applicant had become unhappy with the Respondent's performance, and approached the various parties directly with a view to settling the matter on the basis that the various parties effected and paid for repairs to the property. Settlement was reached along these lines.

[12] The Respondent rendered his final account on [date] August 2009. At that stage, the Respondent's previous account rendered on [date] June 2009 remained unpaid.

Complaint and Standards Committee decision

[13] The Applicant complained generally about the Respondent's advice and performance in connection with this matter. Matters complained of particularly included:

- The advice provided by the Respondent to sue the vendors only.
- The subsequent late advice to file an Amended Statement of Claim against the various third and following parties.
- The Respondent's performance at the Joint Settlement Conference.
- The subsequent advice relating to the potential buy-back of the property.
- Changes to the Respondent's hourly charge-out rate.

[14] The Applicant contended that because of these shortcomings, the Respondent's account dated [date] June should be reduced and the account dated [date] August 2009 should be waived. The Applicant also contended that previous accounts should be adjusted.

[15] During the course of the investigation, the two accounts in question were reviewed by a Costs Assessor who came to the conclusion that the two accounts were fair and reasonable for the work that was done.

[16] Following a review of the file, the Committee resolved that:

- (a) In respect of conduct prior to 1 August 2008, it had no jurisdiction pursuant to section 351(1) of the Lawyers and Conveyancers Act 2006 to investigate the complaint as the conduct complained of was not such that proceedings of a disciplinary nature would have commenced under the Law Practitioners Act 1982. (In passing, I note that the test in section 351(1) is whether proceedings could have been commenced under the Law Practitioners Act 1982, not would have commenced).
- (b) In respect of the conduct after 1 August 2008, the Committee decided to take no further action in the matter pursuant to section 138(2) of the Lawyers and Conveyancers Act which provides that having regard to all the circumstances of the case further action was unnecessary or inappropriate.

[17] In its decision, the Committee recorded the background to the matters complained of, the parties responses to the various matters raised and referred to the Costs Assessors report. It then provided a summary of the Committee's deliberations in which -

- (a) it accepted the Costs Assessors findings;
- (b) it accepted assurances from the Respondent and his employer that all relevant matters had been appropriately presented at the Judicial Settlement Conference;
- (c) it noted that the late filing of the Amended Statement of Claim appeared to have been caused or exacerbated by an administrative error by the Court;

- (d) it did not consider that further mediation would assist in resolving the complaint.

[18] Overall, the Committee considered that the Respondent's conduct had been reasonable and was not such as to raise any professional standards issues.

The application for review

[19] In the application for review, the Applicant refers particularly to the two bills of costs and seeks that Orders be made reducing the bill dated [date] June 2009 by \$12,690 plus GST, and cancelling the bill dated [date] August 2009. In addition, the Applicant seeks reimbursement of overpaid and invoiced fees on the difference between the hourly rate he alleges he initially agreed to with the Respondent against that actually charged.

[20] In the application he notes the following:-

- (a) That he was not aware of the increases in the Respondent's hourly charge-out rates;
- (b) that the Respondent had previously failed to file and follow-up with the Courts to ensure filing had been processed in time;
- (c) that he had requested that the Applicant cease work on the statute-barred issue and any further work on the file in a telephone conversation following receipt of a memorandum from the Respondent on [date] July 2009.
- (d) the failure to follow up with the Court to ensure the Amended Statement of Claim was processed in time.

[21] Inherent in this application for review is the complaint concerning the Respondent's performance generally and particularly at the Joint Settlement Conference.

Review

The relevant law

[22] At the outset of this review a brief mention needs to be made of the relevant legislation

[23] On 1 August 2008, the Lawyers and Conveyancers Act 2006 came into force. Prior to that, the legal profession was regulated by the Law Practitioners Act 1982.

[24] The Applicant lodged his complaint on [date] September 2009. Pursuant to section 351(1) of the Lawyers and Conveyancers Act, complaints in respect of conduct which occurred prior to 1 August 2008 can only be made if the conduct complained of

was conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

[25] Under the Law Practitioners Act, disciplinary consequences could follow if a lawyer was guilty of misconduct, conduct unbecoming or negligence or incompetence of such a degree or so frequent as to reflect on the lawyer's fitness to practice or which would tend to bring the profession into disrepute (sections 106 and 112 Law Practitioners Act).

[26] The Lawyers and Conveyancers Act introduced a new concept of "unsatisfactory conduct". This is defined in s 12(a) of the Act as being 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.

[27] The Respondent's conduct falls to be considered under both pieces of legislation.

[28] As a preliminary decision, I record that none of the Respondent's conduct which took place prior to 1 August 2008 could be considered to be such that disciplinary charges under that Act could have been commenced against him. As a result therefore, this review will concentrate on the conduct of the Respondent which took place after 1 August 2008. The main aspects of the Applicant's complaint fall within this period in any event.

Delay

[29] One of the main aspects of the Applicant's complaint is the perceived shortcomings of the Respondent in advising that proceedings should be issued against the vendors of the building only in the first instance which ultimately resulted in some difficulties at the Joint Settlement Conference. The Applicant states that he was unaware that he could take proceedings against the various parties as he believed he did not have "legal backing" to support his claim.

[30] The Respondent states that the Applicant was aware from the outset that he could bring claims against a number of parties involved in the design and construction of the house, but that he advised the Applicant to issue proceedings against the vendors only in the first instance and to wait and see who they joined as third parties. Through this process, the roles that each potential defendant played in the construction of the dwelling would become clear. This would seem to be a reasonable strategy to pursue, and as noted by the Respondent, was the most cost-effective way of proceeding.

[31] The relevance of this aspect of the complaint, is that subsequently, as the 10 year limitation for filing claims approached, the Respondent advised in April 2009 that the Statement of Claim should be amended to include the various third and following parties as defendants.

[32] Leave of the Court was sought on [date] May 2009, and the Associate Judge granted leave unless any opposition was received by [date] May. This date was extended to [date] May, as some of the parties had not received the Minute granting leave.

[33] The Amended Statement of Claim was lodged with the High Court Registry on Monday [date] May 2009. The date by which the Amended Statement of Claim had to be filed to be within the 10 year limitation period was [date] June. Instead of accepting the Amended Statement of Claim for filing, the Registry sought directions from the Judge as there were "some letters from self-litigants objecting to being sued as defendants." As a result, the Amended Statement of Claim was not filed within the limitation period and this provided the defendants with leverage against the Applicant at the Conference.

[34] The Applicant had expectations that a settlement would be achieved at the Conference, but this did not eventuate. He considers that the reasons for this was that the defendants had been provided with grounds to resist the claim against them and that the Respondent did not perform competently at the Conference.

[35] For there to be any adjustment to the bills of account as sought by the Applicant, there must first be a finding of unsatisfactory conduct against the Respondent. If there is no such finding, then no Orders such as those sought by the Respondent can be made.

[36] The Respondent has provided a copy of the memorandum prepared by him in connection with the proposed application to the Court seeking Orders to allow for the Amended Statement of Claim to be filed. In that memorandum, he records the events which led to the Court not filing the Amended Statement of Claim at the time it was lodged. I have noted that it was lodged on Monday [date] May. Leave to file had become effective on the previous Friday. Consequently, there can be no accusation levelled at the Respondent that there were any delays in this regard.

[37] For some unexpected reason, however, the Court staff referred the Amended Statement of Claim to the Judge for directions. The directions received from the Judge were that the Settlement Conference scheduled for [date] June was to proceed.

[38] This series of events unfortunately provided the defendants with some additional leverage with which to resist settlement. However, the Committee noted that this was caused or exacerbated by administrative error by the Court and that it was not clear that it was directly attributable to the Respondent. I would go somewhat further and observe that it was not at all attributable to Mr YD. In usual circumstances, filing documents on Monday would provide an appropriate period of time to ensure that the document filing was completed by the end of the week. Indeed, the Amended Statement of Claim could not have been filed any earlier, as the Court's Minute did not become effective until the preceding Friday.

[39] I consider therefore that there can be no criticism of the Respondent's conduct in this regard.

[40] The period between the date on which the Respondent sought instructions to file the Amended Statement of Claim, and the filing of the Application for leave on [date] May, was some four weeks. It may be easy with the benefit of hindsight, to suggest that the Respondent should have lodged the application for leave within a shorter time frame. I am not sure of that, but in any event, do not consider that such a criticism could form the basis for an adverse finding against the Respondent.

[41] It would be fair to say that events conspired against the Respondent. The Judge's Minute was not served on all parties initially, and then the Court Registry did not accept the Amended Statement of Claim for filing in the usual way. Whilst the Applicant may be critical of the Applicant for failing to allow time to address these unexpected events, it can not be said that the Respondent's conduct "fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer" (s12(a) Lawyers and Conveyancers Act). Consequently there can be no finding of unsatisfactory conduct against the Respondent in this regard.

The settlement conference

[42] The Applicant is critical of the Respondent's performance at the Settlement Conference. He alleges that there was a failure to present a cohesive and well thought-out case which left the Applicant open to criticism and attack. The Applicant alleges that the Respondent did not have all of the documentation to hand to present as evidence when called upon, and was not able to clarify the facts. He also voices criticism at the manner in which the mediation proceeded – this of course is not a

matter for which the Respondent can be responsible. That was in the hands of the Judge convening the Conference.

[43] As the Costs Assessor observes, without being present at the Settlement Conference and being able to observe the Respondent's advocacy, it is not possible to make a decision in this regard. I do however take note of the Committee's observations as to the distinction between the conciliatory aims of a Settlement Conference and the adversarial nature of Court proceedings and the consequent difference in how issues are to be raised and discussed. These observations are specifically drawn to the attention of the Applicant.

[44] The fact that no settlement was achieved is not of itself an indicator of any lack of competence on behalf of the Respondent. The parties themselves must be amenable to a settlement for a Settlement Conference to produce a result, and it would seem that the parties at the Conference were not well disposed to settling at that stage. They had recorded opposition to being joined as defendants, notwithstanding that they were already included in the proceedings as third and further parties which would tend to suggest that there was no willingness to be co-operative at that stage to achieve an outcome.

[45] It must also be noted, that the Applicant's position at the time of the Settlement Conference was somewhat different to the position accepted by him subsequently. At the time of the Conference, the Applicant was seeking compensation to the extent of the cost of repair by alternative tradesmen, or the cost of a complete rebuild, which would necessarily have cost the various defendants considerably more than the costs to which they subsequently agreed.

[46] I make these comments for the purpose of noting that the lack of a favourable outcome at the Settlement Conference involved factors that did not necessarily relate to the Respondent's performance. I have therefore come to the view that there are no grounds that can be made out to the necessary standard of proof required for making any finding against the Respondent in this regard.

Termination of instructions

[47] In the review application the Applicant advises that he "requested [the Respondent] to cease pursuing all matters in relation to arguing the statute-barred issue and any further work in relation to [the] case" in a telephone conversation subsequent to the letter sent by the Respondent to the Applicant on [date] July 2009.

In that letter, the Respondent had suggested that costs could be saved by not pursuing the application to claim against the third, fourth and fifth parties.

[48] In his email to the Law Society on [date] December 2010, the Applicant states that he “had requested via reply email to Mr YD and Mr [A] to “cease all further action regarding pursuing the 10 year limitation period against the 3rd, 4th and 5th parties.”

[49] I have not sighted any such email.

[50] The two statements are at odds with each other. In any event, the Applicant continued to seek advice and assistance from the Respondent in concluding the settlement he had negotiated, including instructing him to prepare a draft settlement agreement in August 2009. There are also a number of telephone conversations between the parties during that period and if the Applicant meant that the Respondent should cease work altogether, then one would expect him to have said so again. Consequently, I conclude that the instructions to the Respondent were to cease work only on the time limitation issue.

[51] The Respondent has advised that he has not included in his account of [date] August 2009 any of the time recorded relating to that issue. From a review of the time records relating to bill # 5515, the total time recorded was \$8,935. The sum of \$6,500 was billed. This supports the statement made by the Respondent.

[52] On the basis that costs relating to the limitation matter have not been included in the bill, there would be no reason for any adjustment to be made to that account. In addition there is no conduct in respect of which a finding of unsatisfactory conduct could be made against the Respondent and consequently no Orders can be made in respect of the accounts.

The Respondent’s charge-out rates

[53] The Applicant states that he did not agree to any increases in hourly rates to be charged by the Respondent. From the Respondent’s time-sheets I have noted the following hourly rate changes in respect of time recorded by the Respondent:-

[date] March 2007	\$200.00
[date] April 2007	\$220.00
[date] May 2008	\$250.00
[date] July 2008	\$280.00
[date] November 2008	\$300.00

[54] I observe, that other than the last increase on [date] November 2008, there was no formal requirement for a lawyer to notify charge-out rates and changes thereto. Nevertheless, it was accepted that this would have been good practice.

[55] However, estimates of costs were provided to the Applicant in terms of a cost to complete a particular matter. The estimate of costs for the initial work was provided to the Applicant in an email from the Respondent dated [date] September 2007. A subsequent estimate of costs was similarly provided in respect of the anticipated costs relating to the Amended Statement of Claim. The Respondent's retainer was not therefore based on an hourly charge-out rate. The costs charged by the Respondent fall within the estimates provided. I can see no merit in this aspect of the complaint.

Summary

[56] In summary, therefore, there is no conduct of the Respondent in respect of which proceedings under the Law Practitioners Act 1982 could have been commenced in relation to conduct prior to 1 August 2008, nor are there any aspects of the Respondent's conduct after that date which would be considered to be unsatisfactory in terms of the Lawyers and Conveyancers Act 2006.

Decision

Pursuant to 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Auckland Standards Committee 3 is confirmed.

DATED this 9th day of May 2011

Owen 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 BR as the Applicant
Mr YD as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society