

CONCERNING

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

AND

CONCERNING

a determination of the Waikato Bay of Plenty Standards Committee 1 of the New Zealand Law Society

BETWEEN

Ms Hartlepool
of Hamilton
Applicant

AND

Mr Basildon
of Hamilton
Respondent

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

DECISION

Application for review

[1] An application was made by Ms Hartlepool for a review of a decision by the Waikato Bay of Plenty Standards Committee in respect of her complaint against Mr Basildon. The complaint related to Mr Basildon refusing to act for her further in respect of certain family court proceedings relating to her grandson.

[2] In particular Ms Hartlepool had retained Mr Basildon to act for her in relation to an application for supervised contact of her grandson. A hearing was conducted on that matter on 25 September 2008. The court issued a judgment on 30 September 2008. Ms Hartlepool was unsuccessful in her application and costs were awarded against her. There then followed various exchanges between Ms Hartlepool and Mr Basildon relating to the possibility of an appeal. Those exchanges culminated in Mr Basildon applying, successfully, to be removed from the record as Ms Hartlepool's lawyer.

[3] Ms Hartlepool was of the view that Mr Basildon had failed in his obligations to her in refusing or failing to assist her with the appeal. She also maintained that Mr Basildon had assured her that she would be successful in her application for supervised contact.

She also stated that Mr Basildon did not warn her of the possibility of an adverse costs order.

[4] Ms Hartlepool complained to the New Zealand Law Society which referred the matter to the Waikato Bay of Plenty Standards Committee 1. That Committee found that Ms Hartlepool had not established that Mr Basildon had given assurances in respect of the success of the application and that Mr Basildon had failed to warn about the risk of an adverse costs order. The Committee also found that given her complaints about the service of Mr Basildon her stance was not credible. The Committee exercised its discretion under s 138(2) of the Lawyers and Conveyancers Act 2006 stating that in all of the circumstances no further action was necessary or appropriate.

[5] Ms Hartlepool sought a review of that decision. The matter was heard on the papers and without hearing from the parties in person by the consent of the parties.

Background

[6] Ms Hartlepool instructed Mr Basildon to act for her in her application for contact with her grandson. She stated in her complaint to the Law Society that Mr Basildon assured her that she would receive supervised contact. The application to the Family Court was unsuccessful and a costs order of around \$8000 was made against Ms Hartlepool. On being notified of the decision Ms Hartlepool made it clear she wished to appeal and corresponded with Mr Basildon in this regard.

[7] It may be useful to set out in chronological order the events and communications subsequent to the hearing of the contact application in the Family Court on 25 September 2008:

Date (all 2008)	Event
26 September	Ms Hartlepool faxes Mr Basildon after the court hearing saying I will need to appeal this and querying the examination of witnesses.
26 September	Mr Basildon replies to fax by letter explaining examination of witnesses and advising that no appeal can be lodged until a decision issues. Bill of costs enclosed.
30 September	Family Court decision made. Application unsuccessful and costs ordered on a 2B basis.
30 September	Ms Hartlepool faxes Mr Basildon (by noting on the foot of the bill) "please stop work until I check with Legal Aid".

10 October Ms Hartlepool faxes Ms Basildon instructing him to obtain tapes of hearing and making several allegations about his conduct.

10 October (p.m.) Telephone call from Ms Hartlepool to Mr Basildon indicating wish to lodge appeal.

13 October Mr Basildon writes to Ms Hartlepool outlining the basis upon which an appeal would be conducted and raising the issue of allegations made.

15 October Fax from Ms Hartlepool's daughter to Mr Basildon complaining about delays.

17 October Memorandum filed in court (in other proceedings) by Mr Basildon stating "counsel is in the process of taking instructions from Mrs Hartlepool in relation to making an appeal..."

24 October Ms Hartlepool faxes Mr Basildon instructing him to file a notice of appeal.

24 October Mr Basildon replies "I have no time to file or prepare anything until after 7 Nov 08 as discussed yesterday".

4 November Ms Hartlepool faxes Mr Basildon requesting him to advise the Court that he is unable to take instructions but will be opposing costs.

7 November Ms Hartlepool faxes Mr Basildon stating "we will lodge application for leave out of time I wish you to do the appeal to the High Court re costs and J Riddell's decision".

14 November Mr Basildon writes to Ms Hartlepool advising against an appeal (now restricted to costs alone) but indicating that he was available to act.

11 November Fax from Ms Hartlepool to Mr Basildon stating "please phone I want to lodge and appeal out of time. Have you a barrister who will present this".

20 November Fax from Ms Hartlepool to Mr Basildon seeking advice as to costs appeal and enquiring "did you advise 2000 to do just the costs".

24 November	Costs order against Ms Hartlepool sealed in the High Court.
25 November	Fax from Ms Hartlepool to Mr Basildon reiterating need to address issue of costs.
26 November	Fax from Ms Hartlepool's daughter instructing Mr Basildon to apply to have costs set aside
26 November (approx)	Reply fax from Mr Basildon stating "a colleague of mine had (in emergency) gone to hospital this morning... I can't take up your matter, please arrange to see another counsel".
2 December	Ms Hartlepool faxes Mr Basildon reiterating her instructions.
3 December	Mr Basildon writes to Ms Hartlepool stating that he will no longer act for her.
4 December	Application by Mr Basildon for a declaration that he no longer acts for Ms Hartlepool made.
8 December	Ms Hartlepool opposes application for declaration
9 December	Court seeks clarification of whether Ms Hartlepool asked Mr Basildon to stop working on the file on 30 September.
8 December	Complaint made to Law Society
10 December	Ms Hartlepool applies to Family Court to set aside costs order on the basis of failure by Mr Basildon.
22 December	Declaration that Mr Basildon no longer acts for Ms Hartlepool issued by Family Court.

Assurance of success / costs

[8] Ms Hartlepool complained that she was surprised by the decision of the Family Court because Mr Basildon had assured her of success, and had also not alerted her to the possibility of an adverse costs order if she lost.

[9] Mr Basildon denies the allegations stating that he never gave such an assurance. He also states that he had advised her of the possibility of the costs order. He says that he did say that the application for unsupervised access would be very unlikely to succeed and that an amended application for supervised access would have a far better chance.

[10] I have examined the exchange of correspondence subsequent to the Court's decision of 30 September. Ms Hartlepool raised with Mr Basildon some issues concerning the service provided him after the hearing (particularly in relation to the examination of witnesses). However it was not until 2 November in a fax from Ms Hartlepool that she articulated the complaints that she had not been warned about costs. It appears that it was not until 8 December when a complaint was made to the Law Society (and 10 December 2008 when she applied to set aside the costs order) that she alleged had been assured the application would be successful. While these matters may have been raised earlier either orally or in other correspondence I have not seen, it is clear from overall nature of the material before me that they were not matters of serious contention until late in the day.

[11] It is very unlikely that a lawyer would give an absolute assurance as to the success of any given proceeding, though they might be give an optimistic view of the likelihood of success. I conclude that Ms Hartlepool was most probably advised that there was a good chance of success of that application for supervised contact and certainly a much better chance that that of an application for unsupervised contact. She may have assumed that she was certain to be successful, however, I do not consider it to be established that advice of that nature was given by Mr Basildon.

[12] Had Ms Hartlepool been caught entirely by surprise about the costs order I would have expected her to raise it in correspondence with Mr Basildon more or less immediately after the order was imposed. She certainly did this in respect of her criticisms of his questioning of certain witnesses. In light of the fact that the adverse order of costs was not raised early on I conclude that Mr Basildon did advise her of the possibility of that order.

[13] Mr Basildon is not guilty of any professional breach in respect of the alleged failure to warn of the possibility of an adverse costs order or the possibility of the application being unsuccessful.

Failure to file appeal: background

[14] The central aspect of this complaint, stated generally, is that Mr Basildon failed or refused to act for Ms Hartlepool in relation to appealing the decision of the Family Court.

[15] I have, in the chronology above, recounted much of the correspondence between Mr Basildon and Ms Hartlepool. Ms Hartlepool maintains that throughout she was of the view that Mr Basildon was acting for her, though on various occasions he put her off. On 30 September Ms Hartlepool asked Mr Basildon to stop (or drop) work while her

legal aid position was clarified. This was not a termination by Ms Hartlepool, but simply a quite reasonable request that he pause work while she investigated her ability to pay. It appears that some time thereafter she satisfied herself of her ability to pay because on 10 October she requested him (by fax) to file an appeal. He responded by a letter of 13 October.

[16] Mr Basildon maintains that in the letter of 13 October he made it clear to Ms Hartlepool that he ceased acting for her. That letter therefore requires some examination. In its first paragraph the letter acknowledges Ms Hartlepool's wish to initiate appeal proceedings and addresses the issue of costs by stating that "We are willing to take up the High Court appeal matter with an hour rate of \$180 plus GST per hour". The letter then continues to identify the concerns that Ms Hartlepool had with the questioning of certain witnesses and Mr Basildon defended his conduct. The letter then proceeds as follows:

As part of professional ethics, we advise that in the face of the allegation, albeit minor, it is not proper for us to continue to act for you. We are advising so that you understand that you have the right to change counsel at any time. We therefore ask you to reconsider your position in reinstructing. We therefore will wait to receive your formal instructions now. We discussed about whether you would take the matter to Ms XX.

The letter concluded, "We look forward to receiving instructions from you soon".

[17] That letter cannot be said to amount to Mr Basildon stating that he will not act in the appeal. Quite the reverse. The letter outlines the basis upon which Mr Basildon was prepared to proceed. It appears that he quite reasonably had two things that he considered needed to be dealt with. One was the issue of costs. The other was the allegations of negligence in his conduct of the hearing. The paragraph reproduced above indicates that if Ms Hartlepool was serious in her allegations of negligence it was proper for her to look for alternative counsel. However its general tenor is consistent with Mr Basildon acting in the matter once he received instructions on the basis of his agreed fees.

[18] On 14 November the appeal had still not been filed. It appears that Mr Basildon (perhaps quite reasonably) had misgivings as to its merits. In a letter of that date (which followed a telephone call of the previous day) he confirmed an apparent narrowing of the appeal to the question of costs alone. He gave firm advice that he did not recommend an appeal even on that narrow matter. However he also made it clear that if Ms Hartlepool wanted to pursue the appeal despite the advice he would be

prepared to act. He stated “if you still insist on lodging an appeal to the High Court in respect of costs please let us know as soon as you can” and “We look forward to receiving instructions from you soon”. Such statements are not consistent with a previous decision not to act for Ms Hartlepool on the appeal.

[19] There are numerous other communications of varying levels of formality which are consistent with the assertion that Mr Basildon indicated he was prepared to act on the appeal and intended to do so. What can also be deduced from those communications is that he did so with some reluctance. As time progressed he deferred starting work on the appeal and gave excuses for doing so, such as other work commitments and the illness of a colleague. While the truth of those excuses is accepted, it reflects the fact that he did not consider Ms Hartlepool’s appeal a priority even though the appeal period was running (and later on was expired).

[20] Mr Basildon’s counsel referred to the decision of the Family Court and the fact that the Judge considered Ms Hartlepool an unreliable witness and at times dishonest. The suggestion seems to be that Ms Hartlepool was unrealistic in her expectations and not entirely straightforward in her dealings and as such her allegations against Mr Basildon should be discounted. I do not consider that those matters have any relevance to the examination of the conduct of Mr Basildon in relation to the termination of the retainer. I also note that I was provided with some communications from Ms Hartlepool’s daughter to Mr Basildon and she also wrote to this office directly. I have not found it necessary to place reliance on those communications in considering this matter.

[21] It was only on 3 December that Mr Basildon made it clear to Ms Hartlepool that he made clear that he would not act further. In that letter he asserted that the original engagement was restricted to the application for contact in the family court and did not extend to an appeal. He also somewhat disingenuously referred to Ms Hartlepool’s fax asking him to stop work until the legal aid position was clarified. Mr Basildon suggested that this amounted to Ms Hartlepool discharging him from any engagement. He then stated that in light of the allegations of Ms Hartlepool made against him it was untenable for him to act in the appeal and he was applying to the Court to formally withdraw as counsel.

Failure to file appeal: consideration

[22] It was suggested by Mr Basildon in his letter to Ms Hartlepool of 3 December that he never accepted instructions in the appeal. In particular it was suggested that the original instructions were limited to the Family Court application for contact and that on

the judgment in that matter issuing the retainer was at an end. Mr Basildon's repeated statements to the effect that he had not yet been formally instructed or was awaiting instructions may be pointed to as support for this contention.

[23] The question of whether or not a lawyer has been retained is to be determined objectively. The fact that Mr Basildon had personal reservations as to whether he was going to take the case are relevant only in so far as they were objectively ascertainable. The question is whether a reasonable person observing the conduct of both Mr Basildon and Ms Hartlepool would conclude that the parties intended lawyer-client relationship to subsist between them *Day v Mead* [1987] 2 NZLR 443, 458; *Blyth v Fladgate* [1891] 1 Ch 337. See also *Giffith v Evans* [1953] 1 WLR 1424, 1428 emphasising that some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer.

[24] In the present case Mr Basildon had indicated a willingness to undertake the appeal and Ms Hartlepool had instructed him to do so. There can be no doubt that in the present case a lawyer-client relationship existed. There is no need for any "formal" instructions for a retainer to come about.

[25] Mr Basildon's counsel has stated that Mr Basildon was disqualified from acting by virtue of the Rules of Conduct and Client Care and states that he was professionally obliged to withdraw from acting in the matter. He suggests that this establishes that Mr Basildon was not acting for Ms Hartlepool. In this regard the relevant rule is r 5.11 of the Rules of Conduct and Client Care which provides:

When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately—

- (a) advise the client to seek independent advice; and
- (b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

[26] That rule does not require a lawyer to cease acting every time a client raises some issue or complaint. In particular where a client requires an explanation of a course of conduct by the lawyer it may be enough simply to proffer the explanation to the client. However where a complaint might reasonably be the basis of a claim against the lawyer, the lawyer is obliged to cease acting until the issue is resolved. Rule 5.12 provides further that "A lawyer may resume acting for a former client where the matter in dispute has been resolved".

[27] Given the stance of Ms Hartlepool in relation to the conduct of the hearing by Mr Basildon he had a number of courses of action open to him. He could have refused to

act further. He could have refused to act further until Ms Hartlepool had taken advice on the matter and was satisfied that she did not wish to pursue a claim against Mr Basildon. He could have explained his position in respect of the matters raised to Ms Hartlepool and, providing she accepted his explanation as a satisfactory answer to the matters she raised, he could have continued to act.

[28] However Mr Basildon did not adopt any of these courses of action. Rather he equivocated in respect of the matters raised by Ms Hartlepool. Whilst he identified the complaints as ethically problematic (and suggested another lawyer who might do the work) he continued to express a willingness to receive her instructions in respect of the appeal if she instructed him. On a number of occasions Ms Hartlepool gave unequivocal instructions to Mr Basildon to commence the appeal process and he did not do so. His equivocations continued throughout the period within which an appeal could properly be made.

[29] In its decision the Standards Committee took into account the tension between Ms Hartlepool making allegations against Mr Basildon on one hand and instructing him to lodge an appeal on the other. It is a fair observation that Ms Hartlepool seemed to be adopting courses of action in both instructing and complaining about Mr Basildon that were inconsistent. In such a situation it falls to the lawyer to resolve the matter.

[30] In failing to either resolve the complaints of Ms Hartlepool or unequivocally communicate that he would not act for her Mr Basildon has failed in his professional duty. While it was proper for Mr Basildon to cease acting for Ms Hartlepool, he delayed doing so. That delay spanned from 28 September when the complaint about his conduct first emerged until his letter of 3 December when he stated that he was going to apply to the Court to be removed as counsel on the record and that it was untenable for him to act on the appeal.

[31] Rule 3 of The Rules of Conduct and Client Care state that:

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[32] In the present case Mr Basildon was retained by Ms Hartlepool to act on the appeal. He delayed in filing the relevant documents (or in terminating the retainer) for some months and therefore failed to act in a competent and timely manner as required by r 3. The conduct of Mr Basildon has resulted in Ms Hartlepool being out of time for the filing of the appeal.

[33] I observe that the Committee concluded that in all of the circumstances it would take no further action. It appeared to do so on the basis that Ms Hartlepool was not to be believed and that her obligation to pay the order of costs was not a matter of concern for Mr Basildon. I am of the view that on the information before the Committee it should have been clear that Mr Basildon was in breach of his professional obligations. The Committee found that it was appropriate for Mr Basildon to seek to withdraw from acting. In this it was correct but the Committee failed to turn its mind to the delay of Mr Basildon in doing so. Accordingly in the circumstances the Committee ought not have exercised its discretion under s 138 to take no further actions but rather should have either investigated the matter further, or have issued a determination on the appropriateness of Mr Basildon's conduct on the material before it.

[34] In this case the behaviour of Mr Basildon was in breach of the Rules of Conduct and Client Care and therefore amounts to unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act. I am also satisfied that the conduct of Mr Basildon was conduct that would be regarded by lawyers of good standing as unacceptable and therefore amounts to unsatisfactory conduct under s 12(b) of the Act.

Further steps

[35] On making a finding of unsatisfactory conduct one or more of the orders found in s 156 of the Lawyers and Conveyancers Act 2006 may be made. Those orders may be both penal and compensatory in nature. I observe that the approach to penal orders was addressed in *T v G* (LCRO 29/09). Any order of a compensatory nature will be made only where it can be shown that the conduct of the lawyer has led to loss being suffered as required by s 156(1)(d). It was suggested by Ms Hartlepool in her original complaint that Mr Basildon should undertake the work of the appeal. For the reasons given above this is not tenable.

[36] It is also appropriate that a costs order in favour of the Law Society be made against Mr Basildon in this matter. In this regard I refer Mr Basildon to the *Costs Order Guidelines* of this office.

[37] It is proper that the parties be given an opportunity to make submissions on these matters. Accordingly the following directions are given:

- Ms Hartlepool is to make any submissions in respect of compensatory orders that might properly be made within five working days of the date of this decision.
- Mr Basildon (or his counsel) is to make any submissions in respect of any orders that may be made including costs within ten working days of the date of this decision.

[38] At the expiration of that period a decision as to the appropriate orders to impose will be made.

Decision

[39] The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Standards Committee is reversed.

DATED this 3rd day of September 2009

Duncan Webb
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:

Ms Hartlepool as Applicant
Mr Basildon as Respondent (Mr X as Counsel)
The Waikato Bay of Plenty Standards Committee¹
The New Zealand Law Society