

LCRO 82/2012

**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

**BETWEEN**

**MR WE**  
Applicant

**AND**

**MR AW AND  
MR AX**  
Respondent

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

**DECISION**

**Introduction**

[1] Mr WE's complaint primarily concerned the fees charged to him by Mr AW and Mr AX. Mr AX is a barrister who was instructed by Mr AW. Prior to the review hearing, Mr AX and Mr WE settled the complaint about Mr AX's fees, and Mr WE's complaint about Mr AW's fees was settled during the course of the review hearing.

[2] There remains some issues as to Mr AW's conduct which need to be addressed to complete this review.

**Background**

[3] It is unnecessary to relate the facts of the matter on which Mr WE instructed Mr AW and Mr AX, as they have no bearing on the matters complained of.

[4] Mr WE's complaints (other than costs) were:-

- (a) Mr AW did not provide the client information required by Rules 3.4 and 3.5 of the Conduct and Client Care Rules<sup>1</sup> until long after he had commenced working for (and billing) Mr WE;
- (b) the client information, when provided, did not include Mr AW's (or Mr AX's) hourly rates;
- (c) Mr AW did not keep him informed about the work that was being conducted on his behalf;
- (d) Mr AW misled him as to the extent of his involvement once Mr AX was instructed;
- (e) Mr AW did not follow instructions to make representations to the Official Assignee as to the process to be followed in remitting funds from New Zealand to the [country];
- (f) Mr AW threatened to disclose confidential information about Mr WE's affairs to the media; and
- (g) Mr AW did not act competently in representing Mr WE, resulting in Mr WE receiving limited benefit from the services provided by Mr AW.

[5] All of the above matters impact on the complaint about fees which was settled between the parties. The Standards Committee did not address any of these conduct issues separately and determined to take no further action in respect of Mr WE's complaint about fees, after considering the Costs Assessor's report.

[6] However, for the sake of completeness, the conduct issues do need to be separately addressed and I will undertake that in this review, rather than returning the matter to the Standards Committee to consider.

[7] Prior to the hearing (on 27 March 2013) Mr WE was invited to withdraw his application to review the Standards Committee determination insofar as it related to Mr AX, as the complaint about Mr AX's fees had been settled. Mr WE responded that although it had been settled and payment made, Mr AX had not acknowledged receipt of payment. Mr AX was at the review hearing and verbally acknowledged receipt of payment. He indicated he would provide a written receipt if required. On the basis of these acknowledgements by Mr AX, the review as it relates to Mr AX is withdrawn.

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<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[8] The complaint as to Mr AW's fees was also settled at the review hearing, and the terms of that settlement were recorded in a Minute issued on 28 March 2013.

### **Review**

[9] The parties were initially invited to mediate the complaints and endeavoured to do so. This was not successful, partly I suspect, because Mr WE was at that time residing in England and the mediation lacked the immediacy that would otherwise have been the case.

[10] A review hearing took place in Hamilton attended by Mr WE, Mr AW and Mr AX. Mr AW objected to the presence of a support person for Mr WE as he intended to pursue recovery of his fees and there was a possibility that evidence provided or statements made during the course of the review hearing could prejudice these proceedings if statements made during the course of the hearing were known to the support person.

[11] I was uncertain as to how knowledge by the support person could affect Mr AW's recovery proceedings, but nevertheless, as the Lawyers and Conveyancers Act provides that review proceedings are private, I acceded to Mr AW's request that the support person be requested to leave the hearing.

[12] She was invited to remain outside the hearing room to be consulted at any time during the course of the review by Mr WE if he wished to do so.

### **Delay in providing client information**

[13] Rules 3.4 and 3.5 of the Conduct and Client Care Rules provide that a lawyer must "in advance" and "prior to undertaking significant work under a retainer" provide the client with information as set out in those Rules, which includes "the basis on which fees will be charged".

[14] In his letter of complaint, Mr WE notes that Mr AW's bill related to the period commencing on 23 September 2010, but that he did not receive the letter of engagement from Mr AW until 11 November 2010. Mr WE further notes that the letter of engagement provided at that time did not include any charge-out rates for either Mr AW or Mr AX, and that consequently he was not aware of the rates being applied by the lawyers to the work carried out by them until he received an invoice on 6 April 2011.

[15] Mr WE and Mr AW were friends. Mr WE states that he was under the impression that Mr AW was assisting him as a friend and that he was not aware that Mr AW was charging him from September 2010. He states that if he had been aware he was being charged (and if he had been informed as to the hourly rates) he would not have continued to consult with the lawyers as he was in no position to pay.

[16] In an email to the Law Society dated 17 August 2011 Mr WE states:

[Mr AW] allowed the lines between his former friendship with me and his professional role to become blurred, to the extent I had no idea he was intending all along to charge me for every attendance (notwithstanding his statement that he has not).

[17] In his responses to the Law Society Mr AW did not address this issue and similarly made no comment to this Office notwithstanding that I had specifically raised this issue in a letter dated 18 May 2012 when suggesting that the parties mediate.

[18] At the review hearing, Mr AW produced two letters of instructions signed by Mr WE. The first was undated, but read:

To [Mr AW]

I instruct you to act for me in these proceedings in court against bankruptcy [?] in England. I [?] you to instruct [Mr AX] as barrister to appear on my behalf, and take care of his fees.

[Mr WE]

From its content, it is clear that these instructions were provided by Mr WE prior to Mr AX being instructed.

[19] A second letter was dated 30 November 2010 and reads:

Dear [Mr AW]

Please settle on best established terms a.s.a.p.

Regards

[Mr WE]

[20] Both letters of instructions are in handwriting and I am unable to ascertain some of the words, and may have misread others. However, there can be no doubt from these letters that Mr WE was instructing Messrs AW and AX to act on his behalf, from which it follows that he must have been aware that he was incurring legal fees. In any event, Mr AW provided his letter of engagement on 11 November 2010.

[21] However, that does not absolve Mr AW from the fact that he did not provide the required client information “in advance” and “prior to undertaking significant work”.<sup>2</sup> In addition, the terms of engagement did not include hourly rates to be charged by Messrs AW and AX.

[22] Section 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) defines unsatisfactory conduct as being conduct consisting of a contravention of the Act, Regulations, or Practice Rules made under the Act. The Conduct and the Client Care Rules are Practice Rules made under the Act, and therefore Mr AW’s failure to provide the client information constitutes unsatisfactory conduct.

[23] Mr WE initially argued that because Mr AW did not provide the client information as required by the Conduct and Client Care Rules, Mr AW should therefore be disentitled to any fees at all. That does not follow, as once it is accepted that a lawyer has been engaged, it follows that the lawyer should be paid for his or her services.

[24] The appropriate penalty in this instance is a fine. In similar circumstances, I have noted that a Standards Committee has imposed a fine of \$500 and I consider that to be an appropriate level of fine to be imposed on Mr AW.

### **Failure to advise hourly rates and to keep Mr WE informed**

[25] The finding above encompasses the second issue, namely that Mr AW did not include hourly rates in the client information when he did provide it. It also encompasses Mr WE’s complaint that Mr AW did not keep him informed of the costs he was incurring.

### **The extent of Mr AW’s involvement**

[26] Mr WE also complained that Mr AW misled him as to the extent with which he would be involved once Mr AX was engaged. With his complaint to the Law Society, Mr WE included a copy of his letter dated 29 April 2011 to Mr AW in which he raises his complaints. In that letter he stated:

you gave me to understand that your role as an instructing solicitor would be very limited and that the work *that would be undertaken would be carried out by Mr [AX] and not by you.*<sup>3</sup>

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<sup>2</sup> Rules 3.4 and 3.5 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>3</sup> The italicised words are indistinct in the copy of the letter provided to me and may not be exactly correct.

[27] Again, Mr AW did not directly address this matter in his response to the Law Society and it is readily understandable that Mr WE was not aware of the work that Mr AW was doing, particularly as no account was rendered until some six months after work commenced.

[28] I note, however, that Mr AW has referred to personal attendances on Mr WE in his account. He also produced at the review hearing written statements from two barristers with offices adjacent to his, who both aver to numerous occasions when Mr WE attended at Mr AW's office. There is also reference to many occasions when Mr AX attended at Mr AW's office from which the barristers were in no doubt that Messrs AW and AX were engaged in acting on behalf of Mr WE.

[29] I do not think that Mr WE cannot have been unaware of all the activity by the two lawyers on his behalf or that he could realistically have considered that they were undertaking significant legal work in a novel area of law relating to cross-border enforcement of rights by the Official Assignee in Bankruptcy in the [country] at no cost.

#### **Did Mr AW fail to follow instructions?**

[30] This allegation relates to Mr WE's complaint that Mr AW did not either directly, or through Mr AX, challenge the transfer of funds by the Official Assignee in New Zealand to the Official Assignee in the [country] at the tourist exchange rate rather than at the commercial rate. He alleges that this has caused him a loss of \$250,000.

[31] He also alleges that Mr AW (and Mr AX) did not challenge the fees charged by the law firm acting for the [country] Official Assignee.

[32] These were not issues which Mr WE had raised in his initial complaint and consequently cannot be addressed in this review. However, I do note that Mr AW's responded to the allegations in the review application by advising that Messrs AW and AX had advised Mr WE that they could not act in any litigation against the Official Assignee because they would be potential witnesses. Instead, Mr AX offered to discuss the matter with another barrister and did so.

#### **Threatening to disclose confidential information**

[33] This complaint arises from an alleged conversation between Mr AW and Mr WE in which Mr WE alleges that Mr AW indicated he could receive more from the media for information about the events giving rise to the issues with which Mr WE was involved than he could for the fees which he had charged. Mr WE is adamant that Mr AW made

these comments, and that he was so shocked by the suggestion that he made specific notes of the comments in his diary.

[34] Mr AW did not respond to that issue in his responses to the Law Society. Mr WE raised the matter again in his review application. Again, Mr AW did not respond to the issue in his communications with this Office.

[35] At the review hearing, however, Mr AW denied that he had ever threatened to reveal anything to the media and disputes that the discussions took place. Mr WE said that the meeting at which the comments were made took place on 22 February 2011, but Mr AW says he has no record of any meeting on that date.

[36] The standard of proof in professional disciplinary proceedings is the civil standard, i.e., the balance of probabilities.<sup>4</sup> I am confronted here by conflicting accounts from the opposing parties. There is no evidence available to the requisite standard that would enable me to make a finding in support of either position. In addition, I am not convinced that the comment as related by Mr WE amounted to a “threat” – it could be described as an observation of what may very well have been the case, without any expression of an intent to make any contact with the media.

[37] Consequently, there are no grounds on which an adverse finding against Mr AW can be sustained in connection with this issue and I do not intend to take any further action in this regard.

### **Competence**

[38] The matter in which Mr WE was involved was an application in New Zealand for the first time to enforce the powers of the [country] Official Assignee in Bankruptcy. The standard required by s 12(a) of the Act is that which could be expected by a member of the public of a reasonably competent and diligent lawyer, to be proved on the balance of probabilities.

[39] Mr WE was bankrupt in the [country] and the [country] Official Assignee was applying to exercise his rights in New Zealand. The only course of action that could have been adopted was to try and minimise the impact on Mr WE of the exercise of those rights and it is difficult to see what Mr WE expected of his lawyers. It would seem that the strategy was to negotiate an outcome, and from what I can see, this was achieved.

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

[40] The allegation is so broad and general that it is difficult in the context of professional disciplinary proceedings to attempt any further examination of the allegations without details from Mr WE. The proper forum for an examination of that detail would be in the courts by way of an action in negligence, and for that reason I decline to take any further action in respect of this aspect of the complaint.

### **Decision**

- (1) Following the settlement of the costs complaints against both lawyers, the determination of the Standards Committee is confirmed pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 in that regard.
- (2) The determination of the Standards Committee is modified to the extent that pursuant to s 152(2)(c) of the Act no further action is appropriate in respect of the conduct issues raised by Mr WE other than as referred to in (3) following.
- (3) Mr AW's conduct in failing to provide the required client information in terms of Rules 3.4 and 3.5 constitutes unsatisfactory conduct by reason of s 12(c) of the Act.

### **Order**

In respect of the finding of unsatisfactory conduct referred to in (3) above, Mr AW is fined the sum of \$500 pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006, such amount to be paid to the New Zealand Law Society by no later than 11 July 2013.

### **Costs**

The Costs Orders Guidelines of this Office provide that where an adverse finding is made against a lawyer, an award of costs will be made against the lawyer pursuant to s 210(1). That power is, however, a discretionary power, and as the adverse finding against Mr AW is in respect of only one issue amongst many, I do not consider that it is appropriate to make any Order for costs against Mr AW in this regard.

### **Comment**

Messrs AW and AX commenced acting for Mr WE in September 2010. They did not render their first accounts until April 2011, for a total of \$115,172.50. It is easy to understand why Mr WE reacted with some shock on receiving this account. Interim billing on at least a monthly basis would have kept Mr WE advised of the costs he was



incurring, and whilst the failure to render interim accounts does not breach any professional conduct rules, best practice must surely dictate that a client be kept abreast of costs and remove the shock that must necessarily occur on receipt of such a significant bill, which in turn has led to complaints in respect of both conduct and costs.

**DATED** this day 10<sup>th</sup> of June 2013

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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 WE as the Applicant  
Mr AW as the Respondent  
Mr AX as the Respondent  
The Waikato Bay of Plenty Standards Committee  
The New Zealand Law Society  
Secretary for Justice