LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 200

Ref: LCRO 099/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**SQ** Applicant
AND	**LP** Respondent

DECISION

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

Introduction

[1] Mr SQ has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr LP, at the relevant time a lawyer and a director of [Law Firm A] (the firm).

[2] Mr SQ owns a 142ha farm (the property), 42ha of which is covered by regenerating native trees. Mr SQ had asked Mr LP for advice about the territorial authority (the Council) having identified part of the property as a matter of national importance under the Resource Management Act 1991 (the RMA).

[3] The events, described in some detail by Mr SQ in both his complaint and his application for review, began on 30 March 2001 when Mr SQ obtained a sustainable forest management permit (SFMP), under section 67F of the Forests Act 1949, to log trees on the property, the value of which Mr SQ estimates at $750,000.

[4] Six months later on 26 September 2001, Mr SQ was granted a resource (land use) consent by the [Area] Regional Council to disturb the beds of a creek, and tributaries of a nearby river during logging, and log extraction.

[5] In October 2006 the Council published information explaining that the RMA required it "to recognise and provide for" certain "matters of national importance" including "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna" described by the Council as "significant natural areas (SNAs)".

[6] The Council informed (by letters) Mr SQ (a) on 28 February 2007 that as required by s 6(c) of the RMA, it had identified Mr SQ's property as "possibly containing an SNA", and (b) three years later, on 19 January 2010, that part of the property was "considered significant as it is an under represented ecosystem and has high rarity distinctiveness values".[1]

[7] As explained in more detail in my later analysis, from 3 August 2011 Mr SQ brought proceedings against the Council in the Environment Court seeking an order that the Council acquire the property, and pay him compensation. On 24 January 2013, he objected to the Council's 1 September 2012 valuation of the property.[2] He represented himself on both matters.

[8] However, because he refused to pay rates on the property, the Council issued summary judgment proceedings against him, granted by the District Court on 26 September 2013, then bankruptcy proceedings resulting in him being adjudicated bankrupt on 11 August 2014.[3]

[9] Mr SQ says on 8 October 2015 when he instructed Mr LP to act for him, he had already obtained legal advice from other legal firms – twice concerning the SNA matter, and another in respect of the Council's bankruptcy proceedings. He signed Mr LP's 14 October 2015 letter of engagement on 20 October 2015.

[10] Mr LP briefed a barrister, Mr ET, who on 29 October 2015 provided a written review of options open to Mr SQ. Mr ET's advice included that there were "no obvious

---

[1] Mr SQ says the Council's letter was accompanied by an ecologist's September 2007 report which concluded Mr SQ's property was "significant".
[2] Soon after Mr SQ was informed by the Council that the regenerating native forest on the property had "high rarity distinctiveness". He requested a review of the Council valuations from 1 September 2007.
[3] Annulled a year later on 27 July 2015.

sign of illegality by the Council, and "there did not appear to be strong arguments for judicial review at [that] stage".

[11] Mr ET also assisted Mr SQ (a) from 26 January 2016 requesting information from the Council about the SNA process in respect of which Mr ET sought intervention by the Ombudsman, and (b) from 28 July 2017 concerning Mr SQ's objection to the Council's 1 September 2015 valuation of the property lodged by Mr SQ with the Council on 20 January 2016.

[12] Mr SQ met with Mr LP on 11 August 2017 about matters including Mr ET having settled Mr SQ's objection to the Council's 1 September 2015 valuation of the property, on 1 May 2018 to "review [Mr SQ's] matter generally" and consider the "next steps", and again on 12 June 2018 "to revisit Mr SQ's objectives".[4]

[13] On 5 July 2018 the Council informed (by letter) Mr SQ, amongst other things, that once he had obtained a renewal of the SFMP issued to him in March 2001 he could apply to the Council "for a resource consent to undertake logging in accordance with the [SFMP]".

[14] Mr SQ says he applied for a renewal of the SFMP, and a resource consent on 1, and 2 August 2018, respectively. On 8 November 2018 he sent (by letter) to the firm his complaint about the way in which the firm had handled his matter.

Complaint

[15] Mr SQ lodged a complaint with the Lawyers Complaints Service on 4 February 2019. He claimed Mr LP (a) refused, as instructed, to issue judicial review proceedings against the Council in respect of the Council's SNA process, and (b) had therefore wasted [Mr SQ's] "time, money, and work with no outcome".

[16] He sought (a) compensation of $160,000 for emotional harm, stress, humiliation, pain and suffering, and (b) reimbursement of costs incurred of $113,997.84.

[17] He said both the Council, and the Ministry for Primary Industries were now processing his resource consent, and forestry permit applications respectively without charge.

[4] Mr LP says he also assisted Mr SQ with "a number of accounting and taxation issues" at the 12 June 2018 meeting.

(1) Instructions

(a) Judicial review

[18] Mr SQ claimed he instructed Mr LP at their meeting on 8 October 2015 to bring proceedings against the Council, "as suggested" by the District Court in its 26 September 2013 judgment, but Mr LP had refused to do so.

(b) Valuation objection

[19] Mr SQ said he asked Mr WR, also a director at the firm, on 23 May 2018 "to review [his] objection to [the Council] valuations for the years starting from 2007" but had not received a response.

(2) Fees

(a) Valuation objection

[20] Mr SQ queried the firm's legal costs incurred with Mr ET who from 28 July 2017 assisted with [Mr SQ's] objection to the Council's 1 September 2015 valuation.

[21] He said having achieved a settlement, reached at a meeting with Quotable Value (QV) in the firm's office on 11 August 2017 whereby the Council agreed to reduce the valuation, he instructed Mr ET to apply to the Land Valuation Tribunal (LVT) for costs but instead Mr ET "did a deal with" QV without first referring to him.

[22] He claimed because he applied to the LVT for costs a year later, the firm is "liable" for Mr ET's attendances incurred by the firm on his behalf.

(b) SNA process

(i) Information request

[23] Mr SQ said he "d[id] not know" how Mr ET, who had now left New Zealand, and the firm "were going to use" the information Mr ET had requested from the Council about the SNA process.

[24] He said he had asked Mr WR to cease work on the enquiry which he claimed had left him "out of pocket for thousands of dollars to achieve nothing".

(ii) Ecologist

[25] Mr SQ said on 22 August 2017 Mr ET asked an ecologist to advise whether [the ecologist] "could find a possible basis for disagreeing" with assessments of his forest by ecologists from the Council, and from the Department of Conservation.[5] However, he says on 31 May 2018 Mr WR asked the same ecologist for a quote to advise "whether the previous sustainable forest permit could be obtained".

[26] He claimed although Mr WR's inquiry duplicated Mr ET's inquiry a year earlier, Mr WR charged for the second request.[6]

Response

[27] Following an initial assessment by the Lawyers Complaints Service (LCS), Mr SQ's complaint was dealt with through its Early Intervention Process which, in broad terms, involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[28] On 29 May 2019 a Legal Standards Officer telephoned Mr LP and informed him that the Committee had reached a preliminary view that it would take no further action on Mr SQ's complaint, and asked Mr LP whether he wished to respond to the complaint. Mr LP indicated that he did not wish to respond other than to say he had sympathy for Mr SQ's position which did not concern [Mr LP], and he would telephone and explain this to Mr SQ who owed the firm fees.

Standards Committee decision

[29] The Standards Committee delivered its decision on 31 May 2019, and determined, pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), that because the Courts are the more appropriate forum to hear Mr SQ's allegations, no further action on his complaint was necessary or appropriate.

[30] In reaching that decision the Committee described Mr SQ's complaint as "essentially" one of "negligence" for the Court to determine, and for that reason declined to consider Mr SQ's complaint that Mr LP "did not follow [Mr SQ's] instructions".

---

[5] Mr SQ said the ecologist's cost estimate for a full assessment was $7,000 and $8,000, but there was no charge for an appraisal.
[6] Mr SQ said the firm had billed him $3,045 for Mr ET's attendances, and then billed him $3,103.30 for Mr WR's attendances.

[31] The Committee added that in any event Mr SQ's allegations were "not supported" by any "evidence of Mr SQ's instructions to Mr LP nor of any action or inaction on Mr LP's part, other than Mr SQ's handwritten summary".

[32] However, the Committee said if conduct issues arose from any proceedings issued by Mr SQ claiming negligence by Mr LP then such issues could "properly be considered" by a Standards Committee.

[33] Although the Committee referred to Mr SQ having complained about having "incurred unnecessary costs" with the firm, the Committee did not address that issue, or his allegation Mr WR had not responded to his 23 May 2018 instructions to review the Council's valuations from 2007.

Application for review

[34] In his application for review filed on 17 July 2019 Mr SQ largely goes over his complaint allegations and the accompanying background.

[35] He says he does not accept the Committee's decision. He seeks orders that Mr LP either (a) issue proceedings against the Council challenging the exercise by the Council of its powers in the process of identifying and providing for SNA's, in particular, the proposed SNA on the property, or (b) refund all fees paid by him to the firm so he can engage another lawyer, and pay the costs of doing so.

(1) Instructions

[36] Mr SQ says he relies on the District Court's decision which he says "instructed" Mr LP "to seek relief under the Judicature Amendment Act" against the Council. He says he "d[id] not know" how to initiate those proceedings "so instructed" Mr LP who "agreed to act" for him, but "later refused" to "file a charge" against the Council.

[37] He says even if he did, as stated by the Committee, issue proceedings in negligence against Mr LP, he would still need to "bring a charge against the Council" in respect of which he says Mr LP "accepted to supply legal services" to him.

(2) Fundamental obligations

[38] Mr SQ says Mr LP was required to issue judicial review proceedings, as suggested by the District Court, to comply with his fundamental obligation as a lawyer "to uphold the rule of law and to facilitate the administration of justice in New Zealand".

Response

[39] In his response filed on his behalf by his co-director, Mr WR, on 9 August 2019, Mr LP asks that Mr SQ's application for review be dismissed.

[40] Mr LP says (a) "[a]t all times" he "followed" Mr SQ's "directions", (b) "at no time" had Mr SQ "directed [him] to institute judicial review proceedings, preferring to pursue other more tenable and economic options in the first instance", and (c) his advice to Mr SQ to "obtain a resource consent for his forestry endeavours was ultimately followed by him".

[41] He says he understands Mr SQ has "obtained the resource consent he requires to resume logging".

(1) Judicial review

[42] Mr LP denies Mr SQ instructed him "unequivocally" in 2015 to bring judicial review proceedings against the Council. He says even if Mr SQ did, any instructions were "superseded by further instructions to investigate other options after advice was given".

[43] He explains that Mr SQ's matter had been "managed" by Mr ET, a barrister instructed by the firm, who, on completion of his engagement on 16 April 2018, handed responsibility for the file back to [Mr LP]. He says Mr SQ did not instruct him to initiate judicial review proceedings at their meetings on 5 May, and 12 June 2018.

[44] Mr LP says although asked by Mr SQ "to consider a judicial review on a number of occasions", Mr SQ "never directed [him] to institute judicial review proceedings and ha[d] largely followed" his advice as set out in Mr ET's 29 October 2015 memorandum which Mr LP says he sent (by fax) to Mr SQ the following day.

(2) Other options

[45] Mr LP says Mr ET's advice was that (a) judicial review was "unlikely to be successful – particularly without further information" as to the Council's "decision-making process; (b) even if successful, "would not necessarily achieve the result" Mr SQ wanted because the Council may still not "modify its designation" of Mr SQ's property as an SNA.

[46] He says there were other options available to Mr SQ that "provide better value for money, lower risk and largely better outcomes" to investigate "in the first instance".

Review on the papers

[47] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[48] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[49] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[7]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[50] More recently, the High Court has described a review by this Office in the following way:[8]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO

[7] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[8] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[51] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

[52] The issues I have identified for consideration on this review are:

(a) What legal services did Mr SQ ask Mr LP to provide? Did those legal services include the issue of judicial review proceedings against the Council?

(b) Did Mr LP provide the legal services requested by Mr SQ?

(c) Were the firm's fees fair and reasonable for Mr ET's attendances (i) from July 2017 assisting Mr SQ with his objection to the Council's 1 September 2015 valuation; (ii) requesting information from the Council concerning the SNA process; and (ii) in August 2017 requesting a report from an ecologist, and a year later when Mr WR made a similar request of the same ecologist?

Analysis

(1) Legal services – issue (a)

(a) Context

[53] The events leading up to Mr SQ's and Mr LP's meeting on 8 October 2015, and Mr LP's 14 October 2015 letter of engagement, taken largely from Mr SQ's complaint and application for review, and Mr ET's 29 October 2015 advice memorandum, provide context for consideration of this issue.

[54] As noted earlier, having been informed by the Council on 28 February 2007 that his property had been identified as "possibly containing an SNA", three years later, on 19 January 2010, the Council informed Mr SQ that part of his property was "considered

significant", and an "under represented ecosystem" with "high rarity distinctiveness values".[9]

[55] Mr SQ says representing himself, on 3 August 2011 he applied to the Environment Court for an order "obliging the [Council] as a heritage protection authority to take" the property. However, by 23 May 2012, having filed submissions, as requested by the Court, whether there was "any reasonable cause of action", and whether "it would be an abuse of process to allow the proceedings to continue", the matter proceeded no further.[10]

[56] On 24 January 2013, Mr SQ, similarly representing himself, objected to the Council's 1 September 2012 valuation of the property.[11] He requested a review of the Council valuations from 1 September 2007.[12]

[57] Mr SQ says he obtained his own valuation, dated 30 April 2013, which assessed a reduction in the value of his property of $110,000 as a consequence of the Council's proposed SNA on the property. On 13 May 2013 he lodged a notice of claim with the LVT.

[58] He says in an affidavit filed in support of the Council's defence, the Council's rating manager stated that (a) the Council's 1 September 2012 valuation did not take effect for rating purposes until 1 July 2013, and therefore Mr SQ's objection did not affect the validity of the rates as set, which he must pay pending the outcome of his objection, and (b) Mr SQ had not applied to the High Court to challenge the validity of the Council's power to set the rates.

[59] The Council issued summary judgment proceedings against Mr SQ for payment of rates for the period 1 October 2011 to 30 December 2012. Mr SQ's defence and counterclaim were heard by the District Court on 7 August 2013. The District Court issued a judgment in favour of the Council in the sum of $2,160 plus costs on 26 September 2013.[13]

---

[9] Mr SQ says the Council's letter was accompanied by a September 2007 report prepared by Sustainable Solutions which concluded Mr SQ's property was "significant".
[10] Mr SQ says he claimed the Council, or its lawyers were in contempt of court for not producing a legal opinion referred to in an affidavit filed in support of the Council's position.
[11] The Council's valuation produced by QV (1 September 2012) was $1,225,000.
[12] Shortly after, he was informed by the Council the regenerating native forest on the property had "high rarity distinctiveness".
[13] *Grey District Council v Graham* DC Greymouth CIV-2012-018-132, 7 August 2013 at [37]: Mr SQ's counterclaim was struck out "for failing to disclose a cause of action", and as "an attempt to relitigate decisions made by the Environment Court…as an abuse of process".

[60] Importantly, for the purpose of this review, the District Court stated that Mr SQ's counterclaim sought to "relitigate matters already determined by the Environment Court or to seek the exercise of powers that are exclusively vested in the Environment Court".[14]

[61] The Judge stated it was "not for the District Court to sit on appeal from the decision of the Environment Court and effectively review that decision" when Mr SQ's remedy was to appeal the Environment Court decision "to the High Court under the [RMA] or judicial review".[15]

[62] The Judge observed that "[i]t is possible" the Council may have "acted outside its powers or exercised its powers in a way which entitle[d] Mr SQ to seek relief under the Judicature Amendment Act", but "not…in [the District] Court through these proceedings".[16]

[63] Mr SQ says on 14 October 2013 he retained a lawyer to review the Council's SNA process, and the effect of that process on the rateable value of the property. Having received a report from another legal firm briefed by that lawyer, on 27 January 2014 he instructed the lawyer to apply to the Court for a declaration concerning the legality of the Council's SNA process but the lawyer declined to act further.

[64] Mr SQ says he then instructed another lawyer in a third legal firm to assist him defend the Council's bankruptcy proceedings against him for non-payment of rates, but was adjudged bankrupt on 11 August 2014.[17]

(b) Scope of legal services

(i) SNA process

[65] Mr SQ first met with Mr LP in Mr LP's office on 8 October 2015.

[66] In his 14 October 2015 letter of engagement, signed by Mr SQ on 20 October 2015, Mr LP described the legal services to be provided by the firm as: (a) reviewing Mr SQ's efforts so far "to extract compensation from the Council for any loss of value caused by the proposed SNA"; (b) considering whether the firm could assist Mr SQ "with strategies to secure [Mr SQ's] objectives" such as "compensation for the value" of the property, or "defeating the SNA"; and (c) advising Mr SQ on "any perceived costs of

[14] At [29].
[15] At [31].
[16] At [34].
[17] Mr SQ says his bankruptcy was annulled almost a year later on 27 July 2015.

recommending [Mr SQ's] best way forward, and perhaps to adjust [Mr SQ's] goals to what can realistically be achieved".

[67] Mr LP's fee estimate for his initial advice was $4,500 plus GST. Thereafter Mr LP said the firm's fees would be charged on an hourly basis as advised in the letter of engagement.

[68] Included among the names of the firm's members who would be involved on Mr SQ's matter was Mr ET, a barrister, who Mr LP said would be doing "some of the work", and whose attendances, at the hourly charge out rate specified, would be incorporated in the firm's invoices.

[69] Mr ET provided his 29 October 2015 report to Mr LP sent (by fax) to Mr SQ the following day.

[70] In summary, Mr ET advised that Mr SQ's "campaign and hopes for compensation" from the Council due to the Council's "actions or proposed actions" were "effectively exhausted". He explained that both the Environment Court in 2012, and the LVT in September 2015 had made it "clear" that the identification of the native forest on the property as a "potential SNA" did not activate the compensation provisions in Part 8 of the RMA.[18]

[71] Mr ET suggested alternative courses of action if Mr SQ was "prepared to accept that compensation is not a realistic goal", namely: (a) ascertain from the Council whether a resource consent was required to resume logging; (b) if the Council would not issue a resource consent, or issued the consent on onerous conditions, then apply to the Environment Court for compensation; and (c) make submissions on any proposed change to the Council's District Plan concerning "proposed SNAs", or to have the SNA process "scrapped".

[72] Again, importantly concerning this aspect of Mr SQ's complaint, Mr ET advised that although the Council's SNA process "appear[ed] rather inadequate", because there were "no obvious sign of illegality" by the Council "there did not appear to be strong arguments for judicial review at [that] stage". Moreover, Mr ET advised that "a successful judicial review might not achieve much" for Mr SQ because the Council would "still be responsible for applying section 6(c), as [the Council] (reasonably) sees fit".

[73] As noted earlier, from 26 January 2016 Mr ET assisted with Mr SQ's request to the Council for information about the SNA process, and (b) on 22 August 2017 made

[18] Mr ET advised that an SNA was neither a "designation" or a "heritage order".

enquiries with an ecologist to review a February 2015 assessment of the property by a Council-appointed ecologist.

(ii) Valuation objection

[74] On 28 July 2017, Mr ET also assisted Mr SQ with Mr SQ's objection to the Council's 1 September 2015 valuation.

(iii) Discussion

Mr SQ

[75] Mr SQ claims he instructed Mr LP at their meeting on 8 October 2015 to bring proceedings under the Judicature Amendment Act against the Council, "as suggested" by the District Court in its 26 September 2013 judgment, that the Council "had acted outside its powers" concerning the SNA process.

[76] He claims Mr LP had refused to follow those instructions, and instead stated in [Mr LP's] 14 October 2015 letter of engagement that [Mr SQ's] instructions were about claiming compensation from the Council for the reduction in the value of his property brought about by the "proposed SNA".

[77] He says had Mr LP brought those proceedings then the legality or otherwise of the Council's process in its District Plan for identifying SNAs could have been determined. Instead, he said Mr LP's letter of engagement had "broken the issue down to several contracts that have achieved very little"

[78] Mr SQ says Mr LP "eventually told" him that [Mr LP] "would not take any legal proceedings" against the Council because [Mr SQ] "could not win". He says he finds that "a little hard to understand" as the ecologist, on whose report the Council relied on in initiating the SNA process, had not inspected his property.

[79] He said that report contrasted with a later assessment from another ecologist obtained by the Council in February 2015 that any "nationally threatened or uncommon plant species" had not been seen on the property, and "timber extraction under a [SFMP] was unlikely to compromise the values present in the overall site".

Mr LP

[80] Mr LP says "at no time" had Mr SQ instructed him to institute judicial review proceedings, but opted for "more tenable and economic" steps first. He says his advice

to Mr SQ to "obtain a resource consent" for his forestry operations was "ultimately followed by him".

[81] He says despite "clarifying" Mr SQ's instructions regarding judicial review proceedings, he had "not been directed to file" those proceedings. He says Mr SQ's "prefer[ence]" was to first "explore other options" including obtaining further information from the Council about the Council's SNA process.

[82] He says even assisted by the Ombudsman's "intervention" to obtain the information requested, having met with Mr SQ on 1 May 2018 to "revisit" Mr SQ's matter "with some fresh eyes", and again on 12 June 2018 to "revisit Mr SQ's objectives", on each occasion for approximately four hours, Mr SQ did not provide "further instructions".

[83] Mr LP explains that because Mr SQ wanted to "resume a sustainable logging operation", he advised Mr SQ to apply for a resource consent. Mr SQ then instructed him to obtain a quote from an ecologist for a report to support the application which Mr LP says he requested by 31 May.

Consideration

[84] Mr SQ's claim that he instructed Mr LP to issue judicial review proceedings against the Council is denied by Mr LP.

[85] A "retainer" is the agreement or contract between a lawyer and client for the provision of legal services by the lawyer to the client. Rule 1.2 of the Rules describes a "retainer" as:

> … an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[86] Although preferable for evidentiary purposes, a retainer need not be in writing to be enforceable.[19]

[87] However, lawyers must provide their clients with information on the principal aspects of client care and service, including the basis of charging, in advance of commencing legal work on a retainer. This information is commonly sent to a client in a

[19] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4].

document which accompanies the lawyer's letter of engagement, and the lawyer's terms of engagement, which together record the retainer terms.[20]

[88] In his 14 October 2015 letter of engagement referred to above, Mr LP described the legal services to be provided by the firm. In summary, the firm was to "review" Mr Q's endeavours to obtain compensation from the Council, advise on strategies to obtain compensation or "defeat" the SNA, and estimate the cost of achieving "realistic" objectives.

[89] By signing the letter of engagement, in the space provided, on 20 October 2015, Mr SQ "requested" Mr LP "to act on [the] matter". Soon afterwards, on 29 October 2015 Mr ET provided the advice requested by Mr SQ in the letter of engagement.

[90] If I am to be persuaded that Mr SQ instructed Mr LP to issue judicial review proceedings against the Council, then he must prove, on the balance of probabilities, he did provide Mr LP with those instructions.[21]

[91] However, other than the letter of engagement which he signed and his statements in this complaint and application for review, Mr SQ has not produced any independent evidence in support of his claim that he provided those instructions to Mr LP either from the outset, or subsequently at his meetings (a) with Mr LP on 11 August 2017, and (b) with Mr WR on 5 May 2018 to "review" his matter and consider the "next steps", and on 12 June 2018 "to revisit [his] objectives".

[92] The outcome of the 12 June meeting was that (a) Mr WR would enquire whether Mr ET "made an error in relation to settlement" of the LVT proceedings without addressing costs; (b) await the Council's response to Mr SQ's request for information before Mr SQ instructed the firm to research whether a resource consent was necessary for him to resume logging; and (c) Mr SQ would make enquiries of the "status of his Court proceedings" - it was "uneconomic" for the firm to do so.

[93] From the information produced, the conclusion I have reached is that Mr SQ's instructions did not require Mr LP to issue judicial review proceedings against the Council in respect of the Council's SNA process.

---

[20] Rules 3.4, 3.5, and 3.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). In respect of barristers, rr 3.4A, 3.5A and 3.6A apply. The term "client" is not defined in the Act or the Rules, but in the context used in rule 1.2, and in a number of the rules, a client is the recipient of legal services. See New Zealand Law Society "Client Care" (6 August 2020) <https://www.lawsociety.org.nz/professional-practice/client-care-and-complaints/client-care/> for letter of engagement, terms of engagement, and information for clients specimen documents.

[21] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

(2) Carrying out instructions – issue (b)

[94] Having determined that Mr SQ did not instruct Mr LP to issue judicial review proceedings against the Council, his claim Mr LP refused to carry out those instructions falls away.

(3) Fees

(a) Parties' positions

Mr SQ

[95] Although not framed as a fees complaint, Mr SQ queries the firm's fees on several aspects of the firm's attendances.

January 2016 – request to Council for information

[96] As noted earlier, Mr SQ says he "do[es] not know" how Mr ET and the firm "were going to use" the information requested from the Council about the SNA process. He said he had asked Mr WR to cease work on the enquiry which he claimed had left him "out of pocket for thousands of dollars to achieve nothing".

July 2017 – objection to Council's 1 September 2015 valuation

[97] Mr SQ claims having achieved a settlement, reached at a meeting with QV in the firm's office on 11 August 2017 whereby the Council agreed to reduce the valuation, he instructed Mr ET to apply to the LVT for costs.

[98] However, he says instead Mr ET "did a deal with" QV without first referring to him. He claimed because he applied to the LVT for costs a year later the firm is "liable" for Mr ET's attendances charged to him.

August 2017 – request for ecologist's report

[99] Mr SQ says on 22 August 2017 he instructed Mr ET to ask an ecologist for a report on the assessments of his forest by ecologists engaged by the Council, and by him, yet a year later on 31 May 2018 Mr WR asked the same ecologist for a quote to advise "whether the previous sustainable forest permit could be obtained".[22]

[22] Mr SQ said the ecologist's cost estimate for a full assessment was $7,000 and $8,000, but there was no charge for an appraisal.

[100] He claims Mr WR's inquiry duplicated Mr ET's inquiry a year earlier, yet Mr WR charged for the second request.[23]

Mr LP

July 2017 – objection to Council's 1 September 2015 valuation

[101] Although not addressed in his response to Mr SQ's review application, on 28 June 2018 Mr WR informed (by letter) Mr SQ that [Mr SQ] was not "disadvantaged" by Mr ET's "handling of the matter" because the LVT "would not have awarded [Mr SQ] costs".[24]

[102] Mr WR explained that "unlike the District and High Courts, the [LVT] does not have the ability to award costs except in very limited circumstances which were not applicable in [Mr SQ's] proceedings".

(b) Discussion

[103] Rule 9 prohibits a lawyer from charging a client a fee that is more than fair and reasonable for the legal services provided by the lawyer:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[104] The Committee identified Mr SQ's allegation about having incurred unnecessary costs but did not address this aspect of Mr SQ's complaint. For that reason, I have decided that the appropriate course is to return this aspect of Mr SQ's complaint to the Committee for consideration.

(4) Valuation objection

[105] For completeness, Mr SQ also alleged Mr WR did not respond to his 23 May 2018 request "to review [his] objection to [the Council] valuations for the years starting from 2007".

[106] Because that complaint was directed at Mr WR, then if not already considered by the Committee as a separate complaint it is open to Mr SQ to request the Committee to do so.

---

[23] Mr SQ said the firm had billed him $3,045 for Mr ET's attendances, and then billed him $3,103.30 for Mr WR's attendances.

[24] Mr WR's 28 June 2018 letter to Mr SQ accompanied [Mr WR's] response to the application for review.

Decision

[107] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is confirmed as to the Committee's finding to take no further action concerning Mr SQ's allegation that he instructed Mr LP to issue judicial review proceedings against the Council but modified by providing that pursuant to s 138(2) any further action is unnecessary or inappropriate.

[108] Pursuant to s 209(1)(a) of the Act the Committee is directed to reconsider and determine Mr SQ's complaint about those of the firm's invoices which relate to the three matters referred to in paragraphs [96] to [100] above for the purpose of determining whether the firm's fees in respect of those three matters, as required by r 9, were fair and reasonable for the services provided having regard to the interests of Mr SQ, and Mr LP, and having regard also to the factors set out in r 9.1.

Anonymised publication

[109] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 27th day of October 2020

_____

B A Galloway
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 SQ, as the Applicant
Mr LP, as the Respondent
Mr WR, as the related party (respondent)
[Area] Standards Committee [X]
New Zealand Law Society