

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 158

Ref: LCRO 018/2020

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Central Standards Committee 2

BETWEEN

MP

Applicant

AND

LT

Respondent

DECISION

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

Introduction

[1] Mr LT 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 the respondent, Ms LT.

Background

[2] Mr MP filed proceedings in the Disputes Tribunal.

[3] The dispute involved matters relating to a motor vehicle.

[4] In May 2018, Mr MP took advice from [Law Firm] in respect to the motor vehicle dispute.

[5] Mr MP was provided at commencement with a letter of engagement dated 31 May 2018.

[6] That letter of engagement:

- (a) Provided a summary of the legal services to be provided.
- (b) Advised that fees would be rendered on a time cost basis.
- (c) Identified the lawyers who would be completing the work, and the hourly charge out rate for those lawyers.
- (d) Signalled that Mr MP should anticipate a fee in the vicinity of between \$2,500 and \$3,000 “for our initial advice and preliminary stages”.
- (e) Provided a summary of the factors which could assume relevance in calculating the fee to be charged.¹

[7] Ms LT and her supervising partner, Ms CR, completed work for Mr MP over a period of approximately one week.

[8] On 26 June 2018, Ms CR rendered her account in the sum of \$7,699.25 (GST inclusive).

[9] Mr MP challenged the account and requested to be provided with a breakdown of time spent on the file.

[10] Mr MP did not pay the account.

[11] [Law Firm] filed a claim to recover the debt in the District Court on 26 April 2019.

The complaint and the Standards Committee decision

[12] Mr MP lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 29 July 2019. The substance of his complaint was that:

- (a) At commencement he had been advised that he would incur a maximum of \$2,500 costs unless steps were taken to file proceedings in court.
- (b) A week after providing instructions he was informed that his costs were \$7,699.

¹ The factors identified, are those set out in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the reasonable fee factors).

- (c) [Law Firm] filed a claim in the District Court seeking recovery of costs in the sum of \$11,845.
- (d) Proceedings were transferred to the Disputes Tribunal.
- (e) The Tribunal had advised him to file a complaint with the New Zealand Law Society.

[13] By way of outcome, Mr MP sought to have the fee reduced to the estimate/quote he said he had been provided with at commencement.

[14] The Standards Committee dealt with the complaint through its Early Resolution Process.

[15] That procedure involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[16] Ms CR was contacted and advised that the Standard Committee had formed a preliminary view that no further action would be taken on the complaint. Request was made of Ms CR to convey this position to Ms LT.

[17] Ms CR and Ms LT expressed a willingness to provide any information or further response to the complaint if required.

[18] A file note made by the Legal Standards Administrator assisting the Committee, confirms that Ms CR and Ms LT were advised that the Committee did not require any further response from them, and would be proceeding to make a final decision.

[19] The issue identified by the Committee to consider, was the question as to whether the fee charged by Ms LT was fair and reasonable for the work completed.

[20] The Standards Committee delivered its decision on 17 December 2019.

[21] The Committee determined, pursuant to s 138(1)(f) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[22] In reaching its decision the Committee concluded that:

- (a) There had been a considerable volume of ongoing communications between Mr MP, Ms LT and Ms CR.

- (b) Service provided went beyond what could be described as preliminary advice for work completed in the initial stages of a matter.
- (c) Mr MP had not made complaint about the quality of the services provided.
- (d) It was apparent that matters quickly progressed beyond the scope of the initial instructions.
- (e) The breakdown of work provided indicated that the total value of work completed was in the vicinity of \$8,490.50.

Application for review

[23] Mr MP filed an application for review on 27 January 2020. The outcome sought is that his complaint be reconsidered on the basis of a consideration as to whether it was fair and reasonable for the lawyers to have charged three times the quote² provided, without communicating this intention to him.

[24] He submits that:

- (a) the Committee had misdirected its inquiry; and
- (b) his complaint was not as to the reasonableness or otherwise of the fee charged, but rather whether the lawyers had kept their fee within the range they had advised; and
- (c) the lawyers had a duty to inform him if their fees were likely to significantly exceed what he considered had been a firm quotation provided at commencement; and
- (d) the sum involved in the Dispute Tribunal proceedings did not merit the expenditure of fees incurred, and he would not have allowed the fees to escalate to the point they did if he had been kept informed.

[25] Mr MP filed further submissions. Those submissions in essence reinforced the matters raised in his initial application.

[26] Ms CR provided a response to Mr MP's review application.

² Mr MP describes the indication of initial fee as a quote.

[27] Ms CR commenced her submissions by noting (correctly) that the complaint had been made against Ms LT. She submits that if the complaint was to be upheld, any conduct finding made should be entered against the firm ([Law Firm]) rather than Ms LT.

[28] Ms CR submits that:

- (a) Mr MP's initial instructions had been to provide advice in respect to a dispute that was being heard by the Disputes Tribunal.
- (b) The scope of those initial instructions expanded considerably.
- (c) As a result of the change in instructions, substantial extra work was required to be completed.
- (d) Mr MP was given an update on his fees, and whilst he noted that the fees were more than had been anticipated, he had indicated that he understood why the additional work was required to be completed.
- (e) Fees charged were fair and reasonable.
- (f) At no stage had Mr MP been provided with a firm quote.
- (g) The letter of engagement provided to Mr MP made clear that the estimate provided was for the providing of preliminary advice.
- (h) The Committee's decision had addressed the issue which Mr MP argues on review was pivotal to his complaint.
- (i) Mr MP raised no complaint about the fee charged on receipt of the invoice.
- (j) Mr MP's advancement of a conduct complaint, presents as an attempt on his part to delay meeting his obligation to settle the outstanding account.

Review on the papers

[29] 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.

[30] The parties have agreed to the review being dealt with on the papers.

[31] 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

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

[33] More recently, the High Court has described a review by this Office in the following way:⁴

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

[34] 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:

- (a) Consider all of the available material afresh, including the Committee's decision; and

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (b) Provide an independent opinion based on those materials.

Discussion

[35] Having carefully considered the submissions filed by the parties, I consider the issues to be addressed on review are:

- (a) Has the subject of Mr MP's complaint been correctly identified?
- (b) Did the Committee correctly direct itself to the issues of complaint raised by Mr MP?
- (c) Was the Committee's approach to assessing the reasonableness of the fee charged adequate?

Has the subject of Mr MP's complaint been correctly identified?

[36] Not entirely.

[37] Ms LT was identified by Mr MP as the subject of his complaint when he filed it.

[38] The letter of engagement is issued under the name of Ms J and is signed by her. Ms CR has helpfully confirmed that Ms J's married name is LT.

[39] The letter of engagement provided to Mr MP at the commencement of the retainer indicates that Ms J (Ms LT) was to have responsibility for the carriage of the file. However, this was an error. Ms CR has confirmed that she had overall responsibility for the file.

[40] The error in the initial letter of engagement is immediately identified when the correspondence is carefully considered.

[41] There is nothing at all untoward to be drawn from the mistake. It is obvious that when Ms J (Ms LT) refers in her letter of engagement to "the writer" having "conduct of the file", it was her intention to reference Ms CR, despite the letter of engagement issuing under her name.

[42] When Mr MP made request to be provided with a breakdown of his account, Mr MP was provided a summary which identified the lawyers who had worked on the file, together with the costs charged to the individual lawyers.

[43] Total time recorded as having been spent on the file translated to a fee of \$8,490.50.

[44] Work done by Ms LT in contribution to that fee amounted to \$4,430.50. Work done by Ms CR, \$4,060.00.

[45] The invoice rendered to Mr MP on 26 June 2018 is issued in Ms CR's name.

[46] The terms of engagement provided to Mr MP confirm that the letter of engagement accompanying the terms of engagement would "outline what we will do for you on the job" and identify "the person/partner with overall responsibility for the job. That person/partner will be the one we believe is most suited to that job and to our relationship with you".

[47] Ms LT, at the time a junior solicitor employed by [Law Firm], is identified as the subject of the conduct complaint, in circumstances where her supervising partner has both acknowledged responsibility for oversight of Mr MP's file, and been actively involved in working on the file.

[48] Ms CR was alert to the problems with this when she noted in her submission filed with the LCRO that the "complaint had been made against LT, who had rendered the invoice on instructions of the firm, [Law Firm]. We consider that the complaint, if it be upheld, should be found to be against [Law Firm], being the entity responsible for rendering the invoice to the complainant".

[49] Ms CR is correct in identifying that Ms LT appears to have been incorrectly identified as the sole subject of Mr MP's complaint. It was not the case that Ms LT rendered the invoice. The invoice was rendered by Ms CR.

[50] Nor would it be appropriate for a conduct finding to be entered in the name of Ms CR's firm.

[51] Section 132(1)(a) of the Act provides that a person may make complaint to the appropriate Complaints Service about—

- (a) the conduct—
 - (i) of a practitioner or former practitioner; or
 - (ii) of an incorporated firm or former incorporated firm; or
 - (iii) of a person who is not a practitioner but who is an employee or former employee of a practitioner or an incorporated firm;

[52] [Law Firm] is a law firm which operates as a partnership.

[53] It is not an incorporated firm.

[54] Conduct complaints cannot be brought against a partnership. Rather, the subject of the complaint must be identified as a lawyer (partner or employee) working for the partnership.

[55] I consider it unfortunate that Ms LT has been identified as the sole subject of Mr MP's complaint.

[56] It would have been more appropriate for the complaint to have been advanced as a complaint against Ms CR.

[57] It would be unreasonable to level criticism at Mr MP, the lawyers from [Law Firm], or the Complaints Service for an apparent failure to identify the correct subject of Mr MP's complaint.

[58] Mr MP was provided with a letter of engagement which inadvertently identified Ms LT as the lawyer responsible for the carriage of the file.

[59] On being informed by the Complaints Service that the complaint was being managed through the Early Resolution Process, and having been made aware that the Committee had formed a preliminary view that it would take no further action on the complaint, it was understandable that both Ms LT and Ms CR would see little need for their further involvement.

Did the Committee correctly direct itself to the issues of complaint raised by Mr MP?

[60] Mr MP emphasises on review that his main complaint was that the lawyers had significantly exceeded the fee initially indicated, without informing him as to the extent of the escalating costs. He argues that the Committee failed to adequately consider this component of his complaint.

[61] I am not persuaded that the Committee focused sufficient attention on the issue pivotal to Mr MP's complaint, although I accept that it was not totally ignored.

[62] Mr MP maintains that if he had been sufficiently informed as to the extent of his rapidly escalating fee, he would have pulled the plug earlier.

[63] The Committee did address the issue, but its approach in doing so, was closely linked to its examination of, and conclusions reached, as to the reasonableness of the fees charged.

[64] Because of the reservations I have concerning the approach adopted by the Committee when addressing the issue as to the reasonableness of the fee, I have concerns as to whether Mr MP's complaint that he had not been sufficiently informed of the escalating fee, was adequately addressed.

[65] Mr MP says that he was given initial indication that his fee for "initial advice and preliminary stages would be in the vicinity of between \$2,500 to \$3,000".

[66] Approximately a week after he was provided with that initial estimate, he was informed that his accrued fees were \$7,475.

[67] The Committee concluded that Mr MP "must have been aware from the various communications with the firm that matters had moved on from his initial instructions and that the fees would likely exceed the initial estimate".

[68] That is a reasonable argument, but it must be noted, that the fee rendered substantially exceeded the initial estimate provided.

[69] The Committee noted that the total value of the work done was \$8,490.50, reduced by [Law Firm] to \$6,500 plus GST.

[70] Rule 9.5 of the conduct rules provides that a lawyer must upon request, provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.⁵

[71] I accept in this case that circumstances changed quickly, and that the lawyers were required to respond to the rapidly evolving nature of the retainer.

[72] However, I am not persuaded that the Committee has adequately addressed the question as to whether Mr MP should have been informed earlier than he was as to the likely costs that would be incurred in carrying out the additional work that became necessary.

[73] As noted, the Committee did address the issue. Its approach in so doing was closely linked to its examination as to the reasonableness of the fee charged.

[74] I have concerns as to the methodology adopted by the Committee, when addressing the question as to whether the fees charged were fair and reasonable.

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[75] This was a very brief retainer.

[76] The costs incurred substantially exceeded the initial indication provided.

[77] I accept that additional work needed to be completed as a consequence of the evolving nature of the retainer. However, in reaching the conclusion that Mr MP must have been aware of his rapidly escalating costs, the Committee relied in large part on argument that Mr MP must have been aware that his instructions had expanded, and that the fees charged reflected the significant amount of necessary extra work that was required.

[78] I am not persuaded that this approach adequately addressed the issue as to whether Mr MP should have been better informed in respect to his fees exceeding the estimate, particularly in light of the conclusions reached regarding the approach adopted by the Committee when assessing the reasonableness of the fees charged.

Was the Committee's approach to assessing the reasonableness of the fee charged adequate?

[79] The Committee commenced its examination of the fee, by emphasising that it didn't consider it necessary to appoint a costs assessor, as the Committee included members with a wide range of experience including dispute resolution.

[80] The Committee noted the fee factors that are to be given consideration,⁶ and concluded that having reviewed all the information, it considered the fee charged to have been reasonable and in line with what would be charged in the market for work of a similar nature.

[81] It noted that the breakdown of work completed indicated that a considerable amount of work had been done for Mr MP. The Committee noted that there had been a substantial volume of ongoing communication between Mr MP, Ms LT and Ms CR.

[82] I have considered the information on the Standards Committee file.

[83] That is comprised of:

- (a) Mr MP's complaint.

⁶ Referencing the factors set out in r 9.1 of the Rules.

- (b) [Law Firms]'s letter of engagement (sent by Ms J (Ms LT)) dated 31 May 2018.
- (c) Ms CR's invoice dated 26 June 2018.
- (d) A breakdown of the work undertaken by the authors with description of work completed, and cost charged.
- (e) Request by Mr MP of the District Court to transfer [Law Firm]'s debt recovery proceedings to the Disputes Tribunal.
- (f) Copy of [Law Firm]'s statement of claim.
- (g) Correspondence between the Complaints Service and the parties addressing administrative matters relating to the progressing of the conduct inquiry.

[84] It is a small file.

[85] There is no indication of the Committee making request of Ms LT or Ms CR, to provide their file.

[86] The information on which the Committee relied in undertaking its assessment as to the reasonableness of the fee charged, was confined to its examination of:

- (a) The invoice issued to Mr MP; and
- (b) A document (prepared by the lawyers) providing a breakdown of work undertaken, this document identifying author, work undertaken, time spent on the tasks described, and costs charged for the specific work described.

[87] I accept that there were members of the Committee who identified themselves as having a particular expertise in work similar to that being undertaken for Mr MP. However, I am not persuaded that the inquiry as to the reasonableness of the fee charged presented as sufficiently robust to give confidence, particularly to Mr MP, that the inquiry was sufficiently comprehensive.

[88] The Committee assessed the reasonableness of the fee charged solely by reference to the information provided by the lawyers.

[89] The lawyers provided their time records and invoice. The Committee, confident in the expertise of its members, concluded that this was sufficient for them to make a fair assessment as to the reasonableness of the fee charged.

[90] Mr MP could reasonably question as to whether he was receiving the benefit of a fair enquiry, if all the Committee relied on was the invoice and summary of work completed.

[91] He could, I think reasonably, have reservations about a process which in essence, made an assessment that the fee was fair and reasonable, solely on the basis of the lawyers providing account of what they had done.

[92] I do not discount that the Committee decision carefully references the fact that its membership comprised individuals who had a wide range of experience, including experience in dispute resolution.

[93] But I am not persuaded, and I certainly intend no disrespect to the Committee members, that a general experience in dispute resolution provides a sufficiently comprehensive platform for assessing the reasonableness of a practitioner's fee in this particular case, when the only documents relied on are the lawyers time records and invoice, and no steps have been taken to obtain the practitioner's file.

[94] I accept that there will be occasions when experienced lawyers will be able to effectively assess a fee by a consideration of time records and reference to the outcome achieved without need for further investigation. Experienced family lawyers would for example, have a good understanding of the costs involved in obtaining a protection order. Experienced criminal lawyers would be well placed to effectively assess costs involved in a straightforward and conventional bail application. Whilst likely more difficult to assess because of the variety of circumstances and varying degrees of complexity, experienced civil litigators would likely be able to provide in most cases, accurate assessment as to the reasonable cost of bringing a summary judgment application to the court.

[95] But it is not always possible to assess the reasonableness of a fee solely by reference to time records and an invoice.

[96] In this instance, a thorough understanding of the work that was done can only be achieved by cross-referencing the time records and notation of work compiled in the invoice, to the practitioner's file.

[97] The time records in themselves are not determinative.

[98] For example, in this case the time records include three references to “research”. It is impossible to determine whether the work completed (which is not insignificant in terms of total time charged), is work that was necessary and appropriate, or work that was indicative of a junior lawyer endeavouring to come up to speed on a matter that she was not particularly familiar with.

[99] There is reference in the time records to office/internal consultation with senior staff, and indication that the time charged for these consultations was \$497.50.

[100] These consultations may have been both necessary and appropriate, but any attempt to draw conclusion either way is entirely speculative, and starkly illustrative of the difficulties in assessing a fee in these particular circumstances without having reference to the lawyer’s file.

[101] The time records contain references to three instances of work done which is described as “review of current position”. This notation is vague and provides little explanation of what was actually done.

[102] In fairness to the lawyers, Ms CR’s invoice is comprehensive in the account provided of the work completed, and it must be noted that the account rendered is in a sum less than the value of the time recorded.

[103] But on balance, it is my view that parties who complain about fees charged by their lawyers may, particularly in circumstances where they have been charged for advice of a general nature, take the view that they have not received the benefit of a fair fee enquiry if the information relied on by a Committee is confined to the time records and invoices provided by the lawyers.

[104] I consider it appropriate that this matter be returned to the Committee for further consideration.

[105] That consideration is to include:

- (a) Recasting the inquiry to capture the lawyer(s) who are properly the subject of the complaint; and
- (b) Providing opportunity to receive further responses from the lawyers; and

- (c) A further consideration as to whether Mr MP was provided with an estimate or quote at commencement and whether the obligation to promptly consult if exceeded (as required by r 9.4) was met by the lawyers; and
- (d) An assessment as to the fairness and reasonableness of the fee charged, that assessment to include reference to the lawyers' file.

Anonymised publication

[106] 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 bereft of anything as might lead to their identification.

Decision

- (1) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.
- (2) Pursuant to s 209 of the Lawyers and Conveyancers Act 2006, the complaints by Mr MP are to be returned to the Standards Committee for reconsideration.
- (3) That reconsideration is to include:
 - (a) Recasting the complaint to capture the lawyer(s) who are properly the subject of the complaint; and
 - (b) Providing opportunity to receive further responses from the lawyers; and
 - (c) A further consideration as to whether Mr MP was provided with an estimate or quote at commencement and whether the obligation to promptly consult if exceeded (as required by r 9.4) was met by the lawyers; and
 - (d) An assessment as to fairness and reasonableness of the fee charged, that assessment to include reference to the lawyers' file.

DATED this 31st day of August 2020

R Maidment
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 MP as the Applicant
Ms LT as the Respondent
Ms CR as the Respondent's Representative
Mr JB as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society