

LCRO 246/2016

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

AS

Applicant

AND

NL

Respondent

DECISION

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

Introduction

[1] Ms AS has applied for a review of a determination by the [Area] Standards Committee [X] (the Committee) in relation to a complaint she had made about her former lawyer Ms NL.

[2] In its determination, the Committee made a finding of unsatisfactory conduct against Ms NL in relation to several of Ms AS's issues of complaint and determined to take no further action in relation to other issues of complaint.

[3] Ms NL has not applied to review the findings made against her.

[4] Ms AS's application for review concerns the Committee's decision to take no further action on her complaint about Ms NL's fees. As well, Ms AS is critical that the

Committee did not make an award of compensation in her favour and asks this Office to do so.

Background

[5] Ms NL practises as a barrister.

[6] In July 2014, Ms AS instructed Ms NL to act for her to obtain a temporary protection order against Ms AS's former partner.

[7] On 13 July 2014, Ms AS paid \$2,000 directly into Ms NL's bank account, as requested by Ms NL.

[8] On 17 July 2014, the Family Court granted Ms AS's application for a temporary protection order.¹

[9] On 3 October 2014, as requested by Ms NL, Ms AS made another payment directly into Ms NL's bank account of \$2,500. This was for further work on the temporary protection application, as well as being towards legal fees for relationship property proceedings that Ms AS had instructed Ms NL to prepare and file.

[10] By late-November 2014 Ms NL had not prepared or filed relationship property proceedings on Ms AS's behalf.

[11] Ms AS then asked Ms NL to make her files available for uplifting. Ms NL asked for further fees of \$852.15 before she would release the files and gave Ms AS an invoice in this amount.

[12] On or about 19 December 2014, Ms AS instructed Ms NL to urgently lodge a Notice of Claim against the home previously occupied by Ms AS and her former partner. She had learned that he was in the process of selling the home.

[13] Ms NL told Ms AS that she would not undertake the work until the outstanding fees of \$852.15 had been paid. Ms AS paid this sum directly to Ms NL.

[14] On 23 December 2014 Ms AS paid Ms NL, directly, a further \$491.60 for legal work in connection with the Notice of Claim.

[15] Ms NL did not lodge a Notice of Claim.

[16] By January 2015, Ms AS had instructed another lawyer to act for her.

¹ The temporary protection order, made in July 2014, was made final in October 2015.

[17] Total fees paid directly to Ms NL by Ms AS were \$5,843.75.

Complaint

[18] Ms AS lodged her complaint against Ms NL with the New Zealand Law Society Complaints Service (Complaints Service) on 18 November 2015. She identified the following issues:

- (a) unfair and unreasonable fees;
- (b) failure to act competently and in a timely way;
- (c) failure to protect and promote Ms AS's interests;
- (d) failure to treat Ms AS with respect and courtesy; and
- (e) failure to keep Ms AS informed of progress.

[19] Attached to Ms AS's complaint were several emails that were on the file she uplifted from Ms NL, a copy of Ms NL's time records and other correspondence.

Response

[20] Ms NL provided response to Ms AS's complaint on 23 December 2015. She said:

- (a) she acted for Ms AS between July and December 2014;
- (b) legal fees paid by Ms AS "were invoiced on completion of work". The amount paid was \$5,843.80;
- (c) the fees included a disbursement of \$149.50;
- (d) Ms NL charged Ms AS a reduced hourly rate of \$285 plus GST. The fees charged represent 17.3 hours of work. The legal fees were fair and reasonable;
- (e) an initial sum of \$2000 was paid by Ms AS after Ms NL drafted the without notice application for a protection order. The application was then filed in the Family Court and a judge made a temporary protection order;

- (f) fees were to be charged progressively during the retainer and paid directly to Ms NL rather than through her instructing solicitor;
- (g) further fees of \$2,500 were paid on 1 October 2014. This related to work on the protection order after 13 July 2014, as well as for relationship property advice given and steps taken by Ms NL;
- (h) during November and early December 2014, Ms AS raised some concerns with Ms NL about her representation. Ms NL addressed those concerns;
- (i) on 27 November 2014, Ms NL gave Ms AS an invoice for work done in relation to the protection order, in the total sum of \$852.15;
- (j) in the few days before Christmas 2014, Ms AS asked Ms NL to lodge a Notice of Claim over the couple's family home. Ms NL said that all she was prepared to do was to write to Ms AS's former partner's lawyers and "provide notice". This she did; and
- (k) Ms AS paid Ms NL \$491.60 towards this work.

[21] Ms NL attached several documents to her response, including copies of correspondence she had sent on Ms AS's behalf during the latter part of 2014.

Standards Committee determination

[22] In its determination, dated 20 October 2016, after considering Ms AS's complaint and Ms NL's response to it, the Committee made unsatisfactory conduct findings against Ms NL as follows:

- (a) taking instructions directly, rather than through an instructing solicitor;²
- (b) failing to inform Ms AS in advance and in writing of the basis on which fees would be charged, as well as advice about indemnity insurance and complaints processes;³

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 14.4.

³ Rule 3.4A.

- (c) failing to pay into a trust account funds received for fees for work yet to be done, when such funds were not for a predetermined and invoiced fee;⁴
- (d) failing to provide competent and timely advice;⁵ and
- (e) failing to keep Ms AS informed and updated about the work being done and failing to respond to information requests in a timely manner.⁶

[23] As to the fees charged, the Committee held:⁷

- (a) Ms AS had paid Ms NL, directly, a total of \$4,991.60 that had not been accounted for by invoicing at any time; of which:
 - \$2000 was paid on 13 July 2014;
 - \$2500 was paid on 3 October 2014; and
 - \$491.60 was paid on 23 December 2014.
- (b) There was no evidence that any of those payments related to a fixed fee.
- (c) None of those payments had gone into a trust account.
- (d) One invoice, which was dated 24 November 2014 and was for \$852.15, had been produced and that invoice was paid by Ms AS.

[24] The Committee found that conduct to have breached:

- (a) Section 110 of the Lawyers and Conveyancers Act 2006 (the Act) dealing with trust account obligations.
- (b) Rule 9.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the LCCCR) dealing with payment of fees in advance.⁸

⁴ Lawyers and Conveyancers Act 2006, s 110, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, rr 9.3 and 14.2(e), Lawyers and Conveyancers Act (Trust Account) Regulations 2008, regs 9 and 10.

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 3.

⁶ Rules 3.2 and 3.3.

⁷ Standards Committee determination, 20 October 2016 at [15]–[21] and [37]–[38].

⁸ Rule 9.3 provides that “a lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008”. The rule presupposes that monies will have gone into a trust account and upon the taking of any fees, require immediate invoicing and provision of that to the client.

- (c) Rule 9.6 of the LCCCR dealing with the provision of invoices.
- (d) Rule 14(2)(e) of the LCCCR providing that a barrister must not receive money on behalf of another.

[25] The Committee did not uphold Ms AS's complaint about lack of respect and courtesy by Ms NL.⁹

[26] The Committee next considered whether the fees charged by Ms NL were fair and reasonable.¹⁰

[27] With the benefit of the file Ms NL had sent the new lawyers, as well as her time records, the Committee calculated that she had spent 19 hours on Ms AS's matters which, applying the hourly rate she had identified, amounted to \$6,175.

[28] Taking into account the reasonable fee factors set out in rr 9 and 9.1 of the LCCCR, the Committee concluded that Ms NL's actual fees (on its calculation Ms AS had been charged \$5,843.75) were on the high side, but not unreasonable or unfair.

[29] As to penalty, the Committee considered that Ms NL's conduct breaches were "at the higher end of the spectrum of unsatisfactory conduct". It said:¹¹

There appears to have been numerous and blatant breaches of the rules by Ms NL. The Committee also takes into account Ms NL's disciplinary history noting that there has been a previous finding of unsatisfactory conduct against her.

[30] The Committee:

- (a) ordered Ms NL to be censured;
- (b) ordered Ms NL to pay a fine of \$7000; and
- (c) ordered Ms NL to pay costs of \$1200.

Application for review

[31] Ms AS lodged her application for review with this Office on 7 November 2016. By way of outcome she seeks a refund of the fees she paid Ms NL, which she said totalled \$5,843.75. She said that she "received very little value in return for the fees [she] paid".

⁹ Standards Committee determination, above n 7 at [31].

¹⁰ At [33]–[36].

¹¹ At [40].

[32] Ms AS also sought compensation from Ms NL because of her failure to lodge a Notice of Claim against the title to the family home.

[33] Ms AS noted the Committee's description of the seriousness of Ms NL's conduct breaches, including that her work "was not of a competent standard".

No response from Ms NL

[34] Ms NL was invited to comment on the review application. She has not done so.

Review on the papers

[35] Section 206(2) of the Act allows a Legal Complaints Review Officer (LCRO) to conduct a review on the papers, based on all information available and without the parties' consent, if the LCRO considers that the review can be adequately determined in their absence.

[36] Before doing so the LCRO must give the parties a reasonable opportunity to comment on whether the review should be conducted in that manner.¹²

[37] Ms NL spoke to a case manager in the Office on 11 March 2019 and indicated she would confirm whether she was happy for the hearing to proceed on the papers, however she did not contact the Office further.

[38] In an email to this Office dated 27 March 2019, Ms AS indicated that she was happy for the hearing to proceed on the papers.

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

Nature and scope of review

[40] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹³

... 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.

¹² Lawyers and Conveyancers Act, s 206(2A).

¹³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[41] More recently, the High Court has described a review by this Office in the following way:¹⁴

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.

[42] 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
- (b) provide an independent opinion based on those materials.

Analysis

[43] As indicated at the beginning of this decision, this is Ms AS’s application to review the Committee’s decision to take no further action on her complaint that Ms NL’s fees were unfair and unreasonable.

[44] Ms AS also asks this Office to award compensation in her favour, in relation to what she has described as “the lost opportunity to be involved in the sale of [the family home]”.

[45] However, that was not an issue of complaint made by Ms AS.

¹⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[46] This Office may only review issues of complaint that were before a Standards Committee. Fresh issues of complaint (including remedies sought) — even if they arise out of the same lawyer/client retainer — must first be made to the Complaints Service for consideration by a Standards Committee.

[47] Accordingly, I cannot take Ms AS's request for compensation further.

[48] I once again note that Ms NL did not apply to review the findings that had been made against her, including that collectively those conduct breaches amounted to higher-end unsatisfactory conduct. The Committee's findings and its determination about those conduct issues remain the last word about them.

[49] I would only add that the conclusions reached by the Committee about Ms NL's conduct and which led to the finding of unsatisfactory conduct, appear to me to have been soundly based. They are also relevant to the question of whether Ms NL's fees were fair and reasonable.

[50] The undisputed facts are:

- (a) there is no record of Ms NL having an instructing solicitor, or from being exempt from the requirement for a barrister always to have an instructing solicitor;¹⁵
- (b) in her email to Ms AS dated 11 July 2014, Ms NL asked for payment towards her fees in the sum of \$2000 and provided her bank account details for that payment to be made.
- (c) in her email to Ms AS dated 1 October 2014, Ms NL asked for payment of \$2,500 towards her fees and again provided her bank account details.
- (d) on 27 November 2014, Ms NL provided Ms AS with an invoice in the sum of \$852.15. It appears to have been for completed work;
- (e) on or about 21 December 2014, Ms NL asked Ms AS to pay her, again directly, a further sum of \$491.60 towards legal fees connected with the Notice of Claim instructions;

¹⁵ I am concerned by Ms NL's comment in her response to the Complaints Service to Ms AS's complaint where she refers to having agreed with Ms AS to charge fees progressively "rather than require monies held on trust with [her] instructing solicitor". This explanation implies the existence of an instructing solicitor, whose identity was known by Ms AS and that all parties had agreed that fees could be paid directly to Ms NL. In fact, there appears never to have been an instructing solicitor.

- (f) of the total fees paid, \$5,843.75, only \$852.15 was supported by an invoice;
- (g) fees paid directly for which no invoices were produced, amounted to \$4,991.60; and
- (h) Ms NL's conduct in acting for Ms AS included:
 - (i) breaching the intervention rule;
 - (ii) failing to provide adequate terms of engagement including as to the way fees would be charged;
 - (iii) receiving funds directly;
 - (iv) failing to pay funds into a trust account;
 - (v) failing to provide invoices;
 - (vi) failing to provide competent and timely advice; and
 - (vii) failing to keep Ms AS informed of work being done and provide updates.

[51] In deciding to take no further action on Ms AS's fees complaint, the Committee's approach was to disregard the lack of instructing solicitor, direct payments, lack of the use of a trust account and lack of invoices and assess the fees charged against the work said by Ms NL to have been carried out by her. It applied the reasonable fees factors contained in rr 9 and 9.1 of the LCCCR and found that the total fees paid were fair and reasonable.

[52] That approach, focussing only on fee quantum, was in my view, unduly narrow.

[53] However, for the purposes of this review I agree with the Committee's conclusion as to the fees represented by the single invoice provided by Ms NL to Ms AS. I now deal briefly with that.

The November invoice

[54] The 27 November 2014 invoice was for fees of \$852.15. It appears to have been for completed work.

[55] Although the heading on the invoice describes it as being “Protection Order and Relationship Property”, the narration refers only to follow-up work in connection with the temporary protection order. I infer that the heading is simply a general description of Ms NL’s retainer rather than an indication of work done under the invoice.

[56] The fee represents something in the region of two and a half hours work which I accept is likely.

[57] I conclude this to have been a fair and reasonable fee for work done by Ms NL.

Other fees paid

[58] Ms AS directly paid Ms NL the sum of \$4,991.60 in circumstances where:

- (a) she had no instructing solicitor;
- (b) she accepted funds directly and in advance and for which there has been no accounting;
- (c) she did not lodge funds into a trust account;
- (d) she did not provide invoices; and
- (e) where the Committee said that “Ms NL [acted] incompetently in relation to [relationship property proceedings and the Notice of Claim]”.¹⁶

[59] The Committee also noted that “Ms NL [does not appear to have] provided any written reporting letters to Ms AS at all about the progress of the protection order proceedings”.¹⁷ It further noted that Ms NL’s file contained:¹⁸

email requests from Ms AS for copies of invoices, letters and her affidavit which do not appear to have been responded to in a timely manner ... [and] that some of the information was not provided until it was given to the [Complaints Service] in response to the complaint and passed on to Ms AS.

[60] To conclude that fees charged in these circumstances can nevertheless be fair and reasonable, significantly overlooks the primary purpose of the Act, namely to:¹⁹

¹⁶ Standards Committee determination, above n 7 at [22]–[26].

¹⁷ At [28].

¹⁸ At [29]. The Committee did not, however, note that Ms NL also failed to provide Ms AS with a final account within a reasonable time of her retainer being terminated, contrary to r 9.6. That being said, although a breach of the rules, I do not propose to make it the subject of a finding of unsatisfactory conduct given the ultimate conclusions I have come to in this decision.

¹⁹ Lawyers and Conveyancers Act, ss 3(1)(a) and (b).

- (a) maintain public confidence in the provision of legal services and conveyancing services;
- (b) protect the consumers of legal services and conveyancing services.

[61] Rules 9 and 9.1 of the LCCCR make it clear that lawyers may only charge a fee that is fair and reasonable having regard to the interests of themselves and their client.

[62] When considering whether a lawyer has charged a fee that is fair and reasonable, it is relevant to also consider whether, in acting for their client, the lawyer has also committed any conduct breaches material to the nature of the retainer and therefore to whether the fee charged was fair and reasonable. Unethical or unprofessional conduct is, by its very nature, unreasonable.

[63] The question as to whether a conduct breach, if established, has relevance to the determination as to the reasonableness of the fee charged, will depend upon the nature of the particular conduct breach.

[64] A low-level breach — such as a lawyer providing terms of engagement after the commencement rather than in advance of a retainer — would seem to me to have little or no bearing on whether the lawyer's eventual fees were fair reasonable.

[65] At the other end of the scale, a fee charged in circumstances where a lawyer has not acted competently, would not appear to be a fair and reasonable fee. It is not uncommon for complaints to be advanced on grounds that the fee charged was unreasonable because the work had not been carried out competently.

[66] In the present matter, Ms NL was instructed in three matters:

- (a) to apply for a temporary protection order;
- (b) to initiate relationship property proceedings; and
- (c) to lodge a Notice of Claim.

[67] In relation to the temporary protection order, Ms NL's conduct breaches were:

- (a) to take fees in advance;
- (b) without an instructing solicitor;
- (c) without lodging the funds in a trust account; and
- (d) without accounting for the fees paid.

[68] This was an important matter for Ms AS. She was a victim of domestic violence who required swift and competent representation. With respect to the work completed to secure the temporary protection order, I consider that Ms NL provided that. A Family Court judge was persuaded to grant a temporary protection order.

[69] The requirement for fees in advance to be secured in a trust account and not be taken as fees until the work is completed and the funds accounted for, is an important feature of the consumer protection principles underpinning the Act.

[70] I do not trivialise Ms NL's conduct breaches in relation to this aspect of her retainer with Ms AS. The fine imposed by the Committee — albeit for other conduct breaches — sufficiently marks the seriousness of those breaches.

[71] However, as against that Ms NL successfully carried out the work she was instructed to do in respect to the application for a protection order, in circumstances of urgency and seriousness.

[72] In the particular circumstances I accept that the fees charged for that work — being the sum of \$2,000 paid by Ms AS directly to Ms NL on 11 July 2014 — were fair and reasonable. As a GST inclusive amount, it represents net fees of approximately \$1,740.

[73] However, the position is different in relation to the other fees paid directly to Ms NL, being the sums of \$2,500 and \$491.60 paid on 1 October 2014 and 21 December 2014 respectively.

[74] Again, those fees were paid in advance, they were not secured by Ms NL in a trust account and no invoices have been generated.

[75] The former amount was for relationship property attendances, the latter in relation to instructions to lodge a Notice of Claim.

[76] Ms NL took no steps to attend to instructions to lodge a Notice of Claim.

[77] The very essence of such instructions, is the requirement for prompt action. A failure to do so can significantly compromise a party's interest in the asset that the Notice of Claim is intended to preserve.

[78] Ms NL made it clear that she would take no steps until her fee had been paid. Having received payment, she was obliged to do the work.

[79] The extent of the efforts made by her appear to be confined to advising the lawyer for Ms AS's former partner of the intention to lodge a claim.

[80] Nor is there evidence of any significant progress having been made in respect to the relationship property matter.

[81] Significantly, underpinning this apparent lack of action was, as noted by the Committee, a failure on Ms NL's part to respond to repeated requests by Ms AS to be provided with invoices, copies of correspondence and copies of affidavits.

[82] A consequence of this failure, would have been that Ms AS could not monitor the situation with her costs.

[83] The Committee described Ms NL as not having acted competently in relation to either piece of work.

[84] As I have noted, Ms NL has not applied to review any aspect of the Committee's determination.

[85] Nevertheless, I have looked carefully at the Committee's reasoning in coming to that conclusion. I agree with it.

[86] In simple terms, Ms AS paid Ms NL \$2,991.60 for work which achieved minimal result for her. Ms NL's ability to provide defence to that criticism is substantially compromised by her failure to provide a proper accounting of the work that had been done.

[87] The Committee was prepared to consider the reasonableness of the fee in the absence of any invoices having been rendered, by reference to Ms NL's time records and an examination of her file.

[88] Such an exercise inevitably, by its very nature, has a degree of imprecision. In assessing the reasonableness or otherwise of a fee it is commonplace for Committees to carry out that exercise by reference to an examination of time records and a consideration of the work that had been done by reference to the practitioners file. But that exercise is invariably undertaken in a context of scrutinising the practitioner's invoices.

[89] The work completed in respect to the protection matter is able to be measured by reference to the objectively measurable outcome achieved.

[90] But I think it more difficult to assess, as the Committee has done, the reasonableness of the balance of the fee by reference to time records and a perusal of the file, when there is no invoice rendered and the Committee has concluded that there has been a lack of competency.

[91] It is fundamental that a lawyer is required to render an invoice in order to provide a foundation for fees charged.

[92] Ms NL's failure to complete work she was instructed to do, her flagrant breaches of her obligations as a barrister with respect to receiving and managing monies received, her failure to render an invoice and indifference to requests from her client to provide invoices and information, reflect the very essence of a lawyer who has not acted either competently or diligently on their client's behalf.

[93] The Committee was right to have characterised it in this way. Fees charged in these circumstances are the opposite of fair and reasonable.

[94] The fees paid by Ms AS to Ms NL in the sums of \$2,500 and \$491.60 are neither fair nor reasonable and I order Ms NL to refund them to Ms AS.

Result

[95] The review is allowed to the extent that Ms NL's fees are cancelled in the amount of \$2,991.60, and this amount is to be refunded by Ms NL to Ms AS.

Decision

[96] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act, the determination of the Standards Committee is reversed as to the finding that the fees charged by Ms NL were fair and reasonable.

[97] Ms NL must refund the sum of \$2,991.60 to Ms AS within 30 days of the date of this decision and simultaneously inform this Office of that step having been taken.

[98] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, I confirm that the refund order made by me may be enforced in the civil jurisdiction of the District Court.

[99] For the avoidance of doubt, I record that penalty and costs orders made by the Committee are unaffected by the orders I have made and remain effective.

Publication

[100] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 25th day of June 2019

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:

Ms AS as the Applicant
Ms NL as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society