

LCRO 25 / 2009

**CONCERNING**

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

**AND**

**CONCERNING**

A determination of the Waikato Bay of Plenty Standards Committee

**BETWEEN**

**MR SALISBURY** of Waikato

Applicant

**AND**

**MR HEXHAM** of Hamilton

Respondent

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

**DECISION**

**Background**

[1] The applicant, Mr Salisbury complained to the Law Society on 2 October 2008 in respect of the conduct of Mr Hexham concerning legal work he undertook in respect of a possible appeal of a criminal conviction. In particular he complained that the fees charged were excessive and that the matter was not handled properly by Mr Hexham. The Waikato Bay of Plenty Standards Committee instructed a costs assessor and on the basis of the assessor's opinion concluded that the costs charged were reasonable and should stand. For these reasons the Committee concluded that no further action was necessary and dismissed the complaint. Mr Salisbury made an application for review to this office on 12 March 2009.

[2] This review was conducted on the basis of the application, the file of the Standards Committee which was made available to me and the submissions of the parties. The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act 2006 this matter is being determined on the material made available to this office by the parties and without a hearing in person.

[3] Mr Salisbury was convicted of a criminal offence in the District Court at Waikato and sought the advice of Mr Hexham as to the prospects of a successful appeal. It was agreed that Mr Salisbury would pay Mr Hexham's instructing solicitors in advance to pay the amount of the bill when rendered. The parties disagree as to whether it was agreed to be a fixed fee or rendered on a time and attendance basis. There is no record of the agreement. In the event the bill rendered was for \$550 plus GST. Mr Salisbury considered this excessive.

[4] Mr Salisbury also complained about the quality of service and way in which the matter was handled by Mr Hexham. In general the complaint was that Mr Hexham did not attend to matters in a timely way, was disorganised, and provided advice that was not well founded. Due to his dissatisfaction with Mr Hexham, Mr Salisbury instructed other counsel to pursue the appeal. The appeal was successful, though it perhaps bears noting that Mr Salisbury was ultimately discharged without conviction rather than being found not guilty.

### **Applicable standard**

[5] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service since that date may be the basis for a regulatory response by the professional body.

[6] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105).

Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

### **Fees**

[7] The bill of costs was, in all of the circumstances, modest. It was reviewed by a competent costs reviser who reached the same opinion. I note that it represents only around three hours work at a reasonable charge out rate for work of this kind. Assuming that the opinion provided in this matter was based on a proper reading of the Court transcripts this is a reasonable fee. The Standards Committee was correct to conclude that there was no basis to revise the bill of costs in this case.

[8] It perhaps also bears noting that since 1 August 2008 the jurisdiction of the Law Society to revise bills of costs rendered prior to that date was extinguished with the repeal of the Law Practitioners Act 1982. Complaints in respect of conduct which occurred prior to 1 August 2008 may be made in respect of conduct which could found proceedings of a disciplinary nature – s 351 Lawyers and Conveyancers Act 2006.

### **Handling of the matter**

[9] Mr Salisbury has made numerous allegations regarding the way Mr Hexham handled the matter. Probably the central allegation is that his opinion as to the prospects of the appeal was not well founded and that Mr Hexham did not undertake the work he claims to have undertaken (i.e. reading the transcripts from the District Court) in forming that opinion. The allegation that Mr Hexham provided his opinion and rendered his bill without undertaking the underlying work is a serious one.

[10] The opinion of Mr Hexham was expressed in a brief letter of 8 April 2008. In that letter he stated that in his view credibility findings had been made against Mr Salisbury that were "notoriously difficult if not impossible to overturn". He advised against continuing an appeal. Mr Salisbury suggests that Mr Hexham's opinion was vague and reflected the fact that analysis of the evidence in the District Court had not been undertaken. Mr Salisbury compares Mr Hexham's note with the opinion of Mr XX (counsel he subsequently instructed) eight-page letter of 29 June 2008 which contained an analysis of the law. The question is obviously not which opinion was

correct, but whether the opinion of Mr Hexham was founded on an actual reading of the relevant material as claimed and whether it was competent. If it was not competent the issue is whether the lack of competence was so grave as to lead to a disciplinary response.

[11] Other allegations of Mr Salisbury touching on the negligence or incompetence of Mr Hexham include:

- dilatoriness in attending to the appeal leading to a failure to file the notice of appeal on time;
- providing advice as to merits of the appeal with only one day of the appeal period left;
- losing an earlier completed notice of appeal (requiring Mr Salisbury to travel to Waikato);
- failing to respond to communications; and
- withdrawing from acting for Mr Salisbury without good cause.

[12] In its decision the Standards Committee noted that Mr Salisbury has complained about “incorrect handling of the matter” however in its reasons and decision no reference was made to the disposal of that aspect of the complaint. I am of the view that this aspect of the complaint needed to be separately dealt with. If the Committee were to make an adverse finding in respect of the conduct of Mr Hexham it has powers conferred under s 106(4)(f) of the Law Practitioners Act 1982 to make orders in respect of the bill of costs.

[13] I also observe that in an email to the Court of 16 April Mr Hexham explained that he would no longer be acting for Mr Salisbury. In that email he makes it clear that he had formed the opinion that the appeal was unmeritorious and closed by saying “I trust I need to say no more; I do not wish to jeopardise my ex-client’s interests”. This email appears injudicious. All that was required of Mr Salisbury when his instructions were terminated was to inform the court accordingly and seek leave to withdraw. It is not apparent from the material before me what prompted that email (and I note that an appropriately sparse email was sent to the Court by Mr Hexham on 14 April 2008). In light of that I reserve further comment.

[14] I make no finding as to whether or not the allegations of a professional breach against Mr Hexham in respect of his handling of this matter are made out. I reiterate, however, that for discipline to follow the negligence or incompetence must be of such a

degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor, or as to tend to bring the profession into disrepute. Similarly, for a finding of misconduct or conduct unbecoming a high threshold must be reached.

### **Decision**

[15] The application for review is upheld. Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act I direct that the Waikato Bay of Plenty Standards Committee consider the specific question of whether Mr Salisbury's complaint in respect of the handling of the matter by Mr Hexham is upheld.

**DATED** this 12<sup>th</sup> day of May 2009

---

Duncan Webb  
**Legal Complaints Review Officer**

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr Salisbury as Applicant  
Mr Hexham as Respondent  
The Waikato Bay of Plenty Standards Committee  
The New Zealand Law Society