

LCRO 48/09

CONCERNING

The Lawyers and Conveyancers Act
2006

AND

CONCERNING

a review of a decision of a Complaints
Committee of the Nelson District Law
Society pursuant to Section 97 of the
Law Practitioners Act and s 355 of the
Lawyers and Conveyancers Act

BETWEEN

CLIENT B

Applicant

AND

LAWYER Q

Respondent

LAY OBSERVER'S REPORT

Background

[1] This is a review of a decision of the Complaints Committee of the Nelson District Law Society in respect of a complaint by Client B (through his lawyer) against Lawyer Q. Client B complained to the Nelson District Law Society that he had overpaid certain money on account of fees to Lawyer Q and that Lawyer Q refused to repay the overpaid amount.

[2] It appears that the matters in question go back some time – one invoice was issued in 1999 and payments appear to have been made to Lawyer Q between February 2001 and October 2005. There are suggestions by Lawyer Q that the matters may go as far back as 1995.

[3] Through his lawyer, Client B has sought repayment of amounts he considers to have been overpaid. He has produced three invoices amounting to \$6 453.75. He also maintains that his bank records show that \$11 950 was paid to Lawyer Q. A schedule of payments that appears to have been prepared by Client B and supplied to Lawyer Q is on the file of the Complaints Committee provided to me.

[4] By virtue of the reform of the law relating to the regulation of Legal Practitioners the office of Lay Observers ceased to exist on 1 February 2009. Pursuant to s 355 of the Lawyers and Conveyancers Act 2006 any inquiries which are incomplete as at that date are to be completed by the Legal Complaints Review Officer, a statutory Office created on 1 August 2008. In completing the inquiry the Legal Complaints Review Officer has the duties and powers that the Lay Observer would have had under the Law Practitioners Act 1982. It is on this basis that this inquiry is being undertaken. In conducting this review I therefore effectively stand in the shoes of the Lay Observer.

This Review

[5] The role of the Lay Observer is to consider an allegation by a member of the public “concerning any District Law Society’s *treatment of a complaint* about the conduct of a practitioner” pursuant to s 97(1) of the Law Practitioners Act 1982. The primary focus of the enquiry is therefore on the proper consideration of the complaint and the material put before the Society and its Complaint’s Committee.

[6] From the correspondence and documents on the file it is clear that the parties were given an adequate opportunity to make their views known and they fully availed themselves of that opportunity.

The Investigation by the Committee

[7] The fundamental issue to be addressed by the Committee was whether the conduct of Lawyer Q could amount to a professional breach which might lead to discipline as set out in s 106 of the Law Practitioners Act 1982. In particular whether the conduct could be said to amount to “misconduct in his professional capacity”, “conduct unbecoming a barrister or solicitor” or negligence or incompetence which “has been 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.” In investigating this matter the Committee has considerable powers conferred by s 101 of the Law Practitioners Act 1982. In most cases it is not necessary to exercise these powers as practitioners willingly provide information in respect of the matter in issue. In this case there seems to have been some reluctance on the part of Lawyer Q to spend (an admittedly considerable amount of) time in locating the relevant information from his records.

[8] The Committee noted in its decision that the complaint was that Lawyer Q “failed to account properly for the payment of fees in respect of work carried out”. This accurately reflects the complaint. The complaint was not upheld on the basis that insufficient evidence was provided to establish that the amount paid to Lawyer Q exceeded the total amount of the bills rendered. The Committee stated its view that it was incumbent on the complainant to provide evidence that an overpayment has been made and that “he should be able to provide copies of the accounts rendered to him to back up that assertion”.

[9] There are three invoices from Lawyer Q to Client B on the file I received from the Complaints Committee. Client B appears to maintain that the three accounts he has provided to the Committee are all of the accounts he recalls receiving from Lawyer Q.

[10] Lawyer Q failed to provide the Committee with any evidence in support of his assertion that all of the payments made were applied to bills properly rendered. In particular, Lawyer Q admitted on one occasion to being unable to ascertain how much money he had received from Client B (in his letter of 24 January 2006).

[11] There was also evidence put to the Committee (in the form of notes of a telephone conversation between his lawyer and Lawyer Q) that at one point Lawyer Q accepted that an overpayment had been made.

[12] Client B (through his lawyer) supplied the three accounts mentioned above to Lawyer Q on 5 April 2006. Lawyer Q was invited to produce any other accounts that may exist. He was unable or unwilling to do so. He replied on 7 April 2006 with a loose assertion that he had acted for Client B for a number of years and there must have been more than three accounts rendered. After further correspondence with his lawyer, Client B stated in a letter of 27 April 2006 that he was not prepared to go back over his records to ascertain the proper position.

[13] In a letter of 12 May 2006 from Lawyer Q to Client B’s lawyer, Lawyer Q referred to an account rendered on 26 September 2003. No copy of that account was produced. He also stated that the last payment was received from Client B on 30 December 2004. It was further asserted that \$235 remained owing on the accounts rendered. After some further correspondence from Client B’s lawyer to Lawyer Q (which did not elicit a response) a complaint was made to the Nelson District Law Society on 30 June 2008.

[14] There was no evidence before the Committee that invoices for more than \$6 453.75 had been issued by Lawyer Q.

[15] Lawyer Q replied to that complaint on 15 July. In that he gave an overview of his recollection of the matters and indicated that he could establish that payments of \$2 150.00 had been received. He asserted that it was incumbent on Client B to justify their claim for overpaid funds and that it was not incumbent on him to try and reconstruct matters going back to 1995. He did not provide any extrinsic evidence (such as accounts rendered or bank statements) to support his assertions.

[16] In response to that reply Client B provided the schedule of payments made on 26 November 2008. It was also indicated to the Committee that bank statements existed to verify those payments (with minor exceptions). On 22 December a further letter on Client B's behalf noted that one of the outstanding payments could not be verified by recourse to bank statements.

Consideration

[17] It appears that Lawyer Q either does not have records of the invoices he issued to Client B in this matter or that he does not consider that he should provide those to Client B. It may be that Lawyer Q has formed the view that Client B is being querulous and he is of the view that there has been no overpayment. It does, however, appear that his record keeping is not particularly orderly. In his letter to Client B's lawyer of 2006 he indicated that he was unable to "sort out" what payments he had received from Client B. Lawyer Q throughout has been unable to produce invoices which confirm that he was entitled to retain all of the monies paid. Neither has he been able to produce any kind of reconciliation of monies received from Client B.

[18] Lawyer Q is a barrister and as such is not subject to the stringent rules applicable to solicitors when handling client money and is not obliged (or permitted) to operate a trust account: *Waikato Bay of Plenty District Law Society v Baledrokadroka* [2002] NZAR 197. However, those rules are indicative of the stringent duties imposed on lawyers when handling funds and the importance of obligation to account to clients for funds received. It appears that this was an arrangement under which Client B was repaying amounts outstanding for work already completed (as opposed to paying fees in advance). However, it is reasonable to expect that when such an arrangement is entered into the recipient of the funds should clearly account for the amounts received and how they were applied. While the new Rules of Conduct and Client Care were not in force when the matters under consideration occurred, they are reflective of professional standards generally. It is of note that Chapter 9 which deals with fees places the obligation to provide accurate information about fees clearly on the lawyer.

[19] In its decision the Committee was of the view that the complainant had not provided any evidence that the amount paid exceeded the total of the bills rendered. This appears to be a misconception. Evidence was provided in the form of a schedule of payments and copies of invoices. It also appears that bank statements could have been made available if requested. While Lawyer Q asserted that other invoices existed, he did not produce them. I note that s 101(3)(d) of the Law Practitioners Act 1982 empowers the Committee to require the production of any accounts and records from the person complained against.

[20] The Committee also seemed to be of the view that it was incumbent on Client B to establish the amount he paid and the amount he owed. This seems odd as it is to be expected that a legal practitioner will keep accurate records of the amount charged to clients, especially when ongoing payments on account are being received. It would also be expected that a legal practitioner would keep accurate records of sums received on account of outstanding fees. It would seem proper that Lawyer Q should be able to justify the retention of all the amounts paid, after all he is the professional imposing the charges.

[21] It seems to me that had the Committee exercised the powers of investigation it has under the Act that the lack of evidence in this matter may have been cured.

Recommendation

[22] I recommend that the Committee further investigate this matter including by:

- obtaining bank statements from Client B;
- requiring Lawyer Q to produce copies of all invoices upon which he relies in retaining the monies paid by Client B;
- requiring Lawyer Q to produce bank statements and any accounting records showing the amounts received from Client B on account of fees;

[23] I also recommend that if it appears that Lawyer Q has not kept accurate records of account the Committee further consider whether Lawyer Q was in breach of his professional obligations in this regard.

[24] I note that as of 1 February 2009 the Complaints Committee of the Nelson District Law Society ceased to exist. Therefore this matter will fall to be considered by the new Standards Committee appointed under s 356 of the Lawyers and Conveyancers Act 2006 to deal with matters which remain outstanding from the former Complaints Committees.

DATED this 20th day of April 2009

D Webb
Legal Complaints Review Officer

In accordance with s 97(6) of the Law Practitioners Act 1982 copies of this decision are to be provided to:

Client B (through His lawyer) as complainant
Lawyer Q as the person about whom the complaint was made
The New Zealand Law Society as the successor of the Nelson District Law Society