

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

[2020] NZLCRO 236

Ref: LCRO 14/2020

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

CL

Applicant

AND

BB

Respondent

DECISION

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

Introduction

[1] Ms CLJ (Ms CL) has applied for a review of the determination by [Area] Standards Committee [X] to take no further action with regard to her complaints about Mr BB.

Background

[2] Ms CL and her two brothers were the beneficiaries of a Trust established by their parents. Following the death of their father, it was proposed that the Trust be wound up.

[3] The trustees of the Trust at that stage were one of Ms CL's brothers (NE) and her niece (RP).

[4] Ms CL suspected that her brother, NE, had not fully accounted for all Trust money and assets, and a dispute arose between her and her brother with regard to a proposed distribution.

[5] Ms CL instructed Mr BB in August 2018, by which time the dispute had been running for some time. She instructed Mr BB to investigate dealings with the Trust assets and to endeavour to resolve the dispute between members of the family. She asserts that Mr BB told her he would communicate with her brothers and resolve matters promptly.

[6] Ms CL advised of her expectation to Mr BB that she did not want to end up with a large legal bill.

[7] Ms CL became dissatisfied with Mr BB's services and terminated instructions on 16 November 2018. Mr BB rendered his account in the sum of \$3,475 plus GST and disbursements.

Ms CL's complaints

[8] Ms CL's letter of complaint summarised the issues that concerned her: "Lack of duty of care – excessive account – \$4,171.25, being charged \$70 emails to book an appointment and then receive "ok" back."¹ She has analysed the firm's time records and refers to charges of \$70 for minor administrative matters. She also refers to time recorded by Mr BB's PA.

[9] The entry in the time records that concerns her most is an entry recording three hours of Mr BB's time (\$1,050) spent reviewing financial statements of the Trust. She asserts that Mr BB had not undertaken this task competently, as he could not find any anomalies in the accounts and suggested that if she wanted to have the financial accounts investigated in any depth, she would need to engage the services of a forensic accountant. She argues that she should not have to pay for Mr BB's time to reach this conclusion.

[10] Ms CL complains that Mr BB has not acted promptly enough at times,² and has extended the time spent on her file "trying to stretch things out".

[11] Her allegations of a lack of duty of care relate to occasions when she says she was asked for information which she had already provided.

¹ Letter of complaint (19 November 2018).

² By way of example she expected Mr BB to act immediately following instructions, but it was not until five days later that Mr BB took action.

[12] She asserts that the inconsistencies, lack of care, and failing to meet his legal duty to act in good faith, has “caused [her] undue stress.” She says that Mr BB has “overpromised and underperformed”.

The Standards Committee determination

[13] The Standards Committee confirmed:³

...that Mr BB was invited to provide a response to the complaint and expressed his willingness to provide the Standards Committee with any information it needed to make its decision. He also confirmed his willingness to resolve the fee with Ms CL but understood it was her preference that the Standards Committee provide a ruling on the invoices.

[14] The Committee did not require any further information and “considered that the complaint could be adequately decided with the information it held”.⁴

[15] The issue addressed by the Committee was “whether Mr BB has breached any of his professional obligations and whether the fees he has charged are fair and reasonable”.⁵

[16] It said:⁶

It is apparent that Mr BB, having been engaged to provide independent legal advice, was acting to protect what he considered to be Ms CL’s best interests.

What is also apparent is that the advice from [Law firm A] did not sit well with the position as Ms CL saw it to be, and the speed at which negotiations were progressing.

[17] I would add to this, that it was apparent that NE (at least) was not minded to cooperate, and meet Ms CL’s concerns.

[18] The Committee determined to take no further action on Ms CL’s complaints about Mr BB’s conduct having made the following observation:⁷

...that Ms CL is not happy with the service that she received from Mr BB does not translate into an argument that the advice has been so incompetent as to merit consideration of the imposition of a disciplinary penalty, especially where it is acknowledged that the advice has not been followed.

³ Standards Committee determination (27 November 2019) at [7].

⁴ At [8].

⁵ At [9].

⁶ At [10] and [11].

⁷ At [14].

Fees

[19] The Committee noted that Ms CL did not dispute the entire bill but objected to certain parts of it. It also noted that Mr BB was ready to try to resolve the issue directly with Ms CL but she declined to enter into discussions with Mr BB.

[20] The Committee recorded the factors set out in r 9.1 of the Conduct and Client Care Rules⁸ to be taken into account when assessing a fair and reasonable fee. It identified the relevant factors as being:⁹

In the view of the Standards Committee, in this case the relevant fee factors are, the time and labour expended, the skill, specialised knowledge and responsibility to perform the services properly, the importance of the matter to the client and the results achieved, the experience, reputation and ability of the lawyer, the reasonable costs of running a practice and the fee customarily charged in the market and locality for similar legal services.

Having reviewed the complaint material and the time records provided by Mr BB, the Standards Committee is of the view that the fee is fair and reasonable for the work done.

[21] It then discussed the fee factors relevant to this matter in some more detail and having made these observations, the Committee determined to take no further action on Ms CL's complaints.

Ms CL's application for review

[22] Ms CL's application for review centres around Mr BB's invoice. Matters which she raises in the complaint and the application for review are:¹⁰

- "It is not possible to reach 4K account in the timeframe, PA should not be charged out at \$350".
- She had been charged \$70 (2 x six-minute units) for each administrative matter and/or emails that only needed a brief response.
- She emphasises her view that Mr BB's PA had carried out a lot of the work.
- "Mr BB told [her] to sort it out with [her] brothers and negotiate with them, so why [is she] provided with a 4K bill".

⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁹ Above n 3, at [20]–[21].

¹⁰ Application for review at Part 7, the supporting reasons for application and the attached supporting details.

- “If Mr BB had given the duty of care required to a customer I would still not be trying to reach a settlement for the estate (2 years later).”
- “If you take a case, you act accordingly don’t hang your client out to wash.”
- “It is quite apparent Mr BB did not act in [her] best interest nor did he provide a solution for settlement of the estate.”¹¹

[23] She feels that when Mr BB suggested that she should try to resolve matters directly with her brothers he was “dropping her in it”.

[24] The outcome of the review sought by Ms CL is for “the account to be null and void for non-performance with estate matters.”¹²

Mr BB’s response

[25] Mr BB’s hourly rate of \$350 had been communicated to Ms CL when she instructed the firm by way of the firm’s letter of engagement, and Mr BB points out that his fee is for a little less than 10 hours work.

[26] Mr BB says his PA is not charged out at \$350 per hour and when she does record time it is at the rate of \$150 per hour. He says that any administrative tasks carried out by his PA is built into his hourly rate.

[27] He says:¹³

Ms CL had unreasonable expectations as to the speed at which this complicated family dispute could be resolved. On the one hand, she required thoroughness but on the other, she seemed to think that I could wave a magic wand and resolve the matter in a few days. Her comment that she is still trying to reach settlement confirms the complexity of the matter.

[28] He confirmed that he had suggested to Ms CL that she should try to resolve matters directly with her brothers which would have had the advantage of resolving matters (possibly) more promptly and cost effectively.

[29] Overall, Mr BB rejects Ms CL’s allegations of poor performance.

¹¹ Ms CL refers to settlement of the estate. The matter involved winding up the Trust.

¹² Application for review, Part 8.

¹³ Letter BB to LCRO, 30 January 2020, at 4.

Process

[30] The review proceeded by way of an audio-visual hearing attended by both parties.

[31] During the course of the complaints process Mr BB has expressed on a number of occasions, his willingness to resolve matters by negotiating a settlement acceptable to both parties. Up to the date of the review hearing, Ms CL had not responded positively to any of Mr BB's proposals.

[32] At the conclusion of the hearing I asked Mr BB if he remained amenable to reviewing his charges with a view to putting a proposal to settle the matter before Ms CL. Mr BB advised he was prepared to do so, and I understand that following the hearing, Mr BB has put a proposal to Ms CL.

[33] For her part, at the hearing, Ms CL proposed a settlement whereby Mr BB reduce his fees by the amount recorded for reviewing the financial statements which, if accepted, would be paid by 5pm on the day following the hearing.

[34] I have not received advice that either proposal has been accepted and now proceed to complete this review.

Review

[35] Ms CL says that Mr BB has "overpromised but underperformed". She says that Mr BB undertook to have the dispute with her brothers resolved within a short while.

[36] Mr BB denies that he gave any such commitment.

[37] There is no evidence on which I can rely to support Ms CL's allegations. In addition, it appears improbable that a lawyer would give such a commitment, as resolution of matters relied on all parties coming to an agreement, something which they had been unable to do for some time. In the course of this review, Ms CL has advised that the dispute continues, some two and a half years since it began. This, in itself, is an indication that Ms CL had unrealistic expectations.

[38] It is evident that Ms CL was a demanding client. Her correspondence is replete with expectations that Mr BB act immediately on matters involving her, which would mean that Mr BB would be neglecting his other clients. Ms CL's demands for immediate action would have had the consequence of justifying Mr BB rendering a fee in excess of a fee calculated on time only, as urgency is a factor to be taken into account when assessing the fee to be charged.

[39] Ms CL has seized on instances where she says things were “going around in circles”. By this, she is referring to instances where, she says, Mr BB’s PA had rung her asking for information or documents which had already been provided.

[40] With regard to the specific instance she refers to in her complaint, it seems that Mr BB had sent an email to Ms CL asking her to comment on various matters. Ms CL then rang Mr BB and discussed the email with him. Mr BB’s PA then sent the same email again on the following day asking for her to comment.

[41] Ms CL describes this as “unprofessional non-performance, neglect towards a client, and incompetence”.¹⁴

[42] These descriptions exaggerate what amounts to a miscommunication between Mr BB and his PA, or the fact that his PA had not realised Mr BB had already sent the email. These types of events can occur in the most efficient of offices where lawyers and staff are dealing with multiple clients and matters during the course of a day. To suggest that they reach the threshold of unsatisfactory conduct as defined in the Lawyers and Conveyancers Act 2006 (unprofessional conduct or lack of competence) is completely without merit. This is supported by the many decisions of all bodies engaged in the complaints and disciplinary process.

Financial statements

[43] Ms CL has focused on the time (and consequent fee) spent by Mr BB reviewing the financial statements in an effort to trace transactions whereby Trust assets had been wrongly applied. She refers to the purchase of a digger and other matters. If she remains of this view, then her remedy is to challenge the trustees in court.

[44] Instead, it seems she is accusing Mr BB of incompetence because he has not been able to find anything that supports her accusations. Mr BB made it clear at the outset that if Ms CL wanted a professional investigation of the accounts, then she would need to instruct a forensic accountant to investigate the accounts in depth. This would have taken a specialist significantly longer than the three hours taken by Mr BB with the consequent increasing costs.

[45] Mr BB could not identify any transactions supporting Ms CL’s claims. At the review hearing, she submitted that Mr BB should have investigated further and asked questions of the trustees. Again, that would have increased the time spent by Mr BB and consequently the fees charged to Ms CL. This would have been in direct

¹⁴ Ms CL, letter of complaint.

contravention of Ms CL's repeated directions that she did not want to incur significant legal fees.

[46] At the review hearing, Ms CL was extremely evasive when asked to confirm she had given direct instructions to Mr BB to review the accounts to see what he could locate. Ultimately, after repeated questioning, she accepted that she had given instructions to Mr BB to carry out this task.

[47] There is a certain lack of logic on Ms CL's part when acknowledging that she did instruct Mr BB to review the accounts and then to assert that she should not pay for his time doing so. Such a task is not a results-based activity.

Direct contact

[48] In desperation, Ms CL made direct contact with RP to have the issues she was concerned about addressed. At that stage, Mr BB suggested that it may be more productive for her to continue to communicate directly with her brothers and RP rather than him continuing to pursue matters with the Trust lawyers. This, again, recognised Mr BB's awareness of Ms CL's instructions that she did not want to incur large legal costs.

[49] If Ms CL wished to continue to challenge the actions of the trustees, the only way to ultimately do so would have been to institute court proceedings requiring the trustees to account for their actions.

[50] Ms CL should acknowledge that Mr BB was being frank with her and complying with her request that she incur minimum costs. To paint Mr BB's suggestion that she contact her family directly as "landing her in it" is absurd.

Fees

[51] Mr BB's fee is based on the time recorded. As advised at the review, there can be no finding of unsatisfactory conduct against a lawyer based on disputes about minute amounts of properly chargeable fees.

[52] As noted above, urgency is a factor to be taken into account when assessing a fair and reasonable fee. As also noted, Ms CL was a demanding client, expecting matters to be dealt with immediately.

[53] Mr BB's fee does not reflect any allowances for this.

[54] In addition, Mr BB has, throughout this process, expressed a willingness to compromise in an effort to have Ms CL's complaints dealt with. Ms CL has steadfastly refused to engage in this process.

[55] It was made clear to Ms CL at the review hearing, that the outcome would definitely not result in an order cancelling the fee in total, being the outcome sought by her.

[56] Mr BB's fee is confirmed. The firm's terms of engagement provided to Ms CL include a term that interest will accrue on unpaid fees and Ms CL now faces the probability that the firm will enforce this due to her intractability.

Decision

[57] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

Publication

[58] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, this decision is to be made available to the public and the profession with the names and identifying details of the parties removed.

DATED this 18th day of December 2020

O Vaughan
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 CL as the Applicant
Mr BB as the Respondent
Mr GD Partner [Law firm A] as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society