

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

[2022] NZLCRO 118

Ref: LCRO 145/2021

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

AZ

Applicant

AND

BY

Respondent

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

Introduction

[1] Mr AZ has applied for a review of the determination by [Area] Standards Committee [x] to take no further action on his complaints about Mr BY.

Background

[2] Mr AZ owned a property in Christchurch which was damaged in the 2010/2011 earthquakes.

[3] Mr AZ lodged a claim with his Insurer, [XJI Insurance Limited] [(XJI)].

[4] Mr AZ and [XJI] could not reach agreement and proceedings were filed in the High Court on 31 August 2017.

[5] In May 2018, Mr AZ instructed Mr BY to assist him to progress his claim.

[6] Mr AZ complained about various aspects of Mr BY's advice, service and conduct, during the time Mr BY acted for him.

[7] The relationship between Mr AZ and Mr BY deteriorated until it reached the stage where Mr BY felt he could no longer act for Mr AZ.

[8] Mr AZ instructed new solicitors in March 2019. He did not pay Mr BY's invoice and in September 2020, Mr BY instituted proceedings for recovery of his fees.

[9] Mr AZ lodged his complaints on 9 November 2020.

Mr AZ's complaints

[10] Mr AZ complained that Mr BY:

- (a) Did not protect and promote his interests.
- (b) Did not provide him with information about the work to be done, who would do it and the way services would be provided.
- (c) Did not give him clear information and advice.
- (d) Did not advise him when work was completed.
- (e) Did not provide invoices when requested.
- (f) Breached Mr AZ's confidentiality.
- (g) Terminated instructions without an explanation.

Mr BY's response

[11] Mr BY engaged counsel (Mr CX) to respond on his behalf to Mr AZ's complaints. After addressing each of Mr AZ's complaints, Mr CX concluded:¹

... Mr BY considers that the complaint against him is without foundation. He considers that, viewed in the round, he acted with appropriate skill and care throughout the course of retainer and in accordance with how any reasonable lawyer would have acted in the particularly difficult circumstances of this case.

¹ Letter CX to Lawyers Complaints Service (15 December 2020) at [50].

The Standards Committee determination

Fees

[12] The Committee first addressed what it considered to be Mr AZ's complaint about the quantum of Mr BY's fees. Referring to the fee factors set out in r 9 of the Conduct and Client Care Rules,² and r 9.1, the Committee said:

- The time spent on the matter was reasonable for the work completed.
- Mr BY was required to advise on several complex matters which required specialist skill and knowledge.
- The matter was of particular importance to Mr AZ.
- The Committee, relying on the expertise and experience of its members, was also satisfied that the fees were within the range that would be expected for a similar matter (factor 9.1(m)). Having regard to the factors detailed in rule 9.1, the Committee concluded that the fees charged were fair and reasonable for the services provided.³

Competence

[13] The Committee had regard to the letters of advice sent by Mr BY to Mr AZ. It said:⁴

... Having considered that work and the documents provided during the complaint process, it considered Mr BY had provided clear and direct advice throughout the retainer, even when Mr AZ's instructions were continually changing. ...

Delays

[14] The Committee:

... noted that Mr BY had accepted that there was a two to three week period in July/August 2018 where he was unable to advise Mr AZ because he was preparing for a trial and was ill. The Committee considered that this delay could not constitute a finding that Mr BY had failed to act in a timely manner, particularly because it was clear Mr BY had attended to Mr AZ's matter at the earliest time possible and the delay did not prejudice Mr AZ's position.⁵

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

³ Standards Committee determination (23 August 2021) at [21].

⁴ At [22].

⁵ Ibid.

Not following instructions

[15] Mr AZ had noted several instances where he considered that Mr BY had not followed his instructions. A specific instance referred to by the Committee related to the engagement of Mr DW KC:⁶

... the Committee did not accept that Mr AZ had been unaware that Mr DW QC was being engaged and was satisfied that Mr AZ was on notice regarding the costs associated with his engagement. ...

[16] “The Committee could also find nothing in the material received which suggested that Mr BY had failed to follow Mr AZ’s instructions.”⁷

Confidentiality

[17] “... Mr BY had forwarded an email he had received from Mr AZ together with a draft memorandum relating to the work completed for Mr AZ to another client.”⁸

[18] He had also forwarded an email from Mr AZ to one of the experts involved with the matter.

[19] “...The Committee noted that in response to the first potential confidentiality breach, Mr BY had taken steps to rectify the issue as soon as he became aware of it and apologised for his actions.”⁹ With regard to the second instance, the Committee noted that Mr AZ had not specified that it was not to be sent to anybody else and that it was reasonable that the email had been sent on to an expert engaged with the matter.

Invoices

[20] The Committee referred to r 9.6 of the Conduct and Client Care Rules which requires a lawyer to render a final account within a reasonable time of the termination and considered that Mr BY had complied with his obligation under this rule. The Committee distinguished Mr AZ’s requests for Mr BY to issue invoices from a request for an estimate. It drew the conclusion that Mr BY had not breached r 9.4 which requires a lawyer to provide an estimate of costs when requested by a client.

⁶ At [23].

⁷ Ibid.

⁸ At [24].

⁹ Ibid.

Termination of retainer

[21] "... In those circumstances the Committee considered that Mr BY had good cause to withdraw as counsel and had not breached any professional obligations by doing so."¹⁰

General

[22] The Committee considered that in addition to the specific matters referred to, Mr BY had not otherwise breached any of his professional obligations.

Mr AZ's application for review

[23] In support of his application for review, Mr AZ has commented on particular paragraphs of the Committee's decision. He used the paragraph numbers from the Committee's decision.

[3] Mr AZ has clarified that proceedings were lodged in the High Court more than a year before Mr BY was instructed. He says: "His central task was to coordinate the four experts and their briefs of evidence, and clarify the problems associated with a rebuild on a cross lease property with two lessees".

[5] The Standards Committee said that Mr AZ had disputed that he had instructed Mr BY to engage Mr DW KC. Mr AZ says that is not correct. He clarifies his complaint as being that he "disputed an invoice passed on to me by Mr BY that charged for services of which I had been unaware (in breach of Rule 7.1)".

[6] Mr AZ says that he "received no advice from Mr DW other than his proposal to engage a mediator at the initial meeting".

[13] Mr AZ clarifies that his complaint did not relate to Mr BY's hourly rate but rather about the "quality and efficacy of the services provided for that hourly rate".

¹⁰ At [28].

- [18] Mr AZ advises that the matters referred to by the Committee as having been part of the matters dealt with by Mr BY¹¹ had already been addressed before Mr BY was instructed. Cross-lease issues were resolved after the retainer had been terminated.
- [19] Mr AZ disputes that Mr BY made significant progress during his retainer. He identifies conduct which he considers had delayed or prevented progress being made.
- [22] Rather than changing instructions, Mr AZ says he was pressured to follow Mr BY's approach.
- [24] Mr AZ considers Mr BY has breached r 5 of the Conduct and Client Care Rules¹² by forwarding emails from him to Mr EV which had the effect of exacerbating tensions between the experts.
- [25] Mr AZ refers to Mr BY's terms of engagement which state that he will send interim invoices. Mr AZ speculates that the time records provided to him some four months after he had requested the same, had been prepared retrospectively.
- [27] Mr AZ considers that the Committee "searching for loopholes offered by poor and vague wording such as this amounts to avoidance of the intended purpose of the rules for conduct and client care. How many clients are likely to request an estimate rather than an invoice?"
- [28] Mr AZ considers that the Committee has accepted that Mr BY had 'good cause' to terminate the retainer without addressing the evidence.

[24] The outcome from the review sought by Mr AZ is that the Standards Committee decision be overturned and Mr BY appropriately sanctioned.

Mr BY's response

[25] Mr CX responded to the application on behalf of Mr BY and referred to the reply to the Lawyers Complaints Service following Mr AZ's complaints.

¹¹ Underinsurance and limitation issues.

¹² Rule 5 provides: A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients. I anticipate Mr AZ may be referring to r 5.1 which provides that the relationship between a lawyer and client is one of confidence and trust.

[26] Mr CX considers the Committee had “properly focused on what was the essence of the complaint, namely fees charged by Mr BY and whether Mr BY breached any of his professional obligations to the complainant.¹³ He submits that the “... review application appears to be attempting to impugn the integrity of the Committee process by making inaccurate and hyperbolic assertions regarding conflation of evidence with submission, incorrect attributions, general failure to take the evidence into account, alleged acceptance of “false statements” etc ...”¹⁴ which, he says, are not warranted.

[27] Mr CX then addresses each of the matters raised by Mr AZ in his application for review. Some of his responses are summarised here but I record that I have taken the whole of the response into account in conducting this review.

[3] Mr CX disagrees with Mr AZ’s summary of his instructions. He says that Mr BY’s “engagement generally was to assist the complainant in resolving his litigation with [XJI] Insurance, whether that was by way of settlement or running the matter to a hearing”.¹⁵

[5] Mr CX says that Mr BY “considered it advisable to engage senior counsel and he therefore made this recommendation to the complainant, specifically suggesting Mr DW QC” and that Mr AZ “accepted this recommendation”.¹⁶

[18] Mr CX notes that the issues were complex and not solely confined to the matters referred to by Mr AZ as having already been dealt with.

[22] Mr BY disputes it was necessary for Mr AZ to remind him about court and other deadlines.¹⁷

[24] Mr CX says:¹⁸

In order to do his job, Mr BY was entitled to and needed to liaise with the various experts. These experts were part of the same team and had the same client (the complainant) and there needed to be coordination between them. There was no obvious reason why Mr BY should not have forwarded the email from the complainant to Mr EV, the structural engineer, and this was necessary in order for the joint experts’ report to be prepared.

¹³ Letter CX to LCRO (4 November 2021) at [4].

¹⁴ At [5].

¹⁵ At [7].

¹⁶ At [9].

¹⁷ At [16].

¹⁸ At [19].

[27] Mr CX submits that Mr AZ did not request an estimate of fees and, accordingly, the Committee's determination that Mr BY had not breached r 9.4 was correct.

[28] In conclusion, Mr CX submits that the determination of the Committee to take no further action on Mr AZ's complaints should be confirmed.

Nature and scope of review

[29] The High Court has described a review by this Office in the following way:¹⁹

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.

[30] This review has been conducted in accordance with those comments.

Review

[31] This review has been conducted on the papers.

The quality and efficacy of Mr BY's advice

[32] In his review application, Mr AZ says his complaint was about the quality and efficacy of Mr BY's advice. He says:²⁰

Mr BY failed to provide expert legal advice and to follow instructions, communicated poorly, was frequently unavailable, displayed poor organisational skills, and disclosed confidential information to third parties. He cost me a substantial number of hours spent on inquiries, checks and follow-ups in relation to his activities to the extent that I complained at one point that I was practically running the case.

[33] The duty to be competent was discussed in some detail in *R and N Family Trust v EL*,²¹ where the Review Officer said:

[44] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.

¹⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

²⁰ AZ complaint to Lawyers Complaints Service at [4.1].

²¹ LCRO 205/2015.

[45] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.

[46] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[47] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[34] In response to Mr AZ's allegations that Mr BY did not provide competent advice, Mr CX has provided copies of letters from Mr BY to Mr AZ, in which Mr BY proffered advice to Mr AZ and commented on drafts prepared by Mr AZ.²²

[35] Mr BY constantly gave practical and sound advice to Mr AZ as to the manner in which the litigation should proceed and, looked at objectively, it is impossible to draw the conclusion that the advice was other than competent.

[36] For his part, Mr BY found that Mr AZ's instructions were obscure, leading him to ask for "clear and comprehensible instructions"²³ and it is apparent that Mr AZ's own conduct contributed to the lack of clarity as to the manner in which matters were to proceed.

[37] Mr AZ has criticised the manner in which the advice was provided, often by telephone, and interruptions when he met with Mr BY, leading to delays which, Mr AZ complains, added to costs incurred.

[38] Mr AZ has not identified specific times that he is referring to when making his complaint. I have carefully perused the time records and summaries provided by Mr BY and can not identify any entries relating to time in excess of one hour spent only on telephone calls or meetings in person with Mr AZ.

[39] As a result, there is no evidence which can be relied upon to support Mr AZ's complaints that Mr BY did not carry out his work efficiently.

²² See for example letters dated 1 August 2018 and 1 February 2019.

²³ Letter BY to AZ (1 February 2019) at [26].

[40] Mr AZ simplifies the role that Mr BY was to play. Proceedings had been filed some time before Mr BY was instructed, and Mr AZ says that Mr BY's central task "was to coordinate the four experts and their briefs of evidence, and clarify the problems associated with a rebuild on a cross lease property with two lessees".²⁴

[41] The pleadings filed by Mr AZ have not been provided but if a lawyer is instructed to conduct litigation, he/she would naturally consider that his/her instructions were to progress the litigation, which is somewhat more involved than what Mr AZ asserts.

[42] Mr BY's understanding of his instructions is expressed in his letter of engagement:

The following is a summary of the legal services we expect to be providing to you: advice, advocacy and representation services to you in respect to your proceedings against [XJI] Insurance Ltd.

[43] If Mr BY was exceeding his brief, it would be expected that Mr AZ would have quickly pointed this out to him. He did not.

[44] When Mr AZ says that at times he felt he was running the case, it is apparent that this was because Mr AZ wanted matters to proceed in the manner he required, rather than following Mr BY's advice.

[45] Mr AZ drafted documents and provided these to Mr BY to critique. This is a rather unusual use of a lawyer's time and the reason that Mr AZ felt he was running the case at times was because of his own actions, rather than any deficiency on the part of Mr BY.

Keeping Mr AZ informed

[46] Rule 7 of the Conduct and Client Care Rules provides:

A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

[47] The footnote to this rule reads:

See *McKaskell v Benseman* [1989] 3 NZLR 75 in which Jeffries J at 87 said, "The fiduciary must, in dealing with those to whom he owes such an obligation, reveal fully all circumstances that might affect their affairs, and is thus under a duty of disclosure not imposed on others. For whatever reasons, and notwithstanding the perceived detrimental consequences to the plaintiffs, the solicitors still were obliged to disclose to them the letter no matter what the consequences."

²⁴ Application for review reasons at [3].

[48] The case referred to involved a situation where a lawyer for the opposing party wrote a letter to the lawyer for the client which the lawyer considered to be derogatory to his client. The lawyer did not send the letter to his client but the client subsequently discovered the letter. The client started proceedings against the lawyer for failing to disclose the letter.

[49] The duty imposed on a lawyer to keep his/her client informed is discussed in the text, *Ethics, Professional Responsibility and the Lawyer*.²⁵

[50] The authors of the text refer to the judgement and say:²⁶

The Court found in the clients' favour on this point, deciding that their lawyers had breached their fiduciary obligation of disclosure in failing to reveal the letter's existence and contents. This decision was premised on the basis that the letter's contents were material, rather than trifling, matters. While they were not material to the determination of the fencing dispute of the client, they were clearly matters that the clients wished to be informed about. It appears the lawyer must approach the question of materiality not from a legalistic or lawyerly point of view, but from the perspective of a layperson, and arguably from the perspective of his or her client. The duty to disclose is not restricted to information relevant to the particular legal or business matter the lawyer is handling, but extends to all information relevant to the client's wider affairs which comes into the lawyer's hands. At common law, a decision whether to disclose to a client should, therefore, be made after considering whether the client would wish to be apprised of the particular facts.

[51] Mr AZ says he asked to be copied into all communications from and to Mr BY regarding his claim but repeatedly had to ask for copies of emails. He has provided a number of emails in which he made this request.²⁷

Instructing Mr DW KC

[52] Mr AZ says he did not authorise Mr BY to instruct Mr DW KC. Mr BY instructed Mr DW on 17 October 2018. Mr BY and Mr AZ met with Mr DW on 19 October. If Mr AZ had not agreed that Mr DW be instructed, it would be expected that he would have questioned why the meeting had been arranged.

[53] This aspect of Mr AZ's complaints is not supported.

²⁵ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016).

²⁶ At p 294.

²⁷ Emails dated 24 September 2018, 10 October 2018, 14 December 2018 et al.

Request for estimates

[54] Mr AZ instructed Mr BY on 1 May 2018. On 29 June 2018, Mr AZ requested Mr BY to provide an invoice for fees to date. Mr BY did not send an invoice.

[55] On 2 August 2018, 23 August 2018 and 6 November 2018, Mr AZ referred to the fact that he had requested an invoice but none had been received. Mr AZ also says that he reminded Mr BY verbally on a number of occasions that he was wanting to know the fees incurred to date.

[56] Mr BY rendered an invoice on 22 February 2019. Mr AZ queried and disputed the invoice. On 1 March 2019, Mr BY sent an amended invoice. This has not been paid.

[57] Mr AZ's complaint is that his request for an invoice was a request for an estimate of fees and that Mr BY has breached r 9.4 of the Conduct and Client Care Rules.

[58] The Standards Committee determined that Mr AZ's request for an invoice was not the same as a request for an estimate of costs and that therefore r 9.4 did not apply. I cannot establish what the Committee relied on when making this comment.

[59] In addition, I note that para 2.4 of Mr BY's letter of engagement reads:

We will send interim invoices to you, usually monthly and on completion of the matter, or termination of our engagement.

[60] The letter of engagement clearly states that interim invoices would be sent. I agree that this does not amount to a commitment to send monthly invoices, but Mr BY did not render an invoice from the commencement to termination of his instructions, being a period of some 10 months. This was not in accord with the commitment to send invoices on an interim basis.

[61] Mr AZ wanted to know the level of fees he was incurring. This was important information to enable him to establish the cost/benefit of continuing with the litigation.

[62] Rule 3.2 of the Conduct and Client Care Rules requires a lawyer to "respond to inquiries from the client in a timely manner". In addition, r 7.2 required Mr BY to respond to requests for information in a timely manner.

[63] Mr AZ's request for invoices amounted to inquiries and requests for information. Mr BY did not comply.

[64] In summary therefore, Mr BY has not acted in accordance with the statement in the letter of engagement, or rr 3.2 and 7.2.

Termination of retainer

[65] Mr AZ's complaint is that Mr BY terminated the retainer as the deadline for briefs of evidence approached. This was an inopportune time for Mr BY to express a wish to cease acting. The new lawyers instructed by Mr AZ were required to devote considerable resources to acquaint themselves with the proceedings.

[66] Mr BY's reason for terminating the retainer was that he considered Mr AZ had lost confidence in the advice being provided by himself and Mr DW. Mr AZ instructed Mr BY to follow his instructions. These instructions differed from the course Mr BY and Mr DW considered should be adopted and was against their advice. It would be extremely difficult for a lawyer to properly argue a position in Court as the mouthpiece of his /her client, rather than presenting an argument which he/she believes to be the best argument to present. In these circumstances, it was reasonable for Mr BY to indicate a desire to be removed as Mr AZ's solicitor on the record, and likely to be for Mr AZ's benefit.

[67] Mr AZ had also disputed the invoice rendered by Mr BY on 22 February 2019.

[68] Rule 4.2(c) provides that a lawyer may not terminate a retainer otherwise than for good cause. Good cause includes a failure to pay fees. Mr BY also offered to assist Mr AZ to locate a new lawyer and has complied with his obligations pursuant to r 4.2.3(d).

[69] There are factors for, and against, Mr AZ's complaint about Mr BY effectively terminating the retainer. These add to the reasons for the decision arrived at in this review.

Other complaints

[70] In this decision, I have focussed on the main issues. That does not mean that other matters have not been considered. The Committee's determination of those matters is confirmed.

Summary/decision

[71] Taken individually, each of the matters Mr AZ has complained about do not warrant an adverse finding. However, the overall picture painted by Mr AZ provides a scenario in which Mr BY has not measured up to what was asked of him. Whilst Mr AZ's expectations and requests could be considered to be somewhat more than usual, the claim against [XJI] was extremely important to him and it was not unreasonable for him to want to be closely involved along every step of the way.

[72] It now remains for me to take a step back and consider these matters objectively.

[73] In *Hugh Peter Petrie Ragg v Legal Complaints Review Officer and The New Zealand Law Society*²⁸ the Court of Appeal directed this Office to take that step, when it said:²⁹

When assessing the case against Mr Ragg it was necessary for the Review Officer to consider whether protection of the interests of the community and the profession justified taking the formal step of making a finding that Mr Ragg was guilty of unsatisfactory conduct. The possibility of deciding to take no further action under s 152(2)(c) of the Act needed to be considered. The Review Officer failed to take that step.

[74] Taking an overall and objective view, this is a case where the objectives of the Act, as enunciated by the Court, do not justify the formal step of making a finding of unsatisfactory conduct against Mr BY.

[75] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act, the determination of the Committee to take no further action on Mr AZ's complaints is confirmed.

Costs

[76] Mr AZ's complaints can not be dismissed altogether. Section 210(3) of the Lawyers and Conveyancers Act 2006 provides that Review Officers may, without finding that there has been unsatisfactory conduct by a practitioner, order the practitioner to contribute towards the costs of a review if he/she considers the proceedings were justified.

[77] I have formed the view that there were shortcomings on the part of Mr BY when he did not keep Mr AZ fully informed, and did not render interim invoices, particularly when specifically requested to do so in each case.

[78] In these circumstances an order for payment of costs is justified.

[79] Pursuant to s 210(3) of the Act, and in accordance with the Costs Orders Guidelines issued by this Office, Mr BY is ordered to pay the sum of \$1,200 to the New Zealand Law Society towards the costs of this Review.

²⁸ [2021] NZCA 579.

²⁹ At [40].

Enforcement of costs order

[80] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[81] 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.

DATED this 28TH day of OCTOBER 2022

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:

Mr AZ as the Applicant
Mr BY as the Respondent
Mr CX as the Respondent's Representative
[Area] Standards Committee [x]
New Zealand Law Society