

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

[2021] NZLCRO 167

Ref: LCRO 172/2020

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

CA

Applicant

AND

PL

Respondent

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

Introduction

[1] Mr CA has applied for a review of the determination by the [Area] Standards Committee [X] to take no further action on his complaints about Ms PL.

Background

[2] In 2020, Mr CA instructed Ms PL to act for him on the sale of his property in [Town], and a purchase in [City].

[3] In February, Ms PL received an Agreement for the sale of the property in [Town].

[4] The purchaser subsequently cancelled the Agreement.

[5] Mr CA signed a second Agreement to sell the property on [Date]. The Agreement was conditional on the purchaser arranging finance and being satisfied with

the Council Land Information Memorandum building and toxicology reports. The Agreement was also conditional on the purchaser being satisfied “with the results of a due diligence investigation of the property and the purchaser’s intended development of”¹ the property.

[6] The Agreement was declared unconditional in [Month].²

[7] Sometime during [month], Ms PL received an Agreement which Mr CA had entered into for the purchase of a property in [CITY]. The Agreement was subject to finance, which was approved, and the Agreement was declared unconditional.

[8] On 25 March, New Zealand moved into alert Level 4 COVID-19 lockdown and settlement of the sale and purchase was unable to proceed on [date] as provided for in the Agreements.

[9] Mr CA lodged his complaint on 21 April. This was four weeks into the period of lockdown, and before the transactions had been settled. Ms PL was not advised of the complaint until 4 May.

[10] Both transactions settled on [DATE]. Ms PL’s statements are dated the same date.

[11] Mr CA made his complaint about Ms PL’s fees on 19 May.

Mr CA’s complaints

[12] In his April complaint, Mr CA complained about a lack of communication from Ms PL about how, and when, the settlements were going to be able to proceed. He says that he “asked repeatedly through lockdown to defer settlement and it was only on the 14th April that [Ms PL] said it was deferred.

[13] In subsequent emails, Mr CA complained about ‘misinformation’ from Ms PL as to when settlement would be able to take place.

[14] Mr CA says that he was quoted \$3,000 by other lawyers to carry out the work required of Ms PL. He questions the work Ms PL undertook in respect of the first Agreement that did not proceed, for which Ms PL had charged \$300.

[15] Although he does not specifically refer to Ms PL’s fees for the purchase of the [City] property, he refers to overall fees amounting to \$5,000.

¹ Agreement for sale and purchase ([date]), clause 20.

² No information is available to establish the dates on which the various conditions were satisfied.

[16] In general terms, he asks that Ms PL's fees be 'reviewed'.

The Standards Committee determination

[17] Ms PL was not asked by the Committee to respond to the complaint but at the Committee's request provided copies of her Letters of Engagement, her statements relating to both transactions, and typewritten summaries of the work carried out by her together with the time involved.

[18] The Committee summarised Mr CA's complaints in the following manner:³

The Standards Committee must consider whether Ms PL has breached any duties owed to Mr CA and whether the fees she has charged are fair and reasonable.

Duties owed to Mr CA

[19] The Committee said:⁴

Mr CA fairly accepts that he requested 21 changes to the settlement dates. This could not help but lengthen the time frame to achieve the necessary agreements from his vendor and purchaser and also put Ms PL in the position of waiting to receive information from the other parties before confirming the current position to Mr CA.

[20] The Committee continued:⁵

... although Ms PL's communications did not meet Mr CA's demands, they were not untimely and were clear and direct.

[21] The Committee then referred to the recommendation from the New Zealand Law Society's Property Law Section, that "contracts be amended to defer settlement until Level 2 or below",⁶ but that this recommendation was not issued until 20 March.

[22] In conclusion, the Committee said:⁷

... Ms PL has handled a difficult situation well, balancing the need to obtain certainty as to Mr CA's instructions and the need to confirm the changing settlement requirements with the Bank and the other parties to Mr CA's transactions.

[23] The Committee determined to take no further action on this aspect of Mr CA's complaints.

³ Standards Committee determination (4 August 2020) at [12].

⁴ At [15].

⁵ At [16].

⁶ At [17].

⁷ At [18].

Fees

[24] Ms PL issued three invoices. The Committee determined to “assess the invoices both separately and together”.⁸

[25] The Committee noted the novelty of the circumstances presented by the COVID-19 lockdown and that “Ms PL had provided a discounted fee in a period of flux and has provided time records which substantiate the work she has completed”.⁹

[26] At [31] and [35] of its determination, the Committee particularised in some detail the work that Ms PL had carried out and concluded:¹⁰

Standing back and looking at all the work done as set out in the time records and in the correspondence, the Standards Committee can find no basis on which to say that Ms PL’s fees are not fair and reasonable for the services she has provided. ...

Other matters

[27] The Committee took no issue with the amount Ms PL requested from Mr CA prior to settlement which Mr CA considered to be excessive.

Mr CA’s application for review

[28] Mr CA “feels like the Law Society hasn’t listened to [him].¹¹ He says he was charged “\$1,000 (4 hours!) to defer settlement”. He considers that only one hour would have been necessary to arrange the amended settlement dates.

[29] He repeats his assertion that settlement could have proceeded under Level 4 conditions and consequently there was no need to defer settlement.

[30] He asks that Ms PL’s fee be reduced by \$750.

Ms PL’s response

[31] In response, Ms PL provided some more detail relating to the difficulties she encountered in acting for Mr CA, and completing his sale and purchase.

⁸ At [21].

⁹ At [30].

¹⁰ At [36].

¹¹ CA application for review, Part 7.

[32] She advises that Mr CA became angry and abusive towards her when she declined to meet personally with him during the Level 4 lockdown for the purpose of obtaining his signatures to the documentation.

[33] Other than providing the documents that she had previously provided to the Standards Committee, Ms PL does not address Mr CA's complaint about the quantum of her fees.

Review

Competence

[34] Mr CA criticises Ms PL's understanding of the rules relating to property transactions during the COVID-19 lockdown, particularly as to how settlements were affected.

[35] Ms PL referred to the recommendation from the New Zealand Law Society's Property Law Section, which was that settlement be deferred to the 10th working day after Level 2 or below was established.

[36] That was the position that most, if not all, property lawyers would have pursued at the time.

[37] There is nothing to support Mr CA's allegations.

Not responding to correspondence

[38] Mr CA complained that Ms PL's "communication [was] poor – almost non-existent".¹²

[39] Mr CA was clearly a difficult person to act for. Ms PL advises that he was threatening, angry, abusive and demanding.

[40] Mr CA had already lodged his complaint before the transactions were settled, and indicated he was going to complain about her fees. It is unsurprising then, that Ms PL kept communications with Mr CA to the minimum.

[41] In the face of Mr CA's abusive conduct, and notification that he intended to complain about her fees, Ms PL is to be commended for continuing to act for Mr CA, and completing settlement of his sale and purchase.

¹² Complaint by Mr CA (21 April 2020).

Fees

[42] Before addressing the detail of Mr CA's complaint about Ms PL's fees, it needs to be drawn to Mr CA's attention that a Standards Committee, and this Office, can only adjust a lawyer's fee following a finding of unsatisfactory conduct against a lawyer on the basis that the fee charged was more than fair and reasonable.

[43] The High Court has recognised that a finding of unsatisfactory conduct against a lawyer is a serious matter.¹³ An adverse finding remains on the lawyer's professional record and is not something that can be lightly dismissed.

[44] For that reason, a lawyer's fees need to be clearly unreasonable before an adverse finding will be made, and a decision as to what amounts to a fair and reasonable fee must recognise that there is a degree of latitude to be applied when addressing a complaint about fees.

[45] Mr CA adopts a somewhat simplistic approach when he asserts that it would have taken only one hour of Ms PL's time to arrange the amended settlement dates.

[46] Many matters are directly affected by an amendment to the settlement date of a property transaction. To arrange an amendment to a settlement date is not as straightforward as a single telephone call as asserted by Mr CA.

[47] There are 13 factors to be taken into account by a lawyer when establishing the fee to be charged for work undertaken,¹⁴ one of which is the time expended. Other factors are referred to in the Committee's determination.¹⁵

[48] One of the factors, other than time, is the 'novelty of the questions involved'. There is no doubt, that the circumstances facing Ms PL were novel. Other factors which could be said to be relevant to the fees to be charged by Ms PL are:

- *The importance of the matter to Mr CA, and the results achieved* – the matter was clearly important to Mr CA and the settlements were completed.
- *The urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by a client* – Mr CA unilaterally entered into arrangements with his vendor and purchaser to change the settlement dates and demanded that Ms PL work to those dates.

¹³ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [44].

¹⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

¹⁵ At [29].

- *The fee customarily charged in the market and locality for similar legal services* – see para [55].
- *Whether the fee is fixed* – Ms PL had not agreed to a fixed fee.

[49] The factors referred to above support some degree of ‘uplift’ on Ms PL’s fees, beyond that reached when calculating fees to be charged with reference only to the time expended.

[50] However, Ms PL’s fees were based only on the time spent. Whether or not Ms PL’s time records were created subsequently does not hinder an assessment of the reasonableness of Ms PL’s fees for the work carried out.

[51] Mr CA says that other lawyers had ‘quoted’ him less than the fees charged by Ms PL. He may have sought indicative costs from other lawyers but has not provided copies of anything in writing to support his claims. In addition, there is no indication of what Mr CA asked the lawyers to base their ‘quotes’ on.

[52] He would certainly not have been able to identify the difficulties encountered because of the disruptions caused by the COVID-19 lockdown when requesting indicative costs from other lawyers.

[53] This assertion counts for little when assessing the fairness of Ms PL’s fees.

[54] A final comment to make when addressing complaints about a lawyer’s fees, is to note that members of Standards Committees include practitioners who practice in the areas of law under examination and, importantly, lay members. The views of the Standards Committee members cannot be discounted, and in this instance, the Committee has formed the view that Ms PL’s fees were fair and reasonable.

[55] I add to that, an observation Ms PL’s discounted rate of \$250 per hour charged to Mr CA could be described as ‘more than’ reasonable.

Other matters

[56] The Committee accepted Ms PL’s advice that she had allowed for contingencies when calculating the amount required from Mr CA to complete settlement of the transactions. This was a reasonable conclusion for the Committee to draw.

[57] However, I infer from the fact that there was a credit balance payable to Mr CA following settlement, that Ms PL wished to secure her fees before carrying out the work necessary to complete settlement.

[58] In the circumstances, I do not consider that it was unreasonable for her to do so. Mr CA had already made a complaint to the Lawyers Complaints Service about Ms PL's services, and indicated that he intended to complain about Ms PL's fees even before invoices were rendered.

[59] If I am correct in my assumption in this regard, I do not consider that Ms PL's conduct was unprofessional to the extent of forming the basis for an adverse disciplinary finding against her.

Decision

[60] For the reasons discussed above, I confirm, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee to take no further action on Mr CA's complaints.

DATED this 14TH day of OCTOBER 2021

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 CA as the Applicant
Ms PL as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society