

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

[2022] NZLCRO 22

Ref: LCRO 77/2021

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

GS and VU

Applicants

AND

CN and SW

Respondents

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

Introduction

[1] Mr GS and Mr VU have applied for a review of the determination by [Area] Standards Committee [X] in which the Committee made findings of unsatisfactory conduct against each of them and ordered them to reduce fees by \$14,183.87, and to pay costs of \$500 to the New Zealand Law Society.

[2] As the outcome of this review was facilitated by the parties reaching agreement, this decision will not be as detailed as would otherwise have been the case.

Background

[3] Mr CN and Ms SW are two of Mrs MM's children. They became concerned about their mother's conduct, putting herself at risk and in vulnerable situations. They applied to the Court, pursuant to the Protection of Personal and Property Rights Act 1988, for an order appointing Mr CN as manager of Mrs MM's property.

[4] Mrs MM opposed the application and instructed Mr VU to act for her. Mr GS was Mr VU's supervising partner.

[5] Mrs MM was a difficult client to manage, consuming considerable time with frequent telephone calls. When Mr VU was unavailable, Mrs MM consumed considerable periods of the time of Mr GS and other members of the staff.

[6] On 11 March 2018, "the Court made an order appointing Mr CN to act as manager of property belonging to [Mrs] MM". The order was a temporary one.

[7] Throughout his period of instructions, Mr VU rendered bills of costs which totalled \$56,762.89.

[8] Mr CN and Ms SW lodged their complaints with the Lawyers Complaints Service on 31 August 2018. They explained their mother's circumstances and the details of their complaints.

[9] The complaints were primarily about the quantum of Mr VU's fees and took issue with the fact that a considerable amount of the fees rendered resulted from the numerous and lengthy telephone calls made by Mrs MM to the firm.

[10] They considered that Mr VU and [Law Firm A] had not adopted appropriate strategies to limit the time spent on these phone calls.

[11] Mr VU responded and described the steps that he and other members of the firm had taken to try to limit the time consumed by their client. Mr VU was also mindful that he had to ensure he did not otherwise breach his professional duties to Mrs MM.

[12] No members of the firm other than Mr VU recorded time engaged with Mrs MM. Mr VU's fees were calculated on a time in attendance basis.

The Standards Committee determination

[13] The Standards Committee identified the key issues raised by Mr CN and Ms SW as being:¹

- a. whether Mr VU and/or Mr GS had breached their obligations in failing to take reasonable steps to limit unnecessary interactions with Ms MM; and
- b. whether the fees charged by [Law Firm A] to Ms MM were fair and reasonable.

¹ Standards Committee determination (30 April 2021) at [11].

Failing to take reasonable steps to limit unnecessary interaction

[14] The Committee noted the requirements of r 3 of the Conduct and Client Care Rules² which provides:

- 3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[15] In the Committee's view:³

Ms MM was a client who could not be "managed" in the subtle ways which might otherwise be utilised by practitioners such as pretending that someone is out of the office, claiming to have a meeting or pretending to have an incoming call. Likewise, Mr VU's experience suggests that the complainants' suggestion of confining Ms MM to a scheduled weekly call was unlikely to have been successful. The Committee was therefore satisfied that neither Mr GS nor Mr VU breached their obligations in respect of the management of interactions with Ms MM.

[16] The Committee was also satisfied that Mr GS had not breached his duty to properly supervise Mr VU.

Fees

[17] The Committee appointed a costs assessor to provide a report on the quantum of Mr VU's fees. The assessor concluded that the fees were excessive and recommended a reduction of 20 per cent.

[18] The Committee also took note of the fact that the lawyer appointed by the Court (Mr OB) had charged the sum of \$11,304.69 and had been engaged over a longer period of time.

[19] "... The Committee noted that a key question it therefore needed to determine in its consideration of whether the fees were fair and reasonable, was whether it was appropriate for [Law Firm A] to pass on the costs associated with the phone calls in the way it did."⁴

[20] The Committee also took note of the fact that other practitioners who had assisted Mrs MM did not pass on the costs of unnecessary calls and formed the view that "the effect of their billing was to earn significant fees as a consequence of her inability to make rational decisions about how to engage with her legal representatives".⁵

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

³ Standards Committee determination, above n 1 at [14].

⁴ At [17].

⁵ At [18](f).

[21] Having considered all of the factors, the Committee determined that the fees charged by Mr VU were not fair and reasonable which resulted in findings of unsatisfactory conduct against both Mr GS and Mr VU pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006, by virtue of the breach of r 9 of the Conduct and Client Care Rules.

Review

[22] An audio-visual hearing took place on 15 March 2022 attended by Mr CN and Ms SW, Mr GS and Mr VU, and Mr PG and Mr BB, counsel for Mr GS and Mr VU.

[23] The High Court has described a review by this Office in the following way:⁶

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.

This review has been conducted in accordance with those comments.

[24] Mr CN's and Ms SW's primary concern was the quantum of Mr VU's fees. They felt that the fees were more than fair and reasonable, primarily because Mr VU had recorded all time whilst engaged with their mother, which, in turn, led to the complaint that Mr VU had not managed communications from her to limit the time spent.

[25] Section 132 of the Lawyers and Conveyancers Act 2006 provides that any person may complain about the conduct of a lawyer, or the standard of service provided. Consequently, Mr CN and Ms SW have standing to complain about these aspects of Mr VU's conduct.

[26] If the finding of the Committee, or on review, is that Mr VU had not managed exchanges with Mrs MM in a cost-effective manner, then one of the orders that could have been imposed was for Mr VU/[Law Firm A], to reduce the fees rendered. However, if the finding is that Mr VU's management of exchanges with Mrs MM were well managed, then the focus turns to the fairness of the fees charged.

[27] The Committee considered this aspect of the complaints in the context of Mr VU's obligations pursuant to r 3 of the Conduct and Client Care Rules. This rule provides:

⁶ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[28] It is difficult to conceive of this rule being held to have been breached by reason of a lawyer's inability to properly manage communications from a client.⁷

[29] The fundamental issue is whether Mr VU's fees were fair and reasonable. It is in this regard that the question as to whether or not Mr CN and Ms SW had standing to complain about Mr VU's fees arises, and this is addressed in the next section of this decision.

Jurisdiction

[30] Section 132(2) of the Lawyers and Conveyancers Act provides that "any person who is chargeable with a bill of costs,...may complain...about the amount of any bill of costs rendered by a practitioner..."

[31] Ms SW is clearly not a person chargeable with the bills of costs. The question to be addressed, is whether or not Mr CN is a person 'chargeable' with the bills of costs rendered by Mr VU.

[32] Mr CN was appointed manager of the property belonging to Mrs MM by Order of the Court dated 11 March 2018. The Order was specifically expressed to be a temporary Order, notwithstanding that it purported to be made pursuant to s 31 of the Act.⁸

[33] In a Minute dated 10 March, I invited the parties to comment or provide submissions on the issue. This being a strictly legal issue, it is unsurprising that Mr CN did not comment.

[34] I set out here a precis of the submission provided by Mr PG and Mr BB:

- there is nothing in schedule 1 of the Order (which repeats schedule 1 of the Act) that refers to lodging complaints on behalf of the person subject to the Order
- the complaint was not lodged on behalf of, or supported by, Mrs MM herself;

⁷ One of the definitions of the word "competence" in the Collins English dictionary (Concise Ed.) is "the state of being legally competent or qualified".

⁸ Protection of Personal and Property Rights Act 1988.

- the Order was expressed to be a temporary Order. Section 30 of the Act provides that no temporary Order shall continue for more than three months. The complaints were lodged outside of this period.

[35] I also observe:

- the bills of costs, were addressed to Mrs MM, and if it had become necessary for the firm to sue for its fees, it would have sued Mrs MM.
- Mr CN was appointed manager of Mrs MM's property, and payment of the bills were to be made from Mrs MM's funds.

[36] I am fortunate in that I do not need to reach a definitive decision on this issue, as the parties have agreed to resolve matters between themselves. However, my tentative view is that Mr CN is not a person chargeable with payment of Mr VU's bills and is not therefore a person who could complain.

Settlement

[37] Section 192 of the Lawyers and Conveyancers Act 2006 provides:

The functions of the Legal Complaints Review Officer are—

...

(b) to promote, in appropriate cases, the resolution, by negotiation, conciliation, or mediation, of—

(i) complaints; or ...

[38] After all issues had been addressed at the hearing, I enquired of the parties if matters could be resolved between them. After each of the parties discussed matters themselves, and then with the other party, I was advised that a resolution had been reached.

[39] A condition of settlement attached by the applicants, was that the findings of unsatisfactory conduct be reversed. I address that issue in the section below.

[40] The parties have confirmed that they do not wish me to record the terms of settlement as provided for by s 201(5) of the Act.

[41] I wish to record my thanks to the parties for the constructive manner in which they responded to my enquiry and consider this to be the most beneficial outcome for both parties.

The findings of unsatisfactory conduct

[42] The authors of the text *Ethics, Professional Responsibility and the Lawyer* have this to say about the term “unsatisfactory conduct”:⁹

... In general, unsatisfactory conduct will be conduct which is not so egregious as to amount to misconduct but is still deserving of being marked out as falling below the standard of conduct or behaviour that clients and the public are entitled to expect. It is a professional lapse.

A breach of the unsatisfactory-conduct standard may have significant consequences for a practitioner. In particular, on such a finding, Standards Committees may make one or more of the orders found in s 156 of the Act. At one end of the spectrum, modest orders of censure or requiring an apology may be made. However, far-reaching orders such as compensation (up to \$25,000), a fine (up to \$15,000), remission of fees, and orders relating to the management and/or inspection of a lawyer’s practice may also be made.

[43] It is understandable that Mr GS and Mr VU are concerned to ensure that the findings against them are reversed. I must therefore consider if there is any reason why this should not be done. In doing so, I take into account the following:

- the costs assessor appeared to consider that the only matter Mr VU attended to for Mrs MM was to oppose the Orders under the Protection of Personal and Property Rights Act. Mrs MM had consulted Mr VU on many other matters such as potential limitations on travel, the sale and purchase of properties and issues arising out of her relationship with the complainants.
- the Committee proceeded on the same basis, describing the work required as being “a relatively simple matter lasting 11 months with a hearing of less than a day”.¹⁰
- reference to the fees charged by Mr OB has limited, if any, relevance.
- Mr VU was required to observe his other professional obligations and duties to Mrs MM.
- Mr VU did, on many occasions, make Mrs MM aware that she was incurring significant costs.
- time spent by other members of the firm was not recorded and charged.

⁹ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [4.3.2].

¹⁰ Standards Committee determination, above n 1 at [17].

- Mr VU needed to be careful he did not breach the requirements of rr 3.1 and 4.1.1, and the general requirements of the Human Rights Act 1993 not to discriminate against Mrs MM
- Mr VU had obtained confirmation from Mrs MM's doctor, that she was capable of engaging a lawyer for legal representation. This was supported by a report from a forensic psychiatrist, who considered there was "no reason per se why Mrs MM would be deprived of capacity in regard to her ability to make decisions about her estate and finances."¹¹

[44] Taking all of these factors into account, I am not at all certain, that Mr VU's fees were not fair and reasonable. For this reason, and the uncertainty around whether or not Mr CN has jurisdiction to make the complaint, there is no reason why the findings of unsatisfactory conduct should not be reversed in order to allow the settlement to proceed.

Decision

[45] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the findings of unsatisfactory conduct against the applicants are reversed. The orders made by the Committee thereby fall away.

Publication

[46] Section 206(4) of the Lawyers and Conveyancers Act 2006 provides that this decision may be published if it is considered necessary or desirable in the public interest. I acknowledge that I advised Mr GS at the review hearing that there would be no orders for publication. However, having completed this decision, I have formed the view that it may be helpful for this decision to be published in an anonymised format, dealing, as it does, with a lawyer's general duties to his or her client in difficult circumstances such as those encountered by Mr GS and Mr VU.

[47] The somewhat unique issue as to Mr CN's standing as manager appointed pursuant to the Protection of Personal and Property Rights Act 1988 (as distinct from appointment as attorney), to bring this complaint about Mr VU's fees, is also a reason for publication.

¹¹ Report from Dr JB (3 April 2017).

[48] I request Mr GS and Mr VU to advise whether or not they object to publication of this decision in an anonymised format. Many examples of publication in this format can be viewed on the website of this Office.

DATED this 23rd day of March 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 GS and Mr VU as the Applicants
Mr CN and Ms SW as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society