

LCRO 83/2013

CONCERNING

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

AND

CONCERNING

a determination of the [XX] Standards Committee [X]

BETWEEN

HL

Applicant

AND

MA AND RO

Respondents

DECISION

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

Introduction

[1] Mr [HL] has applied for a review of a decision dated 12 February 2013 by the [XX] Standards Committee [X] to take no further action on his complaint about Ms [MA] and Mr [RO] (the lawyers), both of [MA] Law (the firm).

Background

[2] On 21 February 2012 Mr [HL] instructed the lawyers to pursue a review of an ACC decision. He also instructed them to consider a consequent appeal to the District Court after his review application was later declined. The essence of Mr [HL]'s complaint is his assertion that the lawyers capped their fees then billed him more than they had agreed to, and that Mr [RO]'s service was substandard.

Complaint

[3] Mr [HL]'s complaint of 19 September 2012 alleges that the firm had unfairly overcharged him, having indicated his total costs including medical experts would be capped at \$5,000. He also alleged that the lawyers had provided unsatisfactory service, including suspicious and weird behaviour, poor communication and the lawyers having distorted the facts.

Standards Committee process

[4] The Committee identified two issues for it to consider:

- (a) whether Mr [HL] was overcharged for the legal services provided; and
- (b) whether Mr [HL] received poor service.

[5] Mr [CR] provided submissions on behalf of Mr [HL]. For Mr [HL] it was submitted that the lawyers were deceitful, and had acted in bad faith towards Mr [HL]. Reliance was placed on inconsistencies between file notes made by Mr [RO] at various times before Mr [HL] had expressed dissatisfaction over fees. It was asserted again that Mr [RO] had agreed to cap his fees at \$3,500, and that Mr [BT] was a witness to that agreement.

[6] Mr [BT] signed a letter dated 30 November 2012 saying he had attended a meeting with Mr [HL] and the lawyers on 21 February 2012, when "costs were quoted as being \$3,000-\$3,500, plus about \$1,500 for a medical opinion" for the ACC review.

[7] The basis of the submission that Mr [RO] acted in bad faith is that Mr [RO] had been aware Mr [HL] had savings of \$10,000 and tailored his fees accordingly. The submission said:

We believe Mr [RO] has been motivated unlawfully by this fact to take full advantage of Mr [HL]... Mr [RO] and Ms [MA] took advantage from Mr [HL] by knowing this piece of information (\$10,000) by violating the basic principle of trust and good faith who signed without hassle a deal with them from the first meeting on 21/2/2012...

[8] It was submitted that estimates obtained from other lawyers indicated a far lower fee was reasonable.

[9] The allegation of poor service was supported by Mr [HL]'s account of his dealings with the lawyers. That account appears to have been prepared by Mr [CR] after the events it describes, and repeats that Mr [RO] agreed to cap his legal fees at \$3,500.

[10] The firm responded to each of the allegations made by Mr [HL]. In essence, the firm denies Mr [HL] received poor service, and maintains, consistent with Mr [RO]'s file notes, that there was no cap on fees, only an estimate updated from time to time.

[11] Mr [HL] wrote again on 7 September 2012 to NZLS saying all the costs were capped at \$5,000 all inclusive.

[12] The Committee considered the complaint and other materials provided by the parties, and determined Mr [HL]'s complaint on the basis that further action was not necessary or appropriate pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[13] The Committee set out its reasoning, and concluded on the probabilities that the firm's fees were not capped. In particular, the Committee noted that Mr [HL]'s fees would have exceeded the alleged fee cap early on, but he continued to pay invoices, which was inconsistent with the allegation that fees were capped at \$3,500.

[14] With respect to the allegation of poor service, the Committee concluded there was insufficient evidence to justify an adverse finding, as was the case with the associated contention of bad faith.

[15] Mr [HL] disagreed with the decision and applied for a review.

Application for review

[16] Mr [HL]'s review application is dated 27 March 2013. The grounds for review can be summarised as a concern that the Committee did not deal with every aspect of Mr [HL]'s complaint, ignored elements of it that Mr [HL] considers significant, was selective as to whose evidence it preferred and did no more than "cut and paste" from the firm's submissions. Mr [HL] also raised concerns about the timeliness with which the Committee had addressed his complaint.

[17] Mr [HL] seeks remedies including compensation totalling \$7,666.36 and an order for costs in his favour. He also asks this Office to lay charges against non-parties to this review, but as the Act does not provide for that, it will receive no further attention on review.

[18] The financial orders sought by Mr [HL] include a refund of his legal fees, Mr [CR]'s fees, and compensation "for poor services and physiological pressure", of \$2,000. The assertion that Mr [RO] capped his fees at \$3,500, and all costs at \$5,000

was repeated, and a statement attached from Mr [BT] dated January 2013, which again confirms his understanding of the arrangements over fees reached in February 2012.

Review on the papers

[19] The parties agreed to this review being conducted on the papers pursuant to s 206(2) of the Act. That section allows a Legal Complaints Review Officer (LCRO) to conduct a review on the basis of all the information available, if the LCRO considers, as I do, that the review can be adequately determined with the absence of the parties.

Nature and Scope of Review

[20] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[21] More recently, the High Court has described a review by this Office in the following way:²

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.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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

[22] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Review Issues

[23] There are two questions on review:

- (a) Whether the lawyers agreed to cap their fees at \$3,500 in respect of the ACC review; and
- (b) Whether the conduct of, or service provided by, Mr [RO] or Ms [MA] fell below any of the standards imposed by s 12 of the Act?

Analysis

Did the lawyers agree to cap their fees at \$3,500 in respect of the ACC review?

[24] Although it is described in the complaint and review materials as a quote, the nub of this part of Mr [HL]'s complaint is that the lawyers agreed to cap their fees.

[25] Fee agreements are regulated by rule 9.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) which says:

The terms of any fee agreement between a lawyer and client must be fair and reasonable, having regard to the interests of both client and lawyer.

[26] Rule 9.1(j) refers to the influence a quote or estimate has in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client. Rule 9 prohibits a lawyer from charging a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer. Regard is to be had to all of the factors set out in rule 9.1 in determining whether a fee is fair and reasonable.

[27] As to fee estimates, rule 9.4 requires a lawyer to provide an estimate of fees upon request, and to inform the client promptly if it becomes apparent that the fee

estimate is likely to be exceeded. The information lawyers are required to provide in advance pursuant to rule 3.4 includes the basis on which fees will be charged and whether fees may be deducted from funds held in trust on behalf of the client (subject to any requirement of regulation 9 or 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008).

[28] Framed in terms of the rules, Mr [HL]'s case is that it was not fair or reasonable of the lawyers to charge a fee that exceeded the \$3,500 cap Mr [RO] quoted on 21 February 2012.

[29] Mr [HL] says the lawyers capped their costs, including legal, medical and GST at \$5,000. That position is supported by Mr [BT]'s evidence of what he later recalled having heard in February 2012. Mr [BT] signed a letter dated 30 November 2012 saying he had attended a meeting with Mr [HL] and the lawyers on 21 February 2012, when "costs were quoted as being \$3,000-\$3,500, plus about \$1,500 for a medical opinion" for the ACC review. Mr [BT] signed a second statement dated January 2013 in which he affirmed that Mr [RO] capped his fees at \$3,500, and all costs were capped at \$5,000.

[30] The lawyers say there was no cap, but that Mr [RO] estimated Mr [HL]'s fees would be "\$5,000+", issued interim invoices totalling \$6,416.36 and Mr [HL] paid those fees without demur. That position is supported by file notes made by Mr [RO], including in particular one dated 21 February 2012, and a letter of that date signed by Mr [HL] referring to the firm's "charging and billing" practices. That letter, which was prepared and provided to Mr [HL] to comply with the lawyers' obligations under rule 3.4, included the following:

On your request we may be able to provide an estimate of the overall cost of the work. Please note that an estimate is not a quote and actual costs may vary depending on how the matter progresses. If you have a maximum amount that you are prepared to pay, please advise us of this. If you have any problems with an invoice please raise this with the firm within 14 days of receipt.

[31] The letter of 21 February 2012 also explained that Mr [HL] may have to pay additional expenses, for example for medical reports, as well as his legal fees.

[32] By 8 March 2012 Mr [RO] had formed the view that a medical report should be sought from Dr [EN]. He says he told Mr [HL] that the cost of that report would be "\$1,300+".

[33] Mr [RO] then recorded in a file note that, when Mr [HL] asked about total costs for the ACC review, he "... advised \$4,000 to \$5,000+. Proposed working up to \$3,000 then discussing". Mr [RO]' file note ended with Mr [HL]'s instructions that he would discuss Mr [RO]' advice with his family and Mr [BT] before he would instruct Mr [RO] to go ahead.

[34] It appears Mr [HL] instructed Mr [RO] to go ahead, because Mr [RO]'s file note of 30 March 2012 indicates that he had arranged an assessment by Dr [EN]. The file note recording that also says "Advised billing at \$2,000+. Full cost likely \$4,000 to \$5,000+".

[35] The firm's invoice of 30 March 2012 refers to communication with Mr [HL] and Mr [BT] about the engagement of Dr [EN], the preparation of a draft referral letter and a bundle of relevant documents for the doctor. Mr [RO] subsequently prepared written submissions, and the review of the ACC decision went ahead on 30 May 2012. Mr [HL] began to raise concerns over legal costs after he had received the decision on the ACC review.

[36] The conflict between Mr [HL]'s position and the lawyers' is to be resolved on the evidence. The standard of proof in disciplinary proceedings such as this is the balance of probabilities, which is the civil standard, and is to be applied flexibly according to the nature of the case.³ Evidence recorded at or about the time of events is generally considered more reliable than recollections recounted some time later.

[37] The evidence is that Mr [RO] provided Mr [HL] with the information required by rule 3.4. That included reference to how the firm would provide estimates of overall costs rather than quotes. The letter of 21 February that Mr [HL] signed also indicates he was aware at that time that costs may vary depending on how the matter progressed. Mr [RO] provided an estimate of "\$5,000+". That estimate varied as the matter progressed. The variations were explained to Mr [HL] both by him receiving interim invoices, and by Mr [RO] as recorded in file notes dated at the time. The fact that he paid the interim invoices, apparently without demur, suggests he accepted at the time that the fees were fair and reasonable for the services being provided to him.

[38] It is no criticism of Mr [HL] or Mr [BT] to say that reconstructions from more distant memory are intrinsically less reliable than notes made at or about the time of events: it is just a feature of memory and recall. It is also not a criticism of them that they may have misunderstood the scope of Mr [RO]' first or subsequent estimates.

³ See *Z v Complaints Assessment Committee* [2007] NZCA 91, [2008] 1 NZLR 65.

[39] That is not to say that Mr [HL] could not complain when he came to appreciate the whole cost of the firm's legal fees. He could complain, and he did. However, having considered the evidence available on review, I can find no clear record of Mr [RO] agreeing to cap the firm's fees at any amount. The evidence is that both parties had initially proceeded on the basis that Mr [HL] had agreed to pay "\$5,000+".

[40] To put it another way, Mr [RO] established an expectation at the outset that the fees would probably be around \$5,000, could be more, but was unlikely to be less. It is in the nature of much legal work for costs to be difficult to predict in advance. The rules expect lawyers to tell clients, particularly those who express an interest, what their legal fees are likely to be, and to keep clients apprised as matters develop, particularly if and when fee predictions are exceeded or become unreliable.

[41] Mr [HL] must be taken to have known, because he had signed the letter of 21 February 2012, that if there were additional expenses, for example for medical reports, he would be expected to pay those in addition to his legal fees. Mr [RO] advised him in May 2012 that he could expect to pay "\$1,300+" for a medical report. The fact that Mr [HL] then paid Dr [EN] direct indicates he was aware he had accepted an obligation to pay his fees separately from the lawyers, and acted accordingly. That in turn supports the conclusion that Mr [HL] was aware he would have to pay legal ("\$5,000+") and medical ("\$1,300+") costs separately.

[42] In the circumstances, the answer to the first review issue is that the lawyers did not agree to cap their fees in respect of the ACC review at \$3,500, or any other amount.

Did the conduct of, or service provided by, Mr [RO] or Ms [MA] fall below any of the standards imposed by s 12 of the Act?

[52] The second issue on review is whether conduct of, or service provided by either of the lawyers fell below the standards set out in s 12 of the Act which defines unsatisfactory conduct in the following way:

12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls

short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)...

[53] Mr [HL]'s concerns centre on allegations that Mr [RO] behaved suspiciously by hiding a payment received from ACC; made promises he did not keep and communicated poorly. Ms [MA] is said to have been rude and unfriendly, "twisting the facts" when they met on 4 September 2012.

Suspicious behaviour – Mr [RO]

[54] There is no evidence to support the allegation that the lawyers acted deceitfully or in bad faith towards Mr [HL].

[55] Mr [HL] says Mr [RO] hid money ACC had paid for two months. He says ACC paid the firm on 9 July 2012, but Mr [RO] did not tell him until 31 August that the money was in the firm's trust account. Furthermore, Mr [HL] says, Mr [RO] only revealed the money was in the firm's trust account when Mr [HL] told him ACC had paid it in. He says the lawyers told him there had been an accounting error.

[56] Ms [MA] says the payment from ACC was receipted into the firm's trust account and held to Mr [HL]'s credit until it became clear that he had paid Dr [EN]'s invoice direct. That eventuated some time after Mr [HL] had signed a conditional fee agreement, engaging the lawyers on a "no win, no fee" basis to represent him in an appeal to the District Court against the ACC. At that point it appears Mr [HL] had paid all the firm's outstanding invoices, so there was a credit balance in Mr [HL]'s trust account ledger. The firm therefore paid the full amount ACC had paid in, out to Mr [HL] in accordance with his direction.

[57] What appears to have happened is that a staff member, not Mr [RO], had made an accounting error in relation to one of Mr [HL]'s invoices. Although Mr [RO]

was Mr [HL]'s primary contact, there is no evidence to the effect that Mr [RO] had, or should have had, any involvement in the administration of the trust account. He is not a partner or the trust account partner, so his involvement in overseeing trust account transactions on matters of which he has conduct will be determined by the firm's internal policy. From what Mr [HL] says, the error was attributed to the trust account manager.

[58] As a consequence, although it may well have taken some time for Mr [RO] to speak to Mr [HL] about the money the firm was holding on his account, there is no reason to be suspicious of Mr [RO]. Although it may well have been desirable for Mr [RO] to have been alert to what was going on in the trust account, there is no reason to believe he knew ACC had paid the money in, and no reason to believe he should have told Mr [HL] it was there. Although it is understandable that Mr [HL] would think Mr [RO] should know what was going on with the financial aspects of his file, there is no reason to think that ultimate responsibility for the operation of the trust account rested with Mr [RO].

[59] If anything, the trust account administration aspect of Mr [HL]'s complaint should be directed towards Ms [MA] as a principal of the firm. Mr [HL] has provided no reason, beyond the lack of information, as the basis for suspicion. It may be that the firm had not provided Mr [HL] with a statement of his account since early July when ACC had paid the money in, but that seems unlikely because he had been paying interim invoices, and in such circumstances firms routinely send statements. There is evidence that suggests Mr [HL] struggled to understand the financial aspects of the retainer, and that he went to Mr [BT] for help before raising his concerns with the lawyers.

[60] When Mr [HL] raised his concerns with the lawyers in September 2012, he changed the original direction given in the letter of 21 February 2012. His direction until then in circumstances where fees and the costs of medical reports were owing, and costs had been awarded was that he had authorised the firm to deduct fees and the costs of medical reports from the amount held. In the meantime, as per the letter of 21 February, the costs obtained were placed in the firm's trust account. When Mr [HL] gave a direction the firm acted on it by giving him his money back. There is no reason to believe the firm hid the money, and therefore no ground for a finding of unsatisfactory conduct against Mr [RO] or Ms [MA].

Unkept promises and poor communication - Mr [RO]

[61] Mr [HL] expressed general concerns, and mentioned Mr [RO] having apparently made a promise that he would put Mr [HL] in touch with someone who might be able to assist him in a work trial.

[62] That aspect of the complaint is generally denied by Mr [RO] and Ms [MA].

[63] The allegations lack a sufficient evidential basis to progress them. On Mr [HL]'s evidence, Mr [RO] offered to try and help, there was no promise. The way the complaint and associated correspondence are framed, and the general nature of Mr [HL]'s concerns suggests much of what he says is aimed at negotiating a reduction to his legal fees to bring them within the agreed cap. Ms [MA] agreed to reduce the fees, but that was not enough for Mr [HL], who wanted more of a reduction. The parties were unable to reach agreement.

[64] There was no agreed cap. Although other lawyers may have provided lesser estimates, there is no reason to believe the fees the lawyers charged were unfair or unreasonable based on the time they recorded having spent, the skill and specialised knowledge required to carry out Mr [HL]'s instructions, the importance of the matter to him, and the complexity of the matter given there would have been 16 years-worth of background reading in the ACC file alone. There is insufficient evidence to be satisfied that Mr [RO]'s conduct fell below a proper standard on any basis. A finding of unsatisfactory conduct against Mr [RO] is not available in the circumstances.

Rude, unfriendly and "twisting the facts" – Ms [MA]

[65] Mr [HL] says when Ms [MA] attended the meeting in early September she arrived late, was rude, not friendly and tried to twist the facts.

[66] Ms [MA] again denies the allegations.

[67] It is apparent from the information available that the parties met to discuss how Mr [HL]'s matter would be progressed, the firm's involvement in that and how it would be paid. By this stage there was a conditional fee agreement in place which set out the consequences of Mr [HL] terminating it. The consequences included Mr [HL] being liable for the firm's "fees, disbursements, any invoices rendered by an expert, such as Dr [EN]". He agreed to the firm charging "a normal fee for any work done" in the five days between the conditional fee agreement being entered into and Mr [HL] giving notice of its termination. There was also discussion about the fees he had paid, and the ACC costs.

[68] It is also apparent from Mr [HL]'s subsequent correspondence that he wanted the firm to continue to act on the appeal, that he wanted someone other than Mr [RO] to conduct the appeal, but was unwilling to meet the firm's costs under the conditional fee agreement. It is also implicit in his comment that he had passed the point of no return, that Mr [HL] understood there would be a cost to instructing new lawyers if he terminated his retainer with the firm.

[69] Despite all this, Ms [MA]'s letter saying the firm could only act if Mr [HL] confirmed he had received independent advice also set out clear instructions to assist Mr [HL] in furthering his appeal without the firm's further assistance.

[70] Beyond Mr [HL]'s complaint and supporting comments, there is no clear evidence on how Ms [MA] conducted herself at the meeting. The evidence of the surrounding circumstances does not suggest any impropriety by her. No doubt the meeting on 4 September 2012 was tense. Mr [HL] said it was "not comfortable". Mr [HL] wanted the lawyers to provide a service. The lawyers were willing to provide that service, for a fee, as agreed.

[71] Rule 4.2.1 permits a lawyer to refuse to continue to act for a client if the client indicates he is unable to pay on an agreed basis. It is likely that Ms [MA] resisted renegotiating the terms of the conditional fee agreement that was already in place. She may well have been direct, firm and assertive. Mr [HL] may have taken her refusal to budge as rude and unfriendly.

[72] There is insufficient evidence, and no persuasive reason, that enables me to be satisfied that Ms [MA]'s conduct towards Mr [HL] fell below a proper standard of professionalism such that a finding of unsatisfactory conduct could safely be made.

Summary

[73] In summary, there are no grounds on which to depart from the Committee's decision that, pursuant to s 138(2), further action in respect of Mr [HL]'s complaint is not necessary or appropriate.

Decision

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

DATED this 3rd day of August 2016

D Thresher
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 [HL] as the Applicant
Ms [MA] and Mr [RO] as the Respondents
[XX]tandards Committee [X]
The New Zealand Law Society
Mr [RG]- Related Party
The Secretary for Justice