

CONCERNING

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

AND

CONCERNING

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

BETWEEN

KV

Applicant

AND

LA

Respondent

DECISION

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

Introduction

[1] Mr KV has applied for a review of a decision by the [Place] Standards Committee [X], which decided to take no further action on Mr KV's complaints about Mr LA.

Background

[2] Mr KV's son is Z. Z's mother did not share Mr KV's view of where their child's best interests lay. They were unable to resolve disagreements over Z's care, contact and guardianship. Mr KV instructed Mr LA to act for him. Both parents made applications to the Family Court. The Family Court made a series of orders relating to Z, setting out the basis on which his parents would manage his life over the months that followed, but did not make final orders at that stage.

[3] Mr KV was dissatisfied with the Family Court's orders. He sought advice from Mr LA on how he could challenge them. Mr LA told him he could mount an appeal in the High Court, and explained that process. Mr KV enquired about the costs.

[4] On 18 February 2013 Mr LA's associate, Ms YS, provided a written estimate of the firm's fees to draft and file notice of appeal, prepare for and attend case management conference, prepare for and attend appeal hearing. The letter was headed "High Court Appeal". The fee was estimated at \$6,400, and Mr LA's firm agreed not to exceed that estimate "by more than 25%".¹ The fee for the appeal was therefore effectively capped at \$8,000. The estimate excluded GST, and explained the disbursements for filing, setting down and hearing fees that Mr KV would be required to pay to the High Court for an appeal hearing to proceed.

[5] Mr KV instructed Mr LA to proceed, the appeal was commenced and Z's mother raised a jurisdictional issue relating to whether Mr KV could appeal interim orders. Counsel filed memoranda in April and Mr LA argued the jurisdictional point. Mr KV was kept informed and continued to press Z's mother over the matters he wanted to change.

[6] By the end of May 2013 Mr KV's negotiations with Z's mother had not progressed as he had hoped, and on 28 May the High Court heard the jurisdictional argument. Time was passing. Mr KV had spent money on the appeal, and was having doubts about the wisdom of the course he had adopted.²

[7] The High Court issued its judgment at the end of October. Mr KV had been unable to overcome the jurisdictional hurdle.³ The appeal would not proceed.

[8] Neither party had conceded their position by withdrawing applications made to the Family Court. Both parents' applications awaited finalisation in that jurisdiction.

[9] Mr KV expressed reservations about Mr LA's advice, and asked for costs to be clarified. He said he still wanted to achieve "resolution" of matters involving his son, but considered formal mediation was unlikely to work, and felt "very much let down by the whole process".⁴ I take him to mean that he had been unable to persuade Z's mother or the Family Court to share his view of where Z's best interests lay.

[10] Mr KV did not terminate Mr LA's instructions. The Family Court made final parenting orders, and on 23 December 2013 Mr LA's firm issued Mr KV with final invoices in respect of the appeal to the High Court and the Family Court proceeding. Those invoices incorporated a fee of \$6,000 for the appeal to the High Court and a fee of \$4,000 for finalising the Family Court proceeding. A statement prepared at that time

¹ Letter YS to KV (18 February 2013) at 2.

² Email KV to LA (28 May 2013).

³ *J v S* [2013] NZHC 2829.

⁴ Email KV to LA (31 October 2013).

indicates Mr LA had billed Mr KV a total for fees, GST and disbursements of nearly \$28,000,⁵ in respect of the Family Court matters, excluding the High Court appeal.

[11] In an email dated 21 March 2014 Mr KV said that he had paid one of the outstanding invoices, believing the amount was “fair for the total services rendered in the last 12 months”, but reserving his concerns over the whole amount. Mr KV says that Ms YS capped the cost of the appeal process, and argues that was a complete estimate to conclude all remaining matters. He says the firm did not respond to any of his requests for clarification of his legal costs in 2013, and he did not know what his costs were until he received the two invoices in January 2014. He says that in the absence of information, he assumed very little time had been spent, and that costs would not be a concern. Mr KV records Mr LA’s advice to him that as his invoices had not been paid, he would refer the outstanding debt to debt collectors.

[12] Mr KV says that Mr LA persuaded him, against his better judgement, to pursue an appeal to the High Court. He says Mr LA did not keep him updated on the appeal process as it unfolded, and failed to advise him that the appeal process was potentially not feasible because the parenting orders were made on an interim basis, although Mr LA’s opinion was that the High Court appeal was liable to succeed.

[13] Mr KV says he feels Mr LA “pursued his own agenda to validate his advice on the appeal process”, did not explain the cost implications to him, and did not invite him to attend the High Court hearings. Mr KV says he was left feeling “excluded from the process” and did not understand “the changing nature of the appeal process”. He says Mr LA did not explain his options, including that he could delay or “cancel the appeal”, or tell him that the longer the appeal went on the greater his costs risk became, or advise him of any options to curb his costs.⁶

[14] Mr KV says he considers Mr LA and Ms YS contravened a number of the professional obligations they owed to him, and sought a reduction in his fees accordingly.

[15] On 28 March Mr LA responded, explaining that the advice he and Ms YS had provided related to the process to challenge the Family Court decision. He said that Mr KV had instructed them to bring an appeal, and must thus “assume the responsibility for the costs” of work done following his instructions. Mr LA said Mr KV’s bill did not capture the full value of the time he and Ms YS had spent attending to his matter.

⁵ The amount of Mr LA’s fees is not clear from that statement because it records the whole of the bills of cost, and not all of the invoices have been provided.

⁶ Email KV to LA (21 March 2013).

[16] Mr LA referred to his meeting with Mr KV, at which the Family Court decision was discussed, and advice given on the appeal, after which Mr KV gave instructions to commence the appeal. Mr LA refers to an email Mr KV sent to Ms YS on 15 February 2013 setting out his reasons for wishing to challenge the Family Court orders. Those reasons included Mr KV's immediate concerns for Z arising from a reduction in the time he was to spend in Mr KV's care, and the commensurate increase in time spent with his mother.

[17] Mr LA refers to a report to Mr KV of 28 February 2013, and Mr KV's apparently unsuccessful attempts to negotiate different arrangements with Z's mother to those envisaged in the Family Court orders, after the appeal had been commenced. He referred also to an email of 5 April 2013, and the memorandum he had provided to the Court on the matter of jurisdiction, setting out Mr LA's submissions on that matter. He also referred to a comment made by opposing counsel after the hearing on jurisdiction to the effect that the case put by Mr LA on Mr KV's part was the stronger of the two competing arguments.

[18] Mr LA expressed the view that Mr KV was "completely informed of the issues and the elements", including being provided with a copy of the submissions on appeal and correspondence.⁷ He referred to the High Court appeal hearing on 28 May 2013, and the decision of the High Court being delivered in late October 2013.

[19] Mr KV describes Mr LA's fees as "\$10,000 + GST + disbursements",⁸ which represents a combination of the fee content of the two final invoices. He continued to express the view that Mr LA had not properly advised him.

[20] On 11 April 2014, Mr KV made a complaint to the New Zealand Law Society (NZLS) about the service Mr LA had provided, and his fees.

Standards Committee

[21] The Committee directed the parties to explore the possibility of resolving Mr KV's complaint by mediation, pursuant to s 143(1) of the Lawyers and Conveyancers Act 2006 (the Act). The parties attended mediation, but were unable to reach an agreed resolution. Further correspondence was exchanged, with Mr LA responding and Mr KV commenting on his responses. The Committee convened a hearing on the papers, and considered the materials submitted by the parties.

⁷ Email LA to KV (28 March 2014).

⁸ Letter KV to NZLS (24 June 2015).

[22] The Committee applied rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 in considering the legal advice Mr LA had provided in relation to the appeal, considered the judgment on appeal, and observed that “it is inevitable that all litigation carries with it an element of risk which can never be completely mitigated”.⁹ It referred to Mr LA’s honest belief that Mr KV had an arguable case on appeal, and concluded he had discharged his obligation under rule 3 to provide Mr KV with competent advice.

[23] In relation to the allegation that Mr LA’s fees exceeded an estimate given, and the fees for the appeal should be excluded, the Committee noted Mr LA’s explanation that the cost estimate related only to the appeal, and that a separate file had been opened to record the time devoted to that. Mr LA contends that the fee of \$6,000 was fair and reasonable for the services provided in relation to the appeal. As to the finalising matters in the Family Court, the cost of the time recorded was \$4,000, and that is what Mr LA charged for attendances between October and December 2013.

[24] The Committee accepted that the attendances between October and December were necessary, and appropriately invoiced separately from the appeal, and that Mr KV was aware that additional work, and cost, would be involved if the appeal did not succeed. The Committee considered that if Mr LA had invoiced Mr KV immediately after the appeal concluded, he would have been aware that he might incur further cost. Nonetheless, the Committee did not consider it was open to Mr KV to reasonably conclude that the estimate he had been given for the appeal might extend to cover further substantial work after the appeal concluded. It accepted Mr LA’s evidence that the outcome of an appeal, determines what follows.

[25] The Committee considered Mr LA’s fees, noted Ms YS’ estimate of \$6,400, and that the value of the time Mr LA and Ms YS recorded exceeded that, although the fee billed in relation to the appeal was less than the estimate.

[26] In all the circumstances, the Committee decided to take no further action on Mr KV’s complaint.

[27] Mr KV disagreed with the Committee, and applied for a review.

Review Application

[28] Mr KV’s application for review was received by this Office on 7 March 2015. In it he sets out his concerns that the Committee had not addressed his complaint

⁹ Standards Committee decision at [25].

about the advice he says Mr LA did not give him in relation to litigation risk; did not give proper weight to his evidence; overlooked the “fee cap”, and says that the Committee failed to consider the implications of Mr LA’s “poor communication and timing of invoices” on his total costs.

[29] Mr KV asks for a “revision” of the invoice relating to the High Court appeal, and interest that appears to have been charged on that unpaid debt.

Nature and Scope of Review

[30] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹⁰

... 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.

[31] More recently, the High Court has described a review by this Office in the following way:¹¹

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.

[32] 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:

¹⁰ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

¹¹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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

Review Hearing

[33] The parties attended a review hearing in Auckland on 18 November 2016.

Review Issue

[34] The question on review is whether there is any reason to take further action in relation to Mr KV's complaints about Mr LA. For the reasons discussed below, the answer to that question is no. The decision is therefore confirmed on review.

Analysis

Fees

[35] From the start, Mr KV had choices. The clock was ticking. Arrangements had to be made for Z. Mr KV wanted to influence those, so doing nothing was not an option. He could negotiate. So far, that had not worked. He approached Mr LA. His objective was to secure arrangements for Z.

[36] Mr LA said he could apply for orders from the Family Court. That did not mean he had to stop negotiating. There were cross applications before the Court. Z's mother was also being proactive. Choices were limited. Doing nothing was still an option, but not a choice Mr KV was willing to make.

[37] Mr KV decided to embark on litigation. He does not say he thought that would come without a cost. He does not say he was given an estimate, and given the uncertain nature of litigation, it is unlikely Mr LA would or could have given one. The retainer for the Family Court proceeding appears to have proceeded on the basis that Mr LA would do work, issue interim bills and Mr KV would pay them. For some months, that is what happened. Mr KV does not challenge the bills he has paid. From that I conclude that Mr KV does not object to the arrangements he agreed to with Mr LA at the start.

[38] The question, then, is whether the estimate Ms YS provided could be taken as having altered payment arrangements regarding the Family Court proceeding.

[39] Mr KV's complaint and review application rely on the premise that Ms YS provided an estimate that covered all costs from then on, not just the appeal, but also for any finalisation of the Family Court process if the appeal did not end favourably for Mr KV. He says he did not understand that there could be a return to the Family Court.

[40] Mr LA says that if the appeal was not successful the matter would continue in the Family Court and "that will incur costs not covered by the appeal".

[41] Mr KV says that was not his understanding, and Mr LA did not tell him that was a possibility.

[42] Mr KV's understanding must be based on all the advice he was given, not just the advice provided in relation to the appeal. At the start Mr KV was aware that if he could not persuade Z's mother to his way of thinking, he could apply to the Court for orders. Although Family Court proceedings can be protracted, at some point any application has to come to an end. In Mr KV's situation, that could be by unilateral withdrawal, mutual withdrawal, and/or the Court making orders. However the end eventually came, costs between the parties would always be an issue even with cross applications before the Court.

[43] Advice on the costs risks that arise in litigation is so fundamental it is difficult to envisage circumstances in which a lawyer as experienced as Mr LA would not have provided it. That view is reinforced by Mr KV's evidence that he was, at all times, cost sensitive.

[44] Mr KV may not have been aware from the outset that orders could be challenged on appeal. When that became a prospect, there was a reasonably lengthy discussion between Mr KV and his lawyers. He took two weeks to decide, before instructing Mr LA to commence the appeal.

[45] Mr KV must be taken to have instructed Mr LA to commence the appeal with his eyes open to the costs and risks to him, including the fact that if he was not successful, he may have to contribute to Z's mother's costs.

[46] Mr LA refers to the estimate Ms YS provided for the appeal, and says it is obvious that "the fee estimate covers the appeal". That is correct. It is plain from the face of that document that the firm would charge no more than \$8,000 for the appeal. The estimate makes no reference to the Family Court proceeding. Mr KV had already agreed to the fee arrangements for that proceeding some time before.

[47] However, Mr KV says he did not realise the appeal was a separate file, a separate proceeding, a discrete issue, or would attract a separate fee. From his perspective, all the money comes from the same pocket: his.

[48] Although I take Mr KV's point that if his appeal to the High Court had succeeded that would have brought matters to an end, he was aware that more than one outcome was always a possibility in litigation. Alongside the other potential risks and benefits, there would always be the lawyers' costs, and uncertainty of outcome.

[49] The estimate Ms YS provided on 18 February 2013 set out the four steps it covered in a table: drafting and filing notice of appeal, preparation for and attending a case management conference, preparing for and then attending the appeal hearing. The jurisdictional challenge was not expressly contemplated. Mr LA says the hearing on jurisdiction and the appeal hearing would have been covered by his estimate unless Mr KV had agreed to pay more. In that case, the total estimated fee of \$6,400 may have increased, but could not have been more than \$8,000. The actual fee up to the point jurisdiction was rejected was, quite properly, significantly less than that.

[50] There is no reason to believe the estimate for the appeal modified the terms of engagement for the Family Court proceeding. There is no reason to believe the estimate extended to any attendances beyond the appeal. The estimate clearly explains its scope. While he may well have preferred arrangements to be otherwise, it would have been reasonable for Mr KV to have assumed that any attendances that did not relate to the appeal would be billed on the usual basis for the Family Court matter. It is clear from the face of the letter that it relates only to the appeal. If he was uncertain he could have asked. Mr KV's argument that all of the fees for both jurisdictions from February on were included in the estimate is not tenable.

[51] Mr LA's time records from February onwards are generally consistent with the attendances that can be expected in a matter such as this. The fees charged overall do not accurately reflect the time recorded: they are less than the value of the recorded time. While there may be some slight overlap between the files, the time records do not give rise to any cause for concern.

[52] In all the circumstances, there is no reason to take any further action in respect of Mr KV's complaint about Mr LA's fees. With respect to Mr LA's fees, the Committee's decision is confirmed.

Service

[53] The general thrust of Mr KV's complaint is that if he had known before he commenced the appeal what he knows now, he would not have committed his resources to a fight he did not win. He criticises Mr LA's advice as incomplete and self-serving. He alleges Mr LA did not do enough to ensure he understood the implications of his instructions at the start, did not keep him informed as the appeal went along, and should have done more to explain what was going on.

[54] Mr LA's position is that he took reasonable steps to ensure that Mr KV understood the nature of the retainer, including the appeal; and that he kept Mr KV informed about progress of the retainer, including the appeal. He says that at relevant points Mr KV was consulted on the steps to be taken to implement his instructions, his requests for information and other inquiries were answered, and he was appraised as to the next steps to be taken.

[55] The evidence simply does not support the position Mr KV contends for. It is clear from the emails he sent after the Family Court made orders that his intention was to mount an appeal in the hope of exerting pressure on Z's mother to come around to his view on the issues that were before the courts. She did not. There was always a risk that would be the case.

[56] The appeal did not go Mr KV's way. There was always a risk that would be the case. Having been through the rigours of the Family Court process and experienced a hearing in that jurisdiction, Mr KV cannot say he is a complete novice when it comes to the risks and costs attendant on litigation. Mr LA's comment that there were strategic reasons for Mr KV taking the appeal has some grounds.

[57] There is no reason to believe Mr LA's arguments on appeal lacked merit. The High Court decision goes to some lengths to work through which of the orders were interim and which were final. If the High Court had issued its decision earlier, and rejected jurisdiction, Mr KV would have been in the same situation, waiting for a Family Court hearing in October, but without the potential leverage of an unknown outcome on appeal. In that sense, Mr KV's position was not adversely affected by delay.

[58] The simple fact is that it took time for the High Court to deliver the decision. Mr LA referred to the High Court appeal hearing on 28 May 2013. The decision of the High Court was delivered in late October 2013.¹² Throughout the intervening five months the Family Court orders were running their course. Z's life must be taken to

¹² Above n 3.

have been managed in the manner envisaged by the Family Court, with his father still trying to negotiate arrangements with his mother, because they were still at odds over where Z's best interests lay.

[59] The rules do not dictate how a lawyer records what steps have been taken to ensure a client understands the nature of the retainer, how clients are informed about progress or consulted. The usual routine is to keep file notes, emails and correspondence. Some clients want written advice and are willing to pay for that. Others do not. Being so cost sensitive, it is unlikely Mr KV would have wanted to receive written advice. He cannot now hold a lack of written advice against Mr LA.

[60] The evidence does not support a finding that Mr LA, or for that matter Ms YS, failed in their obligations to Mr KV. Mr KV's complaint is primarily about fees. The service concerns he raises appear to be more of a makeweight to support a reduction in his fees than grievances over the service he received. There is no persuasive evidence of any professional failing, and no reason to take any further action in respect of Mr KV's complaints about service.

[61] The decision is also confirmed in that respect.

Summary

[62] Having carefully considered all of the material available on review, including the parties' evidence and submissions at the review hearing, there is no reason to take further action in relation to Mr KV's complaints about Mr LA's service or his fees. The decision is therefore confirmed on review.

Interest

[63] When he applied for a review Mr KV expressed concern over the interest he said was accruing on his unpaid debt to Mr LA. For completeness I note that interest charges are a contractual matter over which this Office does not exercise jurisdiction. That concern can be taken no further in the course of this review.

Decision

[64] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision is confirmed.

DATED this 13th day of December 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 KV as the Applicant
Mr LA as the Respondent
Mr CQ as a related person
[Place] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice